CITATION: Barrington v. The Institute of Chartered Accountants of Ontario, 2011 ONCA 409
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DOCKET: C52711 and C52683

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., and Lang and Karakatsanis JJ.A.

BETWEEN

J. Douglas Barrington, F.C.A.

Applicant/Respondent in Appeal (C52683)

and

The Institute of Chartered Accountants of Ontario

Respondent/Appellant (C52683)

AND BETWEEN

Anthony Power, F.C.A. and Claudio Russo, C.A.

Applicants/Respondents in Appeal (C52683)

and

The Institute of Chartered Accountants of Ontario

Respondent/Appellant (C52683)

AND BETWEEN

Anthony Power, F.C.A. and Claudio Russo, C.A.

Applicants/Appellants (C52711)

and

The Institute of Chartered Accountants of Ontario

Respondent/Respondent in Appeal (C52711)

Brian Bellmore and Paul Farley, for the Institute of Chartered Accountants of Ontario

Peter H. Griffin and Kristian Borg-Olivier, for J. Douglas Barrington

J.L. McDougall, Q.C, Brian R. Leonard, and Jeremy Millard, for Anthony Power and Claudio Russo

Heard: April 19 and 20, 2011

On appeal from the order of the Divisional Court (J. Wilson, Lederman and Swinton JJ.), dated March 21, 2010, with reasons reported at (2010), 260 O.A.C. 199.

Karakatsanis J.A.:

[1] These appeals arise from professional disciplinary proceedings brought against Barrington, Power and Russo (the members) by the Institute of Chartered Accountants of Ontario (ICAO). The charges brought against the three members by the ICAO's Professional Conduct Committee (PPC) relate to their roles with regard to Livent Inc.'s 1997 audited financial statements.

[2] After a 37-day disciplinary hearing, the ICAO's Discipline Committee (DC) concluded that all three members were guilty of professional misconduct for two instances of failing to ensure that the 1997 financial statements were in accordance with Generally Accepted Accounting Standards (GAAP). Power and Russo were also

convicted of a third breach of GAAP and five instances of failing to perform an audit in accordance with Generally Accepted Auditing Standards (GAAS).

[3] The DC reprimanded the three members, required them to post notices of its decision, fined each of them $100,000, and ordered them to pay costs in the amount of $1,251,000, apportioned equally.

[4] The members appealed to the ICAO's Appeal Committee (AC), which affirmed the DC's decision.

[5] The members then brought applications for judicial review to quash the DC's and the AC's decisions. They were partly successful. The Divisional Court quashed four of the eight convictions against Power and Russo, and all of the convictions against Barrington. The Divisional Court also quashed the DC's costs order and directed that the DC reconsider the penalty imposed on Power and Russo.

[6] Power and Russo now appeal, with leave, from the Divisional Court's decision, seeking to have the four remaining convictions against them quashed. The ICAO, in turn, appeals, with leave, from the Divisional Court's decision, seeking to have the DC's convictions and costs award reinstated.

[7] The main issue in these appeals is one of fairness: whether the members had adequate notice in relation to the charges and the case they had to defend; and whether the DC provided adequate reasons for rejecting the defence expert evidence and finding

misconduct. With respect to costs, the issue raised is whether subsequent legislative amendments have retroactive effect to validate the costs award.

[8] This case is important to the ICAO and the self-regulation of the accounting profession. The panels for both the hearing and the appeal included four chartered accountants. The hearing was the longest in the history of the Institute. More significantly, the issues of audit process and opinion go to the heart of the integrity of our commercial system. The public, shareholders, investors, lenders, and business partners of public companies depend upon the objectivity and professionalism of the auditors of financial statements.

[9] Obviously, this is also an important case for the professional members who have had successful and even distinguished careers. The DC referred to the audit team as "experienced and competent" (para. 209) and also noted evidence of the members' integrity. While the ICAO did not revoke their professional designations, it reprimanded and fined them. They have a right to natural justice and procedural fairness in the defence of their reputations and to know the reasons for any finding of misconduct.

[10] For the reasons that follow, I would allow the ICAO's appeal and I would dismiss Power's and Russo's appeal. The decisions of the DC, including the costs award, should be re-instated.

BACKGROUND

[11] Livent Inc. was a public company that promoted live musical entertainment and musical theatre in Canada and the United States. It was also involved in the construction and management of theatres. At the relevant time, Garth Drabinsky and Myron Gottlieb were Livent's largest shareholders and its two most senior officers.

[12] Deloitte & Touche LLP was Livent's auditor for the fiscal years 1989 to 1997. Power, Russo, and Barrington were senior members of the Deloitte audit team responsible for the 1997 Livent audit. Peter Chant was also a senior member of the team.

[13] In April 1998, Deloitte released an unqualified audit opinion approving the 1997 financial statements of Livent. Later in 1998, under new management, serious financial irregularities were discovered in Livent's books. An internal investigation resulted in the re-statement of Livent's 1996 and 1997 financial statements, and criminal fraud charges were brought against Drabinsky and Gottlieb.

[14] The ICAO, the licensing and governing body of chartered accountants in Ontario, subsequently brought charges of professional misconduct against the four senior Deloitte accountants involved in the 1997 audit: Power, Russo, Barrington, and Chant. They were charged with professional misconduct for allegedly having failed to adhere to accounting and auditing standards.

(a) The Charges

[15] The PPC, the ICAO's investigatory and prosecutory arm, brought two charges, each with multiple particulars, alleging that attaching an unqualified audit opinion to the 1997 financial statements constituted a failure to comply with generally accepted standards of practice of the profession contrary to Rule 206 of the ICAO's *Rules of Professional Conduct.*

[16] The first charge, referred to as the "GAAP charge", alleges multiple failures to comply with generally accepted accounting standards. The second charge, referred to as the "GAAS charge", alleges multiple failures to comply with generally accepted auditing standards.

[17] The charges, which were the basis for the DC's findings of misconduct and which are the subject of these appeals, are set out in Appendix "A" to this decision.

[18] Charges 1(i) and (iii) concern the recognition of income from: (i) the sale of naming rights to AT&T Canada Enterprises Inc. of the Pantages Theatre and a new theatre to be built as part of a new Pantages complex in Toronto; and (iii) from the sale of density rights to Dundee Realty Corporation arising out of an agreement to develop the Pantages complex. The PCC alleged that the recognition of the income was not in accordance with GAAP because "significant acts" remained to be completed under the agreements.

[19] Charges 1(iv) and 2(viii) concern the recognition of the transfer of receivables by Livent to First Treasury Financial Inc. as a sale, rather than as financing, with the result that liabilities in the financial statement were reduced by $3.7 million. The PCC alleged in relation to charge 1(iv) that the recognition of the transaction as a sale was not in accordance with GAAP because First Treasury had recourse against Livent. In relation to charge 2(viii), the PCC alleged that, having decided to treat the transaction as a sale, the auditors should have disclosed in a note to the financial statements the contingency that First Treasury had recourse against Livent.

[20] Finally, a number of the particulars under charge 2 relate to the sufficiency of audit evidence or audit procedures in relation to:

> 2(ii) – the recoverability of pre-production costs;
>
> 2(iii) – the last minute acceptance of management's additional $27.5 million write-down of pre-production costs;
>
> 2(iv) – the finding of cut-off errors (i.e. accounts payable recorded in the wrong period) in the testing of accounts payable;
>
> 2(v) – the finding of unsupported transactions in its sample-based testing of additions to fixed assets.

