In the Court of Appeal of Alberta

Citation: Yee v Chartered Professional Accountants of Alberta, 2020 ABCA 98

Date: 20200306
Docket: 1801-0206-AC
Registry: Calgary

Between:

Christopher Yee

Appellant

- and -

Chartered Professional Accountants of Alberta, formerly known as the Institute of Chartered Accountants of Alberta

Respondent

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J. D. Bruce McDonald
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment of the Honourable Madam Justice Strekaf

Memorandum of Judgment of the Honourable Mr. Justice Slatter Concurring in the Result

Memorandum of Judgment of the Honourable Mr. Justice McDonald Concurring in the Result

Appeal from the Decision of an Appeal Tribunal of the Chartered Professional Accountants of Alberta dated February 5, 2018 and May 28, 2018

Memorandum of Judgment
of the Honourable Madam Justice Strekaf

[1] This is an appeal from a decision of the Appeal Tribunal of the Chartered Professional Accountants of Alberta, that dismissed an appeal from its Discipline Tribunal's finding of professional misconduct by a member.

[2] The appellant was a member of the Chartered Professional Accountants of Alberta. He was also the President, Chief Financial Officer, director and shareholder of an oil and gas company known as Hermes Energy Corporation. The charges against him arose from a complaint made by a disgruntled investor in some of the assets owned by Hermes. The appellant was never retained by the investor in any professional capacity. Their dispute was a commercial one that led to litigation, which has since been settled.

[3] In some correspondence between Hermes and the investor, the appellant used his professional designation (CA) in the signature line. The investor testified before the Discipline Tribunal that he placed confidence in those representations.

[4] The Discipline Tribunal found the appellant guilty of four counts of unprofessional conduct: failure to document a trust agreement; failure to adequately substantiate overhead charges to the investor; failure to maintain records to properly account for the investor's share of production revenue; and failure to respond to the investor's request for information about his working interest.

[5] The appellant appealed to the Appeal Tribunal. The majority overturned the conviction on the first count but upheld the remaining counts. The dissenting member concluded the Discipline Tribunal was biased because it showed prejudgment and a lack of fairness and impartiality.

[6] The appellant appeals on several grounds: that the Appeal Tribunal failed to apply the proper standard of review; that he was not guilty of professional misconduct and as such the decision was unreasonable; and that the Discipline Tribunal demonstrated a reasonable apprehension of bias and breached the principles of fairness and natural justice.

[7] I am satisfied that the Discipline Tribunal's conduct of the hearing gives rise to a reasonable apprehension of bias and, therefore, the decision must be set aside and remitted back to be heard by a new panel.

[8] While tribunals are permitted considerable leeway in how their proceedings are conducted, procedural fairness demands impartiality of decision makers. This is because "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.": *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 57. The test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously,

would not decide fairly?": *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, cited in *Wewaykum* at para 60.

[9] A tribunal is entitled to challenge and question a witness vigorously, provided that the tribunal is open minded, that is, open to consideration of the answer to what might be a leading question. The issue before us is whether the questioning in this case and the statements made in the context of questioning give rise to a reasonable apprehension of bias.

[10] The appellant has highlighted the following comments and observations made by the Discipline Tribunal which he submits do give rise to such a reasonable apprehension.

Excerpt A.

> MR. GODFREY:... Q. For — for me, reading through those — those documents, it essentially, as a layman, denies the existence of any deed of trust or any evidence of having an interest in the oil and gas properties. However, there — there does seem to be some, I think, very clear evidence that both HEC and HFI have — have charged operating costs while in another — in another forum, there is denial of deed of trust and denial of any interest. So I'm very confused as to what is — what is the truth and what isn't the truth. And I'm very confused as to your knowledge of these things.... Were you fully aware of what was being said by — by counsel on — on behalf of HEC and — and HFI?
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> A. Yes. I was totally aware of it. I asked counsel, and he said they are just standard pleadings by a lawyer.
>
> Q. So it doesn't really matter whether they are truthful or not, they are just pleadings? It doesn't matter whether they are truthful or not, is that what you're telling me? It doesn't matter to you — maybe it doesn't matter to the lawyers. I don't know that, but does it matter to you that there are statements made in the name of your corporation of which you are the CEO that are not true?
>
> A. Correction, I was just the CFO, but the — those are legal matters which — I am not a lawyer and — and — and, you know, as explained to me. lawyers make pleadings. They will say, you know, everything, you know. So he told me it was fine, so I accepted his advice and left it in.
>
> Q. I can understand that, in part, because when I looked at it. I could see that these were pleadings and claims and counterclaims: but what troubles me is that, if somebody makes a claim on my behalf or makes a counterclaim on my behalf, I will insist that it be truthful. And if can't be stated in a truthful way, then, that is not going to be a claim to which I or my corporation, if such was the case, would agree to. And so I get back to the question of— of charge number 1 which goes back to the original deed of trust, but, to me, strikes more deeper at the question of being a chartered accountant. A chartered accountant who looks for objective, verifiable evidence and looks for — in the old days, we used to even

say that the statements were true; but we — we search for a reasonableness and a truthfulness. And it concerns me, Mr. Yee, that you would accept, as a chartered accountant, those pleadings and move forward.

A. Well, I will have to say, you know what, I live my life by telling the truth. And I also rely on professionals in areas that I have no idea or any strength at all, and 1 don't venture into areas, as you can see.... It's a lawyer's pleadings. And so I accept professional advice and rely on that.

MR. KAUFMANN: Well, I was going to comment on the same item. My notes at some of the statements of defence, really threw me for a loop, and I was wondering whether I was reading the correct binder. So I just want to also say that the statement — the defendant denies that the plaintiff purchased any interest in oil and gas properties as alleged at all, holds the plaintiff to strict proof thereof, is a very troubling statement and it goes back, again, to the lack of documentation, the trust document and so on and so forth. So this is why we beat you up.

[Discipline Hearing Transcript, pages 751-755]

Excerpt B.

MR. GODFREY: Tab 7? Yes, tab 7, September 24 to 137. This is an offer to sell, and the offer is being made by Hermes to 138, in the first case, but we're using it for date purposes. And it's an offer to sell on the September 24th by Hermes. I'm — I'm struck by the lack of a signature on that — those two documents that purport to offer to sell by Hermes. What would I be agreeing to if I — if I signed this document as the buyer, if the seller hasn't committed his own entity himself or his own entity to the transaction? Lacking signatures and lacking documents, it started on day one and it continues this afternoon.

[Discipline Hearing Transcript, page 1060]

Excerpt C.

MR. GODFREY: Mr. Yee. if you sent me a billing that included a piece of property that I didn't know anything about, it would seem to me that there should be something that 1 would sign to say that I am going to be a party to this particular transaction. And it's actually a trend which is noticeable throughout in terms of documentation, but I find only one reference to Cabrerra in all of this.

[Discipline Hearing Transcript, page 728]

Excerpt D.

MR. YEE: Cal Oughton was handling this very issue with Zeke Purves. And so I was waiting for Cal's opinion and advice. We came across that. That one-third overhead issue needed to be documented because it's not in this document. So I was waiting for Cal and Zeke to work those things out, and that's what we — that's why I didn't sign it — or we didn't sign it.

