

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO  
(THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO)  
*THE CHARTERED ACCOUNTANTS ACT, 2010*

**DISCIPLINE COMMITTEE**

**IN THE MATTER OF:** Two motions made on behalf of **STEPHEN W.A. WALL, CPA, CA**  
under **Rule 12** of the Rules of Practice and Procedure.

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

**AND TO:** The Professional Conduct Committee

**REASONS FOR THE ORDER MADE MARCH 12, 2013**

1. This tribunal of the Discipline Committee of the Institute of Chartered Accountants of Ontario (ICAO) convened on March 12, 2013 to hear two motions made on behalf of Mr. Stephen Wall, CPA, CA, the Applicant.
2. One motion, referred to as the Scheduling Motion, asked for an Order: (a) establishing a schedule for the disclosure required by Rules 9.02 and 9.03 of the Rules of Practice and Procedure (Rules) established by the ICAO under the *Statutory Powers Procedure Act*; and (b) that the hearing not commence before November 15, 2013.
3. The other motion, referred to as the Prohibition Motion, asked the Discipline Committee to make an Order prohibiting the public disclosure of the Allegations made by the Professional Conduct Committee (PCC) and the report of the PCC's Investigator pending a final determination of this matter.
4. On the motions, Ms. Emily Nicklin represented the Applicant. She was accompanied by Mr. Timothy Duffy and Ms. Cynthia Amsterdam. Mr. Paul Farley and Mr. Brian Bellmore represented the PCC. Mr. Robert Peck attended as counsel to the tribunal.
5. The decision was announced at the close of the proceedings on March 12, and the Order was dated and sent to the parties on March 15, 2013. These are the Reasons for the decisions made.
6. Both parties made submissions and filed documents. While the Applicant made submissions and the PCC replied, both parties were given an opportunity to fully respond to all the points which were made by the other party. The following exhibits were filed:

Exhibit 1 - Motion to Keep the PCC's Allegations and Portions of the Hearings thereon  
Confidential

Exhibit 2 - Motion on Scheduling

Exhibit 3 - Respondent's Written Argument to Confidentiality Motion

Exhibit 4 - Respondent's Written Argument to Scheduling Motion

Exhibit 5 - Respondent's Brief of Authorities January 2013

Exhibit 6 - PCC Investigation Timeline

Exhibit 7 - Judicial Review of *Birnbaum v. Institute of Chartered Accountants of Ontario*

Exhibit 8 - Extract from CA Act, Section 61

Exhibit 9 - Ottawa Police Force and Lalonde

7. The Scheduling Motion was argued first and both motions were argued before the tribunal made a decision on either motion. As is set out below, the motions did overlap with respect to disclosure of the Allegations to the public.

### **Background**

8. The Allegations relate to the performance of two audits of a corporation 95% of whose net assets, \$5.4 billion in one year and \$7.0 billion the following year, were held by a third party "service organization" that provided both the investment management/advisory function and the prime broker dealer and sub-custodial functions for these assets. It is alleged that the member failed to appreciate the role of Bernard L. Madoff Investment Securities, LLC, the third party service organization.

### **Scheduling motion**

9. Ms. Nicklin advised the tribunal at the commencement of her submissions that the parties had agreed on a number of points with respect to the Scheduling Motion. The point on which they disagreed related to the date for the commencement of the hearing itself. The Applicant asked that the date for the commencement of the hearing be set by the Chair or Deputy Chair presiding at the Pre-Hearing Conference. The PCC asked that the hearing date be set by the tribunal on this motion.

10. Both parties agreed that the tribunal on this motion had the jurisdiction to set the dates for the required disclosure and the dates for the hearing.

11. The date for a hearing to commence is relevant to the relief sought in the Prohibition Motion. When a date for a hearing is set, the ICAO posts a Notice setting out the place, date and time of the hearing and the Allegations (the originating process) on the ICAO website to which the public has access. This Notice is posted in accordance with Bylaw 7.8.1 and s.21 of Regulation 7-3, adopted by the Council pursuant to *The Chartered Accountants Act, 2010* and the Bylaws.