The PCC alleged in these particulars that Power and Russo did not follow generally accepted auditing standards, failed to obtain sufficient appropriate audit evidence, failed

to ascertain the reliability of management's budgets, failed to re-assess the reliability of management's representations, and failed to re-evaluate audit procedures as required under the circumstances.

(b) The Put

[21] At the heart of the dispute about procedural fairness – the main issue raised on both appeals – is evidence relating to the Put agreement between Livent and Dundee.

[22] The Put was an element of Livent's agreement with Dundee to develop the Pantages complex. It provided Dundee with a limited right to exit its investment by transferring its shares and debentures back to the development corporation that was created by the two parties to carry out the project. Dundee's involvement in the development project would end.

[23] The first controversy relating to the Put flared up in the summer of 1997. Livent wished to recognize the revenue it would receive under the Dundee agreement in the second quarter ending June 30, 1997. The Deloitte audit team advised Livent that it could not do so: as long as the Put was in existence, recognition of the income would not be in accordance with GAAP. Moreover, it was inappropriate to recognize it in the second quarter since the agreement closed in the third quarter. Despite clear instructions from the auditors, Livent management announced its second quarter financial results in an August 1997 press release, and included the revenue from the Dundee density rights transaction, contrary to Deloitte's advice.

[24] Deloitte took the position that the statements were materially misstated and the audit team refused to be associated with the statements and threatened to resign from the audit unless the second quarter statements were corrected.

[25] There were two meetings between Livent's Audit Committee and Deloitte in August 1997 to resolve those issues. Deloitte was represented by Barrington, Chant, and a third Deloitte partner. Barrington testified Gottlieb told him on August 22 that the Put had been removed from the agreement. The removal was confirmed by legal counsel for Livent and Dundee's CEO. The agreement between the parties was amended to indicate that the provision relating to the Put had been intentionally deleted.

[26] Livent issued a press release in September 1997, stating that it would be adjusting its second quarter results so that the Dundee/Livent revenue would be recognized in the third quarter.

[27] The second controversy concerning the Put arose in April 1998, just as the audit of the 1997 financial statements was nearing completion, when it came to light that the Put had been re-established in a side agreement. A Deloitte partner working on the audit of Dundee was provided with a "Put Side Agreement" dated August 15, 1997, signed by Gottlieb and Dundee's CEO. It included a confidentiality clause. Livent had not disclosed this document to Deloitte during its audit.

[28] Deloitte held an emergency internal meeting on April 3, 1998 to address the issue and decide whether its relationship with Livent should continue. Chant testified that he

expressed the view at the meeting that Deloitte should withdraw because it had been lied to three times by Livent management. He left the meeting upset, slamming the door. The remaining members of the audit team agreed that specific criteria were required to satisfy them that the Put Side Agreement had been rescinded by the end of the third quarter of 1997. Relying upon evidence that fell short of its own criteria and that the DC found was insufficient, the audit team concluded that the Put Side Agreement had been cancelled shortly after August 15, 1997, which was the date of the Agreement.

[29] Chant's dissent did not come to light until the DC hearing. Prior to the hearing, the PCC investigators had been advised (without Chant's approval) that all decisions taken by Power, Russo, Barrington, and Chant were on a consensus basis.

[30] Ultimately, the DC acquitted Chant on all charges.

THE ICAO APPEAL (C52683)

[31] The Divisional Court granted the members' applications for judicial review and quashed the findings of misconduct against Barrington, Power, and Russo on charges 1(i) and (iii), on the grounds that the DC breached the rules of natural justice and procedural fairness by finding the members guilty "on a basis that did not form part of the charges and the case disclosed and led against them": para. 123.

[32] In addition, the Divisional Court quashed the findings of misconduct under charges 1(iv) and 2(viii) against Power and Russo on the basis that the DC did not provide adequate reasons for its decision.

[33] The ICAO appeals from the quashing of those convictions.

[34] The issues in this appeal are:

1. whether the members had adequate notice in relation to charges 1(i) and (iii) and the case they had to defend;

2. whether the DC provided adequate reasons for finding misconduct for charges 1(iv) and 2(viii); and

3. whether the legislative amendments subsequent to the Divisional Court's decision have retroactive effect to validate the DC's costs order.

I: CHARGES 1(i) AND (iii) – DID THE DIVISIONAL COURT ERR IN FINDING A DENIAL OF PROCEDURAL FAIRNESS?

[35] The Divisional Court concluded that the members had been found guilty of acts of professional misconduct that had not been alleged in charges 1(i) and (iii): that the DC found that they breached the GAAP standard because of their failure to have sufficient appropriate audit evidence respecting the Put.

[36] The Court also held that the events surrounding the Put were not relevant to charges 1(i) and (iii), as laid and particularized, and that the DC erred in considering that evidence because the members' "actions taken respecting the Put did not form part of those charges": para. 132.

[37] In the Court's view, the "allegation with respect to the treatment of the Put" was a "new allegation that arose during the hearing and because of the DC's own conclusions about what should have been charged": para. 133.

[38] The Divisional Court concluded the Put was not part of the charges, the case disclosed, the case led or even the submissions made, and that the members "were not given notice that their conduct respecting the Put agreement was allegedly a breach of GAAP": para 136.

[39] As a result, the Divisional Court concluded that the members had been denied natural justice and were prejudiced by the DC's focus on the Put. The Divisional Court concluded that the AC, like the DC, "erred in law in ignoring the particulars of the charge and the case disclosed and led. The applicants were denied natural justice by the DC, and the AC failed to recognize this": para. 144.

[40] The ICAO submits that the DC properly considered the evidence regarding the Put, as the evidence was relevant to the issue raised by the members that they had reasonable assurance that the significant act of construction would be completed and therefore that the revenues would be received at a future date.

[41] The members take the position that neither the charges nor the disclosure nor the submissions put them on notice that they would be required to defend themselves in relation to their actions in April 1998 in response to the disclosure of the Put. They note that the PCC chose not to amend the particulars at any stage of the hearing. They contend

that, as a result, they did not know the case they had to meet and were found guilty of offences with which they were not charged. They assert that they never raised reasonable assurance as a defence.

[42] In my view, the Divisional Court mischaracterized the nature of the charge and the decision of the DC and erred for the reasons set out below. In summary:

1. The Put was not a new allegation, a particular or an essential element of charges 1(i) and (iii).

2. The DC did not find the members guilty of breaching GAAP standards by failing to obtain sufficient audit evidence regarding the Put. It found the members guilty of recognizing income even though there was no reasonable assurance that the significant act of construction would be completed.

3. The Put was evidence that was relevant to the charge based upon the DC's interpretation of the *CICA Handbook*[1] and GAAP.

4. The DC was entitled to consider the evidence led by the members despite the fact that no concerns were raised about the Put in the Investigator Report or in the evidence led by the PCC. The DC was entitled to take a different route to liability.

[1] This is the handbook of the Canadian Institute of Chartered Accountants.

5. The members were not surprised or prejudiced by the DC's reliance on the evidence surrounding the Put in finding the members guilty of charges 1(i) and (iii).

[43] In the end, there can be no doubt that the members were aware of the case they had to meet. Although the members' response to the Put had not been challenged in the Investigator Report, the members had not disclosed Chant's reaction to the disclosure of the Put to the investigators. The members led the evidence themselves, no doubt because of Chant's evidence and their own experts' opinion that there could be no recognition of income if the Put existed.

