



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO

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DISCIPLINE COMMITTEE - ICAO

RE: DAVID KILBOURN

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IN THE MATTER OF:

**CHARGES AGAINST DAVID J.
KILBOURN, CA, A MEMBER OF THE
INSTITUTE, BEFORE THE DISCIPLINE
COMMITTEE**

SETTLEMENT AGREEMENT

*made pursuant to Bylaw 510 (7.1) of the Bylaws of the
Institute of Chartered Accountants of Ontario*

Introduction

1. The Professional Conduct Committee, at their meeting of June 2, 2009, approved draft charges against David J. Kilbourn, CA ("Kilbourn") **Doc 1**.
2. The first draft charge pertains to Kilbourn's failure to communicate with a client over an extended period while engaged to prepare and complete tax returns for the late "DG" and the Estate of "DG."
3. The second draft charge pertains to Kilbourn's failure to sustain professional competence in the area of income taxation.
4. The third draft charge pertains to Kilbourn's failure to use due care in the work he did perform for the client in or about the period June 8, 2003 through June 2, 2009.
5. The documents referred to in this agreement are found in the Document Brief, as are the applicable *Income Tax Act* requirements as set out in Canada Revenue Agency Guides.

6. The Professional Conduct Committee and Kilbourn agree with the facts and conclusions set out in this settlement agreement for the purpose of this proceeding only, and further agree that this agreement of facts and conclusions is without prejudice to Kilbourn in any other proceedings of any kind, including, but without limiting the generality of the foregoing, any civil or other proceedings which may be brought by any other person, corporation, regulatory body or agency.

Member's Background

7. Kilbourn obtained his CA in 1989 when he was employed as an accounting student with Collins Barrow. In 1990 Collins Barrow merged with Ernst & Young, and Kilbourn moved to the Ernst & Young offices in Toronto where he worked in the computer consulting group.
8. In June 1991, Kilbourn left Ernst & Young to start his own accounting practice. During the period 1992 to 1999, he built a practice in the areas of accounting, tax and business advisory services. He employed no staff but did engage a bookkeeper on an as needed basis.
9. Kilbourn began to wind down his accounting practice in 1999 as the Y2K crisis arose and turned his primary focus to providing computer services to clients.
10. Kilbourn now operates a computer consulting business under the name Blue Ridge Information Group in Campbellville, Ontario. He obtained his CA.IT designation in or about 2003.

Background of Complaint

11. "DG" had been a client of Kilbourn prior to her death on June 8, 2003. Kilbourn was retained by the Estate of DG to prepare the T1 Final Return (**Doc 2**) for DG, and to complete the tax returns for the Estate.

12. Kilbourn came to the attention of the Professional Conduct Committee when a complaint was filed by the Estate Solicitor on behalf of the Estate Trustee. Ms. M. W. (Peggy) Bennett, CA was retained to investigate.

Charge One – Failure to Communicate with a Client

13. Kilbourn filed the T1 Final Return (**Doc 2**) for DG in April, 2004.
14. The T3 return for the first year end of the Estate Trust was filed by Kilbourn in September, 2004. (**Doc 3**) All taxes have been paid. The first year end of the Estate Trust was June 7, 2004.
15. After the T3 was filed in September 2004, Kilbourn's contact with the Estate Trustee and Estate Solicitor was only sporadic, despite the client's requests for updates on the status of the returns.
16. Kilbourn acknowledges that he did not perform work on the Estate file in or about the period 2005 through 2008. He began to take steps to finish the file in 2008 and resumed communication with the client in or about August of that year.
17. Kilbourn acknowledges that in failing to communicate with his client over the four-year period from September 30, 2004 through August 31, 2008, he has failed to maintain the reputation of the profession and its ability to serve the public interest.

Charge Two – Failure to Sustain Professional Competence in Income Taxation

18. Members of the profession are required under Rule 203 to keep informed of and comply with developments in professional standards in all functions in which they practice or are relied upon because of their calling. A failure to do so is deemed a failure to sustain professional competence.

2(a) – Income Inclusion: Fair Market Value of RRSPs and RSPs

19. All income earned in the year up to date of death is to be reported on the T1 Final Return, as is an income inclusion for RRSPs and RSPs equal to their fair market value at date of death. (**Doc A**, pp. 10-11)

20. The fair market value of DG's RRSP and RSP at the date of death was \$114,684.39. Kilbourn did not include this income on the T1 that was originally filed (**Doc 2**).
21. Kilbourn filed an amended T1 adjustment request for 2003 (**Doc 4**) which was received by CRA on April 14, 2009. The amendment reported an addition to income of \$114,684.39, representing the fair market value of DG's RRSP and RSP at the date of death. An estimate of the taxes owing has been paid.

2(b) – Deemed Disposition on Investments

22. Any unrealized gains or losses on personally held capital property up to the date of death are to be reported on the T1 Final Return. (**Doc A**, p. 18)
23. The capital gain of \$16,431.02 on "DG's" non-registered mutual funds to the date of death was recorded on the 2004 T3 Trust Return rather than on the T1 Final Return.