12. Accordingly, in the event the tribunal referred the date for the hearing to the Pre-Hearing Conference, the Allegations would not be posted until after that conference, which the parties agreed would be in November 2013. In effect, if the date for the hearing is set at the Pre-Hearing Conference, the Allegations would not be posted (disclosed) for several months. However, the request of the Applicant is that the Allegations not be disclosed until the conclusion of the matter. This leaves the issue of whether the tribunal can and should preclude publication of the Allegations until the conclusion of the case.

13. The Applicant submitted that: setting the date of the hearing at the time of this motion would be premature; the processes set out in the Rules and Regulations were intended to facilitate sorting out the issues which had to be tried; and accordingly, the date of the hearing should be left to the Pre-Hearing Conference because that conference, and the efforts the parties make before that conference, may have a significant impact on the scope and length of the hearing, the evidence presented, and the issues to be resolved. Moreover, the Applicant submitted that setting the date at the time of the motion might serve no practical purpose as the date might have to be changed as the hearing date approached.

14. The PCC took the position that a hearing was necessary, it would likely be complex and lengthy and that the dates for the commencement and continuation of the hearing should be set at this motion hearing.

### **Prohibition Motion**

15. The Applicant submitted that as Bylaw 7.8.2 gives the Discipline Committee authority to limit disclosure of findings and the names of members subject to discipline, it followed that the committee had the authority to protect such information from improvident disclosure for a limited time.

16. The Applicant also submitted that section 16.02 of the Rules clearly provided the Discipline Committee with the authority to order that "a hearing or a part of a hearing shall be held in the absence of the public" and thus the reports and evidence of the reports could be protected from disclosure.

17. The Applicant submitted that there were two criteria which need to be satisfied before the order requested should be made. The first was that delaying disclosure of the Allegations and reports would not harm the public. The second was that disclosure posed a significant risk of harm to Mr. Wall or his firm.

18. With respect to potential harm to the public, it was the Applicant's submission that as the only Allegations made against Mr. Wall are with respect to funds which are now bankrupt and Mr. Madoff who is now notorious and imprisoned, there is no need to caution the public about Mr. Wall's work.

19. With respect to potential harm to Mr. Wall or his firm, the Applicant's submission was twofold. First, whereas the law in Ontario precluded the use of the discipline proceedings, the Allegations, the evidence and any findings from being introduced in a civil court, there was no assurance that other jurisdictions would apply the same restrictions. Second, the Applicant submitted that the Allegations and a preliminary report, coming with the apparent imprimatur of a licensing body, would not be seen as a preliminary determination that Mr. Wall may have breached professional standards but rather that he did breach professional standards.

20. The PCC submitted that the Discipline Committee did not have the jurisdiction to preclude the practice of posting on the Institute's website the notice of a hearing which includes the Allegations as stipulated in s.21 of Regulation 7-3. It was submitted that Bylaw 7.8.1 and Bylaw 7.8.2 addressed two distinctly different aspects of the ICAO regulatory processes which was confirmed by the fact s.21 of Regulation 7-3 addressed the practice of posting notices of upcoming hearings whereas ss.22 – 26 dealt with notice of the decisions made by a committee. Counsel for the PCC cited in support of this submission a number of decisions, including the decision of the Appeal Committee of the Institute in *Sivakumaran* and the decision of the Divisional Court in *Canadian Newspapers Company Ltd. v. Law Society of Upper Canada*.

21. With respect to prohibiting the disclosure of the portions of the hearing which would disclose the Investigator's report, the PCC agreed with the Applicant that the Discipline Committee had the authority to order portions of the hearing to proceed in the absence of the public which would have the effect of precluding the disclosure of the Investigator's report and the evidence with respect to the report. The PCC however, submitted that such an order would not be in the public interest and that the disclosure posed no serious risk of harm to Mr. Wall or his firm.

22. More particularly, the PCC submitted that the criteria set out in Rule 16.02, which must be satisfied before the Discipline Committee could make such an order, had not been satisfied. The PCC submitted that there were neither matters involving public security nor was there a risk

that a privileged document or communication would be disclosed. The PCC also submitted that there was no evidence to support the argument that there was a serious risk of harm to Mr. Wall which outweighed the desirability of adhering to the principle that hearings be open to the public.

23. The PCC submitted courts must be presumed to have the competency to understand the difference between Allegations and findings and that the Applicant had competent counsel to represent him in other proceedings. Further, as the investigator's report had been provided to Mr. Wall, it was already available to the other parties in those other proceedings.

