

**THE CERTIFIED GENERAL ACCOUNTANTS ASSOCIATION OF ONTARIO  
PROFESSIONAL CONDUCT TRIBUNAL**

**IN THE MATTER OF DAVID CHAN,  
A MEMBER OF THE CERTIFIED GENERAL ACCOUNTANTS  
ASSOCIATION OF ONTARIO**

**Tribunal:** Alexis Perera, CGA, Chair  
David Laventure, CGA  
Helena Hughes, M.A., C. Psych.

**Appearances:** Karen Jolley and Theresa Chung,  
representing the Discipline Committee of the CGAO  
Ian Kostman, representing David Chan  
K. B. Ng, representing the Complainant, Amy Yau (witness)  
Lyle Kanee, counsel for the Tribunal

**Date of Hearing:** January 10, 2006

**Introduction**

Mr. Chan was charged with violating Rules 101, 102 and 606 of the *Code of Ethical Principles and Rules of Conduct* of the Certified General Accountants Association of Ontario ("CGAO"). The charges stem from a complaint made by Amy Yau dated May 11, 2005. After investigating the complaint, the Discipline Committee of the CGAO referred the charges to this Tribunal for a hearing. On May 27, 2005, the President of the CGAO temporarily suspended Mr. Chan's membership for a period of 12 months.

The particulars of the charges, as set out in the Notice of Hearing dated June 7, 2005, are as follows:

1. As the accountant for 1552328 Ontario Inc. you received cheques from the company that were made payable to the Receiver General for the purpose of making remittances to the Canada Customs and Revenue Agency ("CCRA") [now the Canada Revenue Agency] in connection with GST and employee payroll deductions – including those related to Canada Pension Plan, Employment Insurance and withholding tax deductions. You were instructed, and you agreed, to make these remittances to the Canada Customs and

Revenue Agency on behalf of 1552328 Ontario Inc. In total, in the years 2003 and 2004, the cheques issued by 1552328 Ontario Inc. for CCRA remittances, and which were given to you to deposit with CCRA, totalled \$491,581.13. Instead, you only made remittances on behalf of 1552328 Ontario Inc. in the amount of \$5,006.80. The remainder of the amount intended to be deposited in the accounts of 1552328 Ontario Inc. with CCRA, save and except the sum of \$18,334.95, was deposited by you with CCRA to the credit of other persons.

2. Cheque number 0645 in the amount of \$18,334.65 from 1552328 Ontario Inc. was made payable to the Receiver General and given to you to deposit with CCRA to the credit of 1552328 Ontario Inc. Instead, you crossed out the name "Receiver General" on the cheque and substituted "1091092 Ontario Inc." as the payee. The cheque was negotiated and deposited to the credit of 1091092 Ontario Inc. You are the sole director and officer of 1091092 Ontario Inc.

The Tribunal was also advised that Mr. Chan had been charged criminally with, among other charges, defrauding 1552328 Ontario Inc. ("1552328") of monies of a value exceeding \$5,000, contrary to the *Criminal Code*.

#### Procedural Background

The Notice of Hearing with respect to this complaint is dated June 7, 2005. The hearing was originally scheduled for June 13, 2005. The Discipline Committee immediately requested an adjournment in order to complete its investigation. The adjournment was granted by the Tribunal because Mr. Chan was, in any event, outside of the country at that time. The Tribunal was unsuccessful in its attempts to serve him with the Notice of Hearing.

In August, 2005, the Discipline Committee requested that the hearing be rescheduled. The Tribunal served Mr. Chan with a new Notice of Hearing on September 9, 2005, advising him that the hearing would commence on October 12, 2005.

The Discipline Committee sent a copy of its Discipline Brief to Mr. Chan on September 21, 2005. Out of caution, it personally served him with another copy of the Brief on October 5, 2005.

On Friday, October 7, 2005, Mr. Chan contacted Ms. Jolley's office to request her client's consent to an adjournment of the hearing scheduled for October 12, 2005. He advised Ms. Jolley that he had retained a lawyer to represent him and that the lawyer required 3 to 4 weeks in order to prepare his defence. The lawyer in question was Mr. Chan's criminal defence lawyer in related criminal proceedings.

Ms. Jolley contacted the lawyer on Monday, October 10, 2005 and was advised that he had not, in fact, been retained with respect to this discipline hearing, but that he expected to be retained shortly. The lawyer confirmed that, if he was retained, he would be requesting an adjournment of 3 to 4 weeks in order to prepare for the hearing. Based on those representations, the Discipline Committee instructed Ms. Jolley to consent to a brief adjournment. The Tribunal granted the adjournment on consent of the parties the day before the hearing was scheduled to commence.

