

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: A motion for adjournment made on behalf of **STEPHEN W.A. WALL, CPA, CA** under **Rules 12 and 13** of the Rules of Practice and Procedure.

TO: Mr. Stephen W. A. Wall, CPA, CA

AND TO: The Professional Conduct Committee

REASONS FOR DECISION AND ORDER MADE JANUARY 14, 2014

1. This tribunal of the Discipline Committee of CPA Ontario convened on January 14, 2014 to hear a Motion for Adjournment brought by counsel for Mr. Wall under Rules 12 and 13 of the *Rules of Practice and Procedure*.

2. Mr. Paul Farley appeared on behalf of the Professional Conduct Committee (PCC). Ms. Cynthia Amsterdam appeared on behalf of Mr. Wall, accompanied by Ms. Emily Nicklin. Mr. Robert Peck attended the hearing as counsel to the Discipline Committee.

3. It was agreed by Mr. Farley and Ms. Amsterdam that if the motion for adjournment were to be granted, the tribunal members hearing the matter on the merits would not have to be same members hearing this motion.

4. The decision of the tribunal was made known at the conclusion of the hearing on January 14, 2014, and the written Decision and Order sent to the parties on January 22, 2014.

The background to the request for adjournment

5. Ms. Amsterdam explained that the request for an adjournment was to enable Mr. Wall to be represented by his counsel of choice, Ms. Nicklin and Mr. Timothy Duffy. As the tribunal knew, both had appeared before CPA Ontario previously in this matter and represented Mr. Wall before the PCC, in accordance with the long-standing practice of CPA Ontario to allow persons unlicensed by the Law Society of Upper Canada (Law Society) to act as agents in proceedings at CPA Ontario. However, it was now clear that this practice was not acceptable.

6. The problem came to light following the Pre-hearing Conference in this matter on November 5, 2013. After the conference concluded, counsel to the Discipline Committee on the conference, Mr. Glenn Stuart, enquired whether Ms. Nicklin or Mr. Duffy had secured the necessary permission from the Law Society to represent Mr. Wall before the Discipline Committee. Subsequently Mr. Wall's representatives researched, inquired and discussed the situation with other professionals at the Law Society. They discovered that Section 26.1(1) of Ontario's Law Society Act prohibits any person other than a licensee from practising law or providing legal services in Ontario.

7. This change in the law, which came into effect in 2007, was not confirmed until late December. In this regard Ms. Amsterdam referred to Mr. Farley's letter of December 17, 2013 which indicates the PCC position is that the *Statutory Powers Procedure Act* (SPPA) permits a member to

be represented by an agent before the Discipline Committee. Ms. Amsterdam submitted that Ms. Nicklin and Mr. Duffy would not be able to obtain the necessary credentials prior to August 1, 2014.

The applicant's position and submissions

8. Ms. Amsterdam stated that despite diligent efforts to secure permission for Ms. Nicklin and Mr. Duffy to represent Mr. Wall at the discipline hearing scheduled to commence on January 20, 2014, it will be necessary for both counsel to sit certain examinations and undergo a licensing process. Ms. Nicklin and Mr. Duffy applied for and have been granted Foreign Legal Consultant Permits which allow them to provide advice but not legal services in Ontario, with respect to foreign law, and this case involves US GAAS. The time required for Ms. Nicklin and Mr. Duffy to take courses and exams for certification would not be prior to August 1, 2014 and they would still be required to take further courses and pass the bar exam. This means they would not be admitted until January 2015.

9. Ms. Amsterdam stated that the other avenue open to Ms. Nicklin and Mr. Duffy, who have both indicated their willingness, is to article with a law firm in Ontario and then write the bar examination in May. This could be arranged under Ms. Amsterdam's supervision and would be the most practical solution. PricewaterhouseCoopers had offered to arrange for a change of venue to Buffalo or Chicago under CPA Ontario Bylaw 15 in order to meet the scheduled hearing date of January 20, 2014, but the PCC was not willing to consent.

10. Ms. Amsterdam submitted that there would be no question of Ms. Nicklin or Mr. Duffy passing the bar exam. In response to an enquiry from a tribunal member, Ms. Amsterdam was unable to provide a guarantee that the matter would be ready to proceed in mid-August.