[44] The Put occupied a substantial portion of the evidence in the hearing of these charges. It was the centrepiece of the prosecution's submission that the members failed to exercise professional judgment or professional scepticism in a high risk audit environment and that they were not justified in relying upon management representations and good faith.

[45] I have concluded that there is no reason to disturb the DC's finding, upheld by the AC, that the members were not surprised and not prejudiced by the consideration of this evidence.

Analysis

1. The Put was not a new allegation or particular of the charge for which the members were found guilty.

[46] The Divisional Court described the Put as a particular of the charge or as a new allegation in relation to the charge – "that their conduct respecting the Put agreement was allegedly a breach of GAAP": para. 136. This conclusion appears to rest on the Divisional Court's view that the precise evidentiary route to liability was a particular or essential ingredient of the offence.

[47] However, properly characterized, the matter of the Put was evidence that arose during the course of the hearing and that became relevant to the DC's determination given its interpretation of the GAAP standards, and in particular the *CICA Handbook*. It was the basis for a finding of fact that ultimately supported the finding of misconduct. The essential elements of the offences charged in 1(i) and (iii) remained the same.

[48] As noted above, charge 1(i) relates to Livent's sale to AT&T of the naming rights to the Pantages Theatre and a new theatre to be built in Toronto. The fee for the rights was payable over 12 annual instalments, the first falling due in November 1997. Charge 1(iii) relates to Livent's sale to Dundee of the density rights over the existing Pantages Theatre.

[49] The particulars in charges 1(i) and (iii) allege that recognition of $9.2 million as revenue from the AT&T naming rights transaction and $5.6 million as revenue from the

Dundee density rights transaction did not comply with the GAAP principle set out in s. 3400.07 of the *CICA Handbook*, because all significant acts under the agreements had not been completed. The disclosure from the PCC, which consisted of the Investigator Report and documents referred to in the Report, made clear that the significant acts in issue included construction of the new theatre and complex.

[50] Section 3400 of the *CICA Handbook* provides:

> ...
>
> .06 Revenue from sales and service transactions should be recognized when the requirements as to performance set out in paragraphs 3400.07 and .08 are satisfied, provided that at the time of performance ultimate collection is reasonably assured.
>
> .07 In a transaction involving the sale of goods, *performance should be regarded as having been achieved when the following conditions have been fulfilled:*
>
> > *(a) the seller of the goods has transferred to the buyer the significant risks and rewards of ownership, in that all significant acts have been completed* and the seller retains no continuing managerial involvement in, or effective control of, the goods transferred to a degree usually associated with ownership; and
> >
> > (b) reasonable assurance exists regarding the measurement of the consideration that will be derived from the sale of goods, and the extent to which goods may be returned. [Emphasis added.]

[51] The essential elements of charges 1(i) and (iii) were:

1. the member was responsible for the unqualified audit opinion;

2. the audit opinion was released;

3. the revenue was included in the financial statements; and

4. all significant acts necessary to transfer the significant risks and rewards of ownership had not been completed.

[52] The Put was not a necessary element of the charges laid and particularized by the PCC as prosecutor. Nor was the theory of the prosecution about the evidentiary basis for liability an essential element of the charges.

2. The DC did not find that the Put was a breach of GAAP.

[53] The Divisional Court erred in its characterization of the decision of the DC. The DC did not conclude that the members' actions respecting the Put constituted a breach of GAAP standards. Indeed, it is common ground that the failure to obtain sufficient audit evidence regarding the Put could not itself be an accounting error or a breach of GAAP standards. The DC found the members recognized income before the probable completion of all significant acts under the agreements, which was a failure to comply

with GAAP as charged. A review of the position of the parties and the DC's decision makes this clear.

a. The position of the parties

[54] In the disclosure and in the evidence led, the PCC's position was that the recognition of revenue for naming rights under charge 1(i) did not comply with GAAP since all significant acts under the agreement had not been completed. Similarly, it maintained the position that the recognition of revenue from the sale of density rights under charge 1(iii) did not comply with GAAP since all significant acts under that agreement had not been completed. The PCC's position was that the construction of the theatre or the buildings was a 'significant act' that had not been completed.

[55] The theory of the PCC did not change throughout the hearing. In its final submissions, the PCC continued to assert its position that revenue ought not to have been recognized in the absence of construction.

[56] The members' primary position was that construction of the buildings was not a significant act that needed to be completed in order to recognize the income. However, as the Divisional Court noted, the members and their experts also put forward an alternative argument that GAAP compliance could be met where there was probability or reasonable assurance that significant acts would be completed: para. 126.

[57] The defence called four audit experts on their behalf: Frank Kelly, David Yule, Keith Vance, and J.R. Hanna. Their expert evidence was that there was no requirement for Livent to defer revenue recognition under GAAP pending construction of the second Pantages Theatre because the "significant risks and rewards of ownership" of the naming rights and the excess density rights could be transferred without reference to the state of construction.

[58] For instance, with respect to charge 1(iii), Keith Vance noted:

> The performance criteria, which include the transfer of the significant risks and rewards of ownership, were satisfied since Livent had clear title to the asset and transferred title to Dundee. Whether or not the future development occurred would not affect the transfer of title to the assets transferred. The only factor that would have impacted on this criterion was the "put option". Since there was evidence that this was rescinded, there were no further obstacles to meeting these criteria.

[59] Thus, it was clear that existence of the Put would have precluded the recognition of the revenue from the sale of density rights, even if the DC ultimately accepted that construction was not a necessary act to be completed. With regard to charge 1(iii), as long as the Put was in effect, it could not be said that the ownership rights had been transferred.

[60] At least three of the defence experts examined the likelihood that the project would be completed and suggested that it would be sufficient if construction was

'reasonably assured' or that the risk that the buildings would not be constructed was 'very low' or 'remote'.

[61] In its analysis of charge 1(i) with respect to the naming rights transaction, the Vance report noted that building approval had been obtained and there was a contract with Dundee to develop the project. Vance concluded: "Therefore, given the status of this project, as at December 31, 1997 it was *reasonably assured* that the project would be completed, consistent with the going concern basis used in preparing the financial statements" (emphasis added).

[62] The Yule report noted the prosecution position on charge 1(i) and stated:

> In my opinion I prefer to look at the revenue recognition issue in terms of dealing with it as an issue of the remoteness of the occurrence of the contingency and this becomes a judgement based on all the facts available at the time. With $22 million invested in the development of this project, with city approvals in place and with development agreements in place, all combined with an optimistic business outlook, it seems reasonable to me to accept the contingency of not building the project as remote.

[63] With respect to charge 1(iii), Yule noted his own reading of the Dundee contract was that there was no ability by Dundee to return the density rights and recover its payments.

[64] Similarly, Kelly's opinion was in part: "Given the significant investment by Livent in the Pantages Project and with the development agreement with Dundee in place, it is my opinion that the risk the project would not be completed was very low."

[65] The PCC cross-examined the experts on the issue of probability/reasonable assurance. Chant's lawyer submitted in closing that the tribunal had to consider the "probability of occurrence" when looking at the significant act clause of the *CICA Handbook*.

b. The Nature of the DC's Findings

[66] The DC did not accept the PCC's position that s. 3400.07(a) required that construction had to be completed. Nor did it accept the members' position that construction was not a significant act. Although the members suggest that the DC did not find construction to be a required significant act, it was a necessary implication of the DC's findings that reasonable assurance relating to the construction was required: paras. 273 and 277.