KAUFMANN: So it's somebody else's fault?

MR. YEE: It's not somebody else's fault.

[Discipline Hearing Transcript, page 1057]

Excerpt E.

Q. MR. GODFREY: I would also like to go back, as I said, to the very beginning. I believe, at one point, Mr. Lalonde asked you if you were acting as a chartered accountant or as the CFO of HEC. I can be corrected on that, Mr. Lalonde, if I'm incorrect, but I believe you asked that. And I just wanted to state on the record that — that while Mr. Yee answered to you that he was acting for HEC, I believe, as the CFO — I'm sorry, the CFO and not as a practicing chartered accountant, but I would just like to state that when you get up in the morning, you get up as a chartered accountant. When you go to bed at night, you go to bed as a chartered accountant. It doesn't matter what you do during the rest of the day. I believe you 're still in practice?

A. Yes.

Q: Is that correct?

A: Yes.

Q. And you practice in Canmore?

A. Yes.

Q. Are you, at the same time, still the CFO of HFI?

A. Yes.

MR. GODFREY: But that doesn't change the character of behavior that's required, and I just wanted to get that on the record because of the nature of the opening question. As I said, Mr. Lalonde, I believe that was a question that you did ask.

MR. LALONDE: I think you're right.

MR. GODFREY: I just wanted to set that clear. That you're a chartered accountant from the time you get up until the time you go to bed. In fact, you're a chartered accountant while you are asleep. Sometimes we have enough deals going on in our heads we're dreaming about them.

[Discipline Hearing Transcript, pages 755-756]

Excerpt F.

THE CHAIR: Okay. Bill, do you have any further questions?

MR. KAUFMANN: This whole case is bedevilled by lack of paper...

[Discipline Hearing Transcript, page 1056]

Excerpt G.

THE CHAIR: — I'm just saying that's what happened. And I don't think that the arrangement between 137 and Hermes is a trust in accordance with the rules of 612. There is no doubt there is a trust between 137 and — and Hermes to hold the physical title of the property. And, normally, what you would do is document that. And we come back to the whole situation, it's the lack of documentation that's caused the problems in all of this.

[Discipline Hearing Transcript, page 946]

Excerpt H.

THE CHAIR: Okay. As either CEO or CFO of either HFI or HEC, did you sign either e-mails or letters as a CA?

MR. YEE: The specific of your question, if I understand it, is that — did I hold myself out, sign e-mails as a CA being in practice to — the responsibility as a professional, as such, when I signed my notice to readers, yes. And in terms of HEC and HFI, I have used my designation CA after my name, but as officer representing the company.

THE CHAIR: Correct. So to say that your conduct as an officer or director of either HFI or HEC was as a businessman and not as a CA, as I believe Mr. Lalonde indicated, does not seem to be correct to me.

[Discipline Hearing Transcript, page 1046-1047]

Excerpt I.

> MS. HUNKA: You did hear the evidence of, I think, both Dr. Kowalski and — and Mr. Yee both have acknowledged that, you know, instead of doing that amendment to the Crown lease, per se, they would simply hold it in — in trust and not make that reflection, and they acknowledged that at the outset.
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> THE CHAIR: And that's the normal practice of small companies.
>
> MS. HUNKA: Right.
>
> THE CHAIR: And that's not the normal practice of big companies, in my opinion.
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> MS. HUNKA: Yes. And I circle back to Dr. Kowalski sending out $575.000 out the door. Why? Because of the CA designation in which he was familiar with, that he took great comfort in knowing that he would treated with integrity.
>
> THE CHAIR: Agreed. Any comments —
>
> MS. HUNKA: It's remarkable.
>
> THE CHAIR: Any comments, Mr. Lalonde?
>
> MR. LALONDE: Oh, I have many comments. I have many things to say.
>
> [Discipline Hearing Transcript, page 947]

[11] In my view, the above comments made by all three members of the Discipline Tribunal give rise to a reasonable apprehension of bias when they are viewed collectively from the perspective of an informed person. The questioning about denials in the appellant's statement of defence displays a fundamental misunderstanding of the role of pleadings in civil litigation and suggests that the tribunal members viewed those denials as untruthful statements by the appellant. Comments by members regarding their personal and professional values as a chartered accountant reflect a preconceived perspective about one of the live issues before the tribunal. Taken separately, these comments might not rise to the level of a reasonable apprehension of bias, but viewed collectively, the repeated comments suggest a lack of impartiality toward the appellant and a pre-judgment about the important issues to be decided in the hearing.

[12] In my view, the observations of the dissenting member of the Appeal Tribunal are apt. He concluded that "an informed and reasonable person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the questions and statements of the Discipline Tribunal at the Hearing showed prejudgement, were unfair and were not impartial. As a result, this matter should be referred back to a new Discipline Tribunal to be heard again". I agree.

[13] I have reviewed the concurring reasons of my colleague, Justice Slatter, in draft form and agree with his analysis of the internal standard of review to be applied by the Appeal Tribunal set out at paragraphs 31 through 35 of his judgment.

[14] A breach of procedural fairness cannot be cured. The appeal is allowed. The decisions of the Discipline Tribunal and the Appeal Tribunal are set aside. The matter is returned to a new discipline panel.

[15] The direction that the appellant pay the costs of the discipline proceedings is set aside; there is no principled basis on which the appellant should be expected to pay the costs of the proceedings in the circumstances.

Appeal heard on September 10, 2019

Memorandum filed at Calgary, Alberta
this 6th day of March, 2020

REGISTRAR
FILED
MAR 06 2020
Court of Appeal of Alberta

Authorized to sign for: Strekaf J.A.

Memorandum of Judgment
of the Honourable Mr. Justice Slatter
Concurring in the Result

[16] The appellant appeals findings of professional misconduct made against him by a Discipline Tribunal, which were upheld by the Appeal Tribunal of the Institute of Chartered Accountants of Alberta.

[17] I have had the advantage of reading the reasons prepared by my colleague, Justice Strekaf, and I agree, for those reasons, that the appeal should be allowed based on a reasonable apprehension of bias. If one member of the Appeal Tribunal thought that there was actual bias, it is difficult to see how a reasonable apprehension of bias would not taint the entire hearing.

[18] These proceedings, however, raise important issues about professional discipline that warrant discussion:

(a) The scope of "professional misconduct", particularly respecting i) matters of competence, and ii) matters related to the personal conduct of the registrant not directly related to his or her professional activities;

(b) The ability of the profession to control abuses of its process, and the respective roles of the various participants in the discipline system.

Since these issues recur in professional discipline appeals to this Court, further comment is appropriate.

Facts

[19] The appellant is a chartered accountant, but he did not engage in public practice. At the relevant times he was the President and Chief Financial Officer of Hermes Energy Corporation. The complainant was Dr. Kowalski, a surgeon who had previously been a chartered accountant. Dr. Kowalski invested in a series of oil wells owned by Hermes through a numbered company. The investment did not go well, and litigation ensued. That litigation has since been settled or resolved.