2(c) – T1 Adjustments for Interest

24. Kilbourn claimed a deduction for interest in the amount of \$10,258 on the T1 Final Return. The interest was paid on an investment loan during the years 2000, 2001, and 2002. Kilbourn should have filed T1 adjustments for each of these years to claim the respective interest in the year of payment. Only interest paid on the loan in 2003 up to the date of death should have been deducted on the T1 Final Return. (**Doc 5, Doc B**)

2(d) – CPP Death Benefit

25. Kilbourn reported the CPP death benefit of \$2,500 paid to the Estate on the T1 Final Return (**Doc 2**), when it should properly have been reported on the T3 Trust Return (**Doc 3, Doc A**, pp. 7, 10, 26).
26. Kilbourn acknowledges that in the period June 8, 2003 through June 2, 2009, while engaged to prepare and complete the tax returns for the late "DG" and for the Estate of "DG," he failed to keep himself informed of and comply with developments in professional standards in all functions in which he practiced or was relied upon because of his calling, specifically in the area of income taxation. Kilbourn agrees that he did thereby fail to sustain his professional competence contrary to Rule 203 of the Rules of Professional Conduct.

Charge Three – Failure to Perform Professional Services with Due Care

27. Members of the profession are required under Rule 202 to perform their professional services with due care.

3(a) – Failure to Prepare T3 Returns

28. As at June 2, 2009, Kilbourn had not prepared and filed the T3 returns for the years 2005, 2006, 2007, 2008, or 2009. No taxes had been paid with respect to these outstanding returns as at June 2, 2009.

3(b) – Deduction of Interest Expense

29. Kilbourn failed to deduct an interest expense of \$806.04 as a carrying charge on the 2004 T3 Trust Return. Instead, he improperly reported the interest as an "outlay or expense" when calculating capital gains and losses from investments on the 2004 T3 Trust Return. (Doc C, pp. 19, 32)

3(c) – Reporting of Gains or Losses

30. Kilbourn did not report gains or losses on Estate investments from the date of death to the date of sale in 2004 on the 2004 T3 Trust Return. (Doc C, p. 24)

3(d) – Income Earned on Trust Assets

31. Kilbourn did not report investment income earned on Trust assets on the 2004 T3 Trust Return. (Doc C, p. 32)

3(e) – Estate Assets

32. As at June 2, 2009, Kilbourn had not requested a complete list of estate assets from the client.

33. Kilbourn acknowledges and agrees that in the period June 8, 2003 through June 2, 2009, while engaged to prepare and complete the tax returns for the late "DG" and for the Estate of "DG," he failed to use due care in the performance of his professional services contrary to Rule 202 of the Rules of Professional Conduct.

Considerations Supporting Settlement

34. In addition to all of the circumstances described above, the Professional Conduct Committee took the following factors into consideration on entering into this Agreement:

- a. Kilbourn acknowledges his failure to properly serve and communicate with his client;
- b. Kilbourn acknowledges his failure to perform his professional services with due care with respect to this client;
- c. Kilbourn acknowledges his failure to sustain his professional competence in the area of income taxation;
- d. Kilbourn has no prior history in the disciplinary process of the Institute;
- e. The focus of Kilbourn's practice is on information technology consulting services; and
- f. Kilbourn has provided a written undertaking to the Institute not to provide professional services in the area of income taxation in future.

Terms of Settlement

35. Kilbourn and the Professional Conduct Committee agree to the following Terms of Settlement:
- a) A payment by way of fine in the amount of \$3,500;
 - b) Notice of the terms of this Settlement is to be published in accordance with the provisions of Bylaw 575(2), including notice to be given to the CICA, the Public Accountants' Council and in *Checkmark* Magazine; and
 - c) Kilbourn will be allowed twelve months from the time the Discipline Committee accepts this Settlement Agreement to pay the fine referred to herein.
36. Should the Discipline Committee accept this Settlement Agreement, Kilbourn agrees to waive his right to a full hearing, judicial review or appeal of the matter subject to the Settlement Agreement. Upon the member fulfilling the requirements of this Settlement Agreement, the draft charges approved by the Professional Conduct Committee and dated August, 2009 shall be forever stayed.
37. If for any reason this Settlement Agreement is not approved by the Discipline Committee, then:
- a) This Settlement Agreement and its terms, including all Settlement Negotiations between the Professional Conduct Committee and Kilbourn leading up to its presentation to the Discipline Committee, shall be without prejudice to the Professional Conduct Committee and Kilbourn; and
 - b) The Professional Conduct Committee and Kilbourn shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations set out in the charges, or negotiating a new Settlement Agreement, unaffected by this Settlement Agreement or the Settlement Negotiations.

Disclosure of Settlement Agreement

38. This Settlement Agreement and its terms will be treated as confidential by the Professional Conduct Committee and Kilbourn, until approved by the Discipline Committee, and forever if for any reason whatsoever this Settlement Agreement is not approved by the Discipline Committee, except with the written consent of the Professional Conduct Committee and Kilbourn, or, as may be required by law.

39. Any obligations of confidentiality shall terminate upon approval of the Settlement Agreement by the Discipline Committee.

All of which is agreed to for the purpose of this proceeding alone this ^{25th} day of November, 2009.



ROBERT SIMON, CA
DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE



DAVID J.
KILBOURN, CA
on his own behalf