

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO  
*THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017*

**APPEAL COMMITTEE**

**IN THE MATTER OF:** An appeal by **JOE CLEMENT BRIAN DWEK, CPA, CA** of the Decision and Order of the Discipline Committee made December 15, 2016, under **Rule 24** of the Rules of Practice and Procedure.

**TO:** Joe Clement Brian Dwek, CPA, CA

**AND TO:** The Professional Conduct Committee

**REASONS FOR DECISION MADE JULY 28, 2017**

1. This appeal was heard by a tribunal of the Appeal Committee of the Chartered Professional Accountants of Ontario on July 28, 2017. Ms. Tamara Center appeared on behalf of the Professional Conduct Committee ("PCC"). Mr. Dwek was in attendance and represented by his counsel, Mr. James Lane. Mr. Glenn Stuart attended the hearing as counsel to the Appeal Committee ("the appeal tribunal").

2. The decision of the appeal tribunal was made known to the parties at the conclusion of the hearing on July 28, 2017. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, include the decision and reasons of the appeal tribunal.

3. This appeal was an appeal by Mr. Dwek from a decision and order, dated December 15, 2016, of the Hearing Committee of the Chartered Professional Accountants of Ontario ("hearing tribunal"). The allegations that were the subject of the hearing arose from a settlement agreement that Mr. Dwek had signed with the Ontario Securities Commission ("OSC").

4. In its decision of December 15, 2016, the hearing tribunal found that Mr. Dwek had committed professional misconduct with respect to the following Allegations:

1. THAT, the said Joe C. Dwek, in or about the period April 1, 2010 to March 31, 2011, while employed as the Ultimate Designated Person ("UDP") of MineralFields Management Inc. ("MFMI"), Limited Market Dealer Inc. ("LMDI") and Pathway Investment Counsel ("Pathway") (collectively, the "MineralFields Group") and as the Chief Compliance Officer ("CCO") of MFMI and Pathway, failed to perform his professional services with due care, contrary to Rule 202.1 of the Rules of Professional Conduct, in that:
  - a. he failed to meet his UDP responsibilities to establish, maintain and apply controls and supervision to ensure that trades made by access persons to the MineralFields Group were pre-approved and complied with Ontario securities law, as described in the Settlement Agreement attached as "Schedule A"; and
  - b. he failed to meet his UDP and CCO responsibilities to supervise and ensure MineralFields Group's compliance with Ontario securities law by delegating all compliance duties for the MineralFields Group to the CCO

of LMDI, as described in the Settlement Agreement attached as "Schedule A"\*.

2. THAT, the said Joe C. Dwek, in or about the period between January 1, 2002 and December 31, 2011, while the sole legal owner of the voting shares of MFMI and LMDI, associated himself with statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the Rules of Professional Conduct, in that:
  - a. he disclosed in regulatory filings with the Ontario Securities Commission that he was the sole owner of the registered firms within the Mineral Fields Group, when another individual had a beneficial interest in 49.9% of the non-voting shares of MFMI and LMDI, as described in the Settlement Agreement attached as "Schedule A"\*.

\*Schedule A is not attached to these reasons.

5. Mr. Dwek only appealed the finding of professional misconduct with respect to the first Allegation. He did not appeal the finding of professional misconduct with respect to the second Allegation or the penalty imposed. He asked that the finding of professional misconduct on the first Allegation be set aside and a decision dismissing that Allegation be substituted.

6. Prior to the hearing before the appeal tribunal, the appeal tribunal received and reviewed an appeal book with the record of proceedings before the hearing tribunal, as well as facta and books of authorities from each party.

### **Issue on Appeal**

7. It was acknowledged by both parties that the only issue in the appeal was whether the hearing tribunal erred in finding that the facts admitted by Mr. Dwek in the Settlement Agreement between Mr. Dwek and the OSC constituted a failure to perform *professional services*. It was uncontested that the member had to be providing *professional services* in order that Rule 202.1 applied to the conduct in issue and could therefore be breached if those services were provided without due care.

8. Mr. Lane submitted that the hearing tribunal erred in assuming that the facts set out in the Settlement Agreement between the OSC and Mr. Dwek constituted a failure to perform professional services with due care under Rule 202.1. It was Mr. Dwek's position that there was no evidence to demonstrate that the services in issue were "professional services" or services related to accounting or the accounting profession. If the services were not professional services, there could be no evidence that professional services were performed without due care. As a result, Mr. Lane submitted that the finding was not supported by any evidence and should be set aside.