[20] During the dispute, as the Discipline Tribunal noted, "Several long term personal relationships have been destroyed." Communications were at times uncivil. Dr. Kowalski complained to the Institute of Chartered Accountants, who laid disciplinary charges alleging that the appellant was "guilty of unprofessional conduct" as a result of transactions between Hermes and Dr. Kowalski and his numbered company. The particulars provided were that the appellant:

1. failed to properly document the trust agreement after having sent an email to Dr. Charles W. Kowalski, dated February 28, 2008, which stated,

   "You will receive a Declaration of Trust for your 25% WI upon receipt of your $425,000 payable".

2. transferred title of 1372535 Alberta Ltd.'s 25% working interest from Hermes Energy Corporation to Hermes Financial Incorporated, a company operated by you and listed on the TSX Venture Exchange, in or around December 2009, without obtaining consent of 1372535 Alberta Ltd.;

3. failed to adequately substantiate corporate overhead costs charged to 1372535 Alberta Ltd.;

4. failed to maintain records to properly account for 1372535 Alberta Ltd.'s share of production revenues and to properly credit and pay to 1372535 Alberta Ltd. its share of production revenues;

5. failed to provide adequate statements or properly itemized joint interest billings, to 1372535 Alberta Ltd., since November 2012; and

6. failed to respond to requests from Dr. Charles W. Kowalski for information regarding 1372535 Alberta Ltd.'s working interest asset.

The Discipline Tribunal found that the facts underlying allegations #1, 3, 4 and 6 had been proven, and found the appellant guilty of professional misconduct.

[21] The appellant appealed to the Appeal Tribunal of the Institute. The Appeal Tribunal agreed with him that the finding of professional misconduct with respect to allegation #1 was unreasonable, but it upheld the reasonableness of the other findings. The majority of the Appeal Tribunal also dismissed allegations of bias, and breaches of the principles of fairness and natural justice. Remarkably, the dissenting member of the Appeal Tribunal found that there had been actual bias shown during the hearing before the Discipline Tribunal. This appeal resulted.

The Statutory Disciplinary Regime

[22] An overview of the structure of the regulatory regime is an appropriate starting point.

[23] The members of the Institute of Chartered Accountants of Alberta, like most professions in Alberta, are afforded the privilege and responsibility of self-regulation. The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession. No one is better positioned than the profession to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest.

[24] The *Regulated Accounting Profession Act*, RSA 2000, c. R-12 set out a detailed regime for the registration and regulation of accountants.[1] The disciplinary process is triggered by s. 67 which provides:

> 67(1) Any person may make a complaint to an accounting organization about the conduct of a registrant or former registrant.

This provision is very wide, and contemplates that a complaint may be made about competence, misconduct, or other matters. The statute also provides for complaints generated internally within the Institute itself.

[25] Complaints are "reviewed" initially by the secretary of the Complaints Inquiry Committee under s. 69. The secretary has powers to investigate the complaint, and on completing the review the secretary "must refer the complaint" to the CIC chair under s. 69(5). Particulars of the complaint must be provided to the registrant within 30 days, but there is no statutory deadline for the CIC secretary to refer the complaint to the CIC chair.

[26] The duties of the CIC chair upon receipt of a complaint from the CIC secretary are set out in s. 76:

> 76(1) On receipt of a complaint and results of a review from the CIC secretary, the CIC chair must
>
> (a) direct that no further action be taken regarding the complaint if
>
> (i) the CIC chair is of the view that the conduct is not unprofessional conduct,
>
> (ii) the CIC chair is of the view that the conduct is not within the jurisdiction of the complaints inquiry committee or a discipline tribunal, or
>
> (iii) the CIC chair is of the view that the conduct complained about is too minor to warrant any sanction or further investigation,
>
> or
>
> (b) appoint an investigator to investigate any matter.

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[1] The complaints under appeal arose while this statute was in force. It has since been repealed and replaced by the *Chartered Professional Accountants Act*, SA 2014, c. C-10.2.

> (2) If the CIC chair directs that no further action be taken, the CIC chair must notify the investigated party and the complainant of the decision and give them a written explanation of it. . . .

The statute sets out the powers of an investigator, if one is appointed. Section 77(3) provides that the investigator must report the results of the investigation to the Complaints Inquiry Committee.

[27] The duties of the Complaints Inquiry Committee upon receipt of a complaint from the CIC chair are set out in s. 79:

> 79(1) Within a reasonable time after receipt of the investigator's report, the complaints inquiry committee must
>
> (a) direct that a further or other investigation be carried out by the same or another investigator under section 77,
>
> (b) decide that no further action is to be taken, in which case the complaints inquiry committee may also make recommendations or provide guidance in respect of future conduct or practice, or
>
> (c) refer one or more allegations of unprofessional conduct to the discipline tribunal roster chair.

If the Complaints Inquiry Committee decides that a disciplinary hearing is required, the matter is referred to the discipline tribunal roster chair, who must convene a discipline tribunal under s. 81(1). The Complaints Inquiry Committee is specifically empowered to "decide that no further action is to be taken".

[28] The statute provides details for the conduct of a disciplinary hearing. The duties of the discipline tribunal following the hearing are set out in s. 92:

> 92(1) For each allegation of unprofessional conduct referred to it, a discipline tribunal must determine whether the conduct of the investigated party constitutes unprofessional conduct. . . .
>
> 95(1) A discipline tribunal must make its decision within a reasonable time after the conclusion of a hearing.
>
> (2) A decision under subsection (1) must be in writing and contain the reasons for the decision. . . .

If the charges are made out, the discipline tribunal will usually hold a separate sanctions hearing, and impose a penalty. An appeal is available to the appeal tribunal under s. 101, and a further appeal is available as of right to the Court of Appeal under s. 117.

Standard of Review

[29] The standards of review on a statutory appeal from an administrative tribunal are the same as those on other appeals: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para. 49. Those standards of review can be summarized as follows:

(a) conclusions on issues of law are reviewed for correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute".

(b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: ***Housen*** at paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401.

(c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** at paras. 33, 36.

(d) issues of fairness and natural justice are reviewed, having regard to the context, to see whether the appropriate level of "due process" or "fairness" required by the statute or the common law has been granted: ***Vavilov*** at para. 77.

(e) the test on review for bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias.

[30] In professional disciplinary appeals, interpretation of the governing statute is reviewed for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subject to discipline has met that standard.

[31] As noted, the *Regulated Accounting Profession Act* sets up a tiered system of discipline, under which findings of a discipline tribunal can be appealed to the appeal tribunal. In this case, the Appeal Tribunal concluded that the standard of review to be applied by it was "reasonableness". One of the appellant's central arguments is that the correct standard of review on an internal appeal is "correctness".

[32] The Appeal Tribunal was unfortunately distracted by a lengthy discussion of the standard of review. It unhelpfully characterized certain issues as being "jurisdictional", although there was nothing in these proceedings that called into question the jurisdiction of the Discipline Tribunal. It relied on the decision in ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190, which has

since been overruled by ***Vavilov***. In any event, ***Dunsmuir*** was not the applicable authority. ***Dunsmuir*** dealt with the standard of review in external review of administrative action, that is, it dealt with the standard of review by a superior court of the decisions of an administrative tribunal. Different, although overlapping considerations apply to review at various internal levels within the administrative structure: ***Newton v Criminal Trial Lawyers' Association***, 2010 ABCA 399 at paras. 42-3, 57, 493 AR 89, 38 Alta LR (5th) 63. For example, on external review deference is extended by superior courts because the professional disciplinary tribunal is presumed to have heightened expertise and insight. There is no reason to presume that a professional internal appeal tribunal has less expertise than a discipline tribunal.

