

**CASE LAW UPDATE**

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*Barrington v The Institute of Chartered Accountants of Ontario*

2011 ONCA 409 (Released May 27, 2011)

**Professional disciplinary proceeding – Adequacy of notice of charges – Adequacy of reasons – Jurisdiction to order costs**

These appeals arise from the professional disciplinary proceedings against three members of the Institute of Chartered Accountants of Ontario ("ICAO") for their roles in the now defunct Livent Inc.'s ("Livent") 1997 audited financial statements. The Court of Appeal allowed ICAO's appeal and reinstated the ICAO's discipline committee's convictions and costs award. The members' appeals were accordingly dismissed.

In 2004, the ICAO laid charges against J. Douglas Barrington, Anthony Power and Claudio Russo for failing to ensure that Livent's financial statements complied with Generally Accepted Accounting Principles ("GAAP"). The ICAO's discipline committee found the three members guilty of professional misconduct in February 2007 and imposed penalties and costs in September 2007. These two decisions were upheld by the ICAO's appeal committee in February 2009. In March 2010 the Divisional Court quashed four of the eight convictions against Power and Russo and all of the convictions against Barrington. It also quashed the discipline committee's costs order. Power and Russo appealed from the Divisional Court's decision seeking to have the remaining convictions quashed, while the ICAO appealed to have the convictions and costs award reinstated.

The issues on appeal are (1) whether the members had adequate notice in relation to the charges (2) whether the discipline committee had provided adequate reasons for finding misconduct and (3) whether legislative amendments subsequent to the Divisional Court's decision retroactively validate the discipline committee's costs order.

On the first issue of adequate notice in relation to the charges, the Court of Appeal held that the Divisional Court mischaracterized the nature of the charge as the put agreement was not a new allegation. The discipline committee had found the members guilty of misconduct for recognizing income without reasonable assurance that the significant act of construction would be completed. The put agreement was relevant evidence to the charged based upon the discipline committee's interpretation of the GAAP and Canadian Institute of Chartered Accountants handbook. The discipline committee was entitled to consider the evidence led by the members despite the fact that no concerns were raised about the put agreement by the

prosecution. A trier of fact is not bound by the prosecution theory of the case but is entitled to follow a different route to liability. Furthermore, the members were neither surprised nor prejudiced by the discipline committee's reliance on the evidence surrounding the put agreement.

On the second issue of the adequacy of reasons, the Court of Appeal reaffirmed that a tribunal is not required to refer to all evidence or to answer every submission. All that is required is for the discipline committee to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way. The discipline committee had articulated the correct test that any departure from the professional standards must be so significant that it constitutes professional misconduct. Its reasons demonstrated that the panel members had turned their minds to the proper test, the issues and key evidence relied upon, and that they had applied their expertise in articulating their conclusions.

On the final issue of costs, the ICAO challenged the Divisional Court's decision to quash the discipline committee's costs award on the basis that it lacked jurisdiction to order costs. The Divisional Court had held that s. 17.1 of the *Statutory Powers Procedure Act* ("**SPPA**") prevailed over the discipline committee's by-law adopted pursuant to s. 8 of the *Chartered Accountants Act, 1956*. The ICAO submitted that the Divisional Court's decision on costs should be overturned in light of s. 38 of the *Chartered Accountants Act, 2010*, enacted two months after the Divisional Court's decision. Section 38 provides that the discipline committee may award costs of a proceeding and that it applies despite section 17.1 of the *SPPA*. The Court of Appeal ultimately agreed that s. 38 expressly applies to validate orders made on or after December 6, 2000 and that it has the effect of retroactively validating the discipline committee's costs award.

Accordingly, the Court of Appeal allowed the ICAO's appeal, set aside the Divisional Court's decision and reinstated the discipline committee's decision. The appeal of Power and Russo was dismissed.