### **The Decisions of the Tribunal**

24. The relevant provisions of the Bylaws, Rules of Practice and Procedure, and Regulations are attached to these Reasons:

Bylaw 7.8.1  
Bylaw 7.8.2  
Regulation 7-3, ss.21 to 26  
Rule 16.02

### **Scheduling**

25. With respect to the Scheduling Motion, the issue was whether the dates for the hearing would be set at this time or reserved to the Chair or Deputy Chair at the Pre-Hearing Conference. While it may be that the parties, the disclosure process and the Pre-Hearing Conference will be able to reduce the length of the hearing, it was not suggested that a hearing would not be necessary or that it was not likely to be a lengthy; in fact, it was suggested that many days be set aside for the hearing.

26. The discipline process should be timely. In *Howe v the Institute of Chartered Accountants of Ontario* [1994] O.J. No. 2907, 21 O.R. (3d) 315, at paragraph 17, the Ontario Court of Appeal said: "The public has an interest in the prompt and just exercise of the ICAO of the disciplinary powers conferred upon it by statute". Our experience has taught us that the sooner a hearing is scheduled, the sooner it will be heard. One of the complications for volunteer committees or tribunals like the Discipline Committee is the difficulty identifying members who can be available for a lengthy hearing. Again, the sooner the process of identifying members who can be available the better. Accordingly, the tribunal concluded it should set the dates when dealing with the Scheduling Motion.

### **Prohibition**

27. The Applicant's request that the Discipline Committee make an order prohibiting the publication of the Allegations until the final resolution of this matter raised the issue of whether the tribunal has this power. The tribunal concluded that it was not given this power by the *Chartered Accountants Act, 2010*, the Bylaws, the relevant Regulations, or the *Statutory Powers Procedure Act*. The provisions of Bylaw 7.8.1 and the relevant regulation (Regulation 7-3, s.21) are both clear and mandatory. While Bylaw 7.8.2, gives the Discipline Committee some discretion with respect to notice of findings, no such authority is included with respect to the Notice required by Bylaw 7.8.1. The discretion given to the Discipline Committee in ss.22 – 26 of Regulation 7-3 relates to notices of its decision, not to notices of a hearing.

28. In *Canadian Newspapers Company Ltd. v. Law Society of Upper Canada*, [1986] O.J. No. 1304, a case similar to this one in that the relevant acts, bylaws and regulations did not provide the power to the committee to prohibit or amend the notice of a hearing, the Divisional

Court held that what had been referred to as a committee's "plenary power" did not include the authority to alter the notice of the hearing. The tribunal concluded, as the court held about discipline committee of the Law Society, that it did not have such authority within its "plenary power".

29. Further, the public does have an interest in the discipline process, as the court made clear in the Howe decision referred to above. It follows that the process should be a public process unless there are factors which outweigh this principle. While some aspects of the evidence may need to remain confidential, the tribunal concluded that the fact of the Allegations and the hearing should be available to the public once the date for the hearing is set. The Legislature has entrusted the ICAO with the governance of the profession and posting the Notice of Hearing including the Allegations demonstrates the profession takes the authority entrusted to it seriously.

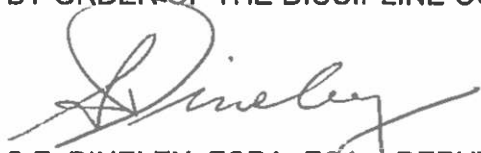
30. The tribunal concluded the posting of Notices of Hearings including the Allegations is an administrative matter outside the jurisdiction or power of the Discipline Committee.

31. As is set out above, it was common ground that the Discipline Committee does have the statutory power to order that a hearing, or part of a hearing, shall proceed in camera. Thus it is possible to preclude the disclosure of evidence, such as the Investigator's report and the evidence with respect to the report, provided the statutory conditions for making such an order are satisfied. The onus to demonstrate the conditions are satisfied is on the Applicant. The tribunal concluded the Applicant had not satisfied the conditions set out in s.16.02 of the Rules.