[33] The mandate and powers of an appeal tribunal are set out in the *Act*:

> 111(1) Unless the parties to the appeal otherwise agree, an appeal must be based on
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> (a) the decision of the body from which the appeal is made,
>
> (b) the record of proceedings before that body, and
>
> (c) any further evidence that the appeal tribunal agrees to receive.
>
> (2) In proceedings under this Part,
>
> (a) an appeal tribunal, in addition to the authority it has under this Part, has the authority of a discipline tribunal under Part 5, and . . .
>
> 112(1) An appeal tribunal may quash, confirm, vary or reverse all or any part of a decision of the body from which the appeal was made, make any finding or order that in its opinion ought to have been made or refer the matter back to the same or another body with or without directions.

It is well established that the breadth of the wording in s. 111(2) and s. 112(1) does not mean that an appeal tribunal should afford no deference whatsoever to the decision of the discipline tribunal: ***Newton*** at para. 54; ***Zuk v Alberta Dental Association and College***, 2018 ABCA 270 at para. 72, 78 Alta LR (6th) 12. That would undermine the integrity of the first level of the disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision.

[34] Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute: ***Zuk*** at para. 71; ***City Centre Equities Inc v Regina (City)***, 2018 SKCA 43 at paras. 58-9, 75 MPLR (5th) 179. The wording of the *Act* makes it clear that the appeal tribunal is to conduct "appeals". Its decision is to be "based on the decision of the body from which the appeal is made", signalling that the primary role of the appeal tribunal is to review that decision. It follows that the appeal tribunal is not to re-conduct the entire proceeding *de novo*, a conclusion that is affirmed by the provision in s. 111(1)(b) that the appeal proceeds on the "record": ***Newton*** at para. 64. The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence

must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal: ***Newton*** at para. 81.

[35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: ***Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation***, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:

(a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;

(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: ***Newton*** at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on ***Dunsmuir***. With respect to matters such as the

appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.

The Scope of Professional Misconduct

[36] Under the *Regulated Accounting Profession Act*, as under most professional regulatory statutes, "professional misconduct" is widely defined:

> 1 In this Act, . . .
>
> (q) "competence" means the combined knowledge, skills, proficiency and judgment required by the registrants of an accounting organization to provide professional services; . . .
>
> (t) "conduct" includes an act or omission, whether or not the conduct relates to the professional activities of a registrant or former registrant;
>
> 91(1) A discipline tribunal may find any of the following to be unprofessional conduct:
>
> (a) conduct that is detrimental to the best interests of the public or harms the integrity of the accounting profession;
>
> (b) conduct that contravenes this Act, the regulations or the bylaws;
>
> (c) conduct that contravenes the rules of professional conduct or practice standards;
>
> (d) conduct that displays a lack of competence; . . .

Section 91 continues to include other forms of misconduct, such as a failure to comply with any prior disciplinary order or settlement, a failure to cooperate with the investigation, or a failure to comply with a sanctions order.

[37] There are two noticeable features of these definitions: conduct relating to competence (s. 91(1)(d)), and conduct unrelated to professional activities (s.1(t)).

Competence

[38] The statute draws a distinction between "competence", and "unprofessional conduct", although there is an overlap brought about by s. 91(1)(d). The statute establishes a practice review committee. The purpose of a practice review is set out in s. 54:

> 54(1) The purpose of practice review is to promote high standards of practice in public accounting firms and professional service providers and, generally, to maintain and improve the competence of the profession.

The intention appears to be that issues relating to "competence" will generally be dealt with by practice review, not by disciplinary proceedings.

[39] Nevertheless, s. 91(1)(d) confirms that "lack of competence" can amount to "professional misconduct". In context, for lack of competence to amount to professional misconduct the incompetent work must be so egregious as to engage the broader public interest or the reputation of the profession: ***Barrington v Institute of Chartered Accountants of Ontario***, 2011 ONCA 409 at para. 122, 333 DLR (4th) 401. Section 91 specifically states that the discipline tribunal "may" find that incompetence amounts to professional misconduct. Generally speaking, matters of "ordinary incompetence" will be better dealt with by practice review, not by disciplinary proceedings.

[40] As a matter of logic, not every accountant can be "above average". Merely because a particular accountant is not a leader in the profession does not mean that the accountant has engaged in "misconduct". Further, accountants are human, and will make mistakes. Some accountants may make more mistakes than the Institute would prefer, and even the best accountants can have a bad day. The Institute does a disservice to its members and the public generally if it allows every allegation of incompetence to be promoted to a matter of discipline.

[41] It follows that a finding of professional misconduct does not automatically follow from a finding of incompetence or lack of skill. There must be an aspect to the unskilled practice that somehow engages the wider reputation of the profession or the protection of the public.

Conduct Unrelated to Professional Activities

[42] Section 1(t) confirms that the professional disciplinary regime is not strictly limited to the professional activities of the accountant, and can extend to other personal or business activities. For example, the Institute could sanction an accountant who engages in a fraud unrelated to his professional activities, or (to take an extreme example) robs a bank. A good example is found in ***Erdmann v Institute of Chartered Accountants of Alberta***, 2013 ABCA 147, 544 AR 321, 81 Alta LR (5th) 411, where the accountant made threats to make complaints to various agencies, including the Canada Revenue Agency, in the context of the construction of her personal residence.

[43] Once again, the acknowledgement in s. 91 that the discipline tribunal "may" find conduct to be unprofessional recognizes an ability to set boundaries. ***Erdmann*** noted at para 20 that there is a line that must be crossed before personal conduct amounts to "professional misconduct":

> Professionals in every walk of life have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. A chartered accountant's status in the community at large means that his/her conduct will from time to time be the subject of scrutiny and comment. While acknowledging the legitimate demands of one's personal life, and the rights and privileges that we all enjoy, private behaviour that derogates from the high standards of conduct essential to the reputation of one's profession cannot be condoned. It follows that a chartered

> accountant must ensure that her conduct is above reproach in the view of reasonable, fair-minded and informed persons.

The distinction was also recognized in ***Marten v Royal College of Veterinary Surgeons***, [1965] 1 All ER 949 at p. 953:

> If the conduct, however, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it seems to me that it may, depending on the circumstances, amount to conduct disgraceful to him in a professional respect in the sense that it tends to bring disgrace on the profession which he practises. It seems to me, though I do not put this forward in any sense as a definition, that the conception of conduct which is disgraceful to a man in his professional capacity is conduct disgraceful to him as reflecting on his profession, or, in the present case, conduct disgraceful to him as a practising veterinary surgeon.

In order to rise to the level of professional misconduct, the private conduct in question must engage either the broader public interest, or the reputation of the profession.

