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

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **J. DOUGLAS BARRINGTON, FCA, CLAUDIO B. RUSSO, CA, and ANTHONY POWER, FCA**, members of the Institute against the Order of the Discipline Committee of the Institute made September 27, 2007, which incorporates the Decision and Reasons for Decision dated February 11, 2007 and Reasons for Sanction and Costs dated September 27, 2007 pursuant to the bylaws of the Institute, as amended.

TO: Mr. J. Douglas Barrington, FCA

AND TO: Mr. Claudio B. Russo, CA

AND TO: Mr. Anthony Power, FCA

AND TO: The Professional Conduct Committee, ICAO

DECISION AND REASONS

1. This appeal was heard by a panel of the Appeal Committee of the Institute of Chartered Accountants of Ontario (hereinafter referred to as Institute) on June 2, 3, 4, 5, 6, and July 3, 2008. The Professional Conduct Committee (PCC) of the Institute was represented by Mr. Paul Farley and Mr. Brian Bellmore. Mr. Peter Griffin, Mr. Kris Borg-Olivier and Mr. Jamie Spotswood represented Mr. J. Douglas Barrington, FCA. Mr. John McDougall Q.C., and Mr. Brian Leonard represented Mr. Anthony Power, FCA and Mr. Claudio B. Russo, CA. Mr. Richard Steinecke acted as counsel to the Appeal Committee. In all, 31 exhibits were filed including 20 volumes of the Appeal Book.

2. The following charges were laid by the Professional Conduct Committee on February 18, 2004:

> 1. THAT, the said Anthony Power, Claudio Russo, Peter Chant and Doug Barrington, in or about the period January 1, 1998 to March 27, 1998, while involved as “Lead Client Service” partner, “Audit Client Service” partner, “Advisory” partner and “Advisory” partner respectively with Deloitte & Touche in an engagement to perform an audit of the consolidated financial statements of Livent Inc. as at December 31, 1997

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) They failed to ensure, in respect of a transaction with First Treasury Financial Inc., that the Financial Statements disclosed the contingency that First Treasury Financial Inc. had recourse against Livent under certain circumstances.

3. Mr. Peter Chant was found not guilty of Charge 1 and is not a subject of this appeal.

4. The Decision appealed from is detailed in paragraph 343 of the Decision and Reasons for Decision dated February 11, 2007, as follows:

> …
> 1. After hearing and considering the evidence and submissions, and after deliberating, for the reasons set out by the panel in their Decision and Reasons for Decision dated February 11, 2007, with respect to Charge 1, the panel finds:

a) Douglas Barrington, Anthony Power and Claudio Russo guilty of the Charge; and

b) Peter Chant not guilty of the Charge.

2. After hearing and considering the evidence and submissions, and after deliberating, for the reasons set out by the panel in their Decision and Reasons for Decision dated February 11, 2007 with respect to Charge 2, the panel finds:

Anthony Power and Claudio Russo guilty of the Charge.

5. The sanction appealed from is set out in paragraph 117 of the Reasons for Sanction and Costs dated September 27, 2007, as follows:

…
With respect to Douglas Barrington

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

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

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

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

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

With respect to Anthony Power

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

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

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

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

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

With respect to Claudio Russo

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

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

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

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

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

6. Costs are set out in paragraph 147 of the Reasons for Sanction and Costs dated September 27, 2007, as follows:

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

7. On this appeal, Mr. Barrington seeks to have the Decision set aside and the charge against him dismissed, in the event that the Appeal Committee does not both allow the appeal and dismiss the charge against him, a hearing *de novo* be ordered, and in the event the foregoing relief is not granted, an Order allowing his appeal from the sanction, including costs, ordered by the Discipline Committee.

8. Messrs. Power and Russo seek to have the Order vacated and a verdict of not guilty substituted on both Charges 1 and 2 and that there be no order as to costs. Alternatively, that a finding be made that Messrs. Power's and Russo's natural justice was denied by the Discipline Committee and that a hearing *de novo* be ordered. In the further alternative, that the Order as

against Messrs. Power and Russo be vacated and a more reasonable order as to sanction and costs be substituted. They further seek other relief as may become necessary or apparent upon the review of the record in this case.

Preliminary Motion

9. Mr. McDougall, supported by Mr. Griffin, presented a motion that the Appeal panel was improperly composed and convened for the following reasons:

(a) insufficient notice of the composition of the panel was provided to appellants;
(b) the panel members lacked sufficient expertise in public company audits;
(c) the panel included two *ad hoc* panelists who were members of the Discipline Committee and might have an appearance of bias;
(d) one member had previously been employed in standards work by the PCC and might have an appearance of bias;
(e) one member had previously performed professional services for Mr. Bellmore and might have an appearance of bias;
(f) The panel chair was a public representative, an individual disqualified from that role both by lack of professional expertise, by such chair's potential role in voting a second time to break a tie, and by the Institute's rule requiring the Chair of the Appeal Committee to be a chartered accountant and member of the Institute.

10. Mr. Farley, speaking for the PCC, stated that these objections required a factual foundation; those objecting had an onus to establish a probable appearance of bias. Ms. Jo Anne Olafson's employment by the Institute had ended before the investigation occurred. The connection between Mr. A. Douglas Nichols and Mr. Bellmore had been a professional one, not a social relationship. It was permissible for any member of the panel to act as its chair, and the role of chair of such a panel differed from the administrative role within the Institute occupied by the Chair of the Appeal Committee. Mr. Farley also noted the example of judges being appointed to Appeal panels on an *ad hoc* basis. Members of the panel would be in the best position to examine these matters.

11. Mr. McDougall replied that the Discipline Committee was a collective, and cited as a comparator the composition of the *Canadian National Energy Board*, as reviewed in the case *Committee for Justice and Liberty et al. v. National Energy Board et al., (1978) S.C.R. 369.* He also argued that a panel chair has the right to make a "casting" or second vote to break a tie, and that this role needs to be filled by an accountant.

Ruling on the Motion

12. The panel heard these arguments on Monday, June 2, 2008. The panel deliberated each panel member's potential conflict separately without the subject member being present. A ruling dismissing the motion was made that day. In speaking to the motion, the Chair clarified that the Appeal panel would never proceed to a decision through the use of a "casting vote"; if for any reason a tie vote were to result, the matter would be resolved procedurally in the interest of the appellants.

The Appellants' challenge of the composition of the Appeal panel

Motion for Adjournment to reconstitute the panel

13. Reasons advanced: A reasonable apprehension of bias
Lack of sufficient notice of the panel's composition
The panel is improperly constituted

14. Arguments of the members were filed with the PCC, March 10, 2008; the PCC replied, on May 2. Notice of a panel composed of three members was also received on May 2; a late addition of two *ad hoc* members from the Discipline Committee then followed.

15. Mr. McDougall spoke on behalf of all three appellants for the motion, supported by brief comments from Mr. Griffin.

16. Mr. McDougall argued that panels are intended to be "expert" panels able to assess arguments from a member's perspective. The appellants need a panel composed of individuals with sufficient experience with audits of large public companies.

17. He argued that the "lay member" of the panel, Dr. Bruce Bowden, should not and cannot fill the role of Chair. The Chair's role is to guide deliberations of the panel and that requires professional knowledge. Reference was made to the provisions of 260.1 and 601 of the Bylaws.

18. Ms. Olafson was Associate Director of Standards Enforcement until ten years ago and, therefore, had a role closely associated with one side; time does not cure that problem.

19. Mr. McDougall also argued that Mr. Nichols should be disqualified because he had performed professional services for Mr. Bellmore's firm. This matter was identified by the PCC; as soon as you raise a barrister's relationship, it is a problem.

20. He further argued that Mr. Nichols and Ms. Carol Danchuk should be disqualified because they were late additions to the panel, drawn from the membership of the Discipline Committee. These additions to raise the panel's membership above the minimum number are a clear indication that it was decided "more horsepower was needed." The additions occurred so late as to be prejudicial. Although the Discipline Committee meets as panels, "it is reasonable to premise a sharing of confidences; even if not, it looks bad."

21. Mr. McDougall referred the panel to several cases, addressing five of them in his remarks.

22. Mr. Griffin also argued that the Institute had had plenty of notice of the appeal, yet now there is this sudden flurry. The members must be afforded a level platform.

23. Mr. Farley stated that arguments alleging an apprehension of bias need a factual foundation. The investigation occurred after Ms. Olafson's departure from employment in the Institute in August 1997, a departure that she had requested. He noted an instance in which Mr. Justice Binnie had written a 2003 decision regarding a case in which he had attended a meeting relevant to its development in 1985. The Nichols-Bellmore relationship had been a professional relationship, not a social one. The required standard for a panel is that it be sufficiently sophisticated, not that it contains specific expertise. The chair can be any member of the panel; this role is quite separate from that of being the Chair of the Appeal Committee.

24. It is permissible for Discipline Committee members to be seconded to sit on an Appeal panel for a particular case. Mr. Farley drew an analogy to that of judges who are regularly appointed to Appeal Court cases on an *ad hoc* basis. The Appeal panel's members are best placed to know whether they have had sufficient time to prepare to hear the appeal.

25. Mr. Farley also reviewed several cases, drawing attention to the specific facts of the *Bygrave* case, and the *Li v. College of Physicians and Surgeons of Ontario* case in which an expert witness had become a member of the College's Discipline Committee before its reasons regarding that case were published. There, an apprehension of reasonable bias was evident.

26. In reply, Mr. McDougall argued that the Discipline Committee is a committee: "a collective." He then cited the *Canadian National Energy Board* case (previously cited) as support. He also referenced the *Royal College of Dental Surgeons of Ontario v. Bygrave* case to point out that the threshold regarding bias is lower for adjudicators who are not judges.

27. Mr. Griffin echoed this point, also noting that standards for courts differ from others. In his view, Mr. Farley's reply had not addressed the cumulative effect of the appellants' objections. Finally, it was the Institute, not the members who raised the adequacy of the skills of the original three panelists as a complete entity.

28. The Chair asked for legal advice from the panel's counsel before the panel met alone. Mr. Steinecke distinguished between actual bias and the appearance of bias. He noted that the facts of two cases were pertinent. Those cases were *Royal College of Dental Surgeons v Bygrave*, and *Li v. College of Physicians and Surgeons of Ontario*. He stated that while the disclosure of a connection does not necessarily mean that it remains a problem, it is worthy of careful consideration, and suggested that the process matters to be considered might include:

- Do I recuse myself?
- Are there pertinent facts to disclose?
- If any member departs for a particular discussion, should the matter be considered by the remaining panel members for each matter, or should a subset of the panel review all questions? There were a variety of ways in which the panel might review these issues?
- A wrong decision about procedural fairness could nullify the entire process, so these matters needed to be reviewed very carefully.

29. In reply, Mr. McDougall again emphasized that the members are entitled to a panel free from bias. He also argued that the use of a "lay" chair was significant, for that individual who was not a member of the profession, has the prerogative of making a "casting vote" and makes the procedural rulings. He might be expected to take a leadership function in deliberations on technical matters.

30. Mr. Farley, in turn, emphasized that the proper test for the panel's composition was not simply, "when in doubt, recuse yourself." Such a decision is properly a very serious matter for individuals who are members of these Institute committees who have a duty to both the members charged and to the Discipline Committee whose members also must expect a fair review. He repeated that the apprehension of bias is a fact specific issue.

Reasons

31. Panelists reviewed the challenge as a whole, and then in its particulars. When the specific matters had been resolved, the entire panel again reviewed the sum total to ensure that they had considered the cumulative effect. When matters regarding a specific panelist were weighed, that panelist was asked to disclose anything that might be pertinent to the parties, and then that panelist departed the room while the others critically reviewed the matter. At all times, on each matter, the largest majority possible was present; each matter was resolved by consensus.

32. Counsel for the members had begun their arguments by saying that they regretted having to make their procedural challenge, knowing that such challenges had the potential to leave an adverse taste or memory with a panel. In fact, from the outset of the panel's discussion, it became clear that it was beneficial to have an opportunity to review these procedural matters.

33. It is the panel's view that the intended objective, and the appropriate standard of knowledge and professional experience for a panel's composition is that of the entire profession, not simply that of auditors of large public corporations working in full-service multinational accounting firms. To this, is added a more general perspective from the public representative.

34. Panelists had worked in large firms, and had been lead auditors on complex accounts. For the rules that have been created by the Institute's Council, a standard is a standard. As well, their other complementary backgrounds were also likely to provide pertinent experience for adjudicators of this appeal. Quite clearly, there had been some difficulty securing the volunteer services of panelists who had no conflicts of interest in this case, another indication that Mr. McDougall's suggested standard was not feasible and well beyond the intent of the Institute's bylaws.

35. It was wise not to begin a hearing with a minimum number of panelists in case of illness, as well as to ensure a more comprehensive perspective that a full panel might bring. Breadth of professional backgrounds has been the preferred norm on the Institute's review panels. Frequently, panelists have listened to arguments that a certain rule was not pertinent to a member's actual work; consistently, panels have ruled that there is a common set of professional standards with general applicability, even though broad categories of specialization are now recognized within the profession. In this respect, divergent backgrounds of panelists might fairly be compared to judges hearing cases and sitting on appeal reviews outside their own professional experience before that time. All five panelists are experienced with a breadth of professional standards in and outside the accountancy profession.

36. Clearly, it is unusual for the public representative to act as the Appeal panel chair. All panelists are familiar with the distinction between the administrative role of the Appeal Committee "Chair," - this individual is required to be a member of the Institute - and the task of a particular panel's chair. Indeed in this case, several motions were determined by the Chair of the Discipline Committee who did not subsequently act as Chair of the empanelled Discipline Committee that heard the case.

37. As well, the panelists were accustomed to participating in dialogue that was lightly coordinated, not directed or controlled by a chair. No one person has a disproportionate influence within deliberations. In that regard the public representative's extensive committee work in universities, and seminar-style teaching is pertinent experience. Dr. Bowden was the longest-serving Appeal Committee member on this panel. For the matter of procedural rulings, all of the panelists were amateurs.

38. The issue of a casting vote: none of the panelists had ever seen this occur, and fortunately, the panel had an odd number of participants. Panelists concluded, however, that a substantive issue had been raised for this specific case. It would be inappropriate for a "casting vote" by a chair who is not a member of the profession to determine an outcome in a "standards" case. The panel expected to resolve matters by consensus, or if not, by determinations that were close to that goal; if for any reason a tie vote were to occur, then the matter would be resolved procedurally in favour of the appellants.

39. The panelists reviewed together their collective familiarity with the materials of this case. While their volume is entirely unprecedented in the panel's experience, each had diligently reviewed the distributed materials. The panel concluded that it was prepared to proceed with the appeal.

40. Without Ms. Olafson being present, the remaining panelists reviewed the issue of her potential bias from her previous employment with the Institute. Her role had been as a staff member working in the field of professional standards with the Institute, an employment that had ended eleven years ago. She brought to the panel several important areas of expertise: professional experience in auditing; knowledge of standards as they were for the Institute during the late 1990's; and her experience as an Ombudsperson with a national, independent, financial dispute resolution service (OBSI). This latter experience had undoubtedly given her expertise in distancing herself from particular parties, and with assessing diverse and detailed evidence - surely, invaluable preparation. Time, plus this unusual professional work had prepared Ms.Olafson very well for adjudicating a case dispassionately, and had clearly separated her professionally from her previous employment.

41. This panel notes that it is not reviewing the work of the Professional Conduct Committee for whom Ms. Olafson had worked; it is reviewing a decision of the Discipline Committee. When Ms. Olafson returned, the entire panel reviewed the issue of an appearance of bias for a second time, concluding that the panel's integrity ought to be apparent to the public and profession. All panelists believe that it would be an unfair test were previous staff members automatically to be excluded from serving as adjudicators because of that work.

42. Ms. Danchuk explained that in 2006 she had been the liaison in an over-ride audit with Deloite & Touche after a corporate takeover. Panelists concurred that this should be disclosed to all parties; no objections were raised when this was done. So, too, Mr. Nichols outlined that he had been an investigator for the Professional Conduct Committee over a three-year period in the 1980's; this, too, was disclosed to all parties, with no concerns expressed.

43. The three permanent members of the Appeal Committee for this motion then turned to the reservation that two members of the Discipline Committee had joined this panel. One of these, Ms. Danchuk had served on two Discipline Committee panels; the other, Mr. Nichols had sat on Discipline Committee panels since 2004 and is a Deputy Chair.

44. The first concern raised by Mr. McDougall and Mr. Griffin had been that of the timing of these two appointments, stating that short notice of these additions had been prejudicial to the members. Mr. McDougall's argument that panelists require background specific to a case also seemed pertinent to this reservation. The members' counsel had asked the Institute to furnish them curriculum vitae of the panelists. The panelists did not agree that prejudice had resulted.

45. The second concern raised was that the Discipline Committee is a collective. To our knowledge, in the past twenty years, these bodies, Discipline Committee and Appeal Committee, have been convened twice – both times together – once to review practices with counsel and staff, more recently to be updated on changes in the Institute's procedures. This apprehension, therefore, is pertinent only to one's participation on particular panels, for there, individuals do at times, but not always, meet each other more than once - often at quite infrequent intervals.

46. Within this context, the initial question then becomes whether these two individuals might feel constrained were they to find themselves needing to express disagreement with the findings of the Discipline Committee. Both members were certain that this would have no bearing upon their commitment to go where their intellect directed them in this case.

47. Members of both the Discipline Committee and Appeal Committee are accustomed to reviewing as "authorities" various cases in which they or other members of that panel had served, always needing to be able to bring critical judgment to bear. None had thereby experienced unease with their current assignment or had found that such overlap had affected the freedom of argumentation used in a panel's private deliberations. The experience of each panelist's work within Institute hearings leads away from counsel's expressed reservation.

48. In this regard, the panelists considered the *Committee for Justice and Liberty et al. v. National Energy Board et al*. case. They reject this as an apt comparison. In that matter, the impugned member had an involvement in a matter related to the subject matter of the hearing that he was to adjudicate. Further, that is a public Board, with a limited membership that stays intact for a number of years through overlapping appointments, one that is constituted to review policy matters, often quite controversial public matters, at times travelling together along with administrative and legal staff, holding public hearings in diverse locations across the country. It indeed is a collective; the contrast between the Appeal panel and a national regulatory Board is compelling.

49. Mr. Nichols has served on the Discipline Committee for four years, the most significant overlap with the role of this Appeal panel. Panelists were already aware that critical matters to be determined in this case might focus on discerning whether specific rulings of the Discipline Committee were matters of fact, law, or mixed fact and law. It was apparent that the recent experience as a panel chair in Discipline Committee cases would provide Mr. Nichols relevant experience that should strengthen this panel's own deliberations about such matters.

50. Lastly, there is the matter that Mr. Nichols had completed review engagements for Bellmore and Moore LLP, and an affiliated company of the partnership owned by the wives of Messrs. Bellmore and Moore, as well as income tax preparation work for these four individuals. This work had ceased in the summer of 2004. Mr. Farley's assessment drew a useful distinction between one's professional work and a social connection. However, while this made sense as a general approach, it may not itself be conclusive as to whether a particular relationship might be significant or ephemeral.

51. The most complete test might be: no previous contact of any sort. In professional life, this has not proven to be the feasible standard, and thus both courts and governments have had to try to make guidelines for determining such potential conflicts of interest. The starting point would be: there must be no apparent advantage to the panelist in this instance, and no apparent harm to anyone appearing before the panel.

52. From there, a variety of other tests might be applied: the nature of the contact and the advice tendered; the degree of personal contact; the length of time; the complexity of or interlocking nature of tasks; extra but related social contact; a friendship; contact since the professional work had ceased. Also relevant would be the period since the contact and the prospect of future business contact. All of these factors might then be viewed against the panelist's own record of experience and sense of professionalism when conducting these tasks. This last point is the final, perhaps the core test, for assessing the potentiality for a conflict of interest is a fundamental aspect of the Chartered Accountant's professionalism. These perspectives were carefully reviewed.

53. Mr. Nichols' services to these firms and individuals had been limited both in time and nature, separated each year with periods of no contact. From the facts, a sense of professional distance from the clients' business had been maintained; contact had been limited to the tax work and had entirely ceased after Mr. Nichols moved away from Toronto. The prospect of future professional contact also diminished after his departure from Toronto. That this would be the case seemed clear to other panelists who had experience in this accounting work. All Chartered Accountants appreciate that with assurance and compliance engagements attitudes of an independent state of mind and professional detachment are essential in discharging the duties of a public accountant. These attitudes would be quite different from being an advocate for a client. Ultimately however, this was confirmed by Mr. Nichols' assurance that he possessed a sense of distance from every counsel in the room.

54. After a final review of all factors that had been raised, the panel's members unanimously concurred that this Appeal panel was properly constituted to conduct a fair hearing without any reasonable apprehension of bias and might proceed with the case.

Overview of the Appellants' Submissions and Arguments

The Submission on behalf of Mr. Barrington

55. Mr. Griffin argued that the Discipline Committee made errors in accounting principles, legal principles and natural justice. Although the panel tried to proceed fairly, the result was unfair. He argued that a person charged for a breach or breaches of the bylaws or Rules of Professional Conduct of the Institute is entitled to know well in advance the basis upon which the charge or charges are made in order to prepare for a well reasoned and appropriate defence. Mr. Griffin argued that this was a standards case under Rule of Professional Conduct 206, and was not about the failure to diagnose a fraud in the 1997 audit. He also argued that Mr. Barrington was convicted of a different matter than that charged, stating that the Discipline Committee lost its way, using the audit of the Put in a way that had not been part of the case. He also submitted that the panel placed too much reliance on the evidence of Mr. Chant. When Mr. Barrington's testimony differed from Mr. Chant's, Mr. Griffin's client was not cross-examined about their differing recollections.

56. Mr. Griffin stated that the leading element of Mr. Barrington's case was that he had been found guilty of a Generally Accepted Accounting Principle (GAAP) failure on the basis of the evidence produced under the Generally Accepted Auditing Standard (GAAS) charge against the other members, a professional failure with which he had not been charged. Mr. Barrington had never been responsible for the audit work, nor had he reviewed this in the detail necessary for him to assume responsibility for its completeness. The panel misunderstood the role of an "Advisory Partner". This verdict, so derived, was a miscarriage of natural justice.

57. Of fundamental importance, and this argument also went to the heart of the case presented by Mr. McDougall on behalf of Messrs. Power and Russo, was Mr. Griffin's view that all these members had been convicted of a substantially different case than the one that was led against them, or of which they had been charged. This, too, amounted to a denial of natural justice.

58. Mr. Griffin reviewed for the panel, with supporting cases, the deference due by an Appeal panel to a finding of the Discipline Committee in matters of fact; the quite small degree of such deference due in matters of law; and standards of deference due in matters of mixed fact and law. His arguments presented regarding a miscarriage of natural justice were to be viewed as errors in law.

59. Mr. Griffin submitted that the sanctioned conduct was not part of the case, since the particulars of the case were set out in Charge 1, whereas Mr. Barrington was found guilty on findings which came to light under Charge 2. Disregarding the experts' evidence that supported the work of Mr. Barrington, the panel failed to deal appropriately with the expert evidence. The experts' testimony represented a body of CA expert knowledge, and the panel could not simply substitute its own view.

60. Mr. Griffin submitted that the panel's findings were inconsistent in that different findings were made for particulars of Charge 1 based on the same application of Generally Accepted Accounting Principles (GAAP). Also there was a different finding against two defendants – Mr. Barrington and Mr. Chant - based on the same approach to GAAP. Third, the panel dismissed particular 1(iv) of the Charge against Mr. Barrington on the grounds that "he was not a decision maker" but found him guilty of Charge 1(i) where he also was not a decision maker.

61. Mr. Griffin submitted that the Discipline Committee failed to apply the accepted legal standard of clear, cogent, and convincing evidence required to support a finding; that the panel concluded that the only acceptable exercise of professional judgment is one which leads to the correct conclusion; that the decision was at odds with the principle that where a competent body of professional opinion supports the conduct of the member, there cannot be a finding of professional misconduct; that the panel ignored the testimony of four expert witnesses, and that the panel ignored the principle that findings of professional misconduct must be limited to cases involving disgraceful, dishonorable, or unprofessional conduct of a member of the profession.

62. Mr. Griffin submitted that the investigation and hearing were procedurally flawed in that the panel failed to consider the impact of the flawed investigation on the fairness to Mr. Barrington; the panel relied on evidence that was denied to the defendants; the panel relied on hindsight in the evaluation of Mr. Barrington's conduct, and based its findings against Mr. Barrington upon the post audit finding of fraud. The panel also rejected a pre-hearing motion to hear the charges in a particular order and this prejudiced the fairness of the hearing. The panel misunderstood,

misinterpreted and improperly relied on a letter from a defendant's counsel to counsel for the PCC dated November 28, 2003.

63. Finally, Mr. Griffin argued that the Discipline Committee's Reasons had to be sufficiently thorough that their reasons for the decision could be understood. Mr. Griffin cited several instances where the panel had not made reference to matters that Mr. Griffin believed were important in reaching a decision.

64. Mr. Griffin expanded on his written submissions and his oral arguments by citing various legal cases, cases of the Discipline Committee and Appeal Committee of the Institute, transcripts of the Discipline Committee hearing of this case, along with documents, briefs, compendia, all of which were submitted as exhibits. In particular he reviewed how Mr. Justice Iacobucci in the *Southam* case had clarified determinations of mixed fact and law. (*Canada (Director of Investigation & Research*) *v. Southam Inc.*, Exhibit 13, par 9) Citing the *Cloney* case, (*ICAO v. Brian Cloney*, September 19, 2007, Exhibit 25, Tab 6) he emphasized the importance of Reasons precisely addressing the specifics of a charge. While deference may be due to the Discipline Committee's conclusions regarding fact, the Appeal panel needs to take care to differentiate these from errors of principle where no deference is pertinent.

The Submission on behalf of Messrs. Power and Russo

65. Mr. McDougall noted that the change in Deloitte & Touche's audit team replacing Mr. Robert Wardell for the 1997 audit was done at the request of Mr. Garfield Emerson, chair of Livent's audit committee. At that point Mr. Power assumed overall responsibility for the 1997 audit. Mr. McDougall pointed out that Mr. Wardell had testified that he did not have any concerns about the ethics of Livent's management.

66. Mr. McDougall submitted that the Discipline Committee made three errors in the exercise of its jurisdiction in that (a) the members were convicted of matters not raised in the charges, and therefore there had been no jurisdiction to do so, (b) the panel misunderstood the difference between errors in judgment and professional misconduct, and (c) the panel ignored, and did not deal with, significant evidence, especially that of the four expert witnesses. The panel made wrong inferences, relying on facts that did not support the particulars of the charges.

67. Mr. McDougall submitted that in analyzing the Put, the panel concluded that there was only one correct answer - that the Put was in place at December 31, 1997. This conclusion was based on hindsight for even the re-audit of November 1998 had not concluded that the Put was in place at the year's end. In addition to the representations of senior Livent management, Messrs. Power and Russo accepted the representations of Mr. Ned Goodman, the most senior executive of Dundee Realty, the purchaser of the property which was the subject of the Put, of Mr. Seyffert, the lawyer who wrote on behalf of Dundee regarding the property transaction, and of Mr. Garfield Emerson, chair of the Livent audit committee. Each had stated that the Put Agreement had been removed.

68. The defence had been prepared to defend the specifics of the charges and had not come prepared to defend a case based on a finding (the audit of the Put) that was not part of the specifics of the charges. The specifics of the two charges defined the issues to be heard.

69. Mr. McDougall submitted that Messrs. Power and Russo should be found not guilty if they used their judgment responsibly and intelligently. Instead, the Discipline Committee determined that a correct conclusion was needed. By looking at the case through the lens of correctness, the panel showed that the case was in fact all about the failure to detect the fraud.

70. Mr. McDougall submitted that the Discipline Committee had to address the expert witnesses' evidence when those views materially differed from their own findings, especially since the experts had reached the same conclusions independently. He contended that this body of evidence had to have been analyzed, not just described. The panel's failure to do this was an error in law, not in fact.

71. Mr. McDougall went through the evidence in detail, discussing whether GAAS required Messrs. Power and Russo to reassess all management representations because of the last minute write-down of pre-production costs in the amount of $27.5 million. He argued that Messrs. Russo and Power testified that they did not think it necessary to reevaluate management's representations because the adjustment was made at the request of a new investor. They knew that the valuation of preproduction charges was highly judgmental; existing management had agreed to take a general provision to account for uncertainty in the first quarter of 1998, and the adjusted carrying value of preproduction charges was within the "zone of reasonableness".

72. Mr. McDougall argued that the Discipline Committee got Mr. Chant's evidence wrong and had relied on evidence not pertinent to the charges. Days of the hearing were spent hearing evidence about the accounting issues surrounding the revenue recognition relating to the sale of naming rights and at what point revenues from the sale could be recognized. The issue was reduced to the question of whether all substantive performance obligations of the transfer of the naming rights by Livent had been completed by the year's end. This issue was successfully defended, and the members were found not guilty of this particular of Charge 1(i).

73. Mr. McDougall then reviewed the individual charges and the evidence regarding each in some detail.

74. The Appeal Committee panel's standard of review regarding the Discipline Committee's role in considering evidence, its findings of fact, and the power of the Appeal Committee to substitute its findings for those of the Discipline Committee, were also reviewed by Mr. McDougall. He referred to the following cases which were included in Exhibit 21. In *Appleton,* (*Re Appleton*, [2007] LNICAO 12, para 14), he pointed out that the Appeal Committee found that the Appeal Committee's role is to determine whether the Discipline Committee committed any errors in its consideration of the evidence before it. In *Huerto*, (*Huerto v. College of Physicians and Surgeons (Sask. Q.B.),* [1994] S.J. No. 390, par. 78), it was pointed out that an appellate judge would be justified in overturning a finding of a discipline committee if the findings of fact were not supported by the evidence, or if the conclusions were not supported by the evidence, or if the conclusions were so wrong as to make the decision unreasonable. The *Golomb* case (*Golomb vs. College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73, p. 82.) bound the discipline committee to the specifics of the charges, and an analysis of the Institute's *Cloney* Appeal case (*Re Cloney,* September 19, 2007, paras 13 ff) indicates the Appeal Committee followed this principle. As had Mr. Griffin, Mr. McDougall cited the *Hallem* case (*Hallem v. College of Physicians and Surgeons of Ontario*, [1993] O.J. No. 459, p.14), drawing attention to the statement that "the honest and intelligent exercise of judgment" has long been recognized as satisfying the professional obligation.

Overview of the Respondent's Submissions and Arguments

75. Mr. Farley noted that the case was heard by the Discipline Committee over a two year period, with many motions, thirty-seven days of evidence, over 200 exhibits of which many were entire volumes, and 8,000 pages of testimony. The Appeal panel would hear five days of argument, no testimony and hear no witnesses or experts. As one example, the Appeal panelists would not see how the witnesses had coped with the Professional Conduct Committee counsel's cross-examination.

76. Mr. Farley argued that the Discipline Committee made findings of credibility, accepting portions of evidence and discounting or rejecting others. It is the Discipline Committee's role to assess the evidence, determine the facts and render a decision as to whether or not the charge or charges were proven. An appellate body is not to interfere with a finding of fact unless it is unreasonable and unless there is no evidentiary basis for the Discipline Committee's conclusions. The arguments of Mr. McDougall presented to the Appeal panel on behalf of Messrs. Power and Russo were those already heard by the Discipline Committee, and these may not simply be re-argued. Mr. Farley submitted that although the Appeal panel may examine the findings of fact, before it can overturn the findings of the Discipline Committee it must conclude they were unreasonable based on the evidence. The Discipline Committee had the right to decide the facts. The Appeal panel has the right to correct errors of law.

77. Both counsel for the PCC emphasized that the Discipline Committee in its Decision and Reasons kept coming back to the issue of professional skepticism. As early as 1994, Deloitte & Touche had identified the risk of financial statement error with this client as high (or "sky high" as one witness testified). This should have caused the appellants to increase their level of skepticism in conducting the audit and examining evidence. Mr. Bellmore outlined the issue of the Put side agreement in detail, arguing that the members' counsel erred in saying that it was never part of the charge. Not true: the Put was a symptom of all the problems that the appellants had with Livent's aggressive accounting policies. The appellants had to have reasonable assurance that all significant acts relating to the transaction had been completed in order for Livent to recognize the revenue.

78. Mr. Bellmore emphasized that the auditors' reasonable assurance had largely come from management. The PCC's argument was that revenue recognition required the absence of any Put on behalf of Dundee. The original Put had been removed from the main agreement on August 27, 1997, yet had been made the subject of a formal Put side agreement signed twelve days earlier, on August 15, 1997. Mr. Bellmore argued that this discovery should have immediately drawn into question management's integrity, thereby requiring independent confirmation of its absence before assurance might be said to have been secured. He stated that all of the Put evidence affected the GAAS charge, for many elements of the evidence concerned the auditors' reliance upon management. Once the test of reasonable assurance was on the table, the Put was on the table. Once reasonable assurance came in large part from management's representations, the Put was vital, since it directly called into question management's integrity.

79. Mr. Bellmore addressed the completeness of the reasons. The Discipline Committee did not ignore the testimony of Messrs. Barrington, Power and Russo; they rejected it. The panel was not required to comment on every portion of evidence. Despite some inconsistencies in Mr. Chant's evidence as outlined by Mr. Griffin, the Discipline Committee viewed his testimony as a whole, as very convincing. In finding that Mr. Chant was a credible witness, the Committee made the ultimate finding of fact.

80. Mr. Bellmore stated that it is not accurate to argue that the Discipline Committee ignored the testimony of the expert witnesses. Their evidence about reasonable assurance on the timing of recognition of naming rights was accepted. The panelists are also fully entitled to rely on their own professional expertise, especially since they were the only members who had heard, read and reviewed all of the case's materials. Mr. Bellmore argued that the test for judgment that had been argued from the *Huerto* case "that no reasonable professional would have…." is not the applicable standard within this profession.

81. There is the issue of the Discipline Committee's use of the concept of a standard of correctness. Mr. Farley argued that Messrs. Griffin and McDougall were misstating the Committee's conclusion when they argued that the Committee was stating that there could only be one answer. The argument advanced was that the proper exercise of professional judgment would result in a decision that falls within the bounds of reasonableness. The panel did go through the process of considering the opinions of expert witnesses that conflicted with their own conclusions; much of that evidence was "fact evidence" and deciding facts is the duty of the Discipline Committee, not that of experts.

82. Mr. Farley submitted that all of the appellants' arguments and submissions put forth in which errors in law were being advanced were essentially the same case that previously had been presented to the Discipline Committee; they were simply being led again; the Appeal panel must not retry the case under this guise.

83. Mr. Farley cited the *Carruthers* case (*Carruthers v Colleges of Nurses of Ontario* (1996), 31 O.R. (3rd) 377; [1996] O.J. No. 4275 (Div. Ct.)) in which a nurse obtained the cooperation of a difficult patient by kissing him. The court sustained that "a substantial degree of deference is accorded the tribunal in connection with its findings of primary facts" (p. 10) and that the professional body's ruling of unprofessional conduct, "absent a palpable and overriding error" would thereby stand. The standards of reasonableness and correctness were elaborated by the 2008 Supreme Court judgment in the *Dunsmuir v. New Brunswick* case ([2008] S. C. J. No. 99 (para. 34)). In the case of the Institute's Appeal Committee's ruling in *Fitz-Andrews* (*Re Fitz-Andrews* [2000] LNICAO 4 (paras. 83-86), that Appeal Committee concluded (a) that with respect to the role of the Appeal Committee: "the role of the appeal committee is to determine whether or not there were errors made by the discipline committee of such a nature that would warrant that committee's determinations being overturned", (b) with respect to findings of fact and credibility: "the discipline committee had the opportunity to hear and question the witnesses directly, and therefore was in a better position to assess credibility and give weight to the respective evidence", and (c) the appellant must convince the appeal committee that the discipline committee either didn't have the evidence: "to make the factual determinations it made, or erred in law in making those determinations". Concluding this approach, Mr. Farley took the panel to the case of *Zenner v. PEI College of Optometrists (*[2005] 3 S.C.R. 645), which stated: "If any of the reasons used to support the conclusion are tenable in the sense that they can stand scrutiny, then the decision is not unreasonable and a reviewing court must not interfere." (p 10, para. 43). A more detailed examination of the sufficiency of reasons by "lay tribunals" was also rendered in the case of *Aronov v. Royal College of Dental Surgeons of Ontario* ([2002] O.J. No. 306), in which it was found that the tribunal did not have to give a detailed analysis of the evidence in reaching its reasons, however it was required to consider important aspects of the evidence (paras. 21-23).

84. Finally, in reply to the members' reliance on the Institute's *Cloney* case of 2007, (*Re Cloney* [2007] (April 22, 2008)), Mr. Farley pointed out pertinent paragraphs (17, 23) to demonstrate how "fact specific" that Discipline Committee's findings had been.

85. Replying to this submission, Mr. Griffin and Mr. McDougall stated that the PCC's counsel had misstated the cases and evidence.

The Appeal Committee's questions to its counsel

86. At the conclusion of the hearing, Mr. Steinecke, counsel to the Appeal Committee, provided his advice to questions posed to him by the panel. Mr. Steinecke outlined his understanding about appellate standards of review. Using the *Dunsmuir* case as the current authority, he outlined two standards, correctness in which a panel must substitute its own view, and reasonableness where the panel must look to the nature of the issue. He stated that a panel's broad powers of review, however, do not change a reasonableness standard into one of correctness, for there are a variety of reasons why Discipline panels merit deference to their findings. Errors of law would include an unreasonable finding, or findings of mistaken interpretation of external law such as the Institute's power to assign costs, or matters of natural justice.

87. The Committee's questions to Mr. Steinecke and for which he provided advice were:

1. What is the Appeal Committee panel's standard of Review?
2. Can findings go beyond the specifics of each charge to address all the evidence led during the Discipline Committee hearing?
3. What is the nature and extent of the requirement for the Discipline Committee to give reasons for its decision?
4. Does the Discipline Committee have the jurisdiction to award costs and if so, in what circumstances?
5. Does counsel have any advice as to the process of the deliberations of the panel?

All counsel were given the opportunity to respond to Mr. Steinecke.

Procedural Rulings by the Discipline Committee

88. The appeal of the three members included the several procedural rulings that had been made before the evidence and witnesses had been heard by the Discipline Committee, rulings that in total, the appellants argued, amounted to a denial of natural justice.

89. For the most part, the various procedural rulings were not reviewed orally with the Appeal panel. The procedural rulings had included:

(a) motions regarding the withholding of relevant documents, and for a stay of proceedings.

The inadvertent failure to disclose one brief document should not result in a stay of proceedings for matters of this importance.

(b) a motion to prohibit the PCC from using evidence obtained by the investigators Allan Wiener and Stephen Held:

There was ample basis to initiate an investigation, and the PCC may retain any person to enquire into all matters.

(c) a motion regarding disclosure and the production of documents.

The panel agreed with the analysis regarding the relevance, privilege and duty to disclose the documents.

(d) a motion brought on behalf of Mr. Barrington that Charge 1 be heard and determined before Charge 2 was heard.

As discussed below, the panel believes that the issues and evidence were so interconnected that it was appropriate for the same panel to hear the evidence altogether.

90. The panel reviewed the written submissions to it with regard to these procedural rulings as well as the rulings with their supporting Reasons made by the Discipline Committee. The pertinent legal framework had been reviewed in detail in each decision and the rulings had been carefully argued, including the Discipline Committee's division about the impact for natural justice of elapsed time. The Appeal panel concluded that no arguments presented to it had undermined the reasoning of these rulings.

91. Among these rulings, however, three natural justice issues were raised in oral argument and shall now be dealt with separately in greater detail. These include, a) an unreasonable lapse of time between the events of the audit in question and the charges being heard; b) the lack of notice to Mr. Barrington that he was under investigation as well as the GAAS vs. GAAP argument on behalf of Mr. Barrington; and c) Mr. Griffin's and Mr. McDougall's representations regarding the substantial change to the case during arguments.

a) Lack of Notice to Mr. Barrington that he was under investigation

92. The investigation was initiated after newspaper reports of accounting irregularities at Livent had appeared. The PCC also investigated and charged two members who held senior management positions at Livent. Although the prosecution of the members involved in the 1997 Deloitte & Touche audit followed public disclosure of possible fraud by Livent officers, all parties agreed that there was no expectation that Deloitte & Touche should have uncovered the fraud. The investigation was made more difficult by the necessary review of the work performed in the July-August 1997 period of that year; by the roles of the members of the revised audit team that was formed thereafter; and by the intricacies of accounting principles to be used for transactions involving pre-production costs, multi-party real estate development, and the sale of theatre naming rights. Canadian and American standards at the time were not always in harmony, and this posed additional challenges.

93. The investigators faced other challenges. The actions of individual members were being investigated, each of them having performed discrete, but closely connected roles in the Deloitte & Touche audit. For a considerable time, it was not clear to the PCC where each member's responsibilities had rested. Accordingly, Mr. Griffin argued that Mr. Barrington who was not directly performing the audit did not receive appropriate notice of a charge being considered against him, and that his defence was thereby harmed.

94. Each individual must know the case that he is to defend in time to prepare his best defence. The panelists reviewed this question in terms of their understanding of the relationship that all members have with their professional body, its rules, and its generally known procedures.

95. Members accept that the Institute has broad investigative powers after an investigation has been initiated, and that the investigation is to be unfettered, with all pertinent papers to be made available, all questions from investigators answered carefully and fully, any request for a meeting with the PCC to be speedily accepted, and that committee's questions answered in a forthright manner. After that point, charges may be drafted. However, long before that, at least as early as a member who is involved in the events and issue receives a request to meet with an investigator and to provide documents, a member knows that charges might follow, for he knows first-hand that his own work and records have become part of the investigation.

96. Did Mr. Barrington know in sufficient time that his work would fall under the scrutiny of the PCC's investigation? Much attention was paid to the November 28, 2003 letter sent to Mr. Farley by Mr. Leonard on behalf of Deloitte & Touche, identifying the roles of the four members. Mr. Griffin emphasized its delineation that Messrs. Power and Russo were in charge of the audit, Mr. Barrington's role being of a more limited advisory scope. However, the letter made it incontrovertibly clear that this was a Deloitte & Touche audit, and that these three appellants completed their roles so as to ensure that the decision to release the audit report was the consensus of all of the members of the audit group.

97. The panel concurs with the Discipline Committee that the letter's emphasis upon that consensus immediately confirmed that all three of the appellants might be subject to the PCC case. This PCC request for clarification and the Deloitte & Touche response flowed from a meeting of the four members with the PCC; that in turn had followed the process of answering questions of the two investigators. Surely, Mr. Barrington had been consulting his records.

98. Did Mr. Barrington know this