11. Ms. Amsterdam stated that she has been in discussions with the LSUC who have the statutory power to pass a bylaw that would allow unlicensed counsel from another jurisdiction to act before the discipline tribunal with the consent of CPA Ontario. The Board of Governors have not yet passed that bylaw but the Law Society is taking steps to allow persons such as paralegals to act as representatives. Ms. Amsterdam undertook to keep pursuing this avenue which would be another possible way for Ms. Nicklin and Mr. Duffy to act for Mr. Wall.

12. Ms. Amsterdam submitted that although she has been involved in this matter, Ms. Nicklin and Mr. Duffy have been more active in all aspects of the legal proceedings from the beginning and are the experts in US GAAS issues. Ms. Amsterdam stated that it would be unfair to Mr. Wall, through no fault of his own, if he could not be represented by counsel of his choice. Ms. Amsterdam referred to *R. vs McCallen* and *Igbinosun v Law Society of Upper Canada*, contained in the Member's Brief of Authorities. Ms. Amsterdam stated that she is not prepared to "fly solo" as it is not the same as having co-counsel during a lengthy case. Ms. Nicklin and Mr. Duffy have prepared and are ready to present a full and fair defence of Mr. Wall before the Discipline Committee. Ms. Amsterdam submitted that she is not ready and able to provide a full and fair defence as this was not the focus of her mandate in representing Mr. Wall.

13. Ms. Amsterdam stated that adjourning the January and May dates would not result in an inordinate delay in the proceedings. Since it was never anticipated that the hearing would conclude on May 16, 2014 and additional dates would have been set, moving the start date until after August 1, 2014 will likely result in the hearing concluding at the same time. Since it is anticipated that four weeks will be needed for this hearing, Ms. Amsterdam submitted that it would be preferable to arrange dates that were not subject to lengthy breaks in between.

14. Ms. Amsterdam submitted that if Mr. Wall was forced to retain counsel other than Ms. Nicklin and Mr. Duffy, who have represented him for the past four and a half years, the PCC would have an unfair advantage, referencing *Toronto Housing Co. v Sabrie*. Natural justice, due process and procedural fairness must all be taken into account and Mr. Wall's fundamental right to have counsel of his choice should be paramount. Ms. Amsterdam stated that the deferral of the commencement of the hearing until mid-August is not considerably material.

15. Ms. Amsterdam stated that all parties were under the misapprehension that Mr. Wall could be represented by Ms. Nicklin and Mr. Duffy, and had only found out in December that this was not the case. Ms. Amsterdam, on behalf of Mr. Wall, submitted that she was seeking an order from the tribunal adjourning the scheduled dates until such time as Ms. Nicklin and Mr. Duffy are eligible to attend as agents or representatives for Mr. Wall at the discipline hearing.

The PCC's position and submissions

16. Mr. Farley acknowledged that the hearing could not commence in January but he submitted that it would be appropriate for the hearing to proceed as scheduled in May.

17. Mr. Farley stated that Ms. Amsterdam, who is with a large multi-national law firm, has represented CPA Ontario Members before the Discipline Committee on numerous occasions in the past and is very familiar with the processes. Partners in her firm have also appeared before the Discipline Committee over the past 30 years, including cases involving similar allegations. Mr. Farley submitted that there are numerous, experienced, partners in her firm that could assist in the defence of Mr. Wall. Counsel would have four months to prepare before the scheduled May hearing dates.

18. Mr. Farley stated that Ms. Amsterdam had been involved in this matter during the initial investigation by the PCC and has intimate knowledge of all aspects of this case. All motions before the Discipline Committee have been brought jointly by Ms. Amsterdam, Ms. Nicklin and Mr. Duffy and Ms. Amsterdam was a co-signatory on lengthy written submissions made in 2012 to the PCC.

19. Mr. Farley stated that prior to the amendment to the *Statutory Powers Procedure Act*, a party could be represented by representative or agent. Since 2007, Ontario law requires that persons representing Members appearing before the Discipline Committee must be licensed to practice law in Ontario under the *Law Society Act*. Mr. Farley noted that the parties are in agreement that based on these facts neither Ms. Nicklin nor Mr. Duffy are entitled to represent Mr. Wall at the disciplinary proceedings.