32. The submission that a court might be confused between allegations of misconduct and findings of actual misconduct is untenable. The submission that a court, in a jurisdiction other than Ontario, might admit evidence or documents from the discipline process, despite the provisions of the *Chartered Accountant's Act*, is speculative and does not outweigh the principle that hearings are to be open to the public.

33. The tribunal understands that its decision to deny the application to proceed in camera does not preclude either party from making a subsequent application which would be dealt with on its merits at the time. Accordingly, the tribunal, which had not received or read the investigator's report, noted that the decision was without prejudice to the Applicant to renew the application at a subsequent time.

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



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

MEMBERS OF THE TRIBUNAL:

P.A. BUSCH, CPA, CA  
R. CARRINGTON (Public representative)  
A.R. DAVIDSON, CPA, CA  
D.L. KNIGHT, FCPA, FCA

it relates to a holder of a public accounting licence or certificate of authorization.

**7.6 Discipline Committee**

- 7.6.1 In addition to the powers and responsibilities of the Discipline Committee set out in the Act, the Discipline Committee shall have the power to informally admonish a Member, Student, Applicant, membership candidate or firm, regardless of whether a finding of professional misconduct is made.
- 7.6.2 Notwithstanding Subsection 3.18.1, a member of the Discipline Committee whose term would otherwise expire remains a member of the Discipline Committee until such time as all hearings over which the member is presiding and matters ancillary to such hearings have been concluded.
- 7.6.3 Practice and procedure before the Discipline Committee shall be governed by the rules.

**7.7 Appeal**

- 7.7.1 Practice and procedure before the Appeal Committee, including, but not limited to, the time and manner of filing a notice of appeal, shall be governed by the rules.
- 7.7.2 Notwithstanding Subsection 3.18.1, a member of the Appeal Committee whose term would otherwise expire remains a member of the Appeal Committee until such time as all hearings over which the member is presiding and matters ancillary to such hearings have been concluded.

**7.8 Public Notice**

- 7.8.1 Notice of the place, date and time of all hearings and considerations of settlement agreements before the Discipline Committee, and all appeals from that Committee, shall be posted on the Institute's website, along with the name of the Member, Student, Applicant, membership candidate or firm and such other information as set out in the regulations.
- 7.8.2 Notice of any finding of professional misconduct, disclosing the name of the Member, Student, Applicant, membership candidate or firm, and any other information as set out in the regulations shall be posted on the Institute's website, and in such other manner as set out in the regulations, unless ordered otherwise by the Committee hearing the matter.
- 7.8.3 All Members, Students, Applicants, membership candidates and firms shall be deemed to have consented to any notice, publication or release of information under the bylaws or regulations.

## **ICAO REGULATIONS**

---

13. The Discipline Committee shall provide its final order and reasons, in writing, to all parties, along with a notice of the right to appeal that order.
14. The Discipline Committee has the power to informally admonish any person under the jurisdiction of the Institute, either during or at the conclusion of the hearing, regardless of any finding of professional misconduct.

### **Appeals**

15. The Appeal Committee shall hear the appeal of every final decision and order appealed by a party from the Discipline and Capacity Committees.
16. The Appeal Committee shall not rehear a matter, but shall decide whether, on the record, the final decision and order made are reasonable on the evidence and law.
17. The tribunal hearing the appeal may seek the advice of counsel to the tribunal during the appeal, and any advice shall be given on the record, and all parties shall have the opportunity to make submissions on that advice. The tribunal is not bound by the advice of its counsel.
18. Only members of the Appeal Committee hearing an appeal shall participate in deliberations and make any decision and order on the appeal.
19. The Appeal Committee has the power to:
  - 19.1 dismiss the appeal;
  - 19.2 vary the final decision and order of the tribunal appealed from, and make any decision and order that the tribunal appealed from could have made; or
  - 19.3 order a new hearing before a differently constituted tribunal of the original adjudicative committee.
20. All matters where the Appeal Committee had jurisdiction under the former bylaws of the Institute, but no longer has jurisdiction, in which a notice of appeal was filed on or before June 16, 2011, shall be heard and disposed of by the Appeal Committee as though the bylaws under which it had jurisdiction had not been repealed.

