THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **J. DOUGLAS BARRINGTON, FCA, ANTHONY POWER, FCA,** and **CLAUDIO RUSSO, CA**, members of the Institute, under **Rule 206** of the Rules of Professional Conduct, as amended.

REASONS FOR SANCTION AND COSTS

(September 27, 2007)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario reconvened on July 3, 2007, to hear evidence and submissions with respect to sanction and costs. The Decision and Reasons for Decision (the "Decision") of the panel which found Anthony Power and Claudio Russo guilty of two charges of professional misconduct, Douglas Barrington guilty of one charge of professional misconduct and Peter Chant not guilty are dated February 11, 2007. Peter Chant is no longer a party to these proceedings. These reasons, for sanction for the misconduct and the order for costs made against the members for the investigation and hearing, use the same terms as the Decision, and should be read in conjunction with the Decision.

OVERVIEW

2. The principles which apply to the imposition of sanction, general deterrence, specific deterrence and rehabilitation, require the panel to consider not only the misconduct which resulted in the finding of guilt but also the relevant facts and circumstances of the member both at the time of the misconduct and during the investigation and hearing.

3. Panels of the Discipline Committee recognize that imposing sanction, as Justice Cory said in *Re: Stevens and the Law Society of Upper Canada,* 55 O.R. (2d) 405 at page 411, is an onerous exercise. When imposing a sanction, panels of the Discipline Committee consider both the misconduct and the member found guilty of the misconduct in the context of other decided cases and make an order which is consistent with orders made in other similar cases. It is acknowledged that while there is a need for consistency, that no two cases are exactly the same and that even cases which seem similar, are often different in important respects. It is also recognized that the imposition of sanction is not an exact science which permits only one possible order, but rather, that the terms of the order should fall within an appropriate range.

4. One of the few things the parties agreed upon with respect to sanction was that the principle of sanction which should have priority in this case is general deterrence. The parties had very different views of the misconduct itself and the terms of an order which would be appropriate. They also had very different views with respect to costs. The panel considered their submissions and sets out in these

reasons the facts and circumstances which it found relevant to sanction and costs. In this overview the panel sets out a few points which it found to be of overriding importance.

5. As the Decision makes clear this is a standards case. This was the position of the Professional Conduct Committee throughout the hearing. It was not alleged that the case against the members involved moral turpitude or that the members knew, or should have known, about the fraud at Livent.

6. Livent was a high profile public company (OSC and SEC registrant). Its officers were sensitive to its reported earnings and known to apply aggressive accounting principles. It attracted a high level of scrutiny and public observation. The auditors knew and told management that Livent did not conduct its accounting practices the way a public company should. The auditors knew this was a high risk audit yet they failed to exercise the required degree of professional scepticism.

7. The financial statements of Livent, which did not comply with generally accepted accounting principles (GAAP) and for which the audit had not been performed in accordance with generally accepted auditing standards (GAAS), were released with an unqualified audit opinion. The audits of public companies and the rigor with which the auditors apply the standards of the profession is a matter of concern for the profession, the business community, security regulators and the public. The members' failure to adhere to the standards of the profession, given the nature of the identified audit risks, the publicly expressed concerns about the client and the fundamentally important role which auditors of public companies have, constitutes serious professional misconduct. The panel concluded that the principle of general deterrence required that its order make it clear that the profession will not tolerate such misconduct.

8. The panel agreed with the parties that the principle of sanction which should have priority in this case is general deterrence. However, the panel also concluded that the principle of specific deterrence is applicable.

9. The audit which gave rise to the charges in this case was a Deloitte audit. Under the *Chartered Accountants Act,* as it was in 1998, a firm could not be charged. The members identified by the firm as responsible for the audit were investigated. Late in the investigation, less than four months before the charges were laid, counsel to the Professional Conduct Committee wrote to the counsel who represented the members at that time. The purpose of the letter was to ascertain who was responsible for the release of the audit opinion and for accepting the application of certain accounting principles. The response received, purportedly on behalf of the members, but apparently from Deloitte, was not factually correct. It misled the Professional Conduct Committee. The letter was never corrected. The actual facts only became known eight months after the letter was filed as an exhibit at the hearing. The members put the interests of their firm ahead of their obligations to their governing body, and accordingly, the principle of specific deterrence is also applicable.

10. The Decision was known for over four months before the submissions with respect to sanction were heard. The members had already made their intention to

appeal known. The Professional Conduct Committee submitted that the members showed no remorse. The members submitted that remorse was irrelevant. They thought they would succeed on the appeal. In their submissions, it was willingness to accept responsibility for the actions taken, not remorse which is relevant. The panel agreed with the members. However, as one of the members, even after the Decision was released, appears to take the position that he does not bear any responsibility for the decisions made, the principle of specific deterrence is again applicable.

11. The panel concluded that the principle of general deterrence could be better served by imposing a significant fine than by a lesser fine and a suspension which would have little or no impact on the three members, two of whom are retired partners of a large national firm. The panel was sensitive to the fact that a fine significant enough to have the required impact could be too heavy a financial burden on the individual members. However, there was no suggestion that the members could not pay the fine sought or the requested order for costs. It was also relevant to the panel that there was evidence to the effect that the firm Deloitte, not the individual members, would pay a fine and/or costs.

12. Aside from the sanction imposed, there are consequences which follow a finding of professional misconduct. The reputations and often the careers of members found guilty of professional misconduct suffer as a result of the finding alone. The consequences of such a finding often include a loss of prestige and opportunity in the communities in which the members work and live.

13. An auditor, found guilty of professional misconduct for failing to adhere to the standards of the profession, is in a particularly difficult position if the client engaged in fraud. Even when, as in this case, it is not alleged that the auditor should have found the fraud, the reputation of the auditor may suffer because members of the public will unfairly associate the auditor's misconduct with a failure to find the fraud. This is the reality for all members, including the members in this case.

The proceedings subsequent to February 11, 2007

14. After the Decision was released, counsel for the parties, in discussions facilitated by counsel for the panel, Robert Peck, agreed on dates for filing written submissions and also agreed upon May 14, 2007, as the day on which the hearing would reconvene to consider the issues of sanction and costs. The Notice and Direction of the Discipline Committee incorporating the agreement was dated March 5, 2007.

15. The hearing did not reconvene as scheduled on May 14, 2007, to hear the evidence and submissions. One of the members was prohibited from flying by his doctors at that time and so could not attend in Toronto. On May 14, 2007, counsel for the parties appeared before the Chair, who with the consent of the parties, marked the Decision as Exhibit 197, the Notice and Direction of March 5, 2007 as Exhibit 198 and the submissions, authorities and other material filed by the parties with respect to sanction and costs as Exhibits 199 to 208 respectively. Also, with the agreement of the parties the hearing was rescheduled for July 3, 2007, and if necessary, July 4, 2007, and July 5, 2007.