20. Mr. Farley stated that he accepts that prior to legal counsel for the Discipline Committee raising the matter at the pre-hearing conference, counsel for Mr. Wall were under the mistaken understanding that Ms. Nicklin and Mr. Duffy could represent Mr. Wall. Mr. Farley did not become aware until mid-December that the issue of eligibility of Mr. Wall's counsel to act had been raised by the Discipline Committee's counsel. Mr. Farley submitted that it was not the responsibility of the PCC, the Discipline Committee or CPA Ontario to satisfy itself of the eligibility of persons representing Members before the Discipline Committee. Reliance is placed on the Member's counsel to ensure they comply with the applicable laws and regulations.

21. Mr. Farley stated that the Member's counsel have offered alternatives: adjourn the matter for one year until January 2015 to enable Ms. Nicklin and Mr. Duffy to become licensed to practice law in Ontario; change the venue from Toronto to a location in the United States; or adjourn the matter until August 2014.

22. Mr. Farley stated that although there is no question a Member appearing before the Discipline Committee is entitled to natural justice and must be treated fairly, it would not be unfair to require that the Member select a counsel who is eligible to act as a representative in accordance with the law. Mr. Farley submitted that since the law was changed, no Members have been represented by agents before the Discipline Committee.

23. Mr. Farley submitted that the right to counsel was not an unlimited right; the person or persons chosen had to be qualified to act as counsel. He cited as support for this limitation of the right to counsel of one's choice *Leslie Anthony Pierre v. Ministry of Manpower and Immigration* and Justice Eberle's decision in *R. v. Taylor* contained in the PCC's Brief of Authorities. Mr. Farley submitted that an error had been made by those Mr. Wall asked to act as about who could lawfully appear as counsel before the tribunal. There was no suggestion that this was intended to delay the proceedings.

24. Mr. Farley stated that fairness can be addressed by adjourning the January 20 start date to May 12 through 16, dates which have already been set aside by all parties. This four-month period would provide adequate time for Mr. Wall's counsel to prepare for the hearing. Mr. Farley submitted that Mr. Wall's counsel is proposing that the matter be adjourned to a tentative date in August when it is anticipated Ms. Nicklin and Mr. Duffy will be eligible to attend as Mr. Wall's counsel.

25. Mr. Farley submitted there is no certainty that Mr. Wall's counsel will pass the necessary examinations or meet the qualifications required by the Law Society in time for an August hearing. Mr. Farley referred to the requirements of the Licensing Process of the Law Society of Upper Canada (Exhibit 26), pointing out that while Mr. Wall's counsel are hopeful that they will be qualified to practice by August 2014, there is no guarantee that the Discipline Committee will not be faced with a further request for an adjournment.

26. Mr. Farley stated that it would not be reasonable to adjourn the hearing to no set date on the hope that Mr. Wall's counsel will become authorized in law to represent him. Mr. Farley submitted that the fairest remedy would be to adjourn the matter for four months and commence on the scheduled May dates. Mr. Farley stated that it is not a regular process for a tribunal to grant an adjournment so unqualified counsel can take steps to qualify to act on behalf of a Member. Mr. Farley stated that the reference in *R. v. McCallen* to adjourning a trial to permit an accused's counsel of choice to be available within a reasonable time would not include such circumstance.

27. Mr. Farley submitted that the PCC is not attempting to gain an unfair advantage by requesting the hearing be adjourned to the May dates. The PCC agrees that an adjournment of the January dates is appropriate but disagrees with Mr. Wall's counsel on the length of time of the requested adjournment. Mr. Wall's attorneys anticipate being eligible by mid-August but there is no certainty that this will occur. Mr. Farley stated that the matter should proceed in May which would provide Mr. Wall time to retain new counsel eligible to represent him.

28. Mr. Farley submitted that the PCC is seeking an order for the costs incurred as a result of this adjournment request. If the parties cannot agree on the quantum of costs, Mr. Farley requested that the matter be returned to the Chair of the tribunal so that argument can be presented for an appropriate order as to costs.

The Applicant's response

29. Ms. Amsterdam responded that Ms. Nicklin and Mr. Duffy, Mr. Wall's counsel of choice, have every expectation that they will receive accreditation by mid-August. Unforeseen circumstances could come up and peremptory dates sometimes do get adjourned. Ms. Amsterdam stated that

It would not be reasonable to expect that Mr. Wall could retain a highly skilled lawyer who would be prepared and available in May. Ms. Amsterdam stated that Mr. Wall is entitled to full and fair representation by his counsel of choice, and the matter should be put over to August 2014.