9. It was Mr. Dwek's position that, if the services provided by a member were not *professional services*, one of three elements had to exist: there was reliance on the member's designation; the member's actions had caused financial harm; or, there was deceit or moral turpitude by the member. Mr. Lane submitted that none of these factors existed in this case. There was no evidence of any reliance having been put on Mr. Dwek's CA or CPA designation to comply with Ontario securities law. There was no evidence of public harm as a consequence of the compliance deficiencies. Moreover, there was no evidence that Mr. Dwek performed any accounting services

without due care. Mr. Lane submitted that the technical compliance deficiencies found by the OSC did not amount to a lack of due care in the provision of professional services under the Rules of Professional Conduct (as they then were).

10. Ms. Center submitted that Mr. Dwek acknowledged in his factum that “professional services” could relate to non-accounting professional services. It was the position of the PCC that Mr. Dwek was performing “professional services” in his roles as UDP and CCO of various public companies, and the investing public and the companies for which he worked were reasonably entitled to rely on his membership with CPA Ontario as giving him competence for the roles, even though he had no securities experience. Mr. Dwek was required to perform those services with due care. Ms. Center submitted that Mr. Dwek could not remove his “accountant hat” in circumstances where he is acting in other capacities.

11. Ms. Center further submitted that Mr. Dwek was reading in an additional requirement that there be evidence of actual reliance on the accountant’s status, harm or deceit. The PCC took the position that this additional requirement did not exist in the language of the Rule and the hearing tribunal correctly found that actual reliance was not required. The PCC’s position was that there was no basis for the appeal tribunal to interfere with the decision of the hearing tribunal, and that the appeal should be dismissed with costs.

## **Facts**

12. The facts of this case were not in dispute. Before the hearing tribunal, the PCC had relied wholly on the Settlement Agreement between Mr. Dwek and the OSC as the evidence supporting findings of professional misconduct, and the PCC had not conducted a separate investigation.

13. For over 10 years, Mr. Dwek had been involved with a group of companies registered with the OSC, known collectively as the MineralFields Group, which distributed and managed flow-through limited partnerships. Mr. Dwek’s responsibilities related to financial oversight of the companies, and he was the registered Chief Compliance Officer for certain of the companies. Mr. Dwek was also registered as the individual responsible for securities law compliance (“UDP”) on a temporary basis as the person meant to be the UDP failed to ensure compliance and register as the UDP in a timely manner. The problems never came to light until the OSC auditors identified them.

14. Mr. Dwek maintained his full-time accounting practice and had no involvement with the day to day activities of the MineralFields Group. Mr. Dwek had served accounting clients as a chartered accountant for more than 40 years but had not worked in the securities industry.

15. Mr. Dwek was registered with the OSC in various capacities from 2002 to 2012. As the UDP, Mr. Dwek was responsible for the compliance functions of the firms but during the review period, Mr. Dwek did not monitor and ensure that all trades made by MineralFields were pre-approved and complied with OSC securities law. Mr. Dwek also admitted that he failed to meet his responsibilities as UDP and CCO to supervise and ensure compliance by the MineralFields Group firms.

16. OSC staff had found that one of Mr. Dwek’s personal trades was not pre-cleared with the CCO of one of the companies, LMDI. Mr. Dwek had sold 1000 shares of that company at a slightly higher price than MineralFields had sold shares of the same company on the same day. The difference in price resulted in additional proceeds to Mr. Dwek of \$12.30.

## **Decision**

17. After considering all of the submissions and the evidence in the appeal record, a majority of the tribunal made the following decision which was delivered to the parties on July 28, 2017:

### **DECISION**

THAT having seen and considered the submissions made on behalf of Mr. Dwek on his appeal of the finding of guilty by the Discipline Committee on Allegation No. 1 and the submissions made by the Professional Conduct Committee on the appeal of Mr. Dwek, the Appeal Committee hereby sets aside the Decision of the Discipline Committee on Allegation No. 1, and finds Mr. Dwek not guilty on Allegation No. 1.

## **Reasons for the decision**

18. The role of this appeal tribunal is not to retry the case that was before the hearing tribunal. The role of the appeal tribunal is to determine whether the hearing tribunal erred in a way that justifies the intervention of the appeal tribunal.