16. On July 3, 2007, the Professional Conduct Committee was represented by Brian Bellmore and Paul Farley. Douglas Barrington was represented by Peter Griffin who was assisted by Chris Borg-Olivier. Anthony Power and Claudio Russo were represented by John Lorn McDougall Q.C., Brian Leonard and Colleen Butler.

17. The Professional Conduct Committee did not call evidence with respect to sanction. On the morning of July 3, 2007, the members called evidence. John MacNaughton gave evidence on behalf of Anthony Power and Douglas Barrington. Michael Owens gave evidence on behalf of Claudio Russo. Jean-Pierre Boisclair and Thomas O'Neill gave evidence on behalf of Douglas Barrington. Counsel for Douglas Barrington, with the consent of the Professional Conduct Committee, read into the record a statement from Frances Lankin on behalf of Douglas Barrington.

18. In the afternoon of July 3, 2007, counsel for the Professional Conduct Committee made submissions with respect to sanction and costs. On the morning of July 4, 2007, counsel for the members, first John Lorn McDougall and then Peter Griffin, made submissions with respect to sanction and costs. In the afternoon of July 4, 2007, counsel for the Professional Conduct Committee made reply submissions. In the course of their submissions counsel referred to their written submissions and authorities. After a brief recess, the parties returned to the Council Chamber and answered questions from the panel. Thereafter, the hearing adjourned and the panel began its deliberations.

Position of the parties

19. The Professional Conduct Committee set out the terms of the orders requested in its written submissions. The requested order with respect to each of the three members was the same and included: a reprimand; a suspension of six to twelve months; a fine in the range of $75,000 to $100,000; and publicity including notice in *CheckMark* magazine, *The Globe and Mail, The National Post,* and the *Toronto Star* newspapers including specific details of the misconduct. The Professional Conduct Committee also requested an order for costs in the amount of $1,140,000 plus the costs of counsel to the panel, which would be divided equally between the three members.

20. The written submissions filed on behalf of Anthony Power and Claudio Russo submit that the appropriate sanction would include: a reprimand in writing; publication of the decision in *CheckMark* magazine; and that a fine might be appropriate in the panel's discretion. It was their position that a suspension was neither necessary nor just, and that the costs suggested were excessive and punitive in nature.

21. Douglas Barrington submitted that the appropriate order with respect to an Advisory Partner would include a reprimand and publication of a notice in *CheckMark* magazine. It was his position that a suspension, fine and punitive costs should not be imposed. With respect to the quantum of costs, Douglas Barrington submitted they should not exceed $50,000.

Issues to be determined

22. The panel concluded that with respect to sanction there were three issues which it had to determine for each member, namely whether or not:

a) a suspension was appropriate, and if so, the length of the suspension;
b) a fine should be imposed, and if so, the amount of the fine; and
c) notice of the decision and order should be published in a newspaper or newspapers.

23. Costs are not imposed as a sanction. An order for costs is intended to be an indemnification, in whole or in part, for the expenses of the investigation and prosecution of the case. If no order for costs is made, the costs incurred would be borne by the membership as a whole. With respect to costs the panel concluded it had to deal with three issues:

a) Whether an order for costs should be made;
b) If an order for costs should be made,
    i) what amount of costs in total should be awarded; and
    ii) what portion of the costs awarded should be borne by each of the three members.

SANCTION

24. The parties had very different views of the underlying misconduct and the range of sanction which would be appropriate. The panel hereinafter sets out the facts, circumstances and factors it finds relevant to the issues of sanction.

THE MISCONDUCT

25. As the Decision makes clear, the charges brought against the members were that they failed to adhere to the required standards of the profession. While there was fraud at Livent, it was not alleged that the members conduct involved moral turpitude or that the members knew, or should have known, about the fraud (Decision, paragraph 51 and following).

26. As the Decision makes clear the departures from the required standards of the profession were significant. The unqualified audit opinion should not have been released (Decision, paragraphs 327 and 328).

The nature of the misconduct

27. The Panel summarized the essential nature of the misconduct as the improper exercise of professional judgment with respect to the reasonable suspicions about the Put (Decision, paragraphs 154 and following) and the failure of the auditors to reconsider their planned auditing procedures. The auditors identified the audit as a high risk audit which required a high degree of professional scepticism. However,

they failed to apply to the circumstances the required degree of professional scepticism (Decision, paragraph 329).

28. The aggravating factors which reveal the nature and extent of the departure from the required standards and which should be taken into account in determining the appropriate sanction for the misconduct of the three members which led to the finding of guilt on Charge 1, with respect to particulars i) and iii), include: the type of client; the fact that the audit was identified as a high risk audit; the identification of particular areas which required increased professional scepticism and the failure to exercise it; a collective failure to properly analyze the evidence obtained to dispel their reasonable suspicions about the Put; and the failure to understand the implications of the explanation (acknowledging an earlier lie) that Myron Gottlieb gave with respect to the Put Side Agreement. The panel's findings are set out in the Decision. They are briefly summarized below with reference to some of the relevant paragraphs in the Decision.

29. Livent was a high profile public company whose management was sensitive to reported net earnings levels and known to apply aggressive accounting principles, which attracted a high level of scrutiny and public observation (Decision, paragraph 129). Livent was dominated by the Chairman and Chief Executive Officer, Garth Drabinsky, who acted in concert with the President, Myron Gottlieb. The two were major shareholders and were known to be tough, demanding and aggressive (Decision, paragraph 206). Douglas Barrington's speaking notes make it clear that the auditors knew that Livent did not conduct its accounting practices as a public company should (Decision, paragraph 167).

30. The auditors themselves had identified the audit as a high risk audit, and had identified the material and unique revenue generating transactions as a particular area of risk (Decision, paragraph 129). The members identified a need to increase their professional scepticism, but failed to exercise the professional scepticism required in the circumstances (Decision, paragraph 329). The auditors set out appropriate steps to be taken to dispel their suspicions about the Put but did not complete them (Decision, paragraphs 217 to 230 and 238). The representation letter, which had been drafted with the identified risks in mind, was not signed until after the audit opinion was released. Moreover, it was signed by the Chief Executive Officer and the President; it was not signed by the Chief Financial Officer (Decision, paragraphs 248 to 250).

31. Deloitte was associated with the interim financial statements of Livent in the autumn months of 1997 when Livent raised US $125 million by way of a public filing in the United States. Deloitte was also aware of Livent's press release of September 2, 1997. Nevertheless, in April 1998, the members failed to consider the implications of Myron Gottlieb's admission that he had lied with respect to the existence of the Put in August 1997. In particular, they did not consider the implications that his lie and the fact that the Put Side Agreement was in effect for two months after August 15, 1997, had for the press release and Deloitte's association with the interim financial statements. (Decision, paragraphs 164, and 231 to 235).

32. Many of those who participated in the late afternoon meeting of Deloitte partners and legal advisors on April 3, 1998, knew later that same day that Myron Gottlieb lied about the Put in August 1997 (Decision, paragraphs 162 to 165). They did not convene again to collectively review the evidence gathered to dispel the suspicions about the Put. The steps taken to dispel the suspicions about the Put and the evidence obtained were not included in the working papers which were apparently reviewed by the Quality Assurance Review Partner. Moreover, the responsible partner did not directly sign off on the QAR, but rather, Claudio Russo, a member of the audit team, signed off for him (Decision, paragraph 202).