[44] In ***Marten*** the appellant was a veterinary surgeon, and the allegations related to the way that the appellant treated his cattle. Since the appellant was a veterinary surgeon, these allegations were more serious than if they had been made against an ordinary farmer, and therefore tended to disgrace the profession. A similar situation arose in ***Ratsoy v Architectural Institute of British Columbia*** (1980), 22 BCLR 303, 113 DLR (3d) 439. Ratsoy was an architect who proceeded with a private building project notwithstanding stop work orders issued by the city. This too was conduct closely related to his profession, and therefore more egregious than the same conduct by an average citizen.

[45] Many factors can be considered to determine if private conduct amounts to professional misconduct: ***Fountain v British Columbia College of Teachers***, 2013 BCSC 773 at paras. 32-3. The closer the conduct comes to the activities of the profession, the more possible it is that personal misconduct will amount to professional misconduct. That is the lesson of ***Marten*** and ***Ratsoy***. It is, however, an error for a discipline committee to assume that because certain "events happened" that are in some sense undesirable or improper, that automatically amounts to "professional misconduct". An accountant may, as one member of the Discipline Tribunal put it, be an accountant "from the time you get up until you go to bed at night", but that does not make everything an accountant does a matter of professional discipline. Section 1(t), and the cases just cited, recognize that private actions can amount to professional misconduct, but they are not intended to allow the Institute to regulate every aspect of its members' private lives.

The Ability to Divert Disciplinary Proceedings

[46] The appellant argued before the Appeal Tribunal that the disciplinary proceedings should have been stayed until the litigation between Hermes and Dr. Kowalski was resolved. He also

argued that the disciplinary proceedings were improperly commenced for collateral purposes in order to "intimidate" the appellant into settling that litigation.

[47] The Appeal Tribunal rejected both arguments:

> Regarding the argument that the CPAA should have waited until the litigation between the complainant and Mr. Yee had been resolved before proceeding with disciplinary proceedings, the Appeal Tribunal turns to *RAPA* for guidance. Under *RAPA*, the CPAA has a duty to investigate complaints and to conduct disciplinary proceedings and to do so within prescribed timelines. If it does not, the CPAA is in breach of its governing statute.

The Appeal Tribunal noted that the civil proceedings and the disciplinary proceedings were separate, and that legal liability did not necessarily equate to the presence or absence of professional misconduct.

[48] With respect to the "collateral purposes" argument, the Appeal Tribunal stated:

> Under *RAPA,* the CPAA has a statutory duty to receive and, if it deems appropriate, to investigate complaints, regardless of the rationale of the complainant for making such complaints.

This reasoning cannot survive appellate review. For one thing, the reasoning on the collateral purposes argument is internally inconsistent. It correctly notes that the Institute has a duty to process complaints "if appropriate", but then goes on to state that this must be done "regardless of the rationale of the complainant". If the complaint has been filed for an improper purpose, then it may "not be appropriate" for it to be taken any further.

[49] The Appeal Tribunal's error was in taking too narrow a view of the mandate of the participants in the discipline procedure, such as the CIC chair. The point is not that proceedings must be stayed or diverted if there is some question about the motivation behind the complaint; serious complaints must be treated seriously, despite the motivation behind them. The point is that the CIC chair, a discipline tribunal, and an appeal tribunal do have a discretion to divert discipline proceedings in appropriate cases. The error in this appeal was the failure to even consider that possibility.

[50] It is correct to say that the Institute has a duty to receive and investigate complaints, but it is not accurate to suggest that it has no ability to divert, delay, or redirect those complaints. The statute requires the CIC secretary to receive, process, and investigate all complaints, and then refer them to the CIC chair. Nothing prevents the CIC secretary from recommending that the complaint be taken no further because it does not disclose "professional misconduct", it relates more properly to a matter of competence, or because the complaint has been filed for improper purposes.

[51] The statute specifically gives the CIC chair the power to divert a complaint. Paragraphs 76(1)(a)(i), (ii) and (iii), read individually and collectively, allow the CIC chair to conclude that no misconduct is shown, or if there is some personal misconduct it does not amount to "professional misconduct". The CIC chair can decide that the matter is too minor to warrant further proceedings. He or she can also determine that the matter is more properly related to competence, and should be referred for practice review. None of this would put the Institute "in breach of its governing statute".

[52] Further, there are no "prescribed timelines" that have any impact on these issues. The CIC secretary must advise the member of the complaint within 30 days. There is no deadline on when the CIC secretary must report the matter to the CIC chair, no deadline on when the CIC chair must make a decision under s. 76, and no deadline on when the investigation must be complete. The complaints inquiry committee must decide within a "reasonable time" after receipt of the investigator's report whether to refer the matter to the discipline tribunal roster chair. At that point, s. 81 requires that the hearing commence within 120 days "or such other time as the roster chair permits". None of these timelines precludes a proper investigation into whether the complaint has been filed for an improper purpose, nor do any preclude staying the processing of the complaint pending the completion of related litigation.

[53] It is true that there is no specific provision allowing the CIC chair to dismiss a complaint because it has been commenced for improper purposes, or because it represents an abuse of the discipline process. That power, however, should be inferred, although it should obviously be exercised with caution. Allowing abuses of the disciplinary process can only serve to undermine the credibility and integrity of that process. If a complaint has been filed out of spite, for revenge as a result of some personal grievance, in order to improperly pressure the accountant to do something (including settling litigation), or for another collateral purpose, the CIC chair could consider dismissing the complaint. Under s. 76(2) the reasons for doing so must be given to the complainant, generating a right of appeal under s. 80. The CIC chair could also consider staying the processing of the complaint, for example until collateral litigation is concluded.

[54] There will undoubtedly be some motivation behind every complaint that is made against a professional. Complaints that are facially meritorious should be considered seriously, even if the motivations behind them are not entirely benevolent or selfless. The CIC chair, and the other levels in the disciplinary process, are not obliged to dismiss complaints simply because they question the motivation of the complainant. Disciplinary proceedings need not invariably be stayed pending resolution of related litigation. However, where there is some doubt that processing the complaint is in the public interest or the interest of the profession as a whole, the CIC chair must at least be open to arguments that the complaint should be diverted or stayed.

[55] Likewise, the existence of collateral legal proceedings does not automatically justify a stay of discipline proceedings. A finding of professional misconduct serves a different purpose than findings of civil or criminal responsibility, and the two findings can stand together. Of concern would be inconsistent findings of fact arise from different processes. Of particular concern is when

disciplinary proceedings are launched in order to pressure the professional into compromising his or her position or arguments in the collateral proceedings. In those instances, the CIC chair, and other participants in the system, must again be open to arguments that the discipline proceedings should be stayed or diverted.

[56] Here it was alleged that Dr. Kowalski filed this complaint merely to pressure the appellant into settling the collateral litigation between his numbered company and Hermes. There was substance to this argument, because Dr. Kowalski admitted a link between the two proceedings (transcript pp. 377-8). He sent the appellant a draft statement of claim, indicating that it would be issued if "a satisfactory result is not achieved". It went on to state:

> Finally, we advise that 137 also considers Mr. Yee's personal conduct with respect to the referenced self-dealing contracts to be reportable to the Institute, ICAA, and will be considering making steps to request ICAA's involvement in the event these amounts are not remitted.

On the face of it, it appears that the professional disciplinary process was being used to pressure the appellant into meeting the numbered company's demands.