19. It was not contested that the standard of review applicable to the present case was reasonableness: *Chartered Professional Accountants of Ontario Act, 2017*, s-s. 37(5), and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 53. In other words, the appeal tribunal should only interfere if the decision of the hearing tribunal was unreasonable and could not be supported by a cogent line of analysis. It is not enough that the appeal tribunal may have reached a different result.

20. Rule 202.1 requires that "A member, student or firm shall perform professional services with integrity and due care." The hearing panel concluded that Mr. Dwek breached this Rule in the circumstances of this case.

21. There was no suggestion by the hearing tribunal, or before this appeal tribunal, that Mr. Dwek had not acted with integrity. The finding of the hearing tribunal rested on Mr. Dwek's failure to take proper precautions or establish adequate systems. However, the appeal tribunal did not agree with Mr. Dwek that dishonesty was a required element for a finding under Rule 202.1. It was the appeal tribunal's view, that there was no requirement of a lack of integrity for a finding under the rule.

22. In the tribunal's view, the appeal centered consequently on whether Mr. Dwek failed to perform professional services with due care alone, within the scope of Rule 202.1 of what were then the *Rules of Professional Conduct* of the Institute of Chartered Accountants of Ontario, when he failed to perform any of his responsibilities pursuant to the *Securities Act* as a UDP and CCO. More precisely, the issue before the appeal tribunal was whether the hearing tribunal came to an unreasonable conclusion in deciding that Mr. Dwek's responsibilities under the *Securities Act* amounted to "professional services" for the purposes of the Rule 202.1?

23. To be able to assess the hearing tribunal's analysis of the issue of whether Mr. Dwek was providing professional services, the appeal tribunal had to first determine whether the hearing tribunal made a decision on that issue and, if so, whether it considered the appropriate relevant factors in deciding this issue.

24. After carefully reviewing the decision of the hearing tribunal, the appeal tribunal concluded that the reasons of the hearing tribunal did not reflect any specific consideration of whether Mr. Dwek was performing professional services. To be subject to Rule 202.1, it is necessary that the lack of due care relate to professional services. It might have been implicit in the hearing tribunal's conclusion that Mr. Dwek did not exercise due care based on the facts as outlined in the Settlement Agreement with the OSC that Mr. Dwek's role constituted professional services, but in the absence of any reasoning on this issue being provided by the hearing tribunal, it is difficult to give deference to the hearing tribunal's implicit, or assumed, conclusion in this regard. In the view of the majority of the appeal tribunal, the hearing tribunal was obliged to consider this issue directly, and specifically whether there was a sufficient connection between the duties imposed by the *Securities Act* and the member's duties under the profession's Rules of Professional Conduct.

25. The appeal tribunal considered whether the evidence before the hearing tribunal supported a conclusion that Mr. Dwek's activities constituted professional services, without the benefit of the hearing tribunal's analysis. The Council Interpretations relating to Rule 202, as they existed in February 2010, included the following definition:

"The term "professional services" applies to all members and students whether or not they are engaged in the practice of public accounting. It includes those of the member's or student's activities where the public, colleagues or associates are reasonably entitled to rely on membership in, or registration as a student of, CPA Ontario as giving the member or student particular competence."

26. The appeal tribunal considered whether Mr. Dwek failed to perform professional services with due care, within the scope of this definition, and in violation of Rule 202.1, when he failed to perform his responsibilities pursuant to the *Securities Act* as a UDP and CCO.

27. The appeal tribunal noted an important distinction in the language of the Rules. The language of Rule 201, dealing with the maintenance of the good reputation of the profession, is very broad, and perhaps all-encompassing. However, this was not the Rule upon which PCC relied in this case. Rule 202.1 is much more limited in scope because its language is limited to professional services that must be performed with due care. The majority of the appeal tribunal concluded that this distinction was significant as it indicated that there may be services, other than professional services, to which Rule 202.1 does not apply. These services would not fall beyond the jurisdiction of CPA Ontario due to the broader language of Rule 201; however, the PCC would need to frame its case in terms of a violation of Rule 201.

28. Counsel provided the appeal tribunal with an extensive review of the cases that had been decided under Rule 202.1 (and its predecessor with the Institute of Chartered Accountants of Ontario). The appeal tribunal agreed that most cases that have been heard by the Discipline Committee where Rule 202.1 was relied upon related to the provision of professional audit or review engagements, compilation of financial statements, tax advice and/or preparation of tax returns. These activities, which counsel described as "professional accounting services", are clearly captured by the term "professional services." The previous cases also indicate, and the appeal tribunal agrees, that Rule 202.1 would also apply to a member undertaking these activities as an employee of an organization as they also would be in the realm of professional accounting services.

