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

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **DAVID LAWRENCE WHITING, CA**, a member of the Institute against the Decision made August 31, 2005 and Order made on November 17, 2005 of the Discipline Committee pursuant to the bylaws of the Institute, as amended.

TO: Mr. David Lawrence Whiting, CA
1882 Sherwood Forrest Circle
MISSISSAUGA, ON L5K 2E7

AND TO: The Professional Conduct Committee, ICAO

DECISION AND REASONS AS TO QUANTUM OF FINE AND COSTS

1. This appeal was heard by a panel of the Appeal Committee of the Institute of Chartered Accountants of Ontario on August 6, 7 and 8, October 28, 29, 30 and 31, and December 22, 2008. Paul Farley appeared on behalf of the Professional Conduct Committee. Frank Bowman and Douglas Stewart represented Mr. Whiting. The panel met on December 30, 2008, to deliberate and made its decision as to all aspects of the appeal, except for the issue of the quantum of the fine and the costs. The panel met on a number of subsequent dates to formulate its reasons for its decision on those aspects.

2. The panel released its reasons on those aspects on May 11, 2009, and invited further submissions from the parties with respect to the quantum of the fine and costs. Those submissions were heard on May 22, 2009, and the panel subsequently met to deliberate, decide and formulate its reasons for its decision. These reasons contain the decision of the panel on the quantum of the fine and costs, and its reasons for that decision.

3. As the reasons released on May 11, 2009 contain a full overview of the matter, such an overview has been omitted from these reasons, and these reasons should be considered supplemental to, and read in conjunction with, those previously released.

4. For the reasons set out below, the appeal as to the quantum of fine and costs is dismissed.

5. On this aspect of the appeal, Mr. Stewart, on behalf of Mr. Whiting, submitted that, as the Appeal panel had overturned the finding of guilt on particular 1(a), Mr. Whiting had, in effect, now been found not guilty on 25 per cent of the charges for which he was sanctioned. As a result, Mr. Stewart submitted that the appropriate way to treat both the fine and the costs was to reduce both by 25 per cent. In the alternative, Mr. Stewart submitted that the fine of $10,000 should remain in place but that the costs should be reduced by 25 per cent.

6. Mr. Farley, on behalf of the Professional Conduct Committee, noted that, despite overturning the finding of guilty on one particular, the Appeal Committee had upheld the Discipline Committee's overall finding of guilt. He submitted that it was necessary to indicate to all members of the profession the seriousness of such a breach of the rules.

7. The panel considered the $10,000 fine, and finds that it is within the appropriate range for the misconduct upon which it has upheld the findings of guilt. Further, a reduction of the fine would connote that there is a set fine for each instance rather than a sanction for professional misconduct. The panel did not accept the premise that the fine was set by the Discipline Committee based on two breaches of the rule and therefore should be reduced.

8. With respect to the assessment of costs, the Discipline Committee determined that the relevant costs of the discipline hearing and the investigation were $182,000. That calculation was reviewed by this panel and found to be appropriate. We also note that the calculation of costs incurred was not challenged by either party. The Discipline Committee, in assessing the portion of the costs to be borne by Mr. Whiting, recognized that Mr. Whiting was found guilty on two of the four charges before it. It also considered the complexity and length of the hearing, the impact of the sanction and the costs on the member, and the conclusion that it was not a case where 100 per cent or any proportion approaching 100 per cent of the costs should be borne by the member. Considering these factors, the Discipline Committee determined that an order to pay $95,000 of the costs was appropriate and fair.

9. This panel has considered the submission by Mr. Stewart that the costs be reduced to 75% of what the Discipline Committee had assessed, or $71,250. The rationale for such a calculation was that, as each of the charges of which the Discipline Committee found Mr. Whiting guilty had two particulars, there were, in essence, four charges. As the Appeal Committee has overturned the finding on one particular, it has, in effect, found him not guilty on 25 per cent of the charges.

10. The panel rejected this approach for the assessment of costs. The ordering of costs is not a sanction. The purpose of a costs order is to recover a portion of the costs of the investigation and hearing. As noted above, the panel has rejected the argument presented by Mr. Stewart that the costs should be reduced on a *pro rata* (25%) basis. The panel considered whether a reduction in the apportionment of the costs would be appropriate given Mr. Whiting's partial success on this appeal. Any such reduction should be for those costs of the investigation and hearing that could be solely ascribed to the particular of which the panel has found him not guilty. The two particulars of charge 1 were intertwined and any costs to be ascribed to the one particular alone would be negligible. In addition, we note that the Discipline Committee had already significantly discounted the total costs. It must be remembered that, but for Mr. Whiting's misconduct, there would not have been an investigation and hearing. Had he been found guilty of only one particular of one charge, both an investigation and hearing would have been necessary. It is inappropriate to apportion the costs on a mathematical formula based solely on the degree of success. For these reasons, the panel has not reduced the costs.

11. After hearing and considering the submissions of the parties, the Appeal Committee upholds the order of the Discipline Committee in this matter.

DATED AT TORONTO THIS 27th DAY OF AUGUST, 2009
BY ORDER OF THE APPEAL COMMITTEE

L.P. BOOKMAN, CA – ACTING DEPUTY CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

D.J. ANDERSON (PUBLIC REPRESENTATIVE)
D.A. ROBERTSON, FCA

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
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APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **DAVID LAWRENCE WHITING, CA**, a member of the Institute against the Decision made August 31, 2005 and Order made on November 17, 2005 of the Discipline Committee pursuant to the bylaws of the Institute, as amended.

TO: Mr. David Lawrence Whiting, CA
1882 Sherwood Forrest Circle
MISSISSAUGA, ON L5K 2E7

AND TO: The Professional Conduct Committee, ICAO

DECISION AND REASONS AS TO FINDINGS

1. This appeal was heard by a panel of the Appeal Committee of the Institute of Chartered Accountants of Ontario on August 6, 7 and 8, October 28, 29, 30 and 31, and December 22, 2008. Paul Farley appeared on behalf of the Professional Conduct Committee. Frank Bowman and Douglas Stewart represented Mr. Whiting. The panel met on December 30, 2008, to deliberate and made its decision. The panel met on a number of subsequent dates to formulate its reasons for the decision.

2. The following charges, as amended at the Discipline Committee hearing on March 4, 2004, were laid by the Professional Conduct Committee against Mr. Whiting on February 28, 2003:

1. THAT the said David L. Whiting, in or about the period January 1, 1990 through March 31, 1990, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

    a) He provided unaudited draft financial statements of York-Hannover Developments Ltd. for the year ended September 30, 1988 to Aetna Realty Investors Inc., without disclosing that the auditors had issued a draft adverse opinion on the September 1988 financial statements as a result of the failure of the company to write down accounts receivable and amounts due from affiliated companies.

    b) He provided unaudited draft financial statements of York-Hannover Developments Ltd. for the year ended September 30, 1988 to Adia International S.A., without disclosing that the auditors had issued a draft

adverse opinion on the September 1988 financial statements as a result of the failure of the company to write down accounts receivable and amounts due from affiliated companies.

2. THAT the said David L. Whiting, in or about the period January 1, 1990 through March 31, 1990, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

   a) He signed as correct an audit confirmation to Coopers & Lybrand that a $35 million loan from Castor Holdings Ltd. to York-Hannover Developments Holdings Ltd. was secured by a guarantee of Mr. Karsten von Wersebe in the amount of $21,125,000 when he knew or should have known that a portion of the guarantee was not reasonably enforceable.

   b) He signed as correct an audit confirmation to Coopers & Lybrand that a $27 million loan from Castor Holdings Ltd. to KVW Investments Ltd. was secured by a guarantee of Karsten Von Wersebe in the amount of $22,500,000 when he knew or should have known that a portion of the guarantee was not reasonably enforceable.

3. THAT the said David L. Whiting, on or about February 8, 1991, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

   a) He signed an audit confirmation to Coopers & Lybrand confirming that the balance owing by York-Hannover Developments Ltd. to Castor Holdings Limited was $678,512.33 when he knew or should have known that the balance owing was approximately $40 million higher.

4. THAT the said David L. Whiting, on or about February 8, 1991, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201 of the rules of professional conduct in that:

   a) He signed an audit confirmation to Coopers & Lybrand confirming that the balance owing by York-Hannover Developments Ltd. to Castor Holdings Limited was $678,512.33 without first obtaining sufficient appropriate information to support the assertion that approximately $40 million in loans from Castor Holdings Limited had been repaid.

DECISION OF THE DISCIPLINE COMMITTEE

3. The decision of the Discipline Committee was made August 31, 2005 and reads as follows:

> THAT, having seen, heard and considered the evidence, charges Nos. 1, 2 and 3 having been amended at the hearing, and having heard the plea of not guilty to the charges, the Discipline Committee finds David Lawrence Whiting guilty of charges Nos. 1 and 2, and not guilty of charges Nos. 3 and 4.

ORDER OF THE DISCIPLINE COMMITTEE

4. The Discipline Committee made its order on November 17, 2005, as follows:

> IT IS ORDERED in respect of the charges:
>
> 1. THAT Mr. Whiting be reprimanded in writing by the chair of the hearing.
>
> 2. THAT Mr. Whiting be and he is hereby fined the sum of $10,000, to be remitted to the Institute within thirty-six (36) months from the date this Decision and Order becomes final under the bylaws.
>
> 3. THAT Mr. Whiting be and he is hereby charged costs fixed at $95,000, to be remitted to the Institute within thirty-six (36) months from the date this Decision and Order becomes final under the bylaws.
>
> 4. THAT Mr. Whiting be suspended from the rights and privileges of membership in the Institute for a period of six (6) months from the date this Decision and Order becomes final under the bylaws.
>
> 5. THAT notice of this Decision and Order, disclosing Mr. Whiting'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 Mr. Whiting surrender his certificate of membership in the Institute to the Discipline Committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Whiting.
>
> 7. THAT in the event Mr. Whiting 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 six (6) months from the date of his suspension, and in the event he does not comply within this six-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. Whiting's practice or employment.

MR. WHITING'S APPEAL

5. On this appeal, Mr. Whiting seeks to have the order of the Discipline Committee finding him guilty of charge Nos. 1 and 2 vacated, and the order as to sanctions vacated.

6. Mr. Whiting further requests an award of costs be made against the Institute in the event that he is acquitted of either charge No. 1 or 2 or both.

7. Alternatively, Mr. Whiting seeks:

a) The order of the Committee as to sanctions be vacated and a more reasonable order as to sanctions be substituted; and
b) No costs be awarded against Mr. Whiting either on the basis of section 17.1 of the *Statutory Powers Procedure Act* (SPPA), or on the basis of set-off of each party's costs.

GROUNDS OF RELIEF SOUGHT

8. In his notice of appeal (Appeal Book, Volume 1, Tab 1), Mr. Whiting sets out the following grounds for his appeal:

- That the Committee erred in its findings of fact and in its review and interpretation of the evidence called at the hearing.

- That the Committee failed to give appropriate weight to the evidence adduced in defence of Whiting and further, gave undue weight to the evidence called by the Professional Conduct Committee (the "PCC").

- That the Committee erred in finding that Whiting's evidence, on matters of importance, was inconsistent with evidence provided by Mr. Irving Rosen, FCA.

- The Committee erred in finding that Whiting associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the Rules of Professional Conduct.

- In the context of charge No. 1, that the Committee erred in characterizing the issue as one involving <u>conclusions</u> the auditors reached with respect to York-Hannover's draft 1988 financial statements when in fact the auditors only provided a <u>draft</u> adverse opinion.

- In the context of charge No. 1, the Committee erred in respect to its finding that Whiting was not precluded from disclosing the draft adverse opinion to York-Hannover's creditors without authorization from the auditor's of York-Hannover to disclose such information.

- In the context of charge no. 1, that the Committee erred in finding that Whiting knew that York-Hannover's draft 1988 financial statements did not represent the true financial health of the company, when the evidence reflects that Whiting believed that the company was in better financial shape than the draft adverse opinion indicated, based on security that the company held.

- In the context of charge No. 1, that the Committee erred in finding that Whiting intended to induce reliance on York-Hannover's draft 1988 financial statements.

- In the context of charge No. 2, that the Committee erred in its understanding of the legal effect of Commitment Letters executed by Whiting.

- That the Committee erred in failing to exclude from the evidence at the hearing before the Committee, transcripts of Whiting's evidence in the Quebec Superior Court in *Widdrington* v. *Wightman.*

- That the Committee erred in failing to order that the Chair of the panel, Harvey Bernstein, should recuse himself on the basis of reasonable apprehension of bias. The Committee further erred in failing to adjourn the hearing's proceedings pending judicial review of its decision not to order Mr. Bernstein recused from the panel. The Committee further erred in finding that Mr. Bernstein did not contravene the Institute's Conflict of Interest Form or policy of the Committee.

- That the Committee erred in failing to remove other members from the panel on the basis of reasonable apprehension of bias. The Committee further erred in finding that those members did not contravene the Institute's Conflict of Interest Form or policy of the Committee.

- That the Committee erred in its finding that there was no evidence of actual bias on the part of Mr. Bernstein or any other member of the panel as being relevant to the determination of whether there was a reasonable apprehension of bias.

- That the Committee erred in delaying the release of it Reasons for over 18 months after the Order of the Committee was made in respect to the charges against Whiting, which delay has created a reasonable apprehension that the Reasons do not reflect the real basis for the conviction on charges No. 1 and 2.

- That the Committee erred in ordering a suspension and a fine in the circumstances of this case and erred in imposing costs given the divided success at the hearing whereby Whiting was successful in his defence of charges No. 3 and 4.

- That the Committee erred in imposing costs given that there is no evidence that Whiting's course of conduct was unreasonable, frivolous or vexatious, or was in bad faith, as required pursuant to paragraph 17.1(2)(a) of the *Statutory Powers Procedure Act,* R.S.O. 1990, Chapter S.22, ("SPPA").

- That the Committee erred in imposing costs given that the Bylaws of the Institute fail to stipulate the circumstances in which costs may be ordered and the amount of the costs or the manner in which the amount of the costs is determined, as required pursuant to paragraph 17.1(2)(b) of the SPPA as it was framed before the amendment was made to that provision in 2006;.

- That paragraph 530(3)(c) of the Institute's Bylaws which provides the basis for the Institute's costs order is *ultra vires* further to the requirements prescribed for imposing costs orders pursuant to paragraph 17.1(2)(b) of the SPPA as section 17.1 (2)(b) was framed before the amendment was made to that provision in 2006.

- Further, the Institute's by-laws, with respect to allowing an award of costs in favour of the Institute, but containing no such provision to award costs in favour of a member of the Institute who has been successful or partially successful in his defence of charges brought against him, is contrary to the Charter of Rights and Freedoms and contrary to the rules of natural justice.

APPEAL HEARING

9. On August 6, 2008, at the commencement of the hearing, counsel for Mr. Whiting brought a motion to recuse two members of the panel. The panel heard submissions from all parties, and after deliberating, denied the motion. The panel did not issue separate reasons for denying the motion. The reasons are summarized below.

Reasons for Denying Recusal Application

10. The Appeal panel first heard submissions from both parties and advice from counsel regarding the process of hearing and deciding the motion to recuse James Blackwell, CA and Darroch Robertson, FCA, from the Appeal panel. The panel deliberated to consider this process, and concluded as follows:

a) All the members of this panel will be present to hear all of the submissions;
b) The panel members who are at issue will be given an opportunity to respond; and
c) All members of this panel will participate in the decision.

11. The Appeal panel then heard submissions relating to a motion to have Messrs. Blackwell and Robertson removed from the Appeal panel. The central issue that the panel had to decide upon was whether Mr. Blackwell or Mr. Robertson had a reasonable apprehension of bias that would interfere with their participation on the panel. At no time during the preceding was there an allegation of bias. There was no suggestion that Mr. Blackwell or Mr. Robertson would not hear the evidence and decide the charges against Mr. Whiting with an open mind.

12. The panel understood that justice must be seen to be done and that "the relevant inquiry is not whether there is in fact either conscious or unconscious bias on the part of the panel members but whether a reasonable person properly informed would apprehend that there was." (*Wewaykum Indian Band v. Canada*)

13. The panel accepted that the correct test for determining whether a reasonable apprehension of bias exists, is as articulated by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board* and quoted in *Wewaykum,* at paragraph 60:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that the [decision maker], whether consciously or unconsciously, would not decide fairly."

14. Mr. Bowman did not allege that there was actual bias and no member of the panel has any reason to believe that there was or is such bias. To our knowledge, no member of the panel had any involvement with York-Hannover Developments Ltd. (York-Hannover) or Castor Holdings Ltd. (Castor). No member of the panel has any specific knowledge of the Castor litigation, other than knowledge acquired as a result of this hearing.

15. Counsel for the panel, David Porter, reviewed the legal cases in the area and indicated that the onus is on the applicant to persuade the Appeal panel that there is a reasonable apprehension of bias.

16. Mr. Farley submitted that the applicant had not demonstrated even a mere suspicion of bias in the case of Mr. Blackwell and Mr. Robertson.

17. Mr. Blackwell and Mr. Robertson responded to each of the allegations of bias that had been raised. They both indicated that in their opinions they were each able to proceed in an unbiased manner.

18. The panel concluded that the applicant did not demonstrate the existence of a reasonable apprehension of bias on the part of Mr. Blackwell or Mr. Robertson. The panel further concluded that the continued participation of Mr. Blackwell and Mr. Robertson did not contravene the Institute's Conflict of Interest Avoidance Form or policy of the Appeal Committee.

19. Without attempting to exhaustively address all of the concerns Mr. Bowman raised, the panel does wish to summarize the relationships which he asserted gave rise to a reasonable apprehension of bias:

a) Mr. Robertson trained as a CA student with firm of Clarkson Gordon from 1977 until 1979. Clarkson Gordon ultimately became Ernst & Young (E&Y). Mr. Robertson returned to Ernst & Young in 1991 as a senior tax manager until 1993. Ernst & Young acted as tax advisors to Karsten von Wersebe and prepared his tax returns. The consulting arm of Ernst & Young provided recruitment services to York-Hannover. Ernst & Young were also retained to deal with issues related to a $40 million dollar loan that was the subject of charges 3 and 4 in the Discipline hearing.

b) Mr. Blackwell was a manager of BDO since 1987 and a partner since 1991 and has been an office managing partner since 2002. BDO, in or around 1990, was retained by Adia to act as a credit consultant and to review York-Hannover's affairs after York-Hannover was noted in default in respect to a debenture agreement. BDO was

retained as trustee for York-Hannover in respect to when Adia was petitioning creditor. From 1985 to 1987, Mr. Blackwell was employed by KPMG. Thorne, Ernst and Whinney (TEW), the auditors of York-Hannover during the late 1980s and early 1990s, became part of KPMG.

A current partner at BDO, Keith Vance, has been acting as a plaintiff's expert at the Castor proceedings for several years. This resulted in revenue for the BDO firm.

20. The mere fact that Mr. Robertson was an employee of a firm that was engaged to prepare Mr. von Wersebe's tax returns is not sufficient to indicate a reasonable apprehension of bias. Mr. Robertson was not involved with the preparation of Mr. von Wersebe's tax returns and had no knowledge that Ernst & Young prepared Mr. von Wersebe's tax returns. Also Mr. Robertson had no knowledge nor involvement with recruiting services provided to York-Hannover by E&Y. In addition, Mr. Robertson had no knowledge nor involvement with E&Y's consulting activities in connection with a $40 million dollar loan that was the subject of charges 3 and 4 of the Discipline hearing. While there was no indication of the office that provided the various services to Mr. von Wersebe and York-Hannover, it should be noted that Mr. Robertson worked out of the London, Ontario office of E&Y, and both Mr. von Wersebe and York-Hannover were based in Toronto.

21. Mr. Blackwell was an employee of KPMG between 1985 and 1987. During this time period, TEW were the auditors of York-Hannover. It was not until later that TEW become part of KPMG. The panel does not believe that it is reasonable to conclude that such an after-the-fact merger could lead a reasonable person to conclude that Mr. Blackwell could not decide fairly.

22. As Mr. Blackwell was an employee and partner of BDO's Orangeville office, he did not have any involvement with the services provided by his firm in terms of acting as a credit consultant for Adia. In addition, Mr. Blackwell indicated that while he knew Mr. Vance, he was not involved or aware of the specifics or services provided as a plaintiff's expert in the Castor proceedings.

23. After deliberation, the Appeal panel did not believe that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that Mr. Blackwell or Mr. Robertson, consciously or unconsciously, would not decide the issues at this hearing fairly. The Appeal panel did not believe that the relationships which Mr. Bowman asserted were matters of concern, would be seen by an informed person as concerns which could give rise to a reasonable apprehension of bias.

Mr. Blackwell's Resignation

24. On the morning of August 8, 2008, Mr. Blackwell informed the Chair that he had received a request from his firm to resign from the Appeal panel. Mr. Blackwell's firm, BDO, based on their policies, requested that he resign from the Appeal panel.

25. The Chair accepted Mr. Blackwell's resignation and provided both parties the opportunity to make submissions on how to proceed with the hearing. The panel heard from its counsel that, according to the SPPA, "If a member of the tribunal who has participated in a hearing becomes unable for any reason to participate in the decision, the member or members may continue the hearing and decision." This section is very similar to the provision in Bylaw 632, which reads: "… in the event any member of a panel, whether a member of the Institute or a public representative, is unable to be present or participate because of death, illness, or other

cause, and provided there continues to be a quorum of the panel, the remaining members of the panel shall continue to hear the evidence, if any, and the submissions and to reach a decision." The panel was also referred to Institute Bylaw 601(2) that reads, "an appeal or a review before the appeal committee shall be heard and determined by a panel of not fewer than three members of the appeal committee, provided that one member of the panel shall be a public representative and, if the member charged holds a public accounting licence, one member of the panel shall hold a public accounting licence".

26. The panel concluded that the three remaining panel members would continue to hear the appeal for the following reasons:

a) there was no objection to continue this appeal from either party;
b) the panel had statutory authority pursuant to subsection 4.4(1) of the SPPA and Bylaw 632 to continue; and
c) the remaining composition of the panel met the requirements of Bylaw 601(2).

Appeal Submissions

27. The Appeal panel heard and considered all the oral and written submissions of the parties, some of which are summarized very briefly below.

Charge No. 1

28. Mr. Bowman submitted that while, as a CA in industry, Mr. Whiting may have exercised poor judgment, he had no intent to mislead Adia or Aetna; he was concerned about getting York-Hannover "back on the rails". The draft financial statements he provided clearly showed York-Hannover was experiencing financial difficulties. He could not send the draft adverse opinion as he had no authority from the auditors to do so. He was entitled to send out the draft financial statements, which he had reviewed, but which he had not prepared. Mr. Bowman submitted that because there are no rules relating to attaching a draft audit report to draft financial statements that it is a matter of professional judgment.

29. Mr. Bowman submitted that the Discipline Committee made an assumption the draft financial statements were false and misleading by relying on the draft adverse opinion of Thorne Ernst without doing their own review of the documents. He noted the Discipline Committee reference to the amounts owing to Aetna and Adia as debentures as an example of the committee's confusion and lack of review.

30. Mr. Bowman took the position that to find Mr. Whiting guilty, the panel would have to find he had a reason to mislead, that he wanted to mislead, not merely that he was careless.

31. The Professional Conduct Committee submitted that at the time Mr. Whiting provided the 1988 draft financial statements to Adia and Aetna, he knew they did not accurately set out York-Hannover's financial position. He sent them to Adia to stave off the demand for audited statements, and to Aetna to "paper their file". Mr. Whiting should not be able to escape responsibility for providing unreliable statements on the basis they were only drafts.

32. The Professional Conduct Committee submitted that Mr. Whiting was aware of the draft adverse opinion; that Mr. Whiting, as evidenced by his testimony in Montreal in a civil lawsuit referred to by the parties as the "Castor proceedings", was aware the write-downs should be larger; and that he did not sufficiently inform Adia or Aetna of the nature of the problem when he sent them the financial statements.

Charge No. 2

33. Mr. Bowman submitted that Mr. Whiting had held onto the increased guarantees and that, at the time he signed the confirmations, he believed the guarantees to be enforceable. He signed the commitment letters, as he was authorized to do, and those letters contained the increased guarantees. Mr. Bowman submitted a *Chronology of Events Regarding Charge #2 – Guarantees* (Exhibit 5) that provided a summary of events, dates and evidentiary sources, covering events beginning with a meeting between Mr. von Wersebe and Castor on December 22 or 23, 1989 and running to March 30, 1990 when Castor lawyers McLean & Kerr forwarded copies of the signed guarantees.

34. Mr. Bowman submitted that a guarantee need not be in writing to be enforceable provided that the individual providing the guarantee is the beneficiary of the guarantee. While as a general rule, the Statute of Frauds requires that a guarantee be in writing and be signed by the guarantor, Mr. Bowman submitted that a legally binding increase in the guarantees took effect by virtue of Mr. von Wersebe's oral agreement in December of 1989.

35. Mr. Farley, on behalf of the Professional Conduct Committee, did not object to the panel receiving the information contained in Exhibit 5.

36. The Professional Conduct Committee submitted that, at the time Mr. Whiting signed the audit confirmations, he knew the guarantees had not been signed or delivered. He also knew that Mr. von Wersebe did not want or intend the guarantees to be enforceable. The commitment letters which Mr. Whiting had signed agreeing to the increased guarantees could not be the basis for signing the confirmation as the guarantees had not been signed, and Mr. von Wersebe, to Mr. Whiting's knowledge, was proposing terms be included which would make the guarantees meaningless.

37. Mr. Farley submitted that the guarantees were not executed at the time the confirmations were sent and therefore were not legally enforceable.

38. The panel, after some initial deliberation on charge No. 2, requested that Mr. Bowman and Mr. Farley re-attend to address the following questions:

> 1. Could you please clarify what the documentation is which is found at Tab 21 of Appeal Book, Volume 1? At the second page of Tab 21, is found an "Agenda of Closing Documents" which lists, as Item No. 12: "New Guarantee of Karsten B. von Wersebe". Is that document included in the exhibits? If so, where is it? Could you please clarify what the remaining documentation is that is found at Tab 21 of Appeal Book, Volume 1.
>
> 2. A similar question arises with respect to Tab 20 of Appeal Book, Volume 1. At the fourth page of that tab is a document entitled "Agenda of Closing Documents". Item number 14 in the agenda is "New Guarantee of Karsten B. von Wersebe". Is that document contained in the exhibits, and if so where is it? Could you please

clarify the nature of the remaining documents which are found at Tab 20 of the Appeal Book, Volume 1.

39. The panel reconvened on December 22, 2008, to address an apparent inconsistency regarding the dates of signing the guarantees. The commitment for the $35 million was dated July 17, 1989, but signed on July 15, 1989. The guarantee for the $35 million loan was dated July 31, 1989, but the Affidavit of Subscribing Witness was dated March 2, 1990. The commitment letter for the $27 million loan was dated December 11, 1989 and signed December 30, 1989. The guarantee for this loan was dated December 29, 1989 and the Affidavit of Subscribing Witness was dated December 29, 1989.

40. Despite the apparent inconsistency of dates, Mr. Bowman submitted that the guarantees were in fact signed on or close to March 2, 1990. He indicated that this was consistent with the Exhibit 5 chronology that he had submitted earlier in the proceedings.

41. Mr. Bowman also submitted that the Commissioner for Taking Affidavits, who was a signatory to the Affidavit of Subscribing Witness, was an employee of York-Hannover.

Appropriate Standard of Review

42. The panel considered the written and oral arguments provided by both the appellant and the respondent on the issue of the appropriate standard of review. The appellant argued that the Appeal Committee is tasked with the job of considering the merits of the decision of the Discipline Committee and substituting its own findings and decision for that of the Discipline Committee as the case may warrant. The respondent argued that the appellant's position contradicts precedent and that considerable deference is owed to the decisions of the Discipline Committee.

43. The Appeal panel concluded that the findings of the Discipline Committee should be given considerable deference in areas of fact and areas of mixed facts and law. However, such a level of deference is not owed in areas of law.

44. With respect to the deference owed to the Discipline Committee on matters of fact, the panel adopts the position of the court in *Carruthers v. College of Nurses of Ontario*: "Provided an evidentiary basis exists to support a finding of primary fact, there should be no appellate substitution therefore absent a palpable and overriding error at first instance."

45. The panel was also guided by the principles set out by the Divisional Court in the cases of *Law Society of Upper Canada v. Neinstein* and *Law Society of Upper Canada v. Evans*. As the court stated in the latter case, "The Appeal panel is entitled to deference on its findings of mixed fact and law and on its interpretation of the [Law Society] Act and this court should only intervene if the Appeal panel's decision is unreasonable. However, on questions of law outside that area of expertise, the Appeal panel is required to be correct."

46. The panel accepts its role is as articulated by the Supreme Court of Canada in *L.(H.) v. Canada (Attorney General)*: "In the absence of a clear statutory mandate to the contrary, appellate courts do not 'rehear' or 'retry' cases. They review for error." This is consistent with the view of previous Appeal panels, including those in *Cloney*, *Appleton* and *Fitz-Andrews*.

The Admission of and Reliance on the Transcripts from the Castor Proceedings

47. Mr. Bowman, on behalf of Mr. Whiting, had submitted at the Discipline hearing that the transcripts from the Castor proceedings should not be permitted into evidence at that hearing.

48. Mr. Bowman submitted to both the Discipline Committee and the Appeal panel that section 13 of the *Canadian Charter of Rights and Freedoms* (the "Charter") applies in an administrative context and should not be limited to criminal proceedings only.

49. Mr. Farley argued that s.13 is designed to protect an individual from self-incrimination and, as a result, is designed to protect an individual from use of prior testimony in a criminal or quasi-criminal setting only.

50. This panel finds it is bound by the authorities on the applicability of the Charter to regulatory proceedings, commencing with the pronouncements of the Supreme Court of Canada in *R. v. Wigglesworth* and continuing through such cases as *Mussani v. College of Physicians and Surgeons of Ontario* and *McDonald v. Law Society of Alberta*. Those cases make it clear that, absent true penal consequences, sections 8 to 14 of the Charter are inapplicable to disciplinary proceedings. They further state unequivocally that the consequences either imposed on Mr. Whiting or available to the Institute are not penal. Therefore, Mr. Whiting cannot avail himself of the protection of s. 13 of the Charter in these proceedings.

51. Mr. Bowman further submitted that, in the event the transcripts are admitted, the panel should not place reliance on these transcripts as Mr. Whiting did not have adequate time to prepare for his testimony at the Castor proceedings and did not have the ability to review his notes.

52. Mr. Farley submitted that Mr. Whiting had ample time to prepare for his testimony and that the panel is entitled to rely on the Castor proceedings transcripts.

53. The panel finds, after considering the legal arguments, that the Discipline Committee was correct in taking into account the evidence contained in the Castor Proceedings transcripts in their deliberations. Mr. Whiting provided evidence, under oath, in a related matter upon which he had significant first-hand knowledge, and the Discipline Committee was entitled to rely on that evidence.

Reasonable Apprehension of Bias – Mr. Bernstein and Discipline Committee Members

54. The panel earlier considered the issue of reasonable apprehension of bias with respect to the composition of its own panel, and has set out its position on the appropriate test and considerations above in these reasons.

55. The panel reviewed *Reasons for the Decision Made June 16, 2004 Denying the Recusal Applicatio*n, issued on July 27, 2004. This decision specifically addressed the apprehension of bias in connection with Mr. Bernstein. In addition, the panel considered the written and oral submissions of Mr. Bowman and Mr. Farley. The key factors in Mr. Bowman's argument are: Mr. Bernstein was a partner of Price Waterhouse (PW), a predecessor firm to PriceWaterhouseCoopers (PWC); Mr. Tambosso, the complainant, is a partner with PWC; and PWC are the experts for Coopers and Lybrand (C&L) in the Castor Proceedings. In addition, Mr. Bernstein receives a pension from PWC.

56. The panel finds the Discipline Committee was correct in concluding that a reasonable person, looking at the facts, would conclude that Mr. Bernstein and Mr. Tambosso were not former partners of each other. There is no indication that Mr. Bernstein and Mr. Tambosso knew each other. In regard to the pension Mr. Bernstein receives from PWC, there is an indication that it is a small part of his income and, therefore, it is not reasonable to conclude that it would influence Mr. Bernstein's ability to decide fairly

57. Mr. Bowman also raised the issue of Reasonable Apprehension of Bias in connection with Ms. Hayes, Mr. Peall and Mr. Wormald, three members of the Discipline panel.

58. The panel reviewed the employment history of Ms. Hayes and Mr. Wormald as it relates to Thorne Gunn/Thorne Riddell, both predecessor firms of Thorne Ernst Whinney (York-Hannover's auditors). While Ms. Hayes and Mr. Wormald had been employed by firms that eventually become part of Thorne Ernst Whinney, the panel did not find any evidence to suggest that either had any involvement with the audit of York-Hannover or even a remote connection to anyone involved in these proceedings. The panel concluded that a reasonable person would not conclude that Ms. Hayes and Mr. Wormald could not decide fairly the matter before them.

59. The panel also reviewed the employment history of Mr. Peall. Mr. Peall was an employee of C&L until 1985, which is prior to the time period under consideration in this matter. There was no evidence presented at the Appeal hearing of a personal or professional relationship between Mr. Peall and Mr. Tambosso. The panel is of the view that simply having been an employee of a firm of which the complainant eventually becomes a partner is far from sufficient to cause a reasonable person to believe that Mr. Peall could not decide fairly the matter before him.

60. For the reasons set out above, this panel finds the Discipline Committee did not commit any errors in having the members of that panel proceed to hear the matter before it.

Delay in Issuance of Reasons

61. The panel considered the delay between the date the Discipline Committee's decision was made (August 31, 2005), the date of its order (November 17, 2005) and the issuance of the written reasons for the Discipline Committee's decision and order (May 25, 2007).

62. Such a lengthy delay is not in the best interests of the member, the profession and the general public. However, the delay, in and of itself, does not inexorably lead to the conclusion the reasons do not reflect the reasoning of the tribunal at the time it made its decision and order.

63. The Supreme Court of Canada, in *R. v. Teskey,* stated: "the onus is therefore on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitutes an after-the-fact justification of the verdict rather than an articulation of the reasoning that lead to it."

64. The panel was not informed of any circumstances contributing to the delay. The panel is also cognizant of the fact the hearing itself was lengthy, and included a number of complex issues and motions. Further, the members of the Discipline Committee hearing the matter are volunteers, not professional judges, and cannot be held to an unreasonable standard. Although the delay was lengthy, there is nothing in the circumstances of that delay or in the evidence or

submissions before this panel to cause the panel to find there is a reasonable apprehension that an after-the-fact justification of the verdict has occurred instead of an explanation of the reasoning that led to the decision.

Sufficiency of Reasons

65. Although it was not contained in the grounds of appeal, Mr. Bowman has also made submissions to this panel that the reasons of the Discipline Committee were insufficient and that this panel should intervene on that basis.

66. As set out by the Supreme Court of Canada in a line of cases, including *R. v. Sheppard* and *R. v. Walker,* and expressed by the court in *Walker*:

> …Sheppard holds that the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e. a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

67. Even if the panel were to find the reasons of the Discipline Committee did not meet the requirements of sufficiency, that failure, according to the court in *Walker*, "does not provide a free-standing right of appeal or in itself confer entitlement to appellate intervention."

68. Further, the courts have cautioned against holding a lay tribunal to the same standard of reason-writing as a court:

> …the reasons of a tribunal which is made up of persons who were not legally trained, ought not to be the subject of 'painstaking scrutiny'. It is not fatal to a decision that specific mention is not made of certain evidence; nor is it fatal if specific reasons are not given before its rejection. (*Trotter v. College of Nurses of Ontario*)

69. The reasons of the Discipline Committee in this matter set out the evidence upon which the Committee relied in reaching its findings, and its rationale for making those findings. The reasons are sufficient to enable the appellant to meaningfully appeal those findings, as he has done. This ground must fail.

Decision on Charge No. 1(a)

70. The appeal is allowed on charge No. 1(a), the finding of guilty is vacated and a finding of not guilty substituted therefor.

71. The panel reviewed the reasons for the decisions of the Discipline Committee on charge No.1. The salient paragraphs follow:

> 61. With respect to the first charge, the issue is whether or not Mr. Whiting knew or should have known that the draft 1988 financial statements of York-Hannover which he sent to Aetna and Adia without disclosing that the auditors had issued a draft adverse opinion were false or misleading. In his letters to both Aetna and Adia he said the auditors had completed their field work but the audit report had not been issued.
>
> 62. Mr. Whiting knew that the auditors had issued a draft adverse opinion concerning the 1988 financial statements. He knew that the auditors took the position that York-Hannover had substantially overstated its assets and that the earnings and retained earnings should be reduced by almost $100 million. He knew that the draft financial statements were not in accordance with Canadian generally accepted accounting principles. He knew that the financial statements would have to be revised significantly before they could be issued with an audit opinion attached. As such, the draft financial statements were misleading. They did not represent the financial position of York-Hannover.
>
> 63. Mr. Whiting was concerned about the precarious financial position of York-Hannover. His memorandum to Mr. von Wersebe of January 31, 1990 makes this quite clear. Yet, Mr. Whiting sent his letters enclosing the 1988 financial statements to Aetna and Adia without informing them that there was any controversy or uncertainty about the financial statements and in particular about the asset valuation. While he wrote about a problem in his letter to Aetna which had "prevented and or delayed the issuance of the auditors report" he did not set out the true nature and extent of the overstatement of the assets and the necessity to write down the assets, earnings and retained earnings. In both instances, he associated himself with financial statements which were misleading and which he knew or should have known were misleading.
>
> 64. The panel was urged by counsel for the member to find that, as the statements were draft statements, no reliance should have been placed on them, and there was no obligation on Mr. Whiting to ensure their accuracy. He also asserted that as Mr. Whiting had not prepared the financial statements he was not responsible for them. As the Senior Vice-President of York-Hannover, he cannot avoid the responsibility for associating himself with the 1988 financial statements because he did not prepare them. The fact that the financial statements were draft might excuse Mr. Whiting if the problem with the financial statements was discovered after they were sent. But this is not the case, Mr. Whiting knew the problems with the financial statements when he sent them.
>
> 65. The panel heard considerable evidence and a number of submissions as to whether Mr. Whiting could have, or should have, provided the draft adverse opinion with the financial statements without the consent of the auditors. This is not really the issue. If he was not entitled to send the draft adverse opinion he ought not to have sent the misleading financial statements.

66. Mr. Whiting provided the statements to Adia in an attempt to reduce the pressure it was exerting for audited financial statements. He provided the financial statements to Aetna to "paper their file" a statement the panel took to mean provide assurances of York-Hannover's financial position. The panel concluded that Mr. Whiting intended the recipients to rely on the 1988 financial statements at least to some extent or for some purpose.

72. In arriving at its decision, the panel considered, in particular, the following factors:

a) As CFO of York-Hannover, Mr. Whiting was associated with the 1988 draft financial statements of York-Hannover.

b) Mr. Whiting had full knowledge of the ongoing discussions with Thorne Ernst & Whinney, the audit firm for York-Hannover. While the ongoing discussions with the audit firm were not complete at the time the draft financial statements were delivered, it is clear from the evidence that there was considerable debate as to the valuation of the company's assets. This is supported by the draft adverse opinion prepared by Thorne Ernst & Whinney. In addition, Mr. Whiting, in providing his evidence in the Castor proceedings, gave evidence that he was surprised that the reserve requested by the auditor was as low as it was.

73. The panel also considered the submissions surrounding the need to provide the draft adverse audit opinion along with the draft financial statements when forwarding to an external party. The panel would have preferred full disclosure with the draft adverse audit opinion accompanying the draft financial statements. However, the panel is of the view that where there are concerns about the draft financial statements, that at a minimum, some warning about the concerns must accompany the draft financial statements when they are sent to an external party. As a result of the discussions surrounding the valuation of York-Hannover's assets, the panel is of the opinion that the draft financial statements, without some warning, would be considered misleading.

74. The panel found that the existence of a draft adverse audit opinion is not sufficient to conclude that the statements are necessarily false or misleading. The very fact that it is a draft opinion indicates that it is designed to be the basis of further discussion. However, the fact that it is an adverse opinion suggests that there are considerable concerns about the draft financial statements. In the panel's view, the existence of such concerns about the financial statements suggests that there would likely be some adjustment to the 1988 financial statements. It is the panel's opinion that the existence of such unresolved issues must be communicated in some manner to potential users of the statements in order to conclude that the statements, when read in conjunction with the communication, are not false or misleading.

75. The panel placed considerable reliance on a letter dated February 21, 1990, (Appeal Book, Volume 1, Tab 14-10). Mr. Whiting, aware that Aetna wanted the audited financial statements it was entitled to under its debenture, wrote to Aetna, in part, as follows:

> I am enclosing, for York-Hannover Developments Ltd.,
>
> 1. year ended September 30, 1987 audited financial statements
> 2. year ended September 30, 1988 financial statements. Our auditors have completed their review of these drafts, but have not issued their report

> 3. year ended September 30, 1989 draft financial statements. Our auditors have only performed limited field work to date.
>
> The principal problem that has prevented and/or delayed the issuance of our auditors' reports is the magnitude and trend of advances to our affiliated companies. As disclosed in Note 7, these advances have grown from $70,000,000 in 1987 to $132,000,000 by 1989. A portion of this increase relates to our continued funding of the Radisson Plaza Hotel Raleigh.

76. While Mr. Whiting did not disclose the existence of a draft adverse opinion when he sent the 1988 draft financial statements to Aetna, he did direct the reader's attention to the primary asset valuation concerns raised in the draft adverse audit opinion as evidenced by the following excerpt from the above letter:

> The principal problem that has prevented and/or delayed the issuance of our auditors' reports is the magnitude and trend of advances to our affiliated companies. As disclosed in Note 7, these advances have grown from $70,000,000 in 1987 to $132,000,000 by 1989.

77. The Appeal panel finds that the Discipline Committee did not place sufficient weight on the warning contained in the letter to Aetna. That warning was sufficient to inform a knowledgeable reader that there were unresolved issues about the financial statements and, in particular, about the asset valuation. Therefore, the decision of the Discipline Committee on this charge cannot stand and the appeal on it is allowed.

Decision on Charge 1(b)

78. The appeal is dismissed.

79. By letter dated March 7, 1990, Adia declared York-Hannover in default under its debenture for failure to deliver the audited financial statements. By letter dated March 12, 1990, Mr. Whiting wrote to Adia as follows:

> At the request of our Mr. K. von Wersebe, I am enclosing unaudited draft consolidated financial statements for York-Hannover Developments Ltd. for its fiscal years ended September 30, 1988 and 1989. The 1988 audit field work has been completed but the audit report has not yet been issued (Appeal Book, Volume 1, Tab 14-16).

80. This letter is not sufficient to direct a knowledgeable reader's attention to the primary asset valuation concerns raised in the draft adverse audit opinion. Having reviewed the evidence and considered the submissions of counsel, the Appeal Committee concurs with the decision of the Discipline Committee

Decision on Charge No. 2 (a) and (b)

81. The appeals are dismissed.

82. In arriving at its decision, the panel considered, in particular, the following factors:

a) The submissions made by all parties on the legal issue relating to the existence and enforceability of guarantees;

b) The actions of Mr. Whiting during the period surrounding the time he signed the confirmations. The panel placed particular reliance on three documents all dated in and around the dating of the audit confirmations:
   i. A memorandum to Mr. von Weresbe from Mr. Whiting dated January 23, 1990 (Appeal Book, Volume 1, Tab 14-22), specifically, the following quotation: *"These guarantees are to be time limited, not enforceable and to be put back to YHDL upon Castor's option."*
   ii. A letter to Castor Holdings Limited from Mr. von Weresbe dated January 25, 1990 (Appeal Book, Volume 1, Tab 14-23), specifically, the following quotation: *"Will be executed by me only after review by legal counsel and receipt of his opinion that the limitations and release provisions noted above are satisfactory in form and substance."*
   iii. A letter to Castor Holdings Limited from David Whiting dated January 29, 1990 (Appeal Book, Volume 1,Tab 14-24), specifically, the following quotation: *"The three commitment letters that included additional guarantees to be given by Karsten are agreed to but are being held until we receive confirmation of the terms, as outlined in Karsten's letter dated January 25, 1990."*

c) Evidence provided by Mr. Whiting at the Castor proceedings where he stated that the guarantees were never in effect (Appeal Book, Volume 3, Tab 45, page 138, lines 14 – 18).

83. The Appeal panel reviewed the reasons of the Discipline Committee on charge No.2 and have reproduced these below:

> 68. With respect to the second charge, the issue is whether or not Mr. Whiting knew or should have known that the confirmations with respect to the increased guarantees were false or misleading when he signed them and sent them to Castor's auditors.
>
> 69. It will be clear from the facts set out above that when Mr. Whiting sent the confirmations on January 18, 1990 and February 8, 1990 the increased guarantees had not been signed by Mr. von Wersebe.
>
> 70. Moreover, Mr. Whiting knew that Mr. von Wersebe proposed to sign the guarantees only if they included terms which made them meaningless. He had confirmed this in his memorandum to Mr. von Wersebe of January 23, 1990, and in his letter to Mr. Smith of January 29, 1990.
>
> 71. Mr. Whiting testified that at the time he signed the audit confirmations he believed the guarantees were fully enforceable. In light of the contemporaneous letters and memorandum, the panel could not accept Mr. Whiting's evidence. The panel concluded that he knew or should have known that the confirmations

> were false or misleading. There is no doubt this misconduct constitutes professional misconduct. Accordingly, he was found guilty of the charge.
>
> 72. Given the situation in which he found himself, it would have been appropriate for Mr. Whiting to have provided the audit confirmations to Mr. von Wersebe for the latter to deal with, but not to deal with them himself.

84. After reviewing the evidence, the panel concluded that by signing and delivering the confirmations there was an attempt by Mr. Whiting to mislead Castor's auditor. Therefore, the panel concurs with the decision of the Discipline Committee.

85. The panel heard submissions as to whether a guarantee had to be in writing to be enforceable. Based on the court's ruling in *John C. Love Lumber Co. v. Moore*, this panel takes the position that, for a guarantee to be enforceable, it need not be in writing provided that the guarantee benefits the person who made the oral guarantee. Mr. von Wersebe, as the majority shareholder of York-Hanover, would benefit from the loan guarantees as the loans would benefit York-Hanover and thus benefit Mr. von Wersebe as the majority shareholder.

86. The many authorities to which counsel for the appellant and the panel's counsel have referred also make it clear that, to have an enforceable guarantee, whether in writing or oral, it is also necessary to have a meeting of the minds in terms of three key elements – parties, property and price. (*Forbes Motors Inc. v. 1136279 Ontario Ltd.*) The parties to the purported guarantee are clear, as is the price. However, given the attempts by Mr. von Wersebe to limit the guarantees so as to ensure his property could not be placed at risk, the only conclusions that can be reached is that there was no enforceable guarantee, there was no intention to create an enforceable guarantee, and no one could believe there was such a guarantee. This conclusion is supported by the fact that Mr. Whiting expressly indicated in the Castor transcripts that no guarantee existed.

87. While, if the Discipline Committee relied on the lack of a signed guarantee and failed to consider the possibility of an enforceable oral guarantee, it was an error to do so, it was, as set out above, correct in finding there was no enforceable guarantee in existence at the time of the confirmations. Further, the Discipline Committee, based on the evidence, did not err in finding Mr. Whiting could not have believed to the contrary. The Discipline Committee made no overriding error and, therefore, the appeals on these charges are dismissed.

Sanctions

88. The panel reviewed the order made by the Discipline Committee and the reasons for the order. The panel has also considered the submissions of counsel, and is mindful of its role. The panel finds that the Discipline Committee properly considered the principles of sanction and that the sanction imposed is within the acceptable range for the charges of which it found the appellant guilty. However, given that the Appeal Committee has found the appellant not guilty of one particular of a charge, it must consider whether the financial sanction is still within the appropriate range. As we will be hearing submissions on the issue of costs, the panel is reserving on the quantum of the fine, and invites submissions from the parties on that issue.

89. Although the appellant also appealed the costs imposed by the Discipline Committee, the parties agreed to abide by the ruling of a separate panel of the Appeal Committee in the matter of *Barrington, Power and Russo,* as to the jurisdiction of the Institute to award costs

against a member. The reasons in that case have now been released, and the Appeal Committee has held that the Institute does have jurisdiction to award costs against a member.

90. As agreed by the parties at the hearing in this matter on October 28, 2008, that ruling is to be applied by this panel, without prejudice to a party's right to raise the issue on a judicial review. The issue of jurisdiction having been settled, the issue of the appropriate quantum of costs remains. The panel has not heard submissions on that issue, and will reconvene on May 22, 2009 to hear submissions of counsel on the quantum of the fine and costs. Separate reasons will be released by the panel after hearing submissions, deliberating and reaching a decision on that issue.

DATED AT TORONTO THIS 11th DAY OF MAY, 2009
BY ORDER OF THE APPEAL COMMITTEE

L.P. BOOKMAN, CA – ACTING DEPUTY CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

D.J. ANDERSON (PUBLIC REPRESENTATIVE)
D.A. ROBERTSON, FCA

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **DAVID LAWRENCE WHITING, CA**, a member of the Institute, under **Rules 201 and 205** of the Rules of Professional Conduct, as amended.

TO: Mr. David Lawrence Whiting, CA
1882 Sherwood Forrest Circle
MISSISSAUGA, ON L5K 2E7

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision Made August 31, 2005 and Order Made November 17, 2005)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario convened on March 4, 2004, May 25, 2004, June 16, 2004, August 24, 2004, August 26, 2004, October 4, 2004, November 8, 2004, July 4, 2005, July 7, 2005, August 17, 2005, August 18, 2005, August 29, 2005, and November 16, 2005 to hear charges of professional misconduct brought by the Professional Conduct Committee against David Lawrence Whiting, a member of the Institute.

2. Mr. Paul Farley appeared on behalf of the Professional Conduct Committee. He was accompanied by Mr. Robert Robertson, CA, the investigator appointed by the Professional Conduct Committee. Mr. Whiting attended and was represented by his counsel, Mr. Frank Bowman, who was accompanied by Mr. Douglas Stewart of his office. Mr. Irving Rosen, FCA, an expert retained by Mr. Whiting also attended.

3. The decision of the panel, the finding of guilty with respect to charge Nos. 1 and 2 and not guilty with respect to charge Nos. 3 and 4 was made known to the parties on August 31, 2005. The sanction was determined and an order made for costs on November 17, 2005. The written Decision and Order was sent to the parties on that day. These reasons, given pursuant to Bylaw 574, include the charges, the decision, the order, and the reasons of the panel for its decision and order.

CHARGES

4. The following charges, as amended at the hearing on March 4, 2004, were laid by the Professional Conduct Committee against Mr. Whiting on February 28, 2003:

1. THAT the said David L. Whiting, in or about the period January 1, 1990 through March 31, 1990, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

a) He provided unaudited draft financial statements of York-Hannover Developments Ltd. for the year ended September 30, 1988 to Aetna Realty Investors Inc., without disclosing that the auditors had issued a draft adverse opinion on the September 1988 financial statements as a result of the failure of the company to write down accounts receivable and amounts due from affiliated companies.

b) He provided unaudited draft financial statements of York-Hannover Developments Ltd. for the year ended September 30, 1988 to Adia International S.A., without disclosing that the auditors had issued a draft adverse opinion on the September 1988 financial statements as a result of the failure of the company to write down accounts receivable and amounts due from affiliated companies.

2. THAT the said David L. Whiting, in or about the period January 1, 1990 through March 31, 1990, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

a) He signed as correct an audit confirmation to Coopers & Lybrand that a $35 million loan from Castor Holdings Ltd. to York-Hannover Developments Holdings Ltd. was secured by a guarantee of Mr. Karsten von Wersebe in the amount of $21,125,000 when he knew or should have known that a portion of the guarantee was not reasonably enforceable.

b) He signed as correct an audit confirmation to Coopers & Lybrand that a $27 million loan from Castor Holdings Ltd. to KVW Investments Ltd. was secured by a guarantee of Karsten Von Wersebe in the amount of $22,500,000 when he knew or should have known that a portion of the guarantee was not reasonably enforceable.

3. THAT the said David L. Whiting, on or about February 8, 1991, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., associated himself with reports, statements and representations which he knew or should have known were false or misleading, contrary to Rule 205 of the rules of professional conduct in that:

a) He signed an audit confirmation to Coopers & Lybrand confirming that the balance owing by York-Hannover Developments Ltd. to Castor Holdings Limited was $678,512.33 when he knew or should have known that the balance owing was approximately $40 million higher.

4. THAT the said David L. Whiting, on or about February 8, 1991, while employed as Senior Vice-President Administration, York-Hannover Developments Ltd., failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201 of the rules of professional conduct in that:

a) He signed an audit confirmation to Coopers & Lybrand confirming that the balance owing by York-Hannover Developments Ltd. to Castor Holdings

> Limited was $678,512.33 without first obtaining sufficient appropriate information to support the assertion that approximately $40 million in loans from Castor Holdings Limited had been repaid.

5. Mr. Whiting entered a plea of not guilty to the charges.

THE PROCEEDINGS

Motions

6. There were a number of pre-hearing and mid-hearing motions brought in this case. The complaint was made by a partner of Coopers & Lybrand who heard Mr. Whiting's evidence in a civil case being heard in Quebec. Coopers & Lybrand is a defendant in the case, *Widdrington et al v. Wightman et al* (*Widdrington v Wightman)* also referred to in these reasons as "the Castor litigation". On November 24, 2003, the then Chair of the Discipline Committee, Ms. Bridge, convened an Assignment Hearing to hear an application brought by the member for a direction that the Professional Conduct Committee state whether it intended to tender as evidence transcripts of the proceedings in *Widdrington v. Wightman* in the Quebec Superior Court and if so to identify the portions of the transcripts they intend to rely upon. The member succeeded with respect to the first point but not the second point. The written Reasons of the Chair of the Discipline Committee are dated December 18, 2003.

7. On March 4, 2004, Mr. Whiting brought an application before the panel to exclude from evidence at this hearing the transcripts of his evidence in the Quebec Superior Court in *Widdrington v. Wightman*. The motion to exclude the transcripts was dismissed. Counsel for the member then brought an application to adjourn or stay the proceedings to enable Mr. Whiting to bring an application for judicial review with respect to the decision not to exclude his prior evidence. This application was dismissed. The written Reasons of the Discipline Committee for the orders made on March 4, 2004, are dated April 6, 2004.

8. On June 16, 2004, after the first day of evidence was heard, counsel for Mr. Whiting brought a motion for an order that Mr. Harvey Bernstein, the Chair of the panel, recuse himself. The application was argued in the absence of Mr. Bernstein. The application was dismissed. The written Reasons are dated July 27, 2004. As counsel for Mr. Whiting indicated he would be seeking judicial review of the dismissal of the motion, the hearing was adjourned first until July 7, 2004, and then on consent until August 24, 2004.

9. On August 4, 2004, Justice Dunnet, sitting as a single Judge of the Divisional Court, dismissed Mr. Whiting's application to stay the discipline proceedings until the application for judicial review was heard by the Divisional Court.

10. On August 24, 2004, counsel for Mr. Whiting brought a motion for an adjournment as he had obtained a date from the Divisional Court on which a panel of the Divisional Court would hear the application for judicial review of the dismissal of the motion for an order of recusal. This motion for an adjournment was denied and the hearing proceeded.

11. On October 4, 2004, at the conclusion of the case for the Professional Conduct Committee, counsel for Mr. Whiting brought a motion objecting to the composition of the panel. The motion was dismissed and the hearing continued. The panel did not issue separate reasons for dismissing the motion. The reasons for dismissing the motion are summarized in the six paragraphs which follow.

12. This panel, with the exception of Mr. Bernstein, considered the issue of reasonable apprehension of bias on the application made for the recusal of Mr. Bernstein on June 16, 2004. In the Reasons for the Decision, dated July 27, 2004, the panel set out our understanding of the applicable principles of law with respect to reasonable apprehension of bias.

13. The material Mr. Bowman filed to support the application was marked as Exhibit T. The material Mr. Farley filed in response to the application was marked as Exhibit U. The panel considered the material and submissions aware that the application required a fact specific inquiry.

14. Mr. Bowman did not allege that there was actual bias and no member of the panel has any reason to believe that there was or is such bias. No member of the panel had any involvement with York-Hannover Developments Ltd. (York-Hannover) or Castor Holdings Ltd. (Castor). No member of the panel has knowledge of the Castor litigation, other than knowledge acquired at this hearing.

15. The panel concluded the participation of its members did not contravene the Conflict of Interest Avoidance Form or policy of the Discipline Committee.

16. Without attempting to exhaustibly address all of the concerns Mr. Bowman raised, the panel does wish to mention four of the relationships which he asserted gave rise to a reasonable apprehension of bias:

a) Ms. Hayes trained as a student and practiced with firm of Thorne Gunn until 1981. She returned on a contract basis for one tax season, to do tax returns, in the late 80's or early 90's. Thorne Gunn became Thorne Riddell which became Thorne, Ernst and Whinney, the auditors of York-Hannover.

b) Mr. Peall trained as a student and practiced with the firm, Coopers & Lybrand. Prior to 1983 he worked in the Hamilton and Ottawa offices of Coopers & Lybrand. In 1983, while he remained an employee of Coopers & Lybrand, he was seconded to the office of the Provincial Auditor. He has remained at the office of the Provincial Auditor since 1983, and became an employee of the Provincial Auditor in 1985.

c) Mr. Wormald trained as a student and practiced with the firm Thorne Gunn during the period 1968 to 1976. He has had no connection with Thorne Gunn, or any firm it became a part of subsequent to 1976.

d) Former partners of Price Waterhouse are retained as experts for Coopers & Lybrand in the Castor litigation. CIBC appointed Price Waterhouse the receiver of the Skyline Triumph Hotel in late July 1991. York-Hannover managed this hotel, had a 16% interest in it and had a right to acquire a further 76% interest. The receiver took possession of the hotel and sold it in 1992. Mr. Bernstein was a partner of Price Waterhouse from 1990 to 1994.

17. The panel did not believe that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that any member of the panel, consciously or unconsciously, would not decide the issues at this hearing fairly. The panel did not believe that, the relationships which Mr. Bowman asserted were matters of concern, would be seen by an informed person as concerns which could give rise to a reasonable apprehension of bias.

The Evidence

18. The member's plea was taken on May 25, 2004. The evidence of the Professional Conduct Committee was heard on May 25, 2004, August 24, 2004, and August 26, 2004. Mr. Robertson was the only witness called by the Professional Conduct Committee. Counsel for the Professional Conduct Committee did file, as part of his case, transcripts of the evidence Mr. Whiting gave on February 28, 2000, March 28, 2000, April 26, 2000, and April 27, 2000 in *Widdrington v. Wightman* and he read excerpts of these transcripts for the record.

19. Mr. Whiting gave evidence on October 4, 2004, November 8, 2004, July 4, 2005 and July 7, 2005. Mr. Rosen gave evidence on July 7, 2005, August 17, 2005 and August 18, 2005. Submissions were made with respect to guilt or innocence on August 29, 2005 and the decision was made known to the parties on August 31, 2005. On November 16, 2005, the panel heard submissions with respect to sanction, brief evidence from Mr. Rosen with respect to costs and submissions with respect to costs. The order with respect to sanction and costs was made on November 17, 2005.

20. Extensive document briefs were filed by each party with respect to the various motions. The documents on the motions were marked as lettered exhibits. Both parties filed documents on the hearing as to the merits of the charges, and these documents were marked as numbered exhibits.

21. In *Widdrington v. Wightman*, Justice Carrière made several orders or directions to prevent the oral evidence rendered at that very lengthy trial, involving a claim for a very large sum of money, from being communicated beyond the courtroom. He excluded witnesses, and instructed witnesses not to divulge or discuss their testimony with third parties even subsequent to their testimony. He ordered the court stenographers not to provide copies of the trial transcripts to anyone other than the counsel at that hearing without the written authorization of the court.

22. An application was made to Justice Carrière seeking permission to use the transcripts of Mr. Whiting in these discipline proceedings. Justice Carrière granted the application and in doing so specifically made reference to the undertaking that the prosecution would ask the Discipline Committee to order that any portion of the hearing dealing with the transcripts be held *in camera* and that any portion of the transcripts filed, be kept under seal. Justice Carrière's Judgment in this regard was filed as Exhibit 5 on May 25, 2004. When the Judgment was filed the Chair ordered that the hearing would proceed *in camera* and the transcripts kept under seal so that third parties would not obtain access to them. Thereafter, when transcripts of *Widdrington v. Wightman* were referred to, the proceedings were held *in camera*.

THE FACTS

23. The hearing was lengthy and there was substantial disagreement with respect to what conclusions should be drawn from the facts. However, the facts themselves were not the subject of substantial controversy. The panel now sets out the relevant facts as we find them to be.

24. Mr. Whiting received his Chartered Accountant designation in 1971. After spending a period of time in public practice, he joined York-Hannover in 1985. He remained with the company until 1992, and during most of his tenure he was the Senior Vice-President - Administration. Mr. Ross Lyndon, CA, a Vice-President and the comptroller handled the day-to-day accounting issues.

25. York-Hannover, a real estate development company, was owned by Mr. Karsten von Wersebe, who was the sole shareholder. Mr. von Wersebe and Mr. Wolfgang Stolzenberg founded Castor Holdings Ltd. (Castor) a company which provided financing to development companies. Mr. von Wersebe sold his shares in Castor in 1978 and resigned as a Director in 1985. Castor provided significant financing to York-Hannover.

26. In the late 1980's, York-Hannover was struggling, due at least in part to the downturn in the real estate market. The firm of Thorne, Ernst & Whinney, Charted Accountants, were engaged to audit the financial statements of York-Hannover for the year ending September 30, 1987. Thorne, Ernst & Whinney issued an unqualified audit opinion dated July 15, 1988, and September 30, 1988 as to note 7(c) (Exhibit 4, Tab 3).

Charge No. 1, association with the 1988 financial statements

27. Thorne, Ernst & Whinney were also engaged to audit the financial statements of York-Hannover for the year ending September 30, 1988. On December 21, 1989 Thorne, Ernst & Whinney issued a draft adverse opinion (Exhibit 4, Tab 4) on the draft financial statements for the year ending September 30, 1988 (1988 financial statements). The draft adverse opinion said:

> To the Shareholder of York-Hanover Development Ltd.
>
> We have examined the consolidated balance sheet of York-Hanover Developments Ltd. as at September 30, 1988 and the consolidated statements of earnings, retained earnings and cash flows for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.
>
> Advances due from affiliated companies having a net realizable value of $47,900,000 are recorded at $90,386,000. Subsequent to year end, additional advances were made to affiliated companies in the amount of $40,025,000 which have a net realizable value of nil. Mortgages and other receivables arising from real estate transactions having a net realizable value of $74,035,000 are recorded at $82,235,000. Other advances having a net realizable value of $7,800,000 are recorded at $16,678,000. It is therefore necessary to provide for these deficiencies in values. Accordingly, advances due from affiliated companies, mortgages and other receivables and other advances should be reduced by $42,486,000, $8,200,000 and $8,868,000, respectively. A provision should be made for future losses of $40,025,000. Earnings and retained earnings should be reduced by $99,579,000.
>
> If these provisions for losses were recorded, the company would be in default of a covenant of the subordinated debenture referred to in note 10 amounting to $23,058,000 and the debenture would become due and payable immediately.
>
> These financial statements are prepared on the basis that the

> Company will continue to operate on a going concern basis. If the provisions for losses referred to above were recorded, there would be a deficiency is Shareholder's Equity of $70,746,000. A failure to continue as a going concern would then require that stated amount of assets and liabilities to be reflected on a liquidation basis which could differ from the going concern basis.
>
> In our opinion, in view of the material effects on the consolidated financial statements of the matters referred to in the preceding paragraphs these consolidated financial statements do not present fairly the financial position of the company as at September 30, 1988 and the results of the operations and the changes in its cash flows for the year then ended in accordance with generally accepted accounting principles.

28. Apart from Castor, York-Hannover had obtained financing from other sources, including Inspectorate Internationale SA (Adia) and Aetna Realty Investors Inc. (Aetna). According to its terms, York-Hannover was in breach of the debenture held by Adia if its shareholder equity fell below $20 million.

29. The debentures required York-Hannover to provide audited financial statements to Adia and Aetna respectively. Both Adia and Aetna applied significant pressure to York-Hannover to produce audited financial statements for the years ending September 30, 1988 and 1989.

30. On December 20, 1989, (Exhibit 4, Tab 13) Mr. Whiting sent a memorandum to Mr. von Wersebe with respect to the Adia debenture. The memorandum includes the following:

> The representations and warranties which were given at closing, continue until the debt is repaid. Paragraph 3.0 (c) provides that the financial statements "have been prepared in accordance with generally accepted Canadian accounting principles consistently applied…"
>
> **...**
>
> Therefore, if we go ahead with the adverse opinion alternative, I believe we will be in default under the Inspectorate debenture as:
>
> 1. The statements will not be in accordance with generally accepted (Canadian) accounting principles as gaap would require the write-down of the "soft assets".
>
> **...**
>
> 2. Needless to say, we are well beyond the 180 days deadline for delivery of the financial statements.
>
> Obviously, I do not have a solution for our dilemma – either financial statements which we have been struggling with for so long or Inspectorates' potential rights.

31. On January 31, 1990, Mr. Whiting prepared a handwritten memorandum for Mr. von Wersebe, (Exhibit 4, Tab 9, a typed version was filed as Exhibit 16). The memorandum discloses Mr. Whiting was clearly uncomfortable with the unsettled financial position of York-Hannover. He was concerned that York-Hannover was or appeared to be insolvent. He concluded the memorandum:

> I am prepared to stay to assist in the wind-down of YHDL but not with any continuing entity owned by/funded by the European companies. I have complete lack of confidence in the European team and will not be associated with them in the longer term.

32. By letter dated March 7, 1990, Adia declared York-Hannover in default under the debenture for failure to deliver the audited financial statements. By letter dated March 12, 1990, (Exhibit 4, Tab 16) Mr. Whiting wrote to Adia as follows:

> Attention Dr. Matthias Jermann
>
> Dear Sir:
>
> At the request of our Mr. K. von Wersebe, I am enclosing unaudited draft consolidated financial statements for York-Hannover Developments Ltd. for its fiscal years ended September 30, 1988 and 1989. The 1988 audit field work has been completed but the audit report has not yet been issued.
>
> Yours very truly,
> YORK-HANNOVER DEVELPMENTS LTD.
> signature
> David L. Whiting

33. On March 26, 1990, Adia acknowledged they had received the financial statements Mr. Whiting sent on March 12, 1990, and declared that York-Hannover was in default as the statements were not audited.

34. By letter dated February 21, 1990, (Exhibit 4, Tab 10) Mr. Whiting, aware that Aetna wanted the audited financial statements it was entitled to under is debenture, wrote to Aetna as follows:

> Dear Kathy:
>
> Re: Radisson Plaza Hotel, Raleigh
>
> I am enclosing, for York-Hannover Developments Ltd.,
>
> 1. year ended September 30, 1987 audited financial statements
> 2. year ended September 30, 1988 financial statements. Our auditors have completed their review of these drafts, but have not issued their report.
> 3. year ended September 30, 1989 draft financial statements. Our auditors have only performed limited field work to date.
>
> The principal problem that has prevented and/or delayed the issuance of our auditors' reports is the magnitude and trend of advances to our affiliated companies. As disclosed in Note 7, these advances have grown from $70,000,000 in 1987 to $132,000,000 by 1989. A portion of this increase relates to our continued funding of the Radisson Plaza Hotel Raleigh.

> I have not enclosed the financial statements of KvW Investments Ltd., the second guarantor. It does not carry on any active business, and has no assets other than investments in and advances to subsidiaries, the principal one being York-Hannover Developments Ltd.
>
> If you have any question arising from your review of these statements, please call me.
>
> Yours truly,
> signature
> David L. Whiting

35. Mr. Whiting did not disclose, to Adia or Aetna, in his letters or otherwise, the fact that the auditors had provided a draft adverse opinion with respect to the 1988 financial statements or the relevant conclusions set out in the auditors' draft adverse opinion.

Charge No. 2, confirmation of increased guarantees

36. As part of its security for the loans advanced to York-Hannover, Castor required that Mr. von Wersebe sign personal guarantees. By letter of commitment dated July 17, 1989, Castor extended and increased an existing loan to York-Hannover to $35 million, and required that Mr. von Wersebe increase his personal guarantee by $6,125,000 to $21,125,000. Mr. Whiting had the authority to accept the terms of the commitment and he did so on July 15, 1989 (Exhibit 4, Tab 19).

37. By letter of commitment dated December 11, 1989, Castor extended and increased an existing loan to KVW Investments Ltd. (a company related to York-Hannover) to $27 million, and required that Mr. von Wersebe increase his personal guarantee by $10 million to $22.5 million. Mr. Whiting had the authority to accept the terms of the commitment, and he did so on December 30, 1989 (Exhibit 4, Tab 27).

38. By letter dated January 9, 1990, Castor asked York-Hannover to confirm directly to its auditors, Coopers & Lybrand, that Mr. von Wersebe had guaranteed $21,125,000 of the $35 million loan. Mr. Whiting did so on January 18, 1990 (Exhibit 4, Tab 18)

39. By letter also dated January 9, 1990, Castor asked KVW Investments Ltd. to confirm directly to its auditor, Coopers & Lybrand, that Mr. von Wersebe had guaranteed $22.5 million of the $27 million loan. Mr. Whiting did so on February 8, 1990 (Exhibit 4, Tab 26).

40. When Mr. Whiting confirmed the two guarantees referred to above, neither increased guarantee had been signed or delivered to Castor. Mr. von Wersebe was engaged in negotiations with Castor to reduce or negate the enforceability of the two guarantees, and one other guarantee which is not an issue in these proceedings. Mr. von Wersebe wrote to Castor Holdings to the attention of Mr. R.B. Smith on January 25, 1990, with respect to the guarantees. His letter (Exhibit 4, Tab 23) concluded as follows:

> While I recognize that these commitment letters are not in themselves guarantees and that formal documentation will be prepared and reviewed by our respective lawyers, I request that you confirm and acknowledge that these guarantees:

1. will be released on or before April 30, 1990
2. will not be enforced before April 30, 1990
3. will be executed by me only after review by legal counsel and receipt of his opinion that the limitations and release provisions noted above are satisfactory in form and substance.

41. Mr. Whiting knew the position Mr. von Wersebe was taking. His memorandum to Mr. von Wersebe dated January 23, 1990 (Exhibit 4, Tab 22) referred to the increased guarantees and said: "These guarantees are to be time limited, not enforceable and be put back to YHDL upon Castor's option." Mr. Whiting wrote to Castor, to the attention of Mr. R.B. Smith on January 29, 1990 and addressed, among other things, the guarantees. He concluded his letter (Exhibit 4, Tab 24) as follows:

> The three commitment letters that included additional guarantees to be given by Karsten are agreed to but are being held until we receive confirmation of the terms, as outlined in Karsten's letter dated January 25, 1990.

42. There is no evidence that Castor ever agreed to the proposal to make the guarantees unenforceable. According to the Affidavit of Execution the guarantee of $22.5 million of the $27 million loan to KvW Investments Ltd. was signed on December 29, 1989 (Exhibit 4, Tab 28). According to the Affidavit of Execution the guarantee of $21,125,000 of the $35 million loan to York-Hannover was signed on March 2, 1990 (Exhibit 4, Tab 20). Mr Whiting witnessed both guarantees. The guarantees were not sent to Castor, but remained on Mr. Whiting's desk.

43. The commitment letters which Castor sent to York-Hannover the following year did not require increases in the amounts of the guarantees as set out in paragraphs 36 and 37 above. Castor renewed its commitment with respect to the $35 million loan by letter dated October 22, 1990. With respect to the personal guarantee the letter (Exhibit 4, Tab 29) stipulated "Personal guarantee of Karsten von Wersebe to remain at $15 million." Castor asked Mr. Whiting by letter dated January 9, 1991 to confirm to its auditors, Coopers & Lybrand, that the security for the loan included the guarantee of Mr. von Wersebe for $15 million. Mr. Whiting confirmed this to be correct on February 8, 1991.

44. When Castor renewed its commitment with respect to the $27 million loan to KVW Investments Limited, by letter dated December 6, 1990, with respect to the personal guarantee, the letter (Exhibit 4, Tab 30) stipulated "Guarantee of Mr. von Wersebe remains at $12.5 million". Castor asked KVW Investments by letter dated January 9, 1991, to confirm to its auditors, Coopers & Lybrand, Mr. Whiting confirmed this to be correct on February 18, 1991.

Charge Nos. 3 and 4, confirmation of debt

45. By early 1991, York-Hannover was indebted to Castor for, among other amounts, $40 million in advances. There were discussions about that $40 million being assigned by Castor to a third party. These discussions are reflected in a memorandum sent by Mr. Whiting to Mr. von Wersebe, dated January 14, 1991, as follows (Exhibit 4, Tab 48) which said in part:

> It is suggested by Castor that an entity other than Castor advance $40,000,000 to YHDL to repay Castor interest and principal charged to the Advance Account. … My discussion was very general, and I understand there is to be further discussion with you prior to its implementation. I have no idea who this mystery lender is or the terms of its loan(s). You and I can probably guess though!

46. Mr. Lyndon had direct responsibility for management of the advance accounts, and indicated to Mr. Whiting the third party advance was proceeding. York-Hannover continued to carry the $40 million liability on its books, but Castor removed it from theirs. Castor had the authority to assign the loan without the consent of York-Hannover.

47. On February 8, 1991, Mr. Whiting signed a confirmation to Coopers & Lybrand, the auditors for Castor, that the indebtedness to Castor was $678,512.33, being the interest on the $40 million debt and not the debt itself (Exhibit 4, Tab 33). Prior to doing so, Mr. Whiting did not ascertain the identity of the third party lender, or take steps to satisfy himself that the assignment had occurred, beyond the assurances he received from Mr. Lyndon. In fact, no such assignment had taken place.

Evidence - Opinion

48. There was a significant amount of opinion evidence given in this matter. Much of it was provided by Mr. Irving Rosen, FCA, who testified for the defence. Mr. Rosen was qualified, without objection from the Professional Conduct Committee, as an expert in GAAP and GAAS issues. He was also qualified, after submissions by counsel, as an expert in the Rules of Professional Conduct, although he was cautioned to refrain from usurping the function of the panel by opining on the very issues before the panel.

49. Mr. Rosen testified that the draft financial statements for 1988 would have revealed to any sophisticated reader that York-Hannover was in financial difficulties. Further, York-Hannover could not have released the draft adverse opinion of the auditors to any third party without the consent of the auditors, which consent would not have been forthcoming. He stressed that the 1988 financial statements had been prepared for internal use, and admitted that, had the statements contained the write-down required, the company was “dead”. Mr. Rosen’s evidence with respect to the financial position of York-Hannover was inconsistent with the more optimistic evidence of Mr. Whiting about the viability of York-Hannover.

50. Mr. Rosen further testified that Mr. Whiting must have believed the increased guarantees on the $27 and $35 million loans from Castor were enforceable; otherwise he would have no reason to sign the confirmations. When asked by the panel what advice he would have given to Mr. Whiting with respect to the confirmations, had he been asked to do so at the relevant time, Mr. Rosen replied that he would have recommended giving the confirmations to Mr. von Wersebe to sign.

51. With respect to the assignment of the $40 million in advances, Mr. Rosen pointed out that Mr. Whiting had some evidence of the assignment, through Mr. Lyndon, and that Mr. Whiting was the Senior Vice-President of York-Hannover and not its external auditor, and therefore had a lesser duty to ensure there was sufficient audit evidence of the assignment prior to signing the confirmation.

Submissions

52. The Professional Conduct Committee submitted that, at the time Mr. Whiting provided the 1988 draft financial statements to Adia and Aetna, he knew they did not accurately set out York-Hannover’s financial position. He sent them to Adia to stave off the demand for audited statements, and to Aetna to “paper their file”. Mr. Whiting should not be able to escape responsibility for providing unreliable statements on the basis they were only drafts.

53. The Professional Conduct Committee further submitted that, at the time Mr. Whiting signed the audit confirmations, he knew the guarantees had not been signed or delivered. He also knew that Mr. von Wersebe did not want or intend the guarantees to be enforceable. The commitment letters which Mr. Whiting had signed agreeing to the increased guarantees could not be the basis for signing the confirmation as the guarantees has not been signed and Mr. von Wersebe, to Mr. Whiting's knowledge, was proposing terms be included which would make the guarantees meaningless.

54. With respect to the assignment of the advance accounts, the position of the Professional Conduct Committee was that, at the time he signed the audit confirmation, Mr. Whiting failed to take the appropriate steps to assure himself the assignment of liability had taken place. He did not know the identity of the third party lender; nor had he any evidence of the assignment. Given the overlap between the charges, the Professional Conduct Committee invited the panel to make a finding of guilty on either charge No. 3 or No. 4 but not on both.

55. Mr. Bowman, on behalf of Mr. Whiting, submitted that, as a CA in industry, while Mr. Whiting may have exercised poor judgment, he had no intent to mislead Adia or Aetna; he was concerned about getting York-Hannover "back on the rails". The draft financial statements he provided clearly showed York-Hannover was experiencing financial difficulties. He could not send the draft adverse opinion as he had no authority from the auditors to do so. He was entitled to send out the draft financial statements, which he had reviewed, but which he had not prepared.

56. Mr. Bowman further submitted that Mr. Whiting had not held onto the increased guarantees and that, at the time he signed the confirmations, he believed the guarantees to be enforceable. He had signed the commitment letters, as he was authorized to do, and those letters contained the increased guarantees.

57. Mr. Bowman also submitted that Mr. Whiting had never asserted that the $40 million in advances had been repaid. Contrary to the position of the Professional Conduct Committee, Mr. Whiting did have sufficient evidence of the transfer of the obligation. He relied, and was entitled to rely, on the representations of Mr. Lyndon. Further, the evidence of Ron Smith, Senior Vice - President, Mortgages, of Castor, as provided on the civil suit in Quebec, was that he had confirmed the transfer arrangements with the nine companies who were assuming the debt.

58. In summary, Mr. Bowman took the position that, to find Mr. Whiting guilty, the panel would have to find he had a reason to mislead, that he wanted to mislead, not merely that he was careless.

59. In reply, the Professional Conduct Committee pointed out that there was no evidence that Mr. Whiting had ever implied the $40 million in advances had been repaid; nor was that part of the prosecution case. With respect to the guarantees, the evidence was that they had been signed on March 2, 1990 and given to Mr. Whiting to try and make them unenforceable, and that they sat on Mr. Whiting's desk for years.

DECISION

60. The panel carefully considered all the evidence, not only the evidence set out above, and the submissions, and rendered the following decision:

THAT, having seen, heard and considered the evidence, charge Nos. 1, 2 and 3 having been amended at the hearing, and having heard the plea of not guilty to the charges, the Discipline Committee finds David Lawrence Whiting guilty of charge Nos. 1 and 2, and not guilty of charge Nos. 3 and 4.

REASONS FOR THE DECISION

Charge No. 1

61. With respect to the first charge, the issue is whether or not Mr. Whiting knew or should have known that the draft 1988 financial statements of York-Hannover which he sent to Aetna and Adia, without disclosing the conclusions the auditors reached with respect to the draft 1988 financial statements, were false or misleading.

62. In his letters to both Aetna and Adia Mr. Whiting said the auditors had completed their field work or review but the audit report had not been issued. He did not disclose that the auditors had issued a draft adverse opinion. Nor did he disclose the fact the auditors concluded that three of the assets set out in the draft 1988 financial statements, the advances due from affiliated companies, the mortgages and receivables and other advances should be written down by in excess of $42 million, $8 million, and $8.8 million respectively, and that the earnings and retained earning should be reduced by almost $100 million. He knew that the draft financial statements were not in accordance with Canadian generally accepted accounting principles. He knew that the financial statements would have to be revised significantly before they could be issued with an unqualified audit opinion attached. Accordingly he knew the draft 1988 financial statements did not represent the financial position of York-Hannover and as such those financial statements were misleading.

63. Mr. Whiting was concerned about the precarious financial position of York-Hannover. His memorandum to Mr. von Wersebe of January 31, 1990 makes this quite clear. Yet, Mr. Whiting sent his letters enclosing the 1988 financial statements to Aetna and Adia without informing them that there was any controversy or uncertainty about the financial statements and in particular about the asset valuation. While he wrote about a problem in his letter to Aetna which had “prevented and or delayed the issuance of the auditors report” he did not set out the true nature and extent of the overstatement of the assets and the necessity to write down the assets, earnings and retained earnings. In both instances, he associated himself with financial statements which were misleading and which he knew or should have known were misleading.

64. The panel was urged by counsel for the member to find that, as the statements were draft statements, no reliance should have been placed on them, and there was no obligation on Mr. Whiting to ensure their accuracy. He also asserted that as Mr. Whiting had not prepared the financial statements he was not responsible for them. As the Senior Vice-President of York-Hannover, he cannot avoid the responsibility for associating himself with the draft 1988 financial statements because he did not prepare them. The fact that the financial statements were draft might excuse Mr. Whiting if the problem with the financial statements was discovered after they were sent. But this is not the case, Mr. Whiting knew the problems with the financial statements when he sent them.

65. The panel heard considerable evidence and a number of submissions as to whether Mr. Whiting could have, or should have, provided the draft adverse opinion with the financial statements without the consent of the auditors. That is not really the issue. Mr. Whiting did not need the permission of the auditors to communicate the nature and extent of the problems with the draft 1988 financial statements or to advise Aetna and Adia that those financial statements

did not represent the financial position of York-Hannover.

66. Mr. Whiting provided the statements to Adia in an attempt to reduce the pressure it was exerting for audited financial statements. He provided the financial statements to Aetna to "paper their file" a statement the panel took to mean provide assurances of York-Hannover's financial position. The panel concluded that Mr. Whiting intended the recipients to rely on the 1988 financial statements at least to some extent or for some purpose.

67. The panel found the charge had been proven. Mr. Whiting associated himself with the 1988 financial statements which were misleading and which he knew or should have known were misleading. There is no doubt this misconduct constitutes professional misconduct. Accordingly, he was found guilty of the charge.

Charge No. 2

68. With respect to the second charge, the issue is whether or not Mr. Whiting knew or should have known that the confirmations with respect to the increased guarantees were false or misleading when he signed them and sent them to Castor's auditors.

69. It will be clear from the facts set out above that when Mr. Whiting sent the confirmations on January 18, 1990 and February 8, 1990 the increased guarantees had not been signed by Mr. von Wersebe.

70. Moreover, Mr. Whiting knew that Mr. von Wersebe proposed to sign the guarantees only if they included terms which made them meaningless. He had confirmed this in his memorandum to Mr. von Wersebe of January 23, 1990, and in his letter to Mr. Smith of January 29, 1990.

71. Mr. Whiting testified that at the time he signed the audit confirmations he believed the guarantees were fully enforceable. In light of the contemporaneous letters and memorandum, the panel could not accept Mr. Whiting's evidence. The panel concluded that he knew or should have known that the confirmations were false or misleading. There is no doubt this misconduct constitutes professional misconduct. Accordingly, he was found guilty of the charge.

72. Given the situation in which he found himself, it would have been appropriate for Mr. Whiting to have provided the audit confirmations to Mr. von Wersebe for the latter to deal with, but not to deal with them himself.

Charge Nos. 3 and 4

73. The third and fourth charges both relate to the confirmation Mr. Whiting signed with respect York-Hannover's debt to Castor. The confirmation referred to interest on the $40 million debt but did not include the debt itself. The issue in charge No. 3 is whether or not Mr. Whiting knew or should have known that the confirmation was false or misleading. The issue with respect to charge No. 4 is whether or not Mr. Whiting had obtained sufficient appropriate information before signing the confirmation, and if he did not, did his conduct breach Rule 201.

74. Unlike the evidence with respect to charge Nos. 1 and 2, the panel was not persuaded that there was clear, cogent and compelling evidence which proved the allegations set out in charge Nos. 3 or 4.

75. Mr. Whiting knew that York-Hannover was indebted to Castor for approximately $40 million in advances. He also knew that Castor was interested in transferring that debt to a third party. His information from Mr. Lyndon, the person directly responsible for dealing with Castor was that the transfer was proceeding. The $40 million liability remained on York-Hannover's books. Mr. Whiting was not Castor's auditor; he had no duty to oversee how it structured its books and Castor did have the right to assign the debt. At the time he signed the confirmation, he had some information, on which he relied, that the debt to Castor was as he confirmed. The evidence fell short of establishing that Mr. Whiting knew or should have known that the confirmation was false or misleading.

76. When Mr. Whiting signed the confirmation he did not exercise good judgment. Given the limited information he had about the assignment of the $40 million debt by Castor to another or other parties there is a serious question as to whether or not he had obtained sufficient appropriate information to support the assertion that he made as alleged in charge No. 4. However, the panel concluded that his lack of good judgement did not fall so far below the required standard that is constituted professional misconduct.

Sanction

77. Mr. Farley, on behalf of the Professional Conduct Committee, characterized the offences of which Mr. Whiting was found guilty as ones of moral turpitude or dishonesty. The sanction sought by the Professional Conduct Committee included: a written reprimand; a suspension of two years; a fine in the amount of $15,000; publication in the usual course, including notice to the Public Accountants' Council, the Canadian Institute of Chartered Accountants and the profession in *CheckMark.* Mr. Farley also indicated the Professional Conduct Committee would seek costs.

78. Mr. Farley pointed out the aggravating factors, including: Mr. Whiting released the draft financial statements to two separate entities; he signed two different audit confirmations; he took no steps to set right his misconduct; and he expressed no remorse for his actions.

79. Mr. Farley also pointed out mitigating factors, namely the misconduct took place in 1990 and arose from what could be seen as a single instance. It was for these reasons the Professional Conduct Committee was not seeking expulsion.

80. Mr. Farley characterized the presentation of the financial statements as intended to make York-Hannover's circumstances appear "significantly rosier" than they were. He urged the panel to consider not just specific but general deterrence, and to send the message that a member's obligations to the profession must outweigh any obligation to an employer, and a further message to the public that it will be protected from having false and misleading financial statements foisted upon it.

81. With respect to costs, Mr. Farley noted that the hearing itself took fourteen days, and that in addition there had been a multitude of motions and applications to the Divisional Court which delayed and prolonged the proceedings. The Professional Conduct Committee did not seek the costs of the investigation, as it took place before the bylaw provided the authority to order costs with respect to an investigation. The Professional Conduct Committee did not seek the costs associated with the applications to the court in Quebec with respect to the transcripts, including the judge's order permitting their use, or the Divisional Court applications. Mr. Farley provided a costs outline, showing the cost to the Professional Conduct Committee was approximately $182,000 for the hearing.

82. The Professional Conduct Committee did not seek recovery of all the costs outlined, but a significant portion thereof. Mr. Farley acknowledged the divided success on the hearing, but submitted, as the last two charges were framed in the alternative, Mr. Whiting was, in effect, found guilty of two of the three charges. He also submitted that the charges of which he has been found guilty are the most complex before the panel.

83. Mr. Farley concluded by setting out a number of factors he asked the panel to consider in assessing costs including: the degree of success by the member; whether the result could have been anticipated by either party; whether the Professional Conduct Committee called unnecessary evidence; the financial circumstances of the member; and the totality of the financial burden the member would bear as a result of the order of the panel.

84. On behalf of Mr. Whiting, Mr. Bowman submitted that this case involved novel issues surrounding Rule 205. He further urged, in mitigation, that the panel consider Mr. Whiting's state of mind at the time, that while the panel found that he should have known that the statements or confirmations were false or misleading, he in fact did not know because he had not turned his mind to those issues and he had not intended to mislead. Mr. Bowman submitted that the appropriate sanction would be a nominal order, a fine of one dollar and a suspension of one day.

85. On the issue of costs, Mr. Bowman took strong objection to the position of the Professional Conduct Committee. He urged the panel not to make any order for costs, as the two most serious charges had been dismissed.

86. In the alternative, Mr. Bowman submitted that if costs were to be ordered the costs awarded should not include: preparation for the motions to attend before Mr. Justice Carrière; travel costs for the investigator, as it was the choice of the Professional Conduct Committee to retain an investigator based in Belleville; the excessive hours of preparation; or for the motions as the success was divided. He submitted that there should be a very substantial reduction of the amount requested by the Professional Conduct Committee. Mr. Bowman also submitted that costs of counsel to the Discipline Committee, as the cost of the court reporter, should be borne by the membership as a whole.

87. Mr. Bowman also pointed out to the panel the expenses of the hearing that Mr. Whiting had borne, including the costs of his expert witness, which exceeded $90,000, and of counsel.

ORDER

88. After deliberating, the panel made the following order:

IT IS ORDERED in respect of the charges:

1. THAT Mr. Whiting be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Whiting be and he is hereby fined the sum of $10,000, to be remitted to the Institute within thirty-six (36) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Whiting be and he is hereby charged costs fixed at $95,000, to be remitted to the Institute within thirty-six (36) months from the date this

Decision and Order becomes final under the bylaws.

4. THAT Mr. Whiting be suspended from the rights and privileges of membership in the Institute for a period of six (6) months from the date this Decision and Order becomes final under the bylaws.

5. THAT notice of this Decision and Order, disclosing Mr. Whiting'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 Mr. Whiting surrender his certificate of membership in the Institute to the Discipline Committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Whiting.

7. THAT in the event Mr. Whiting 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 six (6) months from the date of his suspension, and in the event he does not comply within this six-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. Whiting's practice or employment.

REASONS FOR ORDER

89. The charges of which the panel found Mr. Whiting guilty have aspects which border on moral turpitude. Contrary to what Mr. Bowman urged, the panel found that Mr. Whiting knew what he was doing. With respect to the 1988 financial statements, he deliberately withheld relevant information. The panel has taken into account the fact that the financial statements were in draft form, with all that that imports. However, that does not excuse his conduct.

90. Fortunately, despite his intention to induce reliance on the 1988 financial statements, no one was harmed by the fact he provided them. Further, Mr. Whiting did not disseminate the statements to the general public. He did not send them as part of a plan or scheme to obtain additional funds from Adia or Aetna. He did not personally benefit from his misconduct.

91. The panel appreciates the pressures under which Mr. Whiting was placed, and has great respect for his attempts to perform his job and his altruistic motives. He was a loyal member of his company, and was trying to maintain its viability. Unfortunately, he acted expediently, relying on the draft nature of the statements.

92. However, the panel is concerned about the lack of remorse or insight Mr. Whiting has shown into his behaviour. He must realize that the obligations imposed by Rule 205 apply to members in industry as well as to members who practice public accounting. He is bound by the Rules of Professional Conduct, and those rules supersede any duty or loyalty to an employer.

There are many benefits to being a member of the profession; adherence to the applicable rules is one of the obligations.

Reprimand

93. The panel ordered Mr. Whiting to be reprimanded in writing by the Chair to emphasize the importance of his professional obligations, and its disapprobation for his misconduct.

Fine

94. It is essential that a message be sent not just to Mr. Whiting but to all members of the profession that the duty to act as a professional must always be paramount. The panel considered the precedents cited, and the serious nature of the conduct, as well as the totality of the sanction, and determined that a fine of $10,000 is appropriate.

Suspension

95. The Professional Conduct Committee sought a suspension of two years. While that would reflect the seriousness of the misconduct, it does not take into account the fact that the misconduct, which was only the subject of a complaint after Mr. Whiting testified at the Castor litigation in the year 2000, took place in 1990, or Mr. Whiting's circumstances. As with the fine, a clear message must be sent to him and to the profession that members in industry cannot act on behalf of their employers without regard to their professional obligations. Weighing all of the factors, the panel concluded a six month suspension was appropriate.

Notice

96. Publishing the names of members found guilty of professional misconduct is often the single most significant sanction that may be administered for general deterrence, education of the membership at large, and protection of the public. It is only in the most exceptional circumstances that such important principles will be over-balanced by privacy considerations. No such circumstances were urged on the panel in this matter and, indeed, in this matter, given the concerns of the panel, publication is crucial. The fine, the suspension and the notice are intended to be both a general and specific deterrent.

Certificate of Membership

97. The certificate of membership is the property of the Institute. During the period of suspension, Mr. Whiting has forfeited all rights and privileges of membership. It is therefore appropriate that the certificate be held by the Institute during that time.

Costs

98. The panel carefully considered the issue of costs, in light of the divergence between the parties. The panel were not prepared to accede to Mr. Bowman's submission that no costs be awarded, or that they not be allowed for counsel to the panel or the court reporter. While the general membership, of necessity, bears part of the cost of this process, it was not the general membership's actions which lead to the hearing. Mr. Whiting committed professional misconduct; Mr. Whiting has been dealt with by his governing body; Mr. Whiting must bear at least a portion of that cost.

99. Neither, however, is the panel prepared to charge all the costs of the hearing to Mr. Whiting. A number of the motions brought on his behalf were both unusual or novel and important. He was entitled to raise those issues, regardless of the ultimate lack of success. They were worthy of consideration by the panel, and of benefit to the general membership. Further, the panel takes the position that a portion of the cost of the investigator should not be borne by Mr. Whiting, as the investigator's presence was not necessary throughout the entire hearing. On the other hand, the panel is cognizant of the fact that the Professional Conduct Committee, quite fairly, is not seeking costs for the investigation itself.

100. The panel has considered the fact that Mr. Whiting has been found not guilty on two of the four charges, and also that those two charges involved the same matter and should be considered as one.

101. The outline of costs sets out a figure of $182,000. That provides a useful starting point for the panel. In assessing the appropriate cost to be ordered, the panel has considered the factors listed above. The panel has also considered the totality of the sanction, and the precedents.

102. This hearing was both lengthy and complex. Indeed, as of the date of its completion, it was the longest hearing in the history of the Institute. The issues were important and difficult. It is crucial that the Institute be able to discipline its members, not only for matters that are easily investigated and prosecuted, but for those matters which require a considerable expenditure of resources. Otherwise, the public cannot be assured that the Institute is carrying out its mandate to govern all its members and to protect the public.

103. For these reasons, the panel have determined that a costs order of $95,000 is appropriate and fair. The panel are aware of the burden this will impose on Mr. Whiting, but that burden should be at least partially offset by the provision of a lengthy period of time in which to pay. It is not a burden that should be imposed on the general membership.

Failure to Comply

104. The order has the usual provision to encourage compliance. In cases in which members are not expelled outright, orders of a panel generally specify suspension, followed by, should the member still fail to comply, expulsion with newspaper notification to the public as an ultimate consequence for non-compliance.

DATED AT TORONTO THIS 25th DAY OF MAY, 2007
BY ORDER OF THE DISCIPLINE COMMITTEE

H.B. BERNSTEIN, CA – CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:
A. HANSON, CA
B.L. HAYES, CA
G.R. PEALL, CA
R.A. WORMALD, FCA
P. WONG (Public Representative)