[57] In summary, the Appeal Tribunal's refusal to even consider staying the disciplinary proceedings until the collateral litigation was concluded was unreasonable. So was its refusal to even consider the motivation behind the complaint, or to consider whether the matter was really appropriate for practice review rather than discipline. Both the Discipline Tribunal and the Appeal Tribunal should have made the relevant findings of fact required to decide if the matter should proceed. The Appeal Tribunal (and the CIC chair) were empowered to, and should have considered these issues before deciding whether it was appropriate to proceed with the disciplinary hearing. It was unreasonable to simply dismiss these arguments on the basis that the Institute had no alternative but to process the complaints.

The Findings of the Discipline Tribunal

[58] Against that background discussion of the regulatory process, one can consider the specific findings of the Discipline Tribunal. It should be noted that the appeal to this Court is from the Appeal Tribunal, not from the findings of the Discipline Tribunal. Nevertheless, an examination of the decision of the Discipline Tribunal is necessary, because the Appeal Tribunal largely confined itself to finding the former's decision to be "reasonable". However, the decision of the Discipline Tribunal is flawed, the biggest flaw being that the Discipline Tribunal never made the critical finding: was there professional misconduct? This encompasses two sub-issues: a) even if the appellant's conduct was sub-standard, and perhaps even negligent, did it amount to "professional misconduct", and b) was his private conduct sufficiently related to his professional activities as to turn private misconduct into professional misconduct.

[59] In these proceedings the Discipline Tribunal found that the facts alleged against the appellant had been established. In other words, it found that "events happened" as alleged. It never

proceeded to the next step: given that these events occurred, did they amount to professional misconduct? As a part of that gap in the analysis, the Discipline Tribunal never turned its mind to whether the activities in question were sufficiently related to the profession to elevate the events to "professional misconduct" under the test in ***Marten*** and ***Ratsoy***. The appellant's activities related, at least in part, to his role as the Chief Financial Officer of Hermes. That would engage his accounting skills, even though he was not providing accounting services to a private client. The fact that he used the designation "C.A." when signing some of his communications is likely not of overriding consequence in the overall context. The main point, however, is that the Discipline Tribunal never considered or made findings on these issues. It erroneously assumed that once the underlying facts in the Notice of Discipline Hearing had been proven, its work was complete: ***Acupuncture Committee v Wanglin***, 2009 ABCA 166 at paras. 19, 26, 454 AR 152, 6 Alta LR (5th) 28.

[60] The Notice of Discipline Hearing alleged six specific events, and the Discipline Tribunal found that four of them had been proven. However, finding that the "events alleged" actually happened is only the first stage in the analysis. As previously discussed (*supra*, paras. 42-45), not every misstep by an accountant is misconduct, much less "unprofessional conduct". As noted (*supra*, para. 28) the statute requires that for each allegation of unprofessional conduct, a discipline tribunal "must determine whether the conduct of the investigated party constitutes unprofessional conduct". To illustrate, the Discipline Tribunal dismissed the second count on a factual basis: although no consent was obtained, no consent was required. The Discipline Tribunal never considered whether an absence of consent would have amounted to "professional misconduct". Likewise, it dismissed count #5 on the basis that the joint venture billings "were most likely sent to Dr. Kowalski". It never considered whether a failure to send these reports was so egregious as to amount to "professional misconduct".

[61] The hearing proceeded on an unfortunate foundation, because the Notice of Discipline Hearing does not identify the form of misconduct alleged. It merely alleged that the appellant was "guilty of unprofessional conduct". It did not recite whether this was conduct under s. 91(1)(a) that was detrimental to the best interests of the public or harmed the integrity of the accounting profession, whether it was conduct under s. 91(1)(b) that contravened an enactment, whether it was conduct under s. 91(1)(c) that contravened practice standards, or whether it was conduct under s. 91(1)(d) that displayed a lack of competence. No particulars were demanded.

[62] It is unclear which form of misconduct the Discipline Tribunal thought was in play. That was necessary before any meaningful analysis of the presence of "professional misconduct" could take place. The only section referred to by the Discipline Tribunal was s. 91(1)(a) relating to the public interest. It appears to have proceeded on the reasonable assumption that s. 91(1)(d) (on "competence") is coloured by s. 91(1)(a).

[63] Count #3 related to a dispute over overhead charges. Some charges were imposed, objected to, reversed, and then settled after negotiations. The Discipline Tribunal found that some of the charges "cannot be substantiated", which is consistent with them having been reversed and

adjusted. There was, however, no finding that the initial charging, even if in error, was so egregious as to amount to "professional misconduct", or even if it showed some level of "lack of competence". The same observation could be made about a few fees that were identified by the Discipline Tribunal as "duplicate charges" that were not reversed, and other fees that were found to be unauthorized. To a large extent, this appears to have been a legitimate business dispute between Hermes and the numbered company, perhaps exacerbated by a failure to properly document the agreement between the parties, which was then perhaps compounded by inadequate record-keeping. Even if the Discipline Tribunal implicitly made a finding that this conduct was so egregious as to amount to "professional misconduct", that finding would be open to review by the Appeal Tribunal.

[64] Count #4 related to a failure to properly account for joint venture revenues and expenses. This dispute was a central part of the litigation between the parties, and some portions of it had been reduced to judgment. The Discipline Tribunal nevertheless engaged in its own analysis of the various transactions, concluded that not all the appropriate credits had been given, and that Hermes owed money to the numbered company. Many of these concerns appear to relate more to sloppy or incomplete paperwork than anything else. There is no indication of dishonesty, fraud or deceit, and they appear to engage, at most, incompetence, not any other form of professional misconduct. The Discipline Tribunal never considered whether the level of negligence shown was so egregious as to take the matter out of "ordinary incompetence", and turn it into a professional disciplinary matter. If the Discipline Tribunal proceeded on an implicit finding that there was fraud or deceit involved, it was incumbent on it to make clear findings to that effect.

[65] The Discipline Tribunal noted in several places that the appellant and Hermes had not been totally successful in the litigation with Dr. Kowalski and his numbered company, and that not all of their arguments had prevailed. It is unreasonable to find that a mere lack of success or lack of total success in litigation amounts to misconduct, much less "professional misconduct". It cannot be overlooked that a number of the charges against the appellant overlap considerably with the allegations in the litigation between the parties. Some of those disputes were settled, and others were reduced to judgment. It was inappropriate for the Discipline Tribunal to revisit, and to some extent second-guess the outcome of that litigation. Merely because an allegation is made in litigation, and then partly or wholly acknowledged in a settlement or judgment, does not automatically amount to professional misconduct. For a discipline tribunal to revisit the results of litigation raises a grave danger of inconsistent findings.

[66] It was also unreasonable to conclude that the failure of Hermes (an apparently insolvent corporation) to pay debts that it owed to the numbered company amounted to unprofessional conduct by the appellant. Neither insolvency nor poverty is itself "professional misconduct". Any inference of misconduct from these facts is simply unreasonable. The allegation in count #4 of "failure to maintain records" may on occasion rise above incompetence, and constitute professional misconduct. The allegation in count #4 of "failure to properly credit and pay" cannot, in the absence of deceit, wilfulness or other similar factors, reasonably be said to constitute professional misconduct. Further, given that the Hermes corporations appear to be insolvent, the

Discipline Tribunal's statement that it was "not aware of any reason why payments should not have been made" to the numbered company is puzzling.