[67] The DC accepted the position of the members' experts and gave the members the benefit of a broader interpretation of CICA s. 3400.07(a). The DC concluded, at para. 267, that the *CICA Handbook* did not preclude recognition of revenue provided there was reasonable assurance that the significant acts would be completed:

> It was the position of the members that the revenue from the naming rights contracts could be recognized when the right to name the building had been sold, provided that there was reasonable assurance that the theatre would be built and open to the public. The members submitted that *CICA Handbook* s. 3400.07 did not preclude the concept of reasonable assurance. The panel agreed with the members and the experts for the members.

[68] However, the DC was not satisfied on the evidence before it that the members could conclude that there was reasonable assurance that the buildings would be completed. The construction of the Pantages complex had not been completed. As long as the Put was in effect, there was no reasonable assurance that it would be constructed. Accordingly, the DC held, at paras. 272-73, that the revenues could not be recognized in the 1997 financial statements under GAAP and that charges 1(i) and (iii) were proven:

> With respect to the recognition of revenue from the sale of the naming rights of the Pantages Theatre complex to AT&T, the panel concluded that as the suspicions about the Put had not been dispelled, it was not appropriate to recognize all the revenue from the AT&T naming rights agreement.
>
> ...
>
> The auditors were not entitled to conclude that there was reasonable assurance that "all significant acts" under the arrangement to build the Pantages Theatre complex would be completed because the suspicions about the likely existence of the Put had not been dispelled. Therefore, it was not appropriate to recognize all of the revenue from the AT&T agreement to name the Pantages Theatre complex.

[69] The members contend that they never raised a defence of "reasonable assurance" and that the DC was confused in para. 267. They suggest that the DC introduced the concept of "reasonable assurance of completion of significant acts" in error, apparently conflating the "significant acts have been completed" language in s. 3400.07(a) with "reasonable assurance exists regarding the measurement of the consideration that will be derived from the sale" language in s. 3400.07(b).

[70] I do not agree. Only the question of completion of significant acts, which is an integral part of s. 3400.07(a), was at issue in charges 1(i) and (iii). While characterizing it as a "defence" may be somewhat confusing, there is no doubt that the issue of probable completion of significant acts was raised directly by the members and their experts.

[71] The members also submit that on the plain language of the decision, the DC found them guilty based upon their conduct and actions in relation to the Put. The DC noted that the members did not have sufficient appropriate audit evidence to dispel their suspicions of the continued existence of the Put: para. 251. It noted that as long as the Put was in effect, it could not be said that effective ownership of the rights had been transferred: para. 281. At para. 329, the DC concluded with respect to the Dundee transaction that:

> [T]he essential nature of the misconduct ... [was] an improper exercise of professional judgment with respect to the reasonable suspicions about the Put and the failure to reconsider their planned auditing procedures.

[72] There is no doubt that once the DC determined that the *CICA Handbook* standard permitted the recognition of revenue if there was a reasonable assurance that the significant acts would be completed, the evidence relating to the existence of the Put played a central role in the DC's finding that no such probability existed. The sufficiency of the audit evidence about the rescission of the Put was evidence that the DC considered in determining whether the charge as particularized had been proven – that the members did not comply with GAAP because significant acts, including construction of the building, remained outstanding.

[73] Thus the Divisional Court erred in characterizing the decision of the DC as a finding that the members' actions regarding the Put constituted a breach of the GAAP standards.

3. The Put was evidence relevant to the charge based upon the DC's interpretation of the *CICA Handbook* and GAAP.

[74] The Divisional Court was of the view that the evidence relating to the Put was not relevant to charges 1(i) and (iii) as laid and particularized.

[75] Had the DC accepted the PCC position that the completion of construction was required, a finding of guilt would automatically have followed in this case and the Put would not have been relevant to that theory of liability.

[76] Indeed, even if the DC had accepted the members' position that construction was not a significant act to be completed in order to transfer the significant risks and rewards of ownership, it is clear from the members' own expert that the existence of the Put would have precluded the recognition of the revenue from the sale of the density rights. As long as the Put was in effect, Dundee could back out of the construction contract and it could not be said that the ownership rights had been transferred. Thus the evidence relating to the existence of the Put was relevant to the members' primary position on the requirements of the *CICA Handbook* standards.

[77] When the DC accepted the members' position and accepted the broader interpretation of the *CICA Handbook* guidelines, the evidence of the Put was relevant to the issue of whether there was reasonable assurance that the buildings would be completed. The circumstances surrounding the disclosure of the Put and the members' response to that disclosure was evidence upon which the DC could consider whether there was a probability that the significant act – construction – would be completed.

[78] Thus, the issue to be determined in charges 1(i) and (iii) was whether there was a failure by the members to ensure the financial statements (in particular, revenue recognition) complied with GAAP, having regard to the audit evidence.

[79] Barrington submitted that he was subject only to the (accounting) GAAP charge but that he had been found guilty, based upon the sufficiency of audit evidence regarding

the Put, for breach of an (auditing) GAAS charge, which was the subject of charge 2. However, I agree with the AC, at para. 111, that the evidence was potentially relevant to both charges and that to some extent the offences were intertwined:

> In conducting an audit sufficient audit evidence must be obtained to satisfy the auditor that the financial statements comply with the accounting standards of the profession. The two facets of the auditing process are intertwined and cannot be separated.

[80] The sufficiency of audit evidence clearly relates to GAAS. While the first charge relates to the members failure to ensure that the financial statement complied with GAAP, the audit evidence was relevant to the conclusions about such compliance. It was relevant to whether the Put was cancelled or whether the members reasonably reached the conclusion that the Put was cancelled. The DC was therefore entitled to consider the evidence about the Put given its interpretation of the GAAP and *CICA Handbook*.

4. The DC was entitled to consider the evidence led by the members. The DC was entitled to take a different route to liability.

[81] The Divisional Court found that no issue was ever raised in the disclosure or the evidence led by the PCC or in its written submissions concerning the treatment of the Put agreement and its significance for charges 1(i) and (iii). The Court appears to conclude, at paras. 135-36, that the members were prejudiced as they would not have known it was part of the case they had to meet because it was not in the Investigator Report or in the evidence led by the PCC: "[T]hey had formulated a defence, obtained expert evidence and presented their case in response to the PCC's framing of the case." The Divisional

Court emphasized that the PCC made no submissions that the members did not have reasonable assurance that significant acts remained to be completed because of the Put: para. 128.

[82] However, these conclusions fail to reflect the broader circumstances in this case. The Investigator Report and the case led by the PCC was premised upon the representation that there was consensus on the part of the audit team and was limited by the non-disclosure of Chant's response to the re-emergence of the Put. While the PCC's submissions with respect to charges 1(i) and (iii) remained that construction was a precondition to the recognition of the revenue, the PCC's submissions dealt at length with the circumstances surrounding the Put. Further, the DC was entitled to rely upon the evidence led by the members themselves, despite the fact that no concerns were raised about the Put in the Investigator Report or in the evidence led by the PCC. The DC was not confined to the evidence of the PCC or to the theory of the prosecution. It was entitled to take a different route to liability.

a. The Disclosure – the PCC's case

[83] There is no question that the April 1998 events surrounding the Put and Chant's reaction to the disclosure of the continued existence of the Put became a central issue in the case as it unfolded.