29. The appeal tribunal was satisfied that the facts of this case did not fit with the ambit of accounting services as described above. While Mr. Dwek had financial oversight for the

MineralFields Group, there was no evidence of any deficiency, problem or lack of due care associated with the financial controls or reporting or accounting procedures. However, it was uncontested between the parties, and the appeal tribunal agreed, that Rule 202.1 could also apply where clients or members of the public relied on the member's professional designation. There have been a number of cases where allegations of a breach of Rule 202.1 were established where the member's activities were not so clearly captured by the term "professional accounting services" but were inextricably related to a member's professional status by virtue of reliance of this sort.

30. Unfortunately, although the parties provided an extensive review of the cases decided under Rule 202.1, none of the cases provided a detailed analysis of what constituted "professional services", outside the scope of "professional accounting services". In certain cases, this was the result of a member admitting professional misconduct. For example, in *Monsen (Re)*, 1999 LNICAO 13, the member, known as a Chartered Accountant to his clients, made investments for clients through an investment company. He admitted that he had breached Rule 202.1, and consequently the Discipline Committee did not address the meaning of professional services.

31. However, even though the analysis is not developed in the reasons of the tribunals, the cases do provide support for the proposition that there must be reliance on the member's status as a CA (or, latterly, CPA, CA). For example, in *Murnaghan (Re)*, 2001 LNICAO 18, the member pleaded not guilty to a breach of Rule 202 and denied he was acting as a Chartered Accountant with respect to the matters. Consequently, he took the position that the Institute had no jurisdiction over the matter. However, the bank statements referred to him as a Chartered Accountant, and, in his initial dealings with the client, Mr. Murnaghan acknowledged that he was a Chartered Accountant. The Discipline Committee concluded that Mr. Murnaghan was acting as a CA and subject to the jurisdiction of the Institute. However, the Discipline Committee treated the allegations under Rule 201.1 and 202 together, finding that he committed professional misconduct with respect to both Rules, and did not set out an analysis of the basis for the application. The Discipline Committee did note that a chartered accountant could not claim to act in a capacity other than a chartered accountant, but noted that this was particularly true where the CA held himself out as such.

32. The cases clearly demonstrate that the term "professional services" is broader than professional accounting services but do not provide clarity as to the parameters of that broad term. The issue in this case, and the point of departure between the majority and minority members of the appeal tribunal, was whether Mr. Dwek's functions in his roles as UDP and CCO were encompassed by the term "professional services" as it was used by The Institute of Chartered Accountants of Ontario. More broadly, the members of the appeal tribunal did not agree as to where the line should be drawn between conduct that comes within the scope of Rule 202.1 and conduct that should not be captured.

33. The appeal tribunal was satisfied that it was not necessary for losses to be incurred in order that Rule 202.1 apply to services outside the ambit of accounting services. The fact that no one appears to have suffered a financial loss in this case did not impact the appeal tribunal's analysis.

34. The appeal tribunal agreed with the submission that actual reliance by the public was not necessarily required for actions to be characterized as "professional services". However, the plain language of the Counsel Interpretation of the term clearly indicated that the circumstances of the services had to be such that a member of the public would be "reasonably entitled to rely" on the

member's status as a CA. The appeal tribunal reviewed the evidence to determine if such a basis was established.

35. *National Instrument 31-103* was brought to the appeal tribunal's attention by the PCC as evidence of the reliance placed on Mr. Dwek's professional designation when he was named CCO. This instrument indicated that "a portfolio manager must not designate a person as a chief compliance officer...unless any of the following apply:

- a. Earned a CFA Charter or a professional designation as a lawyer, Chartered Accountant, Certified General Accountant or Certified Management accountant in a jurisdiction of Canada, a notary in Quebec, or the equivalent in a foreign jurisdiction..."