[67] The Discipline Tribunal was also concerned about the contents of the pleadings that had been filed on the appellant's behalf. This concern demonstrated a complete misunderstanding about the role of pleadings in civil procedure. It was unreasonable to find that the contents of the pleadings (which, as might be expected, were drafted by the appellant's lawyer), amounted to any form of misconduct, much less "professional misconduct". The legal system is well-equipped to deal with improper pleadings, and since this was a matter outside the expertise of the accounting profession, it would have been prudent for the Discipline Tribunal to avoid any comment without receiving expert evidence on the subject.

[68] Count #6 alleged that the appellant failed to respond to requests for information from Dr. Kowalski. The context is important. As the Discipline Tribunal noted, the previous personal relationship between the appellant and Dr. Kowalski had been "destroyed". Litigation was underway. Dr. Kowalski sent the appellant a number of insulting and threatening emails (transcript pp. 242 ff) which he admitted were inappropriate, and for which he apologized. The Discipline Committee found Dr. Kowalski had communicated with the appellant in a "non-business-like manner". The appellant reacted to the improper tenor of these communications by not responding. Dr. Kowalski admitted that the appellant responded almost immediately to communications that were business-like in tone (transcript pp. 257, 259).

[69] The Discipline Tribunal found that the appellant had "a professional obligation to provide information", and that his conduct was improper. Whether it was improper is a matter of some debate, but it is unreasonable to suggest that it was "unprofessional conduct". No client or third party has any right to abuse or threaten a professional, and a professional is not required by professional standards to put up with such abuse. A professional faced with abusive communications should obviously not reciprocate in the same manner. Some might attempt to maintain communications in a businesslike manner. Some might challenge the tone of the improper communications. Others might elect a "cooling off" period with no communications. If litigation was underway, some others might find it prudent to allow communications to take place between the lawyers. The appellant chose to suspend communications until things cooled off. Even if the Discipline Tribunal thought he made the wrong choice, it was unreasonable to find that to be unprofessional conduct.

[70] The Discipline Tribunal was overly distracted by what might loosely be called "sloppy paperwork": missing documentation, missed signatures, documents signed in what it perceived to be the wrong sequence, agreements that were drafted but never signed, delays in producing or signing documents, and a general "lack of paper". This record may not reflect the optimal way of conducting business, and it may even reflect on the competence of those involved. However, to suggest that it rises to the level of "professional misconduct" and would be "detrimental to the best interests of the public or harm the integrity of the accounting profession" is problematic. This sort

of expectation of perfection in every detail of a professional's life distorts the professional discipline process.

The Decision of the Appeal Tribunal

[71] As noted, this appeal is actually from the decision of the Appeal Tribunal not the Discipline Tribunal. However, because the Appeal Tribunal generally proceeded on the assumption the findings of the Discipline Tribunal were reasonable, the decision of the Appeal Tribunal perpetuated the errors made by the Discipline Tribunal.

[72] On whether private activities could amount to professional misconduct, the Appeal Tribunal cited the decisions in ***Erdmann***, ***Marten*** and ***Ratsoy***. While the Appeal Tribunal recited the rule that to constitute professional misconduct, personal conduct must be "significantly more reprehensible" in a professional than in an ordinary citizen, it is unclear whether it applied that standard to the specific charges against the appellant. Its reversal of the decision of the Discipline Tribunal on count #1, on the basis that the failure to provide the trust agreement was not unusual in the oil and gas industry, implies that this would not be misconduct by an ordinary citizen. The Appeal Tribunal therefore never directly discussed whether such conduct in a professional would amount to professional misconduct.

[73] The Appeal Tribunal identified the issue:

> The Unprofessional Conduct Matters required the Discipline Tribunal to consider whether the evidence showed that Mr. Yee failed to perform as alleged, and whether such failure to perform constituted unprofessional misconduct under *RAPA*. These are mixed questions of fact and law, attracting a reasonableness standard of review.
>
> The Appeal Tribunal reviewed the decisions of the Discipline Tribunal regarding misconduct and, taking into account that the Discipline Tribunal had the advantage of hearing the evidence first-hand, the Appeal Tribunal finds that, with the exception of the Trust Agreement Matter, the Discipline Tribunal's decisions do fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. (Emphasis added)

In this passage the Appeal Tribunal recognizes that the finding that "events happened" is just the first part of the analysis; the second part is deciding whether what happened constituted professional misconduct. The Appeal Tribunal failed to observe that the Discipline Tribunal failed to conduct the second part of the analysis at all, making the latter's decisions incomplete and unreasonable. As previously noted, the Appeal Tribunal also failed to realize that the standard of review permitted it to apply its own experience and expertise to the findings of what constitutes "professional misconduct".

[74] These shortcomings were reflected in the Appeal Tribunal's analysis of the particular counts. Counts #3 and #4 related to the allegations of failing to adequately substantiate corporate

overhead charges, failure to maintain records, and failure to properly account for the numbered company's share of production revenues. The Appeal Tribunal treated these together as relating to "accounting records and accounting processes", which would engage the appellant's professional credentials and activities. The Appeal Tribunal described these processes as being "inadequate, fraught with error and misstatement, and generally mishandled". This would clearly seem to be a finding of sloppiness in the work, and potentially incompetence. There is no discussion or analysis of whether they amounted to "professional misconduct". The Appeal Tribunal never observed that the Discipline Tribunal had found that these events occurred, but that the Discipline Tribunal had made no finding whatsoever as to whether they reflected "professional misconduct". As such, it was unreasonable for the Appeal Tribunal to simply find that the decision of the Discipline Tribunal was "reasonable".

[75] The Appeal Tribunal correctly declined to deal with the allegation that the numbered company had not been properly credited or paid, reasoning that this was before another decision maker. It did not, however, observe that a failure to pay as a result of insolvency would not, in the absence of deceit or other similar factors, generally constitute professional misconduct.

[76] With regard to count #6, the Appeal Tribunal appears to have widened the scope of the charge. The original charge was that the appellant had failed to respond to requests regarding the numbered company's working interest asset. The Appeal Tribunal summarized this as a "failure to respond to requests for information" generally. It then found a "consistent pattern of communication neglect and the disregard for providing rationale for financial actions". Before the Discipline Tribunal this charge was focused on the communications once litigation had started, and the relationship between the parties had broken down. It was unfair to the appellant to turn this into a generalized analysis of all of his responses to the complainant throughout the history of the investment. Any findings of misconduct must fall within the four corners of the Notice of Discipline Hearing: ***MacLeod v Alberta College of Social Workers***, 2018 ABCA 13 at paras. 24, 29; ***Visconti v College of Physicians and Surgeons of Alberta***, 2010 ABCA 250 at paras. 11-12, 482 AR 244, 31 Alta LR (5th) 1.

[77] The Appeal Tribunal also never discussed whether this deficient communication was so egregious as to amount to "professional misconduct". It never considered the position of a professional who had received abusive communications from a third party. Finally, the Appeal Tribunal again failed to notice that the Discipline Tribunal had also failed to assess whether the events that had been proven amounted to professional misconduct. Again, it was unreasonable for the Appeal Tribunal to just find that the decision of the Discipline Tribunal was "reasonable".