33. The aggravating factors which must be taken into account in determining the appropriate sanction for the misconduct of Anthony Power and Claudio Russo, with respect to Charge 2, include the factors set out above with respect to Charge 1, particulars i) and iii). The reliability of management's representations and estimates were very relevant to Charge 2. The auditors had identified preproduction costs and the extent to which they were recoverable, according to management's estimates, as a particular area of risk (Decision, paragraph 129).

34. Anthony Power and Claudio Russo failed to re-assess the representations of management and the nature, extent and timing of audit procedures even after management's about face at the Audit Committee meeting of April 8, 1998, when management proposed a write-down of preproduction costs by $27.5 million despite their adamant refusal to accept a smaller write-down just days before the meeting (Decision, paragraph 309). Anthony Power and Claudio Russo failed to reconsider the audit plan despite the fact that their initial assumption that they could rely on the representations of management should have been reassessed in light of the information they received in April 1998. The auditors failed to reconsider the audit plan despite the exceptions discovered during control testing (Decision, paragraph 300). They, in particular Claudio Russo, failed to obtain appropriate audit evidence with respect to invoices from a related party (Decision, paragraph 316).

35. With respect to Charge 1, particular iv) and Charge 2, particular viii), the fact Peter Chant, the Advisory Partner on GAAP issues for this client, had repeatedly told his partners that the transaction should not be treated as a sale and his advice was ignored, is also an aggravating factor (Decision, paragraph 288).

Lack of professional scepticism

36. The Professional Conduct Committee, in both written and oral submissions, asserted that the members had "wilfully blinded themselves to overwhelming evidence of management deceit". The Professional Conduct Committee also characterized the members as dupes of management. The members strenuously objected to this submission.

37. Rather than finding that the members were dupes of management, the panel found that the members, particularly Douglas Barrington and Anthony Power, had stood up to management. The panel found that in the autumn of 1997, the reason for the change in the audit team was to give the Chair of the audit committee the strong independent auditor he wanted (Decision, paragraphs 209 to 213).

38. In its Decision, the panel did find puzzling the auditors' failure to resolve the inconsistencies of Ned Goodman's letter of April 4, 1998, (Decision, paragraph 224). The panel also found that in accepting at face value the letter of Rodney Seyffert of April 5, 1998, the auditors showed a remarkable lack of scepticism (Decision, paragraph 228). However, the panel did not find that this amounted to wilful blindness to the misrepresentations of management but rather poor professional judgement.

The members' response to the Professional Conduct Committee

39. Douglas Barrington, Peter Chant, Anthony Power and Claudio Russo appeared before the Professional Conduct Committee sometime before November 6, 2003, with respect to the investigation which had been ongoing for many months. After the meeting, counsel to the Professional Conduct Committee wrote a letter to the members' counsel. The letter included the following paragraph:

> The professional conduct committee was unclear as to the precise role played by Mr. Peter Chant and Mr. Doug Barrington. The committee understands that Mr. Chant and Mr. Barrington were the advisory partners but they are not clear as to what responsibility the advisory partners have in making the decisions on the file. Could you articulate for the professional conduct committee the responsibilities of Mr. Chant and Mr. Barrington for decisions pertaining to revenue recognition and sale of density rights, as well the decision to accept the $27.5 million adjustment to pre-production costs for 1997. Finally the committee would like to know who in particular had the responsibility for authorizing the release of financial statements.

40. The response, received from counsel who attended the Professional Conduct Committee meeting with the members, was dated November 28, 2003. Among other things it said:

> Mr. Power was the ultimate decision maker in respect of each of these decisions. In making those decisions Mr. Power consulted with Mr. Barrington and Mr. Russo. In addition, Mr. Chant was consulted in respect of each of these decisions, except the decision to accept the write-down of pre-production costs. In each case, notwithstanding Mr. Power's ultimate responsibility, the decisions reached by the client services team were very much a matter of consensus. Mr. Power would not have made the decisions he made without the concurrence of the other partners.

41. The panel found the letter of November 28, 2003, to be false and misleading. The client services team did not reach a consensus. Peter Chant did not agree with the decision to release the audit opinion. He did not agree that Deloitte should continue with the audit of Livent. He did not agree that the revenue from the Dundee transaction (which was subject to the Put arrangement) should be recognized. He was not consulted with respect to the $27.5 million write-down of the preproduction costs (Decision, paragraphs 256 to 261).

42. The Professional Conduct Committee submitted that the misleading letter of November 28, 2003, was an aggravating factor of monumental proportions. The panel agreed.

43. Deloitte, not the individual members, retained the lawyers who acted during the investigation. It is noteworthy that Peter Chant asked the internal counsel of Deloitte to have the firm correct the misstatements in the letter and when the letter remained uncorrected, he wrote to the managing partner and Chief Executive Officer of Deloitte pointing out the errors and asking that the letter be corrected. The letter was still not corrected (Decision, paragraph 259).

44. Anthony Power did not see the letter before it was sent although in his testimony he stated that he thought that the letter was accurate. Claudio Russo, who testified that Peter Chant did not want Deloitte to continue with the audit, did not see the letter before it was sent, but knew about it shortly after it was sent.

45. Douglas Barrington acknowledged that he had seen the letter before it was sent but denied he was responsible for it. The letter is in fact inconsistent with his position that he was not responsible for the GAAP decisions or the release of the audit opinion.

46. Douglas Barrington and Claudio Russo had to know that this false and misleading letter to the Professional Conduct Committee would be seen as unethical and suggest that they were not governable. They took no action to correct the letter even after it was put before the panel in January 2005. In effect, they gave the position and interests of their firm priority over complying with the Rules of Professional Conduct and their obligations to their governing body.

47. It is noteworthy that despite the comments made about this letter in the panel's Decision and the evidence recited showing that Douglas Barrington and Claudio Russo knew that the letter was untrue, no member made submissions with respect to this letter.

48. The letter of November 28, 2003, is also relevant when dealing with costs.

Acknowledgement of responsibility

49. Counsel for the Professional Conduct Committee submitted that the panel should take into account the lack of remorse of the members. Counsel for the members submitted that, as the members have the right to appeal and believe that they will succeed on appeal, it makes no sense for the panel to consider their lack of remorse when imposing a sanction.

50. The panel concluded that in the circumstances of this case, given the type of misconduct involved (the improper exercise of professional judgment), it is the willingness to acknowledge responsibility and not the display of remorse which is relevant.

51. Anthony Power and Claudio Russo acknowledged that if the financial statements of Livent, as at December 31, 1997, did not comply with GAAP or that the audit was not performed in accordance with GAAS, that they had failed to comply with the required standards of the profession.

