

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **DAVID BROCK McKEAND, CA**, a member of the Institute, under **Rules 204.1 and 204.3** of the Rules of Professional Conduct, as amended.

TO: Mr. David Brock McKeand, CA
104 Parkwood Drive
CHATHAM, ON N7M 2B2

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision And Order Made July 6, 2004)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on July 6, 2004 to hear charges brought by the Professional Conduct Committee against David Brock McKeand, a member of the Institute.
2. The Professional Conduct Committee was represented by Ms. Barbara Glendinning. Mr. Mark Dauber, CA, the investigator appointed by the Professional Conduct Committee accompanied Ms. Glendinning. Mr. Brian Wright and Ms. Jane Wright were also present and identified by Ms. Glendinning as potential witnesses.
3. Mr. David McKeand, the member, was present at the hearing and was represented by his counsel, Mr. Ronald Kirby.
4. The decision and order of the Discipline Committee were made known at the hearing on July 6, 2004. The formal decision and order was signed by the Secretary to the Discipline Committee on August 11, 2004 and sent to the parties that day. These reasons, given in writing pursuant to Bylaw 574, include the charges, the decision, the order and the reasons of this panel of the Discipline Committee for the decision and order.

CHARGES AND PLEA

5. The charges, made by the Professional Conduct Committee on January 6, 2004, as amended at the assignment hearing of January 22, 2004, read as follows:
 1. THAT the said David Brock McKeand, in or about the period November 2000 through August 6, 2003, while engaged to review the financial statements of "W. E. (K) Limited", failed to remain free of any influence, interest or relationship which, in respect of the engagement, would impair his professional judgment or objectivity or which, in the view of a reasonable observer, would impair his professional judgment or objectivity, in that he borrowed \$10,000.00 from

W.E.(K) Limited or its principles, contrary to Rule 204.1 of the rules of professional conduct.

2. THAT the said David Brock McKeand, in or about the period August 31, 2003 through October 3, 2003, while engaged to compile the financial statements of 116#### Ontario Inc., failed to disclose in the Notice to Reader accompanying the financial statements the influence, interest or relationship which, in respect of the engagement, would be seen by a reasonable observer to impair his professional judgment or objectivity, in that he borrowed \$60,000.00 from 116#### Ontario Inc., contrary to Rule 204.3 of the rules of professional conduct.
3. THAT the said David Brock McKeand, in or about the period August 31, 2003 through September 30, 2003, while engaged to compile the financial statements of 944#### Ontario Inc., failed to disclose in the Notice to Reader accompanying the financial statements the influence, interest or relationship which, in respect of the engagement, would be seen by a reasonable observer to impair his professional judgment or objectivity, in that he borrowed \$50,000.00 from 944#### Ontario Inc., contrary to Rule 204.3 of the rules of professional conduct.

6. Mr. McKeand entered a plea of not guilty to each of the three charges.

EVIDENCE

7. Ms. Glendinning gave a brief opening statement and introduced a Document Brief which contained many of the relevant documents. Ms. Glendinning called Mr. Brian Wright, who had been the President of the corporation identified in Charge No. 1 as W.E. (K) since 1979. Mr. Wright testified with respect to the loan made to Mr. McKeand and the eventual re-payment of the loan. He was cross-examined by Mr. Kirby and re-examined briefly by Ms. Glendinning. Ms. Glendinning also called Mr. Mark Dauber, CA, the investigator appointed by the Professional Conduct Committee. He testified about his discussions with Mr. McKeand and his investigation. Mr. Dauber was cross-examined by Mr. Kirby.

8. Mr. Kirby called Mr. McKeand who testified on his own behalf. Mr. McKeand was cross-examined by Ms. Glendinning

9. Both counsel made submissions with respect to the issue of guilt or innocence on the three charges. Following the submissions, the panel deliberated.

FINDINGS

Charge No. 1

10. There is no dispute about the fact of the loan or how or when it was re-paid. There is a dispute as to whether or not the loan was from W.E. (K) or Mr. Wright personally and whether or not Mr. McKeand had explained the reason why he had requested the loan. There is evidence as to whether or not the amount of the loan, \$10,000, was material to W.E. (K) or the Wrights.

11. The relevant facts as we find them to be are set out in paragraphs 12 to 17 below:

12. Mr. McKeand was engaged as the accountant for W.E. (K) and the Wrights in the mid 1990's and continued to be their accountant through 2003.

13. Mr. McKeand borrowed \$10,000 from W.E. (K) on November 9, 2000. The loan was evidenced by promissory note, made on the letterhead of W.E. (K) which reads as follows:

I promise to pay W.E. (K) Limited ten thousand dollars (\$10,000) on demand payable interest only at prime plus 1½% monthly one month in arrears. Principal balance due in full plus any outstanding by November 8, 2001.
Payment partially or in full before the due date without bonus or penalty.

"David McKeand"
David McKeand

14. Mr. McKeand signed a review engagement report dated August 6, 2003 with respect to the balance sheet, statements of loss and retained earnings and cash flows for W.E. (K) for the year ended February 28, 2003.

15. The loan, which we find to be in an amount material to Mr. McKeand, was outstanding from November 9, 2000 until June 30, 2004. The sum of \$508.25 was paid on account on April 21, 2003. Further, the sum of \$3,800, the amount of the fee set in the account rendered by Mr. McKeand in August, 2003 was set-off against the balance of the debt. The outstanding balance, \$7,406.03, was paid by cheque June 29, 2004.

16. Mr. McKeand rendered accounts in July, 2001 charging a fee of \$4,100, and an account in August 2002 charging a fee of \$3,800. These accounts were not set-off against the then outstanding debt because Mr. McKeand needed the money.

17. Where it differs, we prefer the evidence of Mr. Wright to that of Mr. McKeand. As the panel understands it, Mr. McKeand wrote out the promissory note set out above and signed it. This note is the best evidence about the loan and who made it. Both counsel addressed the issue of whether the loan was material to W.E. (K) or the Wrights. The relevant issue is whether or not the amount of the loan was material to Mr. McKeand. Clearly it was.

18. Mr. McKeand, who testified that the loan was from Mr. Wright and not the company, submitted that the appropriate accounting treatment for the loan was to include the amount of the loan in shareholder advances. As stated above, the loan was from the corporation, not the shareholder. The panel concludes that including the loan in the shareholders advance disguised the fact that there was a loan. In this regard, and in not informing Mr. Wright of the purpose for the loan or the outcome of that purpose, the panel finds that Mr. McKeand was not honest with his client.

19. In the panel's view it is unimportant whether the loan came from W.E. (K) or Mr. Wright, the president of W.E. (K), personally. It is also unimportant whether or not Mr. McKeand explained the purpose for the requested loan. The mere fact of the loan, from either W.E. (K) or the president of W.E. (K) precluded Mr. McKeand from undertaking an assurance engagement.

20. Rule 204.1 of the *Rules of Professional Conduct* at the relevant time read as follows:

204.1 Objectivity – assurance and specified auditing procedures engagements

A member who engages or participates in an engagement

(a) to issue a written communication under the terms of any assurance engagement, or

(b) to issue a report on the results of applying specified auditing procedures

shall be and remain free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.

21. Any reasonable observer would conclude that the loan, whether it was from the company or the president of the company, created an "influence, interest or relationship" which would impair Mr. McKeand's objectivity. Mr. McKeand was thus precluded from undertaking an assurance engagement and, when he issued the Review Engagement Report, he clearly breached Rule 204.1, a fundamentally important requirement of the profession. Accordingly, Mr. McKeand is guilty of the charge.

Charges Nos. 2 and 3

22. Rule 204.3, at the relevant time, read as follows:

204.3 Objectivity- Disclosure of Impairment of Objectivity

Where a member engaged in the practice of public accounting, or in a related business or practice, provides a service not subject to the requirements of Rules 204.1 or 204.2, such member shall disclose any influence, interest or relationship which, in respect of the engagement, would be seen by a reasonable observer to impair the member's professional judgment or objectivity, and such disclosure shall be made in the member's written report, notice to reader or other written communication accompanying financial statements or financial or other information and the disclosure shall indicate the nature of the influence or relationship and the nature and extent of the interest.

23. Mr. McKeand was permitted to accept a Notice to Reader engagement even if the loan impaired his objectivity. But he was required to disclose in each Notice to Reader Report the fact of the loan – if a reasonable observer would think his objectivity was impaired by reason of the loan. In the circumstances of this case, the panel is not persuaded that a reasonable observer would conclude his objectivity was impaired.

24. The companies named in these charges were known to be lenders, in fact lenders of last resort. It was their business to make loans and Mr. McKeand had a loan from each company on the usual terms and conditions which applied to other borrowers. Mr. McKeand paid interest at 9% on the loans which were in good standing. Unlike Charge No. 1, these clients were in the business of lending money. In such circumstances, the fact of a loan, in and of itself, does not necessarily mean a member's objectivity was impaired.

25. Further, there was little or no evidence that any third parties received the financial statements and Notice to Reader Report which Mr. McKeand prepared.

26. The panel recognizes that the Professional Conduct Committee had some difficulty obtaining evidence with respect to Charges Nos. 2 and 3. The companies were owned by two brothers, each brother owning one company. Apparently one of the brothers provided limited information to the investigator appointed by the Professional Conduct Committee, and the other brother provided no information at all.

27. While the panel understands the difficulty the Professional Conduct Committee faced with respect to the evidence, this does not change the fact that the onus of proof has not been satisfied. The panel does not think there is clear and cogent evidence that a reasonable observer would conclude that Mr. McKeand's objectivity was impaired or that the Notice to Reader Reports with the financial statements attached were provided to third parties. Accordingly, Mr. McKeand is not guilty of Charges Nos. 2 and 3.

DECISION

28. When the hearing resumed, the chair read the decision of the panel. He said:

THAT, having seen, heard and considered the evidence, Charges Nos. 1, 2 and 3 having been amended, the Discipline Committee finds David Brock McKeand not guilty of Charges Nos. 2 and 3, and guilty of Charge No. 1.

SANCTION

29. Ms. Glendinning, on behalf of the Professional Conduct Committee, sought: a reprimand; a fine of \$3,000; specified professional development courses; and notice, to be published in the usual form disclosing the member's name. Ms. Glendinning also indicated she would be seeking costs.

30. Ms. Glendinning submitted that a fine of \$3,000 was at the lower end of the range of fines appropriate for the misconduct. She submitted that there was no reason to withhold Mr. McKeand's name from the notice.

31. Mr. Kirby took no issue with the terms of the requested order with respect to professional development courses or notice. He did submit that as there had been three charges and a finding of guilt on only one, the fine should be less than the amount requested.

32. After deliberations, the hearing resumed and the chair set out the essential terms of the order, other than the term with respect to costs which was dealt with later. The order itself, including the term for costs, was sent to the parties on August 11, 2004 and reads as follows:

ORDER

IT IS ORDERED in respect of charge No. 1:

1. THAT Mr. McKeand be reprimanded in writing by the chair of the hearing.
2. THAT Mr. McKeand be and he is hereby fined the sum of \$2,500, to be remitted to the Institute within eighteen (18) months from the date this Decision and Order

becomes final under the bylaws.

3. THAT Mr. McKeand be and he is hereby charged costs fixed at \$6,000, to be remitted to the Institute within eighteen (18) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. McKeand be and he is hereby required to complete, by paying for and attending in their entirety, within eighteen (18) months from the date this Decision and Order becomes final under the bylaws, the following professional development courses made available through the Institute, or, in the event a course listed below becomes unavailable, the successor course which takes its place:
 - (a) *Staying Out Of Trouble*; and
 - (b) *Accounting, Auditing & Professional Practice Update*.
5. THAT notice of this Decision and Order, disclosing Mr. McKeand's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
6. THAT in the event Mr. McKeand fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within this three (3) month period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. McKeand's current or former practice, employment and/or residence.

Reprimand

33. The panel orders that Mr. McKeand be reprimanded in writing by the chair of the panel to make clear to him that his conduct was unacceptable.

Fine

34. The panel imposed a fine of \$2,500 as a specific deterrent to Mr. McKeand and as a general deterrent to other members. The fine is at the lower end of the appropriate range, and Mr. McKeand is given eighteen months to pay the fine, in light of his financial circumstances.

Professional Development Courses

35. It was common ground that it would assist Mr. McKeand's rehabilitation to take the two professional development courses specified in the order.

Notice

36. There is no issue with respect to notice and no rare and unusual circumstances which would justify withholding Mr. McKeand's name from publication. Publication of the notice in *CheckMark*, disclosing the member's name, is intended to be a specific deterrent to Mr. McKeand and a general deterrent to other members.

Suspension and Ultimately Expulsion for Failing to Comply

37. An order which did not provide for consequences in the event the member failed to follow it would be largely meaningless. Accordingly, the order provides that in the event Mr. McKeand does not comply with the terms of the order, he will be suspended, and if he still fails to comply with the terms of the order, he will be expelled.

Costs

38. After hearing submissions, the panel finds that the appropriate award of costs is \$6,000. As a result of Mr. McKeand's misconduct, the Institute incurred considerable expense investigating his conduct and prosecuting the case. The order made does not indemnify the Institute for all of the costs incurred with respect to the investigation and prosecution. It should be understood that, had Mr. McKeand's financial circumstances been different, the award for costs, as the amount of the fine, would have been greater.

DATED AT TORONTO THIS 17th DAY OF NOVEMBER, 2005
BY ORDER OF THE DISCIPLINE COMMITTEE

D. DAFOE, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

N.A. MACDONALD EXEL, CA
J.G. SEDGWICK, CA
R.A. VICKERS, FCA
D.J. ANDERSON (PUBLIC REPRESENTATIVE)