Decision on Motion of the Member for Adjournment

30. The tribunal made the following Decision and Order based on the submissions of the parties:

Having seen and considered Mr. Wall's Motion Record dated January 12, 2014 which sets out his application for an adjournment of the hearing, and the response of the Professional Conduct Committee dated January 14, 2014 which sets out proposed conditions for an adjournment, and hearing the submissions of Ms. Amsterdam and Mr. Farley, both parties agreeing that the composition of the tribunal on the hearing of the merits on this matter need not be the same as the composition of the tribunal on the motion heard this day, the tribunal made the following order:

1. THAT the tribunal grants an adjournment of the hearing scheduled to commence on January 20, and continuing on January 21, 22, 23, 24, 27, 28, 29, 30, 31 and May 12, 13, 14, 15 and 16, 2014;
2. THAT the hearing shall be deferred until after August 1, 2014, to commence prior to September 30, 2014. The hearing is tentatively scheduled for the weeks of September 8 and 15, 2014, subject to the availability of all parties;
3. THAT costs will be awarded to the Professional Conduct Committee as a result of the adjournment. The amount of costs will be provided by the Professional Conduct Committee and reviewed and agreed upon between Mr. Farley and Mr. Wall's counsel. If no resolution can be reached, the matter will be brought back before the Chair of the tribunal; and
4. THAT counsel for both parties shall consult and report to the Secretary as soon as possible on any problems about the suggested dates for the commencement of the hearing, and counsel for Mr. Wall shall advise the counsel to the tribunal on the progress Ms. Nicklin and Mr. Duffy make with respect to obtaining a licence to practise law in Ontario.

Reasons for the Decision and Order

31. The motion to adjourn the hearing was heard by the tribunal on January 14, 2014, only one week before the hearing was scheduled to commence. Although it is not the duty of the PCC or the tribunal to determine if counsel for the member is qualified to appear before the tribunal, it is acknowledged that all parties were unaware of Section 26(1) of Ontario's Law Society Act that does not allow CPA Ontario's long-standing practice of allowing persons unlicensed by the Law Society to act as agents before CPA Ontario. The PCC stated they were not seeking an unfair advantage and agreed that an adjournment of the January dates is appropriate. The tribunal is of the same view, given the timing of the discovery of the error, that adjournment of the January dates is appropriate.

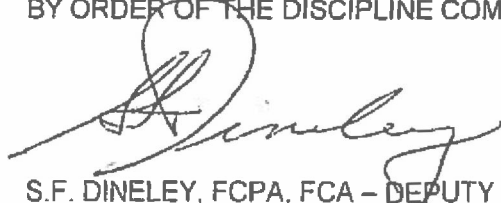
32. With respect to the request to adjourn the May hearing dates with no hearing date to be set prior to August 1, 2014, the tribunal was of the view that commencing a hearing, that is estimated will take 28 days overall, with a five-day session would be inefficient, particularly since no other dates have been set. The tribunal was also of the view that an adjournment from May until August or September was not a material delay.

33. The tribunal asked the parties and the Secretary to work out the actual days available for the parties and the tribunal starting with the week of September 8, 2014 and thereafter to set out the dates in a Notice of Hearing.

34. The tribunal, though its counsel, wants to be informed with respect to the licensing process by the Member's counsel. The tribunal does not want to entertain any further delays or adjournment requests.

35. The PCC has requested costs as a result of the adjournment. Counsel for the member agreed in principle to costs being charged. The tribunal believes it is appropriate that the Member pays costs incurred as a result of the adjournment. In the event the parties cannot agree, the tribunal did not think another motion was necessary to deal with the amount of the costs.

DATED AT TORONTO THIS 20TH DAY OF NOVEMBER, 2014
BY ORDER OF THE DISCIPLINE COMMITTEE

A handwritten signature in dark ink, appearing to read 'S.F. Dineley', is written over the printed name and title of the signatory.

S.F. DINELEY, FCPA, FCA - DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

P.A. BUSCH, CPA, CA

R. CARRINGTON (Public representative)

D.L. KNIGHT, FCPA, FCA