[84] The Investigator Report stated that the members had sufficient audit evidence to satisfy themselves that the Put had been rescinded. In reply, Allan Wiener, who was one of the investigators who prepared the Report and the PCC's only witness, confirmed the opinions expressed in the Report, although he was not specifically asked about the Put.

[85] However, the DC found that the members had left the investigators with false and misleading information until the hearing and did not advise them of Chant's dissenting opinion that management had repeatedly lied to the auditors and that they should disassociate themselves from the audit: paras. 258-61.

[86] Thus, the PCC did not have all of the relevant evidence necessary to determine whether or not the suspicions with respect to the Put had been properly dispelled: para. 263. The investigation may well have progressed differently had the investigators been aware of Chant's significant concerns about management representations. In these circumstances, they cannot now complain that the disclosure did not raise the issue or challenge their conclusions about the existence of the Put.

[87] In any event, the expert tribunal was entitled to make its own findings about the sufficiency of the audit evidence and the Put.

b. Submissions

[88] In concluding that the DC erred in finding that charges 1(i) and (iii) had been proven and that the PCC never alleged that the members breached the GAAP standard because of their actions respecting the Put, the Divisional Court stated at para. 128:

> The PCC made no submissions that the [members] did not have reasonable assurance that significant acts remained to be completed because of the Put. This was not part of the case disclosed, nor the charges laid, nor even the argument made.

[89] The Divisional Court agreed with the members' submission that counsel for the PCC never suggested that the discovery of the Put in April 1998 had anything to do with charges 1(i) and (iii) or that it was relevant to rebut a "reasonable assurance" defence.

[90] Of course, it was not necessary for the PCC to specifically address the members' evidence that it was sufficient under s. 3700.07(a) of the *CICA Handbook* if there was a reasonable assurance that the significant acts would be completed. The PCC continued to submit that construction itself was required.

[91] Nonetheless, I do not accept the members' submission that they had no notice that the Put was part of charges 1(i) and (iii) even in the final submissions of the PCC.

[92] The DC noted that one fundamental disagreement between the PCC and the members was the extent to which the members were entitled to rely on the representations made by management. The PCC took the position that the members did

not have sufficient appropriate audit evidence to rely on the representations of management in reaching their accounting conclusions. Obviously, Chant's evidence and the events surrounding the Put were key to this issue.

[93] The circumstances regarding the members' reaction to disclosure of the Put was prominent in the PCC's written submissions. The submissions explicitly challenged the professional judgment of the members relating to GAAP in light of the high risk context identified by the auditors themselves, including Chant's concerns about management representations and the April events surrounding the Put. The submissions relating to professional judgment, professional scepticism and the reliance on management's representations and good faith all refer at some length to the April 1998 events surrounding the discovery of the Put Side Agreement.

c. The DC was entitled to base its decision on defence evidence.

[94] The DC was entitled to consider and rely on the evidence led by the members, despite the fact that no concerns were raised about the Put in the Investigator Report or in the evidence led by the PCC.

[95] Having acknowledged that the Put precluded recognition of the revenues and having led evidence that they had reasonable assurance it was cancelled, the members themselves placed the matter of the Put in issue. The PCC sought to undermine their evidence of reasonable assurance in cross-examination.

[96] Finally, the DC was entitled to use its own expertise to assess the evidence and to make findings as to liability on another basis than that proposed by the PCC. As the Supreme Court of Canada noted in *R. v. Pickton*, [2010] 2 S.C.R. 198, a trier of fact is not bound by the prosecution theory of the case but is entitled to follow other routes to liability.

5. There was no surprise or prejudice.

[97] The Divisional Court concluded that the prejudice was obvious because "[w]ith respect to charges 1(i) and (iii), they were not given notice that their conduct respecting the Put agreement was allegedly a breach of GAAP." As noted above, the Court observed that the members "formulated a defence, obtained expert evidence and presented their case in response to the PCC's framing of the case": para. 136.

[98] The members submit that they conducted their cross-examination of Wiener and presented evidence to rebut the charges and the Investigator Report. All the expert auditors called as witnesses at the hearing testified that the auditors had sufficient appropriate audit evidence that the Put had been rescinded.

[99] However, the events surrounding the discovery of the Put Side Agreement were within the knowledge of the members. Furthermore, Chant had put the members on notice by way of letter that he disagreed with the suggestion conveyed to the investigators that there was consensus on the audit team regarding the Put and that he would tell the

truth when testifying. The members would have been keenly aware, well before the commencement of the hearing that they would have to deal with the Chant evidence, the resulting questions about their acceptance of the assurances that the Put had been cancelled and their decision to issue an unqualified audit opinion. The members were not taken unawares by these issues.

[100] Not surprisingly, the members led extensive evidence about the Put Side Agreement and its purported cancellation. As the expert report prepared by Vance stated unequivocally, the revenue from the sale of density rights could not have been recognized if there was a Put. Having led this evidence, they could not have been prejudiced or surprised when they were challenged in cross-examination or when the DC relied on this evidence to decide that there was no reasonable assurance about construction of the project. They cannot now say that if they had known the Put was an issue they would have led more evidence.

[101] The DC specifically found at para. 264:

> The members knew that the sufficiency and appropriateness of the evidence accepted to dispel their suspicions about the Put, and the implications which followed, were issues they would have to face, and did face, at this hearing. They were not prejudiced by any failure of the Professional Conduct Committee to identify this issue as part of the case they had to meet.

[102] The DC noted, at para. 251, that it might have come to the same conclusions as the experts about the sufficiency of the audit evidence regarding the Put if it had not been

aware of Chant's evidence and the resulting evidence led by the members about the April events surrounding the Put. It noted, at para. 227, that the only expert called after that evidence was led was Vance, who had read the transcript but was not present during their testimony. It is obvious that the DC discounted the evidence of experts because the factual foundation for their opinions on this issue had changed. As an expert tribunal, it was entitled to use its expertise to assess the evidence before it: see AC reasons, paras. 128-30.

[103] In conclusion, had the DC accepted the position of the PCC on charges 1(i) and (iii) that actual construction was a significant act that should have been completed, then a finding of guilt would have followed. The members were unable to persuade the DC that construction was not a significant act. However, they were successful in persuading the DC that s. 3400.07(a) of the *CICA Handbook* permitted reliance on the reasonable probability that construction would be completed. The evidence about whether the Put was rescinded therefore became relevant and ultimately persuasive to this issue. The members were not surprised and not prejudiced by the DC's consideration of this evidence on these charges.

II: CHARGES 1(iv) AND 2(viii) – The First Treasury Transaction

[104] The ICAO also appeals from the quashing of the convictions against Power and Russo on charges 1(iv) and 2(viii).

[105] The Divisional Court quashed the convictions against Power and Russo on charges 1(iv) and 2(viii) relating to the First National transactions, on the basis that the DC had failed to explain why the conduct in question constituted such a significant departure from the standards of the profession so as to constitute professional misconduct.

[106] These charges are inter-related, arising out of the same transaction. In 1997, Livent entered into an agreement with First Treasury Financial Inc. to transfer receivables owing from Ford Motor Company arising out of the sale of naming rights to its Chicago and New York theatres. The First Treasury transactions were recorded as sales in 1997. There was no note in the 1997 financial statements disclosing any contingency related to the transaction.