52. The situation is less clear with respect to Douglas Barrington. He is charged with only the GAAP charge and he was found guilty on Charge 1 only with respect to particulars i) and iii). He says that he has always accepted responsibility for what he did as an Advisory Partner. He also took the position that as an Advisory Partner he was not responsible for the release of the audit opinion or the acceptance of the accounting principles. His counsel submitted that he did take responsibility for what he did in relation to the Put. However, his counsel called evidence which suggested that it would be wrong to sanction an Advisory Partner as such partners are not in a position to know all of the relevant facts.

53. Thomas O'Neill, the former Chairman and CEO of Price Waterhouse Canada and later the CEO of PricewaterhouseCoopers LLP, Canada, testified of the "chilling effect" that a finding of professional misconduct against an Advisory Partner could have on those in the profession who will be asked to accept this role, which he said was important to the public, the profession and the firms. He expressed the view that those asked to serve as an Advisory or National Partner might prefer to remain on the front lines, responsible for what they know and do, rather than accept the advisory role and be left at the mercy of what the front line partners tell them.

54. When Thomas O'Neill was read paragraphs 330, 331 and 332, of the Decision, he said that the description of Douglas Barrington's role was different than the role an Advisory or National Partner played at his former firm. He was not taken to paragraph 335 where the panel held that Douglas Barrington was not guilty of Charge 1, with respect to particular iv), because he was not a decision maker with respect to that issue and therefore not responsible for it.

55. Douglas Barrington stresses that he was charged as an Advisory Partner. While the charge describes him as an Advisory Partner, he was charged because the letter of November 28, 2003, said he was jointly responsible for the relevant decisions. He was found guilty because of the decisions the panel found that he made in the course of the Livent audit (Decision, paragraphs 332-335). This is not a case where an Advisory Partner's knowledge was derived from front line partners. Rather, he was on the front line both in August 1997 and April 1998. He, not Anthony Power or Claudio Russo, had first hand knowledge of the Put issue in August 1997. He took the lead in setting out the steps to be taken to dispel the suspicions about the Put in April 1998 and failed to ensure that the steps were carried out and the appropriate evidence was obtained.

The misconduct of the individual members and its relative weight

56. The panel recognized that assessing the nature and extent of each members misconduct, and weighing it against that of the other members for the purpose of imposing sanction, was not a precise mathematical exercise. In its Decision the panel set out the responsibility of each of the three members for the misconduct (Decision, paragraphs 330 to 338).

57. As between the members charged, Douglas Barrington took the lead with respect to dispelling the reasonable suspicions about the Put in April 1998, the most significant misconduct in this case. He was personally involved with this issue in August 1997. He had more authority and was a more senior member of the firm's

hierarchy than the other members charged. In this sense his misconduct was more serious than the misconduct of the others.

58. Claudio Russo was less involved and less responsible than Anthony Power for failing to exercise appropriate professional scepticism with respect to the Put in April 1998. However, he did fail to document the steps taken and the evidence accepted and, he did fail to advise Anthony Power that the Chief Financial Officer had not signed the representation letter and that the representation letter was not signed before the audit opinion was released. He was also more responsible than Anthony Power for failing to deal with the errors found with respect to the accounts payable and failing to deal appropriately with invoices from a related party.

59. While Anthony Power was less responsible for the misconduct which led to the finding of guilt on Charge 1 than Douglas Barrington and, less responsible for the misconduct which led to the conviction on Charge 2 than Claudio Russo, he does bear significant responsibility for both charges as he was the Lead Client Service Partner. Anthony Power fully acknowledged this responsibility during the hearing.

60. The panel concluded that each of the three members was responsible for the misconduct and that there was no persuasive reason to find one partner less culpable than the other partners.

THE MEMBERS

61. The failure to exercise their professional judgment properly on the Livent audit is the only involvement the members have had with the disciplinary process of the Institute. It is acknowledged by the Professional Conduct Committee that this is the one and only blemish on their professional careers.

Douglas Barrington

62. Douglas Barrington had a distinguished, even extraordinary career with Deloitte. He became a partner in 1973. He had extensive experience with OSC and SEC registrants. He was the office managing partner in the National Capital Region from 1978 to 1988. He was the deputy managing partner of Eastern Canada from 1988 to 1992. He was the Chairman of the Board of Deloitte from 1992 to 1996. He was the group managing partner of the firm's National Office from September 1996 to April 2001. He was appointed Vice-Chair of the firm effective April 2001. He retired as a partner, as scheduled, in May 2007.

63. John MacNaughton testified to Douglas Barrington's honesty, integrity and expertise in providing wise advice both with respect to accounting and governance matters to the Canada Pension Investment Board. Thomas O'Neill expressed a very high opinion of the professionalism, integrity and expertise in complex accounting matters which Douglas Barrington provided to the Ontario Teachers Pension Board. Jean-Pierre Boisclair testified that Douglas Barrington contributed significantly to public sector accounting in Canada in many positions at the Canadian Comprehensive Auditing Foundation, including filling the role of Chair of the foundation. Frances Lankin spoke highly of Douglas Barrington's commitment

to the United Way where he became the Chair of the United Way of Canada in May 2007.

64. John McNaughton and Thomas O'Neill both testified that Douglas Barrington is well qualified to be a director of a public company. John McNaughton testified that the finding of fault, in and of itself, would preclude him from such appointment. Thomas O'Neill testified that Douglas Barrington would not be seriously considered for a position for a period of five years after the sanction was imposed.

Anthony Power

65. Throughout his career Anthony Power enjoyed a most distinguished career at Deloitte. He was the engagement or lead client service partner of one of Canada's top five chartered banks for over 20 years. He was responsible for the Toronto office banking practice from 1984 to 1993. He was the engagement or lead client service partner for 25 years for an investment company which became one of Canada's largest conglomerates. He was the lead bank audit partner for an international team of 200 professionals on assignment in Mexico to investigate the partial collapse of that country's banking system.

66. Anthony Power was the Chair of the Princess Margaret Hospital Foundation Board in the early 1990s and John MacNaughton came to know him when assisting with the capital campaign of the foundation. John MacNaughton found him to be an effective leader determined to see the foundation succeed and the hospital flourish. He had a very high opinion of Anthony Power's competence, honesty and integrity.

Claudio Russo

67. The panel did not hear evidence in July 2007 with respect to Claudio Russo's career prior to the Livent audit. Anthony Power had previously testified that he made it a condition of accepting the role of Lead Client Service Partner that Claudio Russo would be the Audit Client Service Partner, and that he had great confidence in Claudio Russo who he regarded as a highly competent and ethical partner.

68. Michael Owens, a partner of Deloitte and a member of the Deloitte board from 1998 to 2006 came to know Claudio Russo when he moved to Atlantic Canada in 2003. Claudio Russo reported to him and on two or three occasions they worked on clients' files together. Michael Owens testified that Claudio Russo, who was the director of audit for Atlantic Canada and later, a director for professional practice, became a leader of Deloitte in Atlantic Canada. He was respected by the clients and staff alike. Members of the firm often went to Claudio Russo for technical advice and young members of the firm asked him to be a mentor or coach.