36. *National Instrument 31-103* had not been formally introduced in evidence before the hearing tribunal, and it was not mentioned in the reasons of the hearing panel. The appeal tribunal identified an issue as to whether, if it was evidence, it could properly be considered on the appeal for the first time. Whether it was properly considered evidence, rather than a legal authority, the appeal tribunal was satisfied that further evidence was required to demonstrate that it was in effect at all relevant times. From the information provided, it appeared that the Instrument was only in effect from July 2009. This was well after Mr. Dwek assumed the role of CCO for two of the companies in 2002. No information was provided around the necessary professional qualifications prior to 2009 and whether an individual who had met the previous criteria but did not meet the criteria in that Instrument could be "grandfathered". This information would have assisted in demonstrating whether the public was reasonably entitled to rely on Mr. Dwek's status as a CA. In the absence of this significant information, the appeal tribunal concluded that it was inappropriate to give any weight to *National Instrument 31-103*.

37. The majority of the appeal tribunal accepted the submission on behalf of Mr. Dwek that the services performed by Mr. Dwek were non-accounting services and not performed as professional services by a CA (as the designation then was). There was no evidence of a connection between the services performed and any reasonable reliance on the member's professional designation. Specifically, the hearing tribunal heard no reliable evidence as to the expectations the public may have reasonably had of Mr. Dwek as a UDP or CCO based on the requirements to be registered as a UDP or CCO at the time he assumed those roles. Further, there was no evidence demonstrating that a Chartered Accountant would have "particular competence" in being a UDP or CCO. The majority of the appeal tribunal concluded that it would be unreasonable to conclude, in the absence of any evidence to that effect, that a Chartered Accountant would have a particular competence in being a UDP or CCO.

38. The entire appeal tribunal agreed that more clarity is needed to be able to determine when the duties that members fulfil outside of their formal role as accountants, entirely outside of accounting engagements, have a sufficient connection to their status as members, so that failing to fulfill such duties ought to be subject to accountability under Rule 202.1. Without that clarity, the majority of the appeal tribunal concluded that it was unreasonable to make a finding of professional misconduct against a member whose conduct was not clearly within this term. The majority of the appeal tribunal concluded that the decision of the hearing tribunal effectively expanded the meaning of professional services beyond the language of the term and the related Council Interpretation. In the view of the majority, this expansion of the term was an unreasonable conclusion that could not be supported.

39. The appeal tribunal concluded that the hearing tribunal was correct to rely on the decision of the OSC to conclude that Mr. Dwek did not exercise due care in his roles as UDP and CCO. Mr. Dwek was disciplined by the OSC for his lack of due care; however, that shortcoming was outside the scope of professional services and therefore did not constitute a breach of Rule 202.1. In the view of the majority, the evidence did not reasonably support a conclusion that Mr. Dwek was providing professional services within the meaning of that term under Rule 202.1. Rule 202.1 would only be breached where there was a lack of care in the provision of professional services.

#### **Dissenting Member's Reasons**

40. One member of the appeal tribunal dissented from the conclusion reached by the majority. J. Olafson concluded that the hearing tribunal properly found Mr. Dwek guilty of professional misconduct under Rule 202.1 on the basis that his UDP and CCO duties, had he fulfilled them, constituted professional services.

41. The evidence before the hearing panel demonstrated that a UDP is responsible for overseeing the compliance system of a regulated company. On its face, a member has particular competence in this role. The hearing tribunal concluded on this basis that Mr. Dwek's membership added credibility to his positions and the companies under his control were reasonably entitled to rely on his membership in that he would act with due care.

42. The hearing tribunal noted that Mr. Dwek did not establish, maintain and apply a system of controls and supervision to ensure trades by access persons were pre-approved and complied with Ontario securities law, nor did he monitor and ensure compliance with Ontario securities law. The Settlement Agreement says this meant steps were not taken to protect the confidentiality of client information, to ensure conflicts of interest among MineralFields Group were identified and managed and to ensure adequate insurance coverage was maintained. These were some of the 12 examples of compliance deficiencies. As a member, Mr. Dwek had particular competence in these areas as well as an appreciation of the importance of the compliance function, but he delegated his compliance duties rather than perform them and then failed to supervise to ensure compliance with Ontario securities law. In doing so, he breached his obligations under Rule 202.1.

DATED AT TORONTO THIS 28<sup>th</sup> DAY OF FEBRUARY, 2018  
BY ORDER OF THE APPEAL COMMITTEE



D.A. ROBERTSON, FCPA, FCA – CHAIR  
APPEAL COMMITTEE

#### MEMBERS OF THE TRIBUNAL:

D. IGGERS (PUBLIC REPRESENTATIVE)

J.A. OLAFSON, CPA, CA

M. STEBILA, CPA, CA