[107] Charge 1(iv) alleged that the transaction did not meet the conditions required under GAAP to qualify as a sale (rather than as financing) because of First Treasury's right to seek recourse from Livent in certain circumstances. Particular 2(viii) alleged that, having decided to treat the transaction as a sale, GAAS required the auditors to disclose in the financial statements the contingency that Livent had continuing obligations under the First Treasury agreement.

[108] Power and Russo had initially determined that it was not appropriate to recognize the transaction as a sale. They subsequently accepted management's view that it was a sale because they considered the recourse provided by Livent to be reasonable in relation

to the losses expected to be incurred on the receivables. They did not include a note disclosing possible recourse to a material amount of money. The defence experts agreed with their position.

[109] In finding the members guilty of charge 1(iv), the DC held that the transfer should not have been treated as a sale under GAAP, and that the resulting $3.7 million reduction of Livent's liabilities in the 1997 audited financial statements was material. In addition, it found that having made the decision to treat the transaction as a sale, GAAS required the auditors to disclose the significant continuing obligations Livent had to First Treasury. As the contingency was not disclosed, the DC found the members guilty of particular (viii) of charge 2.

[110] The Divisional Court quashed Power's and Russo's convictions on these two charges as unreasonable, finding that:

- the DC did not "provide any explanation or line of reasoning as to why Power and Russo's characterization of the First Treasury transaction was an error of judgment amounting to a breach of the standard, given the expert evidence before it": at para. 232

- even if the DC was of the view that there was a breach of the standard, there was no explanation as to why the error in judgment was so significant a departure from the standards of the profession as to constitute professional misconduct: paras. 233, 239

- the DC "appears to have misstated the concept of professional judgment by focussing on the correctness of the conclusion": para. 162

a. Adequacy of reasons

[111] After reviewing the standard of reasonableness in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Divisional Court found the DC's decision to be unreasonable because the tribunal did not provide any explanation or reasoning as to why it rejected Power's and Russo's evidence and that of their experts. The Court clearly viewed the evidence on these particulars, including the evidence of the experts, as establishing that these were matters of professional judgment within the range of acceptable standards: para. 229. The Court noted that both the prosecution expert and Chant testified that the assessment of the losses on the transferred receivables raised a question of professional judgment: paras. 227-28.

[112] Having reviewed the evidence, the Divisional Court disagreed with the DC's findings of fact that the transactions should not have been treated as a sale of receivables given Livent's retention of the foreign exchange risk. It was not entitled to do so. The DC was an expert tribunal dealing with professional standards and its finding was entitled to deference.

[113] The reasons for decision in professional discipline cases must address the major points in issue in the case. A failure to deal with material evidence or a failure to provide

an adequate explanation for rejecting material evidence precludes effective appellate review: *Gray v. Ontario* (2002), 59 O.R. (3d) 364 (C.A.), at paras. 22-24; *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 (C.A.), at paras. 61 and 92.

[114] A tribunal is not required to refer to all the evidence or to answer every submission. In the words of this Court in *Clifford* v. *Ontario Municipal Employee Retirement System* (2009), 98 O.R. (3d) 2010 (C.A.), at para. 29, leave to appeal refused [2009] S.C.C.A. No. 416, the DC was required to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way.

[115] In my view, the Divisional Court erred in finding that the DC's decision was unreasonable because it did not provide adequate reasons for its decision. While very brief on the analysis of the particulars, the reasons of the DC disclose the basis for its decision.

[116] The DC concluded that the transaction should not have been treated as a sale. There was evidence to support that finding. While the DC adverted to the defence evidence, it preferred and accepted the opinion of Wiener and Chant that the transactions should not have been treated as a sale of receivables given Livent's retention of the foreign exchange risk: at paras. 287-288. Chant, the auditing partner with the expertise in standards, had advised Power and Russo that, in his opinion, there was no sale because Livent had retained the foreign exchange risk. The DC referred to "E1C-9 Transfers of

Receivables" and the fact that foreign exchange risk was listed as one of the examples of the significant risk and rewards of ownership that should be transferred before the transfer may be recognized as a sale. The DC also referred to the fact that there was no support in the working papers for the members' change of view on this issue. Further, it is implicit that the DC accepted the PCC's submissions that management wanted to avoid reporting a material $3.7 million dollar liability. The DC gave extensive reasons for finding that the members did not exhibit sufficient professional scepticism. I do not agree with the Divisional Court that professional scepticism played no role in these particulars.

[117] With respect to charge 2(viii), the DC adverted to its findings that "First Treasury had recourse against Livent and that Livent retained the foreign exchange risk": para. 325. The DC had found that First Treasury's recourse against Livent was material. It is obvious that the DC did not accept the members' evidence that the contingency relating to the recourse available to Livent on the transfer to First Treasury was unlikely or remote. The interpretation of professional standards fell within the expertise of the tribunal and its reasons are entitled to deference.

[118] The reasons should be reviewed bearing in mind that this is a statutory tribunal comprised of non lawyers possessing training and expertise in the standards of their profession. The legislature determined that members of the self-governing profession are best qualified to determine whether the professionals fall short of the standards of professional conduct.

b. Whether it amounted to misconduct

[119] The Divisional Court considered that the DC at most made a finding of a mere error in professional judgment and did not examine whether the breach fell outside the range of acceptable conduct or was serious enough to constitute misconduct. At para. 233, the Court stated:

> However, even if the DC was of the view that there was a breach of the standard here, given their acceptance of Wiener and Chant's evidence, it did not explain, in respect of charges 1(iv) and 2(viii), why the error in judgment was so significant as to constitute professional misconduct warranting disciplinary sanction. One may surmise that the DC was concerned about the impact of the error – that is, a failure to report a liability of $3.7 million, which was in excess of one percent of liabilities – but the DC did not expressly state that that was the basis for its finding.

[120] I do not agree that the DC applied an incorrect test or that its decision was unreasonable in finding that Power and Russo committed professional misconduct.

[121] Read as a whole, and in the context of an expert tribunal reviewing technical standards, the reasons provide the basis for its decision and are sufficient for appellate review.

[122] The DC articulated the proper test and the requirement that any departure from the standards of the profession must be so significant that it constitutes professional misconduct: para. 54. Similarly, after making the findings that the particulars were proven, the DC specifically addressed the issue of whether the departures from the

required standards and the failure to comply with GAAP constituted professional misconduct. It found that the breaches by the members were "significant enough, in and of themselves, to constitute professional misconduct": paras. 327-29.

[123] The DC measured both the nature of the departure and its impact. The auditors set materiality at $2 million. The DC expressly found that the effect of the breach of the standard on the 1997 financial statements was to understate Livent's liability by $3.7 million, which exceeded the level of materiality the auditors themselves had set for the audit. By definition, for this expert tribunal, the impact of the breach was obvious and significant.

[124] With regard to charge 2(viii), the facts underlying this particular were undisputed: the transaction had been treated as a sale and the fact of possible recourse for a material amount of money was not disclosed. The DC found the particular had been proven and referred in its reason to its earlier findings with respect to 1(iv) that First Treasury had recourse against Livent.