The hearing was rescheduled to November 22, 2005, which was the latest date to which the Discipline Committee was prepared to consent. Mr. Chan was served with a Notice of the new hearing date on October 26, 2005.

On November 17, 2005, Mr. Chan sent a letter by registered mail to counsel for the Tribunal requesting a further indefinite adjournment in order to provide him with time to retain a lawyer with expertise in professional discipline matters. At the hearing on November 22, 2005, Mr. Chan modified his request and specified that he only needed a four-week adjournment. The request for an adjournment was opposed by the Discipline Committee. The Tribunal decided to grant the adjournment request and scheduled January 10 and 11, 2006 as continuation dates in the matter. Mr. Chan was put on notice by the Tribunal that it would be proceeding with the hearing on January 10, 2006, regardless of whether or not he had retained counsel. The Tribunal also ordered that Mr. Chan pay costs in the amount of \$1,000 to the Discipline Committee forthwith in respect of the appearance on November 22, 2005.

### Preliminary Applications

At the commencement of the hearing on January 10, 2006, counsel for Mr. Chan requested that the proceedings be adjourned. Mr. Kostman argued that the proceedings before the Tribunal were "premature". He indicated that Mr. Chan had not yet received full disclosure from the Crown in the criminal proceedings and specifically had not received any documents in the possession of the Canada Revenue Agency ("CRA"). Mr. Kostman submitted that the absence of full disclosure from the Crown in the criminal proceedings inhibited Mr. Chan's ability to address the discipline charges before the Tribunal. Mr. Kostman indicated that Mr. Chan was prepared to agree that the temporary suspension would continue until the conclusion of discipline proceedings and that therefore there was no prejudice in granting an adjournment.

Counsel for the Discipline Committee reminded the Tribunal that there had been four previous adjournments. Ms. Jolley emphasized that the last adjournment was granted peremptorily. Finally, Ms. Jolley submitted that, if Mr. Chan had wanted to obtain documents in the possession of the CRA, he could have requested that the Tribunal issue a summons to any CRA witnesses and request that documents be brought to the hearing. No efforts were made to obtain such summonses.

After a brief recess, the Tribunal ruled that the request for an adjournment was denied. The Tribunal noted that Mr. Chan had notice of the proceedings against him since May, 2005 and the last adjournment was granted to him peremptorily.

### Request to Admit

Section 16 of CGAO, By-Law 4, Article 9 provides:

16(1) Either party to a hearing may serve on the other a Request to Admit, for the purposes of the hearing, the truth of facts or the authenticity of the documents set out in the Request to Admit.

(2) If the party served with a Request to Admit fails to respond to the Request by serving a Response to Request to Admit within 20 days after the Request was served on the party, the party will be deemed to admit, for the purposes of the hearing only, the truth of the facts and the authenticity of any documents set out in the Request to Admit.

Ms. Jolley advised the Tribunal that she served Mr. Chan with a Request to Admit on December 12, 2005. She did not receive a Response from Mr. Kostman on behalf of Mr. Chan until January 6, 2006. The Response to the Request to Admit admitted many of the facts set out in the Request to Admit. At the hearing, Mr. Kostman clarified the admissions and made further admissions on behalf of Mr. Chan. Mr. Kostman indicated that the Response to the Request to Admit was provided by him to Ms. Jolley as soon as reasonably possible and showed Mr. Chan's willingness to cooperate in the proceedings.

Mr. Jolley submitted that 20 days had lapsed from the service of the Request to Admit without a reply on Mr. Chan's behalf and therefore all of the contents of the Request to Admit should be deemed to be admitted and Mr. Chan should not be entitled to contest those facts.

After a brief recess, the Tribunal ruled that the Discipline Committee could only rely upon the Request to Admit to the extent that Mr. Chan, through his counsel, had expressly admitted the facts therein in his written Response of January 6, 2006 and the further admissions made by counsel for Mr. Chan at the hearing. The Tribunal noted that the seasonal and New Year's holidays fell between the date that the Request to Admit was served and the Response of January 6, 2006.

#### Evidence

Ms. Amy Yau testified through an interpreter. Ms. Yau testified that she retained Mr. Chan to incorporate her company 1552328, which operates a garment factory and employs approximately 30 employees. Ms. Yau has known Mr. Chan for approximately

10 years and he has been providing her with accounting services since then. Ms. Yau explained that, in his role as the company accountant, Mr. Chan had possession of the company's records, books and cancelled cheques. Because of her limited ability to speak English and unfamiliarity with tax regulations in Canada, Ms. Yau relied upon Mr. Chan to be her company's representative with the CRA.