### **Notice**

21. Notice of the place, date and time of all hearings of Allegations, reconsiderations, considerations of Settlement Agreements, and appeals shall be posted on the Institute's website, along with the name(s) of the subject Member(s) or firm(s) and the originating process, and a notice that the hearing is open to the public.
22. Notice of a finding of professional misconduct, including brief particulars of the misconduct and disclosing the name of the subject(s) of that finding and the sanction imposed, unless the tribunal orders otherwise, shall be given to:

## ICAO REGULATIONS

---

- 22.1 all Members of the Institute;
  - 22.2 the Public Accountants Council for the Province of Ontario, if the subject is licensed or authorized to practice public accounting; and
  - 22.3 all provincial institutes.
23. Notice of the revocation of membership of a Member and of any restriction, suspension or revocation of a licence or authorization to practice public accounting, including the name of the subject of the revocation, suspension or restriction, shall be given in a newspaper or newspapers distributed in the geographic area where the subject of the revocation, suspension or restriction practiced, if applicable, and in any other area ordered by the tribunal, and the subject shall bear the cost of such publication.
24. Notwithstanding section 23, the tribunal may order no newspaper publication if it finds that such publication is not required for the protection of the public and that it would be unfair to the subject, and provides written reasons for its decision.
25. In addition to section 23, the tribunal may order any publication or notice in any form or media it finds appropriate.
26. The Allegation, decision, order, and written reasons for every finding of professional misconduct, and every approved Settlement Agreement, shall be posted on a publicly accessible area of the Institute's website, and shall be provided to any person on request, and such posting and production shall disclose the name of the subject(s) of the finding or Settlement Agreement, unless ordered otherwise by the tribunal.
27. The Discipline or Appeal Committee, as the case may be, shall report on the disposition of every matter referred to it:
- 27.1 to the parties;
  - 27.2 to the Council; and
  - 27.3 if the subject of the matter is licensed or authorized to practice public accounting, to the Public Accountants Council for the Province of Ontario, along with the written reasons for the decision, disclosing the name of the subject.

### **Discipline Committee**

28. The Discipline Committee shall consist of twenty-five to thirty-five (25 to 35) members, including a Chair and at least two Deputy Chairs, and between five and eight (5 and 8) public representatives. The Members of the Committee shall generally be representative of the Institute's membership by occupation and geographic location, and shall include public accounting licensees.



**RULE 16 ACCESS TO HEARING**

**Hearing to be public**

**16.01** Subject to rule 16.02, every hearing in a proceeding shall be open to the public.

**Hearing in the absence of the public**

**16.02** On the motion of a party, an order may be made that a hearing or a part of a hearing shall be held in the absence of the public where,

- (a) matters involving public security may be disclosed;
- (b) it is necessary to maintain the confidentiality of a privileged document or communication;
- (c) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or
- (d) in the case of a hearing or a part of a hearing that is to be held as an electronic hearing, it is not practical to hold the hearing or the part of the hearing in a manner that is open to the public.

**Attendance at hearing held in the absence of the public**

**16.03** Where a hearing or a part of a hearing is held in the absence of the public, unless otherwise ordered by the tribunal, the hearing may be attended by,

- (a) subject to rule 18.01, any witness the nature of whose testimony gave rise to the order that the hearing or the part of the hearing be held in the absence of the public;
- (b) the parties and their representatives; and
- (c) such other persons as the panel considers appropriate.

**Non-disclosure of information**

**16.04**

- (1) Subject to subrule (2), where a hearing or a part of a hearing is held in the absence of the public, no person shall disclose, except to his, her or its representative or to another person who attends at or participates in the hearing or the part of the hearing that is held in the absence of the public,
  - (a) any information disclosed in the hearing or the part of the hearing that is held in the absence of the public; and
  - (b) if and as specified by the tribunal, the tribunal's reasons for a decision or an order arising from the hearing or the part of the hearing that is held in the absence of the public, other than the tribunal's reasons for an order that a subsequent hearing or a part of the subsequent hearing be held in the absence of the public.

**Order for disclosure: hearing held in the absence of the public**

- (2) On the motion of a person, an order may be made permitting a person to disclose any information mentioned in subrule (1).

**Order for non-disclosure: hearing open to the public**

**16.05** On the motion of a party, or on a tribunal's own motion, if any of clauses 16.02 (a), (b) and (c) apply, an order may be made prohibiting a person who attends at