69. Michael Owens testified that there were no issues with Claudio Russo's files when they were inspected by the Practice Inspection Committee of the Provincial Institutes or by the Canadian Public Accountability Board. He also testified that he knew Claudio Russo well over this period of time and found him to be a man with the highest moral standards.

Consequences of the findings to the members

70. According to the evidence heard by the panel, Douglas Barrington has the ability and competency to serve as a director of a public company and to fulfill important roles as a member of an audit committee or governance committee of a public company. He recently retired as a partner of Deloitte. This was the time in his career when he looked forward to being appointed a director of public companies. The panel accepts that the finding of guilt with respect to the charge brought against him will necessarily delay such appointment, and could with respect to the largest companies preclude such an appointment.

71. Anthony Power retired from the Canadian partnership in 2000. He then spent two years as a partner in Deloitte's central European practice in Ireland. He fully retired in December 2002. The finding of professional misconduct will not have an impact on his career, but it does have a negative impact on his otherwise unblemished and impressive reputation.

72. At the time of the misconduct Claudio Russo was the most junior partner on the audit team. He was subsequently transferred to the Halifax office of Deloitte where, according to the evidence of Michael Owens, he made a significant contribution and was regarded as a leader in that office. Nevertheless, the finding of professional misconduct is something he will live with for the rest of his career.

73. As the panel indicated in the overview, similar consequences – a damaged reputation and loss of opportunities – follow for other members found guilty of professional misconduct.

The applicable principles for imposing sanction

74. The panel agreed with the parties that the principle of sanction which should have priority in this case is general deterrence. Those members engaged in the audit of public companies must be sent a clear and unequivocal message that they must perform such services in accordance with the standards of the profession and that failure to do so will not be tolerated. The public, including and in particularly those who invest in or manage public companies, as well as securities regulators, should be assured that the profession will not tolerate the failure to adhere to the standards of the profession when auditing public companies.

75. As stated in paragraph 42 above, the letter of November 28, 2003, and the members' failure to correct its inaccuracies in a timely way, is an aggravating factor. There is need to specifically deter the members from repeating such conduct in the future. This is particularly true with respect to Douglas Barrington, who was the managing partner of the firm's National Office at the time and, of the members charged, he alone reviewed the letter before it was sent.

76. There is some evidence that Douglas Barrington does not fully accept that while he was described as an Advisory Partner, he became a decision maker and is accountable for the conclusions he reached. He does still have a licence to practice public accounting. Accordingly, while general deterrence is clearly the principle which should have priority, the order made by the panel should also specifically

deter Douglas Barrington from failing to exercise appropriate professional scepticism when required.

77. As Anthony Power is fully retired and does not have a licence to practice public accounting, the principles of rehabilitation and specific deterrence are not applicable to him.

78. The panel was satisfied that Claudio Russo now understands the errors which he made and that his career within the firm subsequent to the Livent audit demonstrated that he did not need to be further rehabilitated or specifically deterred.

Should the terms of all three orders by the same?

79. As two charges were proven against Anthony Power and Claudio Russo and only one charge was proven against Douglas Barrington the question did arise as to whether the terms of the order made against all three members should be the same.

80. The panel concluded that that each of the partners was responsible for the misconduct and that there was no basis for concluding that one partner was less culpable than the others. Accordingly, the principle of general deterrence suggests that the orders for the three members should be the same.

81. The need for specific deterrence is greater in the case of Douglas Barrington than Anthony Power or Claudio Russo. Accordingly, the principle of specific deterrence suggests that the sanction imposed on Douglas Barrington could be greater than the sanction imposed on his partners.

The relevant terms of the order

82. The cases establish that a fine, a suspension and publication of the notice are the terms of the order sought by the Professional Conduct Committee which serve the purpose of general deterrence. These, and a reprimand, also serve the purpose of specific deterrence.

83. Publication of notice of the decision and order, as the cases make clear, is ordered except in rare and unusual cases. There was no suggestion, and no basis for a suggestion, that this is such a rare and unusual case. The question of the extent of the publication is a matter the panel addresses below.

84. The other two suggested terms of the order, which would address general and specific deterrence, are the fine and suspension.

85. In the two most comparable cases, Owen Smith and Michael Howe, a substantial fine and a suspension were imposed as both a general and specific deterrent. Owen Smith failed to perform his professional services with due care (Rule 202) and had expressed an opinion on the financial statements while failing to comply in all material respects with the generally accepted auditing standards of the procession (Rule 206.2). The member's failures were in connection with the audit of

National Business Systems Inc., a public company. The fine imposed in this 1991 case was $20,000 and the member was suspended for one year.

86. In Howe, a 1996 case, the member was found guilty of one charge under Rule 206 of failing to adhere to the standards of the profession with respect to the audit of Standard Trust Co. Ltd., Standard Trust Company and Standard Loan Company, deposit taking institutions. The member had lapses in judgment such as accepting without sufficient evidence the representations of management, failing to obtain adequate audit evidence and failing to adequately assess audit evidence. The panel of the Discipline Committee concluded that the size and complexity of the audit required sophisticated and substantial professional services which would be reflected in the audit fee. The panel did not want the fine to be seen as a licence fee. The fine suggested by the Professional Conduct Committee was $30,000. The fine imposed was $50,000 and the member was suspended for six months.

87. Counsel for the members Anthony Power and Claudio Russo suggested the terms of the order in this case should not be more severe than the terms of the orders in Messina, Fiorino and Craib. The facts and circumstances of the cases are very different. One of the significant differences is that the fine imposed on those members, given their circumstances, was a significant financial burden. In addition, Maria Messina was suspended for two years, Tonino Ferrino was suspended for two years, and Christopher Craig was suspended for six months.

Suspension

88. A suspension would fall within the appropriate range of sanction for the misconduct in this case. However, the panel concluded, as counsel for Anthony Power and Claudio Russo submitted, that in this case “the principle of general deterrence could be better served by imposing a significant fine”.

89. The quote referred to above is from the reasons of the Discipline Committee in Grunberg. The similarities in the two cases include: there was no suggestion of moral turpitude, dishonesty or lack of integrity; the members were knowledgeable, experienced practioners; and the charges arose with respect to one audit and there was no suggestion of a pattern of failing to comply with professional standards or carry out responsibilities with due care.

90. As in Grunberg, the panel concluded that the misconduct itself does not require a suspension. Also, in this case the circumstances of the members persuaded the panel that a significant fine rather than a lesser fine and suspension would have the impact which the panel thinks is necessary in the interest of general deterrence.

91. As Anthony Power is fully retired it appears that a suspension would have no impact on him, other than to further damage his reputation.

92. Douglas Barrington retired in May 2007. A suspension would have no impact on his career with Deloitte. While it can be argued that a suspension would have an impact on his reputation, the evidence the panel heard is such that the finding of guilt, in and of itself, has had an impact on his reputation and prospects for

appointment to public boards. Again, the panel concluded that a suspension of Douglas Barrington, a retired partner, would not have the kind of impact which the sanction in this case requires.