Conclusion

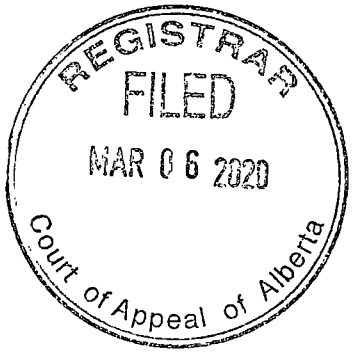
[78] In conclusion, the decision of the Appeal Tribunal must be set aside. In addition to the proceedings before the Discipline Tribunal being tainted by a reasonable apprehension of bias, there were other reviewable errors. No consideration was given to whether the complaint was filed for improper, collateral purposes, or whether the allegations more properly related to competence

than misconduct. The Appeal Tribunal's review failed to observe that the Discipline Tribunal never made any actual findings of misconduct.

[79] The findings against the appellant should be set aside, and the matter referred back to a new discipline tribunal, in the event that the Institute finds it appropriate to continue these proceedings at this stage. The direction that the appellant pay the costs of the discipline proceedings is set aside; there is no principled basis on which the appellant can be expected to pay the costs of these flawed proceedings.

Appeal heard on September 10, 2019

Memorandum filed at Calgary, Alberta
this 6th day of March, 2020



Authorized to sign for: Slatter J.A.

Memorandum of Judgment
of the Honourable Mr. Justice McDonald
Concurring in the Result

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[80] I concur with the reasons expressed by my colleague, Madam Justice Strekaf in her Memorandum of Judgment and adopt them in their entirety. However, I write this Memorandum of Judgment to address the commentary contained in paragraphs 46 – 57 of the Concurring Memorandum of Judgment of my colleague Mr. Justice Slatter with which I must respectfully disagree. This portion of his Memorandum concerns the Appeal Tribunal's rejection of two arguments that had been raised for the first time by the appellant.

[81] First, the appellant had argued before the Appeal Tribunal that the Chartered Professional Accountants of Alberta should not have considered these complaints until the litigation between the complainant and himself had been resolved (the concurrent legal argument). Second, the appellant argued that the Chartered Professional Accountants of Alberta should have refused to consider a complaint made for a collateral purpose, namely to intimidate the appellant into a resolution of the litigation (the collateral purpose argument).

[82] In my colleague's view, the Appeal Tribunal's refusal to even consider staying the disciplinary proceedings until the civil litigation was concluded was unreasonable as was its refusal to even consider the motivation behind the complaint.

[83] In this context, it is important to bear in mind the import of the *Regulated Accounting Profession Act*, RSA 2000, c R-12 (the *Act*). Section 2 expressly provided as follows:

> 2. The purpose of this *Act* is
>
> a) to protect the interest of the public,
>
> b) to protect the integrity of the profession governed by this *Act*,
>
> c) to promote and increase the competence of registrants, and
>
> d) to regulate the conduct of registrants.

[84] Section 65(1) of the *Act* went on to provide:

> 65(1) The purpose of this Part is
>
> a) to protect the public interest,
>
> b) to enforce practice standards and rules of professional conduct for registrants,

> c) **to provide a means by which complaints about the conduct of registrants and former registrants can be dealt with in a fair and expeditious way,** and
>
> d) to preserve the integrity of the accounting profession.
>
> (Emphasis added)

[85] Finally, section 81 of the *Act* provided as follows:

> 81(1) When an allegation of unprofessional conduct is referred to the discipline tribunal roster chair, the chair must, in accordance with section 123, convene a discipline tribunal to conduct a hearing into the allegation.
>
> (2) A discipline tribunal must commence a hearing within 120 days after an allegation of unprofessional conduct is referred to the discipline tribunal roster chair or within such other time as the roster chair permits.

[86] As my colleague acknowledges (at para 53) there is no specific provision in the *Act* allowing the CIC chair to dismiss a complaint because it has been commenced for an improper purpose, or because it represents an abuse of the discipline process.

[87] Rather, section 76 makes it abundantly clear what the CIC chair was required to do upon receipt of a complaint, specifically:

> 76(1) On receipt of a complaint and results of a review from the CIC secretary, the CIC chair **must**
>
> (a) direct that no further action be taken regarding the complaint if
>
> (i) the CIC chair is of the view that the conduct is not unprofessional conduct,
>
> (ii) the CIC chair is of the view that the conduct is not within the jurisdiction of the complaints inquiry committee or a discipline tribunal, or
>
> (iii) the CIC chair is of the view that the conduct complained about is too minor to warrant any sanction or further investigation,
>
> or
>
> (b) appoint an investigator to investigate any matter.
>
> (2) If the CIC chair directs that no further action be taken, the CIC chair must notify the investigated party and the complainant of the decision and give them a written explanation of it. . . .
>
> (Emphasis added)

[88] In my opinion, the motivation behind a complaint is irrelevant. It is clear from a review of the case law that meritorious complaints have sometimes been made by those with "an axe to grind" including embittered ex-spouses and disgruntled former clients. However, the duty of the CIC chair in a situation such as this was to appoint an investigator to investigate the complaint unless he was of the view that the conduct complained of was not unprofessional conduct, that the conduct was not within the jurisdiction of the complaints inquiry committee or a discipline tribunal, or that it was "too minor" to warrant any sanction or further investigation.

[89] In other words, as long as the CIC chair found that the complaint appeared to have some merit, he or she was required to appoint an investigator. This is not surprising given that the mandate of a self-governing body such as the Chartered Professional Accountants of Alberta is to protect the integrity of the profession and to protect the public. In my opinion it would be wrong for an otherwise meritorious complaint to be dismissed owing to the motivation of the individual making that complaint. The question must be whether the complaint itself has apparent merit.

[90] Since professional governing bodies are self-regulating, there may well be a public perception that they are overly protective of their members. Allowing an otherwise meritorious claim to be dismissed due to the motivation of the complainant would, in my opinion, feed that perception.

[91] Furthermore, the fact that civil proceedings were occurring at the same time should have no bearing as to whether an otherwise meritorious complaint should be dismissed or delayed. Professional discipline needs to be prompt to be effective and litigation all too often takes years to resolve. Section 65(1) of the *Act* includes as a purpose of the legislation "to provide a means by which complaints about the conduct of registrants and former registrants can be dealt with in a fair and expeditious way".

[92] If the legislature wishes to give a self-governing body such as the Chartered Professional Accountants of Alberta the discretion to dismiss or delay an otherwise seemingly meritorious complaint, it must do so by clear and express wording. In this case, given the lack of such express language, the Chartered Professional Accountants of Alberta did not have the discretion to dismiss or divert the complaints in question.

[93] Accordingly I agree with the Appeal Tribunal's disposition of both the concurrent legal argument and the collateral purpose argument and for the reasons so expressed (and reproduced at paras 47 – 48 of Mr. Justice Slatter's concurring Memorandum of Judgment).

Appeal heard on September 10, 2019

Memorandum filed at Calgary, Alberta
this 6th day of March, 2020

REGISTRAR FILED MAR 06 2020 Court of Appeal of Alberta

McDonald J.A.

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