[125] While the Divisional Court referred to these reasons as "conclusory", the conclusion did not require further elaboration. As experts, the DC understood the implication of failing to comply with GAAP and GAAS in these circumstances. Reading the reasons in their entirety reveals that the panel members turned their minds to the

proper test, set out the issues and key evidence relied upon, applied their expertise and articulated their conclusions.

c. The correctness standard

[126] The DC noted at para. 237:

> The panel heard considerable evidence about the exercise of professional judgment and what it entailed. One fundamentally important exercise of professional judgement at issue in this hearing related to the reasonable suspicions about the Put and the proper procedures, analysis and conclusions reached by the auditors to dispel these suspicions. The proper exercise of professional judgment requires the auditor to reach a correct conclusion. It is not enough for the auditor to have an appropriate process, to identify the issues and to correctly set out what should be done.

[127] In the Divisional Court's view, the DC concluded that there was only one correct conclusion: the suspicions about the Put had not been dispelled. The Divisional Court stated, at para. 162, that the DC "appears to have misstated the concept of professional judgment by focusing on the correctness of the conclusion" in para. 237 of the DC's reasons.

[128] I prefer the AC's interpretation of the DC's reference at para. 140:

> What then is this standard of correctness? The Appeal panellists note that there is an ability among accountants when exercising professional judgment to reach a correct conclusion. That, however, does not mean that only one answer exists. The Discipline Committee's Reasons refers to a correct conclusion, not the correct conclusion. The contrary

> argument about this text submitted by the appellants removes it from its context. [Emphasis added by AC.]

[129] Finally, the members submit that these charges are inherently inconsistent, and that contrary to the DC's express finding, this charge presumes the First Treasury transactions could be recorded as sales. However, the charges represent two different breaches relating to the same conduct. Charge 1(iv) relates to the auditors' decision to account for the transaction as a sale in relation to GAAP. Having decided to treat the transaction as a sale, charge 2(viii) deals with the auditors' failure to disclose the risk under GAAS. The DC was clearly alive to the fact that these charges arose out of the same transaction.

III: COSTS

[130] Finally, the ICAO challenges the Divisional Court's decision to quash the DC's costs award. The Divisional Court concluded that the DC did not have the jurisdiction to order costs in that s. 17.1 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 (SPPA), prevailed over the DC's by-law adopted pursuant to s. 8 of the *Chartered Accountants Act, 1956*, S.O. 4-5 Elizabeth II, c. 7.

[131] The ICAO does not argue that the Divisional Court was wrong in its interpretation of the relevant legislation at the time of its decision. It submits that the Divisional Court's decision on costs should be overturned in light of s. 38 of the *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, Sched. C, enacted two months after the Divisional Court's

decision. The ICAO contends that the effect of s. 38 is to validate all costs orders that were made by the DC after December 6, 2000.

[132] Section 38 of the new Act provides in part:

> 38. (1) The discipline committee may award the costs of a proceeding before it under section 35 or 36 against the member who or firm that is the subject of the proceeding, in accordance with its procedural rules.
>
> (3) The costs ordered under subsection (1) or (2) may include costs incurred by the Institute arising from the investigation, including any further investigation ordered under subsection 35 (4), prosecution, hearing and, if applicable, appeal of the matter that is the subject of the proceeding.
>
> (4) An order for costs made under *The Chartered Accountants Act, 1956* is deemed to have been validly made if the order was made,
>
> (a) on or after December 6, 2000;
>
> (b) by a committee established by by-laws made under clause 8 (1) (g) or (h) of that Act; and
>
> (c) in respect of a proceeding referred to in subclause 8 (1) (g) (ii) of that Act or an appeal of that proceeding.
>
> ...
>
> (6) This section applies despite section 17.1 of the *Statutory Powers Procedure Act*.

[133] Thus, the new Act expressly provides that s. 38 takes precedence over s. 17.1 of the SPPA, which restricts when a tribunal may order costs. Section 38 also expressly applies to validate orders made on after December 6, 2000.

[134] The members contend, however, that s. 38 does not have retroactive effect. They refer to the presumption that legislation is not intended to be applied retroactively, and the presumption that the legislature does not intend to take away rights accruing under a judgment, even when it enacts retroactive legislation.

[135] The members rely on *Zadvorny v. Saskatchewan v. General Insurance* (1985), 11 C.C.L.I. 256 (Sask. C.A.), leave to appeal to S.C.C. refused (1985), 60 N.R. 78. At para. 9 of the decision, the Court distinguishes between retroactively changing a law of general application and "the extinguishment of a judgment". The Court states that it would take "the clearest of language" to "deprive the respondent of his judgment". The Court expresses concern about depriving a plaintiff "of the fruits of a successful suit."

[136] Here, the members are not being deprived of the fruits of a successful suit. They have not obtained a judgment in a suit. Rather, they have been subject to disciplinary proceedings.

[137] In my view, the language is sufficiently clear: s. 38(4) expressly deems orders for costs to have been validly made if such an order was made on or after December 6, 2000 and the other conditions of the section are met. It is difficult to see why this provision

would have been included in the new Act if it were not intended to validate costs orders retroactively.

[138] I conclude that the effect of s. 38 of the *Chartered Accountants Act, 2010* is to retroactively validate the DC's costs award.

CONCLUSIONS

[139] In conclusion, I would allow the ICAO's appeal, set aside the decision of the Divisional Court as it relates to charges 1(i), (iii) and costs, and reinstate the decision of the DC.

THE POWER AND RUSSO APPEAL (C52711)

[140] The Divisional Court declined to quash the further findings of misconduct against Power and Russo on charges 2(ii) to (v). On appeal, Power and Russo challenge their convictions on these charges.

[141] They submit that the DC found them guilty based upon the Put although it was not relevant to any of the charges, including these particulars; applied the wrong legal test for professional misconduct; and failed to adequately address the expert evidence that professional standards had not been breached.

[142] This appeal raises many of the same issues discussed above in the ICAO appeal:

1. did the Divisional Court convict Power and Russo of something that was not the subject of the charges?

2. Did the DC fail to apply the correct test for professional misconduct on charges 1(iv) and 2(viii)?

3. Did the DC ignore the exculpatory evidence of the experts?

[143] Under charge 2(ii), it was alleged that they failed to obtain sufficient appropriate audit evidence to properly assess the recoverability of preproduction costs because they failed to compare the 1997 production budgets prepared by management in 1996 to actual results in 1997 and thereby failed to ascertain the reliability of management's budget.

[144] Under charge 2(iii), it was alleged that, in accepting an additional $27.5 million write-down of pre-production costs after the audit was virtually completed without reassessing management's representations throughout the audit, they failed to obtain sufficient appropriate audit evidence to enable them to express an unqualified opinion on the financial statements.

[145] Under charge 2(iv), it was alleged that, having found cut-off errors (i.e., accounts payable recorded in the wrong period) in the testing of accounts payable, Power and Russo failed to re-evaluate the nature, extent and timing of planned audit procedures in violation of GAAS.

[146] Finally, under charge 2(v), it was alleged that, having decided on a sample-based testing of additions to fixed assets, Power and Russo failed to obtain sufficient appropriate audit evidence for unsupported transactions.

[147] For the reasons that follow, I would uphold the decision of the Divisional Court confirming the finding of misconduct in relation to these charges.

1. The DC was entitled to consider the evidence about the Put.

[148] Power and Russo submit that the DC denied them a fair hearing by convicting them of alleged misconduct that was not the subject matter of the charges, or of the case led by the PCC. Further, they argue that while the Put may have been relevant to "professional scepticism" in carrying out their work, "professional scepticism" did not form any part of the charges 2(ii) to (v). Thus, they take the position that the Divisional Court erred in accepting the AC's observation that the "real issue" as to charges was whether Power and Russo had exercised sufficient "professional scepticism" in carrying out their work and that the DC had found that they had not.

[149] I do not agree. Power's and Russo's position is founded upon an overly narrow approach to the nature of the charges. The DC explained that professional scepticism was an integral part of professional judgment and was relevant to the members' acceptance of audit evidence in this case. In its conclusion on whether the breaches constitute professional misconduct, the DC stated at para. 329:

> As these departures individually constitute professional misconduct, it follows that collectively, they constitute professional misconduct. Also, collectively, they reveal the essential nature of the misconduct, namely an improper exercise of professional judgment with respect to the reasonable suspicions about the Put and the failure to reconsider their planned auditing procedures. The auditors said that their scepticism was "sky high". However, with respect to the impugned conduct, the evidence disclosed that the auditors failed to exercise the professional scepticism required in the circumstances.

[150] Furthermore, the DC examined each of the particulars individually and determined that the members had breached the relevant standards of the profession, and in some cases, their own audit guidelines. As noted by Power and Russo, charges 2(ii) to (v) all raise questions relating to GAAS.

[151] In any event, for the further reasons set out above in relation to the ICAO's appeal, I would give no effect to this ground.

2. The DC applied the correct legal test for professional misconduct.

[152] The issue of whether the DC misunderstood the concept of professional judgment and the applicable test for misconduct was also raised in this appeal. As noted above, I do not agree that the DC "appears to have misstated the concept of professional judgment by focusing on the correctness of the conclusion" in para. 237.

[153] For the reasons set out in the ICAO's appeal relating to this issue, I would not give effect to this ground of appeal.

3. The DC did not ignore the expert evidence.

[154] It is true that the DC did not refer extensively to the defence experts. It noted however that the experts did not have the benefit of hearing the evidence of Chant and the details of the events surrounding the Put in April 1998. The DC recognized that to the extent that the factual foundations for their opinions changed as the evidence unfolded, the expert opinions would be of little assistance. The AC, itself an expert tribunal, dealt extensively with the issue of the expert evidence that indicated that the members met professional standards. The AC concluded that there were sound reasons to question whether the defence experts provided the DC with a representative professional assessment and noted that they certainly did not provide a fully informed assessment.

[155] It is clear from the reasons that the DC referred to the defence experts' opinions: see, for example, paras. 267, 287, 307, and 320. The decision is replete with instances where it accepted the opinions of the defence experts and found the members not guilty of misconduct on some particulars, including charge 2(vi).

[156] Ultimately, these are findings of fact in a technical area by an expert tribunal. The members turned their minds to the proper test, set out the issues and key evidence relied upon, applied their expertise and articulated its conclusions. They are entitled to deference.

[157] Accordingly, I would dismiss this appeal and affirm the decision of the Divisional Court upholding the convictions on charges 2(ii), (iii) (iv) and (v).

DISPOSITION

[158] I would allow the ICAO's appeal and I would dismiss Power's and Russo's appeal. The decisions of the DC, including the costs award, should be re-instated.

[159] The ICAO should have its costs of both these appeals, fixed in the total amount of $60,000, inclusive of disbursements and applicable taxes, to be divided equally among Barrington, Power, and Russo.

RELEASED: MAY 27 2011

AK

Karakatsanis J.A.

I agree.

I agree, J.A.

APPENDIX "A"

THE CHARGES

1. THAT, the said Anthony Power, Claudio Russo, Peter Chant and Doug Barrington, in or about the period January 1, 1998 to March 27, 1998, while involved as "Lead Client Service" partner, "Audit Client Service" partner, "Advisory" partner and "Advisory" partner respectively with Deloitte & Touche in an engagement to perform an audit of the consolidated financial statements of Livent Inc. as at December 31, 1997 ("Financial Statements"), and having attached to the Financial Statements an unqualified audit opinion, failed to perform their professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the CICA Handbook, contrary to Rule 206 of the Rules of Professional Conduct, in that:

(i) In accepting the client's recognition of $9.2 million as revenue on the sale of naming rights of the existing Pantages Theatre and a new theatre to be constructed to AT&T Canada Enterprises Inc., they failed to ensure that the Financial Statement complied with generally accepted accounting principles since all significant acts under the agreement had not been completed;

(ii) In accepting the client's recognition of $7.7 million as revenue on the sale of naming rights of the Oriental Theatre in Chicago to Ford Motor Company, they failed to ensure that the Financial Statements complied with generally accepted accounting principles since all significant acts under the agreement had not been completed;

(iii) In accepting the client's recognition of $5.6 million as revenue on the sale of density rights over the existing Pantages Theatre to Dundee Realty Corporation, they failed to ensure that the Financial Statements complied with generally accepted accounting principles since all significant acts under the agreement had not been completed;

(iv) In accepting the client's recognition of a loss of $1.2 million on a transaction with First Treasury Financial Inc., they failed to ensure that the Financial statements complied with generally accepted accounting principles since the transaction should not have been accounted for as a sale when all the conditions required to account for the transaction as a sale were not met.

2. THAT, the said Anthony Power, FCA and Claudio Russo, CA, in or about the period January 1, 1998 to March 27, 1998, while involved as "Lead Client Service" partner and "Audit Client Service" partner respectively with Deloitte & Touche in an engagement to perform an audit of the consolidated financial statements of Livent Inc. as at December 31, 1997 ("Financial

Statements"), and having attached to the Financial statement an unqualified audit opinion, failed to perform their professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the CICA Handbook, contrary to Rule 206 of the Rules of Professional Conduct, in that:

(i) They failed to identify a change in accounting policy with respect to the amortization of preproduction costs and failed to ensure that there was disclosure of the change in this policy and the effect of the change on the Financial Statements;

(ii) In having failed to compare 1997 production budgets prepared by management in 1996 to actual results in 1997, they did not ascertain the reliability of management's budgets and accordingly, failed to obtain sufficient appropriate audit evidence to enable them to properly assess the recoverability of preproduction costs;

(iii) In accepting an additional write-down of preproduction costs of specific shows totalling $27.5 million after the audit was virtually complete, they failed to reassess management's representations made throughout the audit and accordingly failed to obtain sufficient appropriate audit evidence to enable them to express an unqualified opinion on the Financial Statements;

(iv) Having determined that a selection of 22 items was an appropriate sample size in their search for unrecorded liabilities, they found errors but failed to re-evaluate the nature, extent and timing of planned audit procedures;

(v) Having decided on a sample based testing of additions to fixed assets, they failed to obtain sufficient appropriate audit evidence for unsupported transactions;

(vi) They failed to identify that the amortization policy for preproduction costs as explained in the significant accounting policy note to the Financial Statements was not in conformity with the method followed by the Company in computing the amortization;

(vii) They failed to disclose that the policy with respect to the translation of the foreign currency denominated financial statements of the subsidiary companies was not in accordance with generally accepted accounting principles in that the foreign subsidiaries were not financially and operationally independent as required to treat them as self-sustaining operations;

(viii) They failed to ensure, in respect of a transaction with First Treasury Financial Inc., that the Financial Statements disclosed the contingency that

First Treasury Financial Inc. had recourse against Livent under certain circumstances.