Particular No. 1

Mr. Chan admitted that in the years 2003 and 2004, 1552328 gave him cheques to deposit to the CRA, payable to CRA, in respect of 1552328's GST and payroll deductions remittances, totalling \$491,581.13. Photocopies of the cancelled cheques totalling such sum were entered as Exhibit 3, Tab 2E.

Ms. Yau testified that in or about November, 2004, she obtained information directly from the CRA indicating that only the sum of \$5,006.82 had been remitted on behalf of 1552328. Exhibit 3, Tab H is a Statement of Account for Current Source Deductions dated December 16, 2004 for 1552328, indicating that the balance paid for 2004 on the previous statement (November) was \$5,006.95.

Ms. Yau testified that she had telephone conversations with Mr. Chan in the early months of 2005 after discovering this information from the CRA. Ms. Yau told Mr. Chan that she was aware that he had not remitted the GST and payroll deductions for 1552328 and that only \$5,000 had been remitted. Ms. Yau testified that Mr. Chan admitted that he had made a mistake and that he would fix it within one month. She further testified that Mr. Chan did not fix it within one month or at any time – no further monies were credited to 1552328 as a result of any efforts of Mr. Chan. On cross-examination, counsel for Mr. Chan suggested to Ms. Yau that Mr. Chan had told her that it was the CRA's mistake, but Ms. Yau denied this suggestion.

Particular No. 2

Exhibit 3, Tab F, is a photocopy of a cheque issued by 1552328 dated November 14, 2003 in the amount of \$18,334 payable to 1091092 Ontario Inc. ("1091092"). It is admitted that Mr. Chan was the sole Director and Officer of 1091092. Ms. Yau testified that this cheque was initially made out to an employee of her company. Subsequently, the payee was changed to "Receiver General" because the company was running out of blank cheques and needed a cheque to pay CRA. The employee's name was scratched out, "Receiver General" was written in and Ms. Yau initialled the change. She then gave the cheque to Mr. Chan and expected that he would remit it to the CRA. Later, Ms. Chan received a copy of the cancelled cheque showing that "1091092" had been written in as the payee in place of "Receiver General".

In response to cross-examination by counsel for Mr. Chan, Ms. Yau denied that she agreed with Mr. Chan that this cheque would be used to pay for his services or that she authorized Mr. Chan to deposit this amount of money in his own account or his company's account for services rendered to 1552328. Ms. Yau indicated that she paid Mr. Chan \$300 per month for services rendered to 1552328 and at no time did she receive an invoice from Mr. Chan for \$18,334 in services.

Mr. Chan who was present throughout the hearing did not testify.

Arguments

Counsel for the Discipline Committee submitted that the Complainant, Ms. Yau, was a vulnerable client who had placed her trust in Mr. Chan to look after her company's financial affairs and specifically to make all necessary and proper remittances to the CRA.

With respect to Particular No. 1, Mr. Chan admitted that he received cheques totalling \$491,581 and was instructed to remit those funds to the CRA. The evidence demonstrates that the CRA only received \$5,006 on behalf of Ms. Yau's company. Mr. Chan told Ms. Yau that it was his mistake and he would fix it, but not further funds were credited to Ms. Yau's company as a result of any efforts of Mr. Chan. Ms. Chan was a trustee of those cheques and he breached that trust. Mr. Chan could have testified, but chose not to. Mr. Chan could have explained his efforts to ensure that the funds provided to him as a trustee were paid to the CRA. Mr. Chan could have also presented any receipts he received from the CRA when he paid those monies on the account of Ms. Yau's company. Mr. Chan could have explained his efforts to correct the "mistake" since Ms. Yau contacted him in early 2005.

Ms. Jolley argued that it was a reasonable inference that Mr. Chan diverted the missing money to his own account, but it was not necessary to establish that in order to prove the Particulars. It was sufficient to substantiate the Particulars to prove, that Mr. Chan did not discharge his responsibilities as a trustee appropriately, and thereby breached his fiduciary duties. This would qualify as unlawful activity under Rule 102. With respect to Rule 606, Mr. Jolley submitted that Mr. Chan's activities were detrimental to the Association and the profession in that he abused the trust placed in him by a vulnerable client who retained him for his expertise. His conduct represents either a fraud, gross negligence, or a serious breach of trust.

In terms of penalty, Ms. Jolley indicated that the Discipline Committee was seeking an expulsion order, a fine of \$2,000 and a contribution to the costs incurred by the Association in the sum of \$5,000. Ms. Jolley submitted that the authorities in the Sentencing Brief provided by the Discipline Committee supported the Discipline Committee's submissions on penalty.

On behalf of Mr. Chan, Mr. Kostman submitted that there was no evidence before the Tribunal from the CRA as to the whereabouts of the \$491,000. Mr. Kostman argued

that Mr. Chan received the money from Ms. Yau's company, paid it to the CRA and he does not know what happened after that.

With respect to Particular No. 2, Mr. Kostman argued that the quality of the cheque that appears at Exhibit 3, Tab F is inadequate to draw accurate inferences from.

Overall, Mr. Kostman submitted that the quality of the evidence was insufficient to warrant the strong penalty of expulsion.

In reply, Ms. Jolley noted that the evidence of Ms. Yau with respect to the cheque for \$18,334 was that it was payable to the Receiver General and she did not authorize the cheque to be transferred to Mr. Chan or his company. Finally, Mr. Chan had the opportunity to testify and to provide the Tribunal with explanations, but he chose not to do so.

#### Tribunal's Decision

Upon careful consideration of all of the evidence and submissions of the parties, the Tribunal concludes that Mr. Chan has violated Rules 101, 102 and 606 of the *Code of Ethical Principles and Rules of Conduct* as particularized in the Notice of Hearing dated June 7, 2005.

The evidence establishes that Mr. Chan received cheques totalling \$491,581.13 in the years 2003 and 2004 from his client, 1552328, for the purpose of remitting that amount to the CRA. The CRA received only the amount of \$5,006.95 on account of 1552328. The evidence does not establish where the balance of the funds were diverted to, except for the cheque dated November 14, 2003 in the amount of \$18,334.45.

Mr. Chan admitted that he received the 27 cheques from 1552328 and was directed to remit the cheques to the CRA. The Tribunal rejects the submission made on Mr. Chan's behalf that, in the absence of evidence of where the funds were diverted, there

is no evidence of any improper or unlawful conduct. The Tribunal finds that it was Mr. Chan's responsibility as a CGA, acting on behalf of 1552328, to ensure that the funds he was entrusted with were remitted to the CRA on behalf of his client. Specifically, the Tribunal concludes that Mr. Chan would have known or should have known prior to January, 2005 that the CRA was not recording the remittances to the account of 1552328. The Tribunal would have expected Mr. Chan to testify and explain this very significant discrepancy and his efforts to rectify the discrepancy, if it was an innocent error. Although Mr. Chan was present throughout the hearing, he chose not to testify. The failure to properly remit the funds of 1552328 to the CRA and to take proper steps to ensure that 1552328's account was credited for the full amount remitted represents a breach of trust and of Mr. Chan's professional responsibilities to 1552328.

With respect to the cheque of November 14, 2004 in the sum of \$18,334.45, the Tribunal concludes that Mr. Chan, without authorization, negotiated and deposited the cheque which had been payable to the "Receiver General", to the credit of 1091092, a company that he was the sole director and officer.

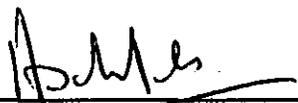
The Tribunal concludes that Mr. Chan participated in activities that he knew or which a reasonably prudent person would believe to be unlawful; that he participated in acts that would be of a nature to discredit the profession; and, participated in actions that were detrimental to the Association or the profession.

#### Penalty

Given the seriousness of Mr. Chan's misconduct, the Tribunal concludes that expulsion is an appropriate penalty. As a self-regulated profession, the CGAO must maintain the public's confidence in the profession. Mr. Chan engaged in unlawful conduct that brought the profession into disrepute. He seriously violated the trust that was placed in him by his client and demonstrated a lack of integrity that is inconsistent with the ethical and professional standards of the profession. We therefore order Mr. Chan expelled

from the Association and order him to return his Certificates to the CGAO. We also order that Mr. Chan pay a fine of \$2,000 to the CGAO and the sum of \$5,000 towards the CGAO's costs.

Dated at Toronto, Ontario this <sup>th</sup> 8 day of March, 2006.

  
\_\_\_\_\_  
Alexis Perera, Chair  
On Behalf of the Tribunal

#### NOTICE

**This decision of the Professional Conduct Tribunal may be appealed to an Appeal Tribunal within thirty (30) days of the sending of this decision. The Notice of Appeal must be in writing, addressed to the Secretary of the Association (Certified General Accountants Association of Ontario, 240 Eglinton Avenue East, Toronto, Ontario, M4P 1K8) and must contain the grounds for the appeal.**

**TAKE NOTE THAT, in an appeal, the Appellant bears the onus of obtaining copies of the transcript of the hearing before the Professional Conduct Tribunal for the Appeal Tribunal (4 copies) and for the Respondent (1 copy). According to Article 9 of By-Law Four, a Notice of Appeal that fails to contain the grounds for the appeal, together with evidence that demonstrates that a transcript of the hearing giving rise to the appeal has been ordered, shall be invalid.**