93. The suspension of a sole practioner or a partner of a small firm will necessarily have a significant impact on both the member disciplined and the firm. The suspension of Claudio Russo, a partner of a national firm, will not necessarily have such an impact, either on the firm which has other partners who could fill the suspended partner's role, or on the suspended partner who could be given other duties within the firm.

94. The panel was persuaded by the evidence it heard that Claudio Russo had learned from his mistakes. He is now seen within the firm as a seasoned leader, someone to go to when difficult circumstances arise. It seemed pointless to impose a suspension nine years after the relevant events..

Fine

95. As the panel concluded that there would be no suspension, general deterrence required the imposition of a significant fine for each member. The size of the fines must be such that national firms who audit public companies and the partners of such firms, will know there will be a significant monetary sanction if they fail to adhere to the standards of the profession.

96. The Professional Conduct Committee submitted that it was appropriate that the fines bear some relation to the audit fee which it said was $500,000. In fact, the audit fee was $95,000. Claudio Russo testified that the docketed time approached $500,000 and that Deloitte was apparently in negotiations to have the anticipated audit fee of $95,000 increased when Livent went into receivership.

97. In the case of Michael Howe, the Discipline Committee made reference to the audit fee in the context of making it clear that the fine should not be seen to be a licence fee. While the panel rejects the submission that the fine should be linked to the audit fee in this case, the panel does think that the fine must be of an amount that it is not mistaken as a licence fee given the remunerative nature of the audit of public companies.

98. The panel concluded that the fines must be substantially greater that the $50,000 fine ordered in Howe as no suspension is to be imposed and the purchasing power of the dollar is substantially less in 2007 than it was in 1996.

99. It is relevant to the panel that there was no suggestion that the members did not have the ability to pay the requested fines. The material filed by the Professional Conduct Committee and referred to in their submissions quoted a senior member of Deloitte to the effect that the firm stood behind the members and was paying the legal costs associated with the discipline proceedings. Although given the opportunity to do so the members did not take issue with the submission that Deloitte would pay the fines on their behalf.

100. The panel determined that the fines for each member should be $100,000.

Newspaper Publication

101. The Professional Conduct Committee requested that a notice, describing the misconduct be published in *The Globe and Mail*, *The National Post* and the *Toronto Star*.

102. Counsel for Anthony Power and Claudio Russo submitted that the Decision and the Reasons for the Decision of February 11, 2007, had already generated substantial publicity, and that a notice placed in the newspapers, which he did not argue against, was not necessary. Counsel for Douglas Barrington submitted that publication in a newspaper was unnecessary and that publication in *CheckMark* magazine would be sufficient.

103. The panel did not share the view of counsel for the members that there had already been significant widespread publicity with respect to the decision. The Decision was posted on the Institutes website. There has been some notice taken of the Decision and there was an article in the *Canadian Business Magazine* and reference was also made to the Decision in a story in *The National Post*. The panel accepts that the larger firms, and in particular those who audit public companies, have most probably made themselves aware of the Decision. However, the panel does not agree that the profession as a whole, the general business community or the investing public is well aware of the Decision.

104. The reasons of past decisions of the Discipline Committee and the Appeal Committee make it clear that publication of a notice in a newspaper is thought to serve the purposes of both general and specific deterrence. The decisions also make it clear that publication is intended to help make the discipline process of the self-governing chartered accountancy profession more transparent, as well as to demonstrate to the public that the Institute takes its responsibilities to govern the profession seriously.

105. A majority of the panel concluded that publication in the three requested newspapers was sufficient and would serve the purposes of both general and specific deterrence. The public representative, however, did not agree that the three specified newspapers represented a suitable level of outreach appropriate in breadth or scope for 2007 and, in her opinion, may fall well short in achieving the general deterrence sought by the panel in view of the profile of the client, the history of this case and the advances in modern day communications.

106. The public representative was of the view that in this case, there is another reason for informing the public of the decision and order made with respect to three partners of a national accounting firm which audited a public company. Generally the Institute has an interest in informing investors in publicly traded companies of decisions regarding matters of discipline involving the chartered accountants associated with those companies. Specifically, those members of the public who invested in Livent have an interest in knowing, and the Institute has an interest in giving them notice, of the finding of professional misconduct and the sanctions imposed during this hearing. The members involved were partners of a national accounting firm all of whom practised primarily in its Toronto offices. The actions

and decisions of this group of accountants were of broad importance, having impact on all of the investors in Livent wherever they invest and reside, and not restricted only to those living in a particular urban centre.

107. The public representative recognized that *The Globe and Mail* and *The National Post* are distributed nationally, and that the *Toronto Star* is distributed outside the Greater Toronto Area, however, she also recognized they are not the exclusive source of news and information, including business news and information for many Ontarians or Canadians. Further, she was of the view that many members of the public, including members of the investing public, no longer rely on traditional print media and newspapers for news and business information, but rather, utilize electronic media sources more commonly, if not exclusively.

108. The public representative concluded that the process and all of its interested parties would be better served with a more widely published notice, intended to reach more members of the public and, in particular, the investing public through the utilization of communication tools beyond traditional print media. A more widely available notice would thus be in the public interest, and further serve the interests of specific and general deterrence as well as improving the transparency of the discipline process.

109. The public representative would have ordered that the notice be placed in the daily newspapers published across Canada serving populations greater than 250,000, as well as, the three specified newspapers. The order would also have considered the utilization of both reasonable and available electronic sites through which the notice could be disseminated.

110. The majority shares the view of the public representative that wide publication is desirable for the reasons set out by the public representative. However, the majority does not share the view of the public representative that the three specified newspapers will not provide adequate coverage for the profession, business community and general public.

Courses

111. The Professional Conduct Committee did not ask that the members take specified professional development courses. The panel did not think that the failure of either Douglas Barrington or Anthony Power to adhere to the standards of the profession was a result of a lack of understanding of the standards. Accordingly there was no reason why they should be required to take professional development courses. This is particularly so in light of the fact that they are retired.

112. The evidence suggested that Claudio Russo may not have fully and properly understood the standards of the profession in 1998. However, the panel was persuaded by the evidence of Michael Owens that Claudio Russo is not now in need of professional development courses.

Reprimand

113. The panel concluded that a reprimand was required to stress to the members that their conduct was unacceptable.

Summary of the terms of the orders re sanction

114. Orders include a term, or terms, so that there will be consequences if a member fails to comply with the requirements imposed by the order.

115. The members did not request time to pay a fine if ordered to do so. The panel determined it would be appropriate to require the members to pay the fine within 60 days.

116. If a member has a licence to practise public accounting, the bylaws provide that the suspension or expulsion of the member will also result in the suspension or termination of the licence to practise public accounting with notice to be given to the public at the member's expense. Douglas Barrington and Claudio Russo are licensed to practise public accounting.

117. For the reasons set out above, the panel determined that when the formal orders of the Discipline Committee are set out, the orders should include and incorporate the following terms:

With respect to Douglas Barrington

1. A reprimand in writing from the Chair of the hearing.

2. A fine in the amount of $100,000, to be remitted to the Institute within 60 days of the order becoming final.

3. Publication of a notice disclosing the members name in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; the costs of such publication to be borne by him.

4. Failure to comply with the terms of this order will result in suspension of his Public Accounting Licence and membership in the Institute; and if such suspensions continue for a period of 60 days, his Public Accounting Licence will be revoked and he will be expelled from membership in the Institute.

5. In the event his Public Accounting Licence is suspended or revoked, and he is suspended or expelled from membership in the Institute, notice of such suspension, revocation or expulsion is to be published in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; the costs of such publication to be borne by him.

With respect to Anthony Power

1. A reprimand in writing from the Chair of the hearing.

2. A fine in the amount of $100,000, to be remitted to the Institute within 60 days of the order becoming final.

3. Publication of a notice disclosing the members name in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; the costs of such publication to be borne by him.

4. Failure to comply with the terms of this order will result in suspension from membership in the Institute, and if such suspension continues for a period of 60 days, he will be expelled from membership in the Institute.

5. In the event he is suspended or expelled from membership in the Institute, notice of such suspension or expulsion is to be published in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; and the costs of such publication is to be borne by him.

With respect to Claudio Russo

1. A reprimand in writing from the Chair of the hearing.

2. A fine in the amount of $100,000, to be remitted to the Institute within 60 days of the order becoming final.

3. Publication of a notice of the decision and order disclosing his name in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; the costs of such publication to be borne by him.

4. Failure to comply with the terms of this order will result in suspension of his Public Accounting Licence and membership in the Institute; and if such suspensions continue for a period of 60 days, his Public Accounting Licence will be revoked and he will be expelled from membership in the Institute.

5. In the event his Public Accounting Licence is suspended or revoked, and he is suspended or expelled from membership in the Institute, notice of such suspension, revocation or expulsion is to be published in *CheckMark*, *the Globe and Mail*, the *National Post* and the *Toronto Star*; the costs of such publication to be borne by him.

COSTS

118. The Professional Conduct Committee and the members had significantly different views about the quantum of costs which should be fixed in this case. The panel hereinafter sets out the facts and factors which it found relevant with respect to the issue of costs.

Jurisdiction to award costs

119. The authority to fix costs is set out in the *Chartered Accountant Act, 1956* as amended and in the bylaws. Section 8 (1) (g) (ii) of the *CA Act,* and bylaw 503(3) (c) enacted thereunder, provide that the Discipline Committee may fix the amount which a member shall pay for the costs of the investigation and hearing when the member is found guilty of a charge.

120. John Lorn McDougall noted that the authority to award costs is apparently an issue raised before the Appeal Committee of the Institute at this time in another case. He noted this for the record so that he that he would not be precluded from arguing the question of jurisdiction at a subsequent time. At this hearing there was no issue about the jurisdiction of the panel to award costs.

121. On February 21, 2003, the Council of the Institute issued a Policy Statement regarding the costs of the discipline process. This document was included in the compendium which the members Claudio Russo and Anthony Power filed (Exhibit 203, Tab 7). The policy statement sets out a number of principles to which the parties referred and other principles which are relevant to our decision. These include:

- The order that a member, student or firm pay costs is not a sanction but an indemnification to a greater or lesser extent for the costs of the investigation and hearing which it is recognized will impose a financial burden on the member, student or firm;
- In seeking costs the Professional Conduct Committee should be governed by the pronouncement of the courts which have generally held that the recovery of costs by a regulatory body is ordinarily permitted only on a partial indemnity basis;
- The request for costs made by the Professional Conduct Committee, with respect to its counsel should be put forward on the basis of the partial indemnity tariff set out in the *Rules of Civil Procedure*;
- An award of costs for an investigation and hearing, even if awarded on a substantial indemnity basis will not cover all of the costs involved;
- The Professional Conduct Committee should provide sufficient details of the costs requested that the Panel is able to determine whether such costs are reasonable and appropriate;

- The costs for the court reporter should be based on a tariff; and
- The costs of the counsel to the committee should be based on the tariff approach set out in the *Rules of Civil Procedure*.

Should an order for costs be made?

122. The panel understands that it is required to make the decision with respect to costs, whether costs should be ordered and, if so, in what amount. The panel concluded that this was a case in which the members, whose conduct was responsible for the investigation and hearing, should indemnify the Institute for part of the costs of the investigation and hearing. This is not a case where it is appropriate that the membership of the Institute as a whole bear 100%, or any proportion approaching 100%, of the costs of the investigation and hearing.

123. The provisions of the *Chartered Accountants Act* (Ontario) and the bylaws do not appear to limit costs to a partial indemnity. The Policy Statement of the Council says that the Discipline Committee has to determine whether the costs are to be awarded on a substantial indemnity or a partial indemnity basis. In this case the Professional Conduct Committee asks for costs on a partial indemnity basis.

124. Since the Policy Statement of Council was adopted in February 2003, the cost regime of the Superior Court of Ontario has changed to a degree, and the *Rules of Civil Procedure* do not now provide for a half day or a full day tariff. The tariff does set out the maximum hourly rates on a partial indemnity basis.

125. In *Boucher v. Public Accountants Council (Ontario) (2004)*, [2004] O.J. No. 2634; 71 O.R. (3d) 291 at paragraph 27, the Court of Appeal for Ontario said:

> Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

126. The panel reviewed the costs put forward by the Professional Conduct Committee, considered the specific challenges the members raised with respect to the components of the costs (chiefly the counsel fees and disbursements for the investigators) and then considered what is fair and reasonable in all of the circumstances, including the reasonable expectation of the parties, the complexity of the case and the significance of the issues. The panel understands this to be consistent with the process followed by Justice Nordheimer in *Hague v Liberty Mutual Insurance Company*, [2004] O.J. 3057; see particularly paragraphs 12-21 of the reasons.

Costs put forward by the Professional Conduct Committee

127. The Professional Conduct Committee set out in reasonable detail four components of the cost order sought. The first was fees for counsel in the amount of $656,728. The second was the fees and disbursements of the investigators in the

amount of $861,118. The third was a fee for the court reporters of $14,124. The fourth was the disbursement cost for transcripts of the hearing which totalled $12,162. These costs are inclusive of GST. These four components total $1,544,132.

128. The cost documentation of the Professional Conduct Committee, (Exhibit 201) sets out the total number of hours spent by its lawyers, namely 2,138 hours. The hourly rate proposed, with the exception of 2.9 hours, is at or below the partial indemnity rate set in the tariff. The cost documentation lists the invoice of the investigators which indicates the hours charged and the hourly rate.

129. It was the position of the Professional Conduct Committee that the total of $1,544,132 did not include all of the costs which had to be borne on account of the investigation and prosecution of this case. Nevertheless, the Professional Conduct Committee reduced these costs which had been computed and discounted by using a partial indemnity basis for counsel only, by a further 25% (rounded down) to the amount of $1,140,000. This reduction was made to take into account such factors as the success the members did have at the hearing. It was the position of the Professional Conduct Committee that in view of all the circumstances the amount of $1,140,000 was fair and reasonable.

130. Counsel for the Professional Conduct Committee, both in written and oral submissions, made the point that the costs set out in detail by the Professional Conduct Committee did not include the costs of counsel to the panel which should also be a component of the total costs awarded.

The position of the members

131. The members asserted that the costs requested were punitive in nature and that they did not adequately reflect the principle enunciated by the Council that costs should be a partial indemnity. They raised specific objections with respect to different elements of the costs put forward.

132. With respect to counsel fees the members took the position that the costs claimed for Paul Farley did not represent actual costs incurred by the Professional Conduct Committee as he is a salaried employee of the ICAO. The members submitted that they should not bear the costs relating to the unsuccessful motions brought by the Professional Conduct Committee or costs related to those motions on which they were partly successful. It was also their position that the costs relating to the particulars of Charge 2 which were withdrawn and the particulars of Charges 1 and 2 which were not proven were inappropriate. Finally, the members submitted that the costs claimed for the lawyer, Karen Mitchell, who did not appear at the hearing, should not be borne by the members.

133. With respect to the investigators' costs, the members submitted that those costs should be reduced as the investigation was misdirected and did not provide significant assistance to the panel. They also submitted that it was not appropriate that the members bear the costs for the investigators Stephen Held or James King, neither of whom testified at the hearing, or the charges of the investigators for work

relating to particulars of charges which were not proven, or opinions which were expressly rejected by the panel.

Fair and reasonable costs

134. In *Hague,* Justice Nordheimer examined the various components of the bill of costs put forward to see if they fell within the "realm of sensibleness". If they did seem sensible, he concluded that any adjustment required should be made when considering the overall question of what is fair and reasonable.

135. The panel believes that the components of costs put forward by the Professional Conduct Committee are sensible and reasonable. As the panel understood the law in Ontario with respect to a salaried employee, both the *Solicitors Act* and the decided cases establish that the costs put forward for salaried employees should be based on the tariff and the hours spent. The panel had no difficulty concluding that there were times when it was cost effective, reasonable and necessary for legal work to be done by Brian Bellmore's associate, Karen Mitchell. Accordingly, the panel found the objection to the fees of $48,919 for Karen Mitchell unfounded.

136. The panel recognized that the factors to be taken into consideration according to Rule 57.01 of the *Rules of Civil Procedure,* when considering the context of the discipline process, include the degree of success of the parties. The panel is aware that a number of the particulars of the charges were not proven. It is also mindful of the fact that the Decision does include criticism of the investigators and the approach they took (Decision, paragraph 64 to 69).

137. The costs of the investigation were substantial because the investigators had to spend a great deal of time on the investigation. The panel concluded that the length of the investigation was primarily the result of the complexity of the issues compounded by the less than transparent way the members (or their firm) dealt with the investigators and the Professional Conduct Committee. The members were not forthcoming with respect to the relevant facts including, and in particular, the relevant events of April, 1998 and Peter Chant's dissent. It is the members who should bear the costs that resulted from their conduct in this regard.

138. The costs associated with the hearing are substantial because the hearing was lengthy and complex. The evidence of the witness called by the Professional Conduct Committee was heard in nine days. The evidence called by the members was heard over twenty eight days. The hearing was prolonged as a result of the letter of November 28, 2003, and the misinformation set out therein. As the responsibility for the letter rests with the members, the responsibility for the prolonged hearing resulting from that letter also rests with the members.

139. The members are entitled to vigorously defend themselves without fear that on that account they would automatically have significantly higher costs awarded against them if found guilty. Members are not entitled to mislead the Professional Conduct Committee as part of a vigorous defence. Moreover, members are not entitled to be less than forthcoming with respect to the relevant facts and then complain about the resulting length and costs of the investigation and hearing.

140. With respect to the reasonableness of the requested costs, it is noteworthy that the members did not put forward their own legal and expert fees as evidence of the unreasonableness of the requested costs. The panel thought this was relevant both when considering the various components of the costs requested by the Professional Conduct Committee and the overall determination which must be made in terms of what is fair and reasonable.

141. The panel concluded that a reduction of 25% of the costs outlined more than offset any appropriate reduction for the degree of success which the members had or the time of the investigators which was not well spent. The panel did not accept the submission of Douglas Barrington that the reduction of 25% of the outlined costs was made because one of the four members charged had been found not guilty.

142. With respect to costs, as with the fine, it is relevant that there was no suggestion that the members did not have the ability to pay. As with respect to the fine, the evidence suggested that if the panel made an order with respect to costs, that the firm Deloitte would pay such costs on behalf of the members.

Counsel to the panel

143. The panel agreed with the submissions made by the Professional Conduct Committee that the costs of counsel to the panel should be a component of the total costs awarded.

144. As the daily counsel fee is no longer included in the tariff, the panel first considered what daily fee would be reasonable for its counsel. The panel concluded that a fee based on the partial indemnity rate of $350 per hour for a seven hour day for each of the 44 days of the hearing would be appropriate. While some of the days of this hearing were relatively short, most involved at least seven hours, some involved more and in addition there was a substantial amount of preparation time required not only for the motions which were argued, but also in reviewing the voluminous exhibits which were filed as well as the daily transcripts. The panel thought that in addition to the sum of $107,800, the amount of $3,200 should be added for the three relatively shorter days of the hearing in July, 2007. The panel concluded that the amount of $111,000 would be a relatively modest partial indemnification for the costs of counsel to the panel. This sum, added to $1,140,000, results in total cost of $1,251,000.

Apportionment of costs

145. The panel concluded that the costs should be apportioned between the three members equally. As between Anthony Power and Claudio Russo who both faced the same charges and were found guilty of the same charges, the panel did not see any realistic basis for making a distinction between the two with respect to costs.

146. The panel recognized that Douglas Barrington faced only one charge and was found guilty of it in that he was jointly responsible for only two of the particulars which were proven. However, the issues with respect to those particulars were the most important issues at the hearing and took most of the time of the hearing. In addition, as the panel concluded the three members were equally culpable with

respect to the misconduct, it followed that each were equally responsible for the costs of the investigation and hearing.

147. For these reasons, one of the terms of the order made with respect to each of the three members shall provide that each member pay the amount of $417,000 for costs.

Time within which to pay the costs

148. As with respect to the fine, the members did not request time to pay costs if ordered to do so, and as there was no suggestion that there was an inability to pay, the panel concluded that the costs should be paid within 60 days of the order becoming final.

DATED AT TORONTO THIS 27 DAY OF SEPTEMBER, 2007
BY ORDER OF THE DISCIPLINE COMMITTEE

Louise. Hayes

B.L. HAYES, CA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

LOUISE HAYES, CA, DEPUTY CHAIR
JOAN CULLEMORE, FCA
MARVIN MARTENFELD, FCA
HARVEY TARADAY, CA
BARBARA RAMSAY, PUBLIC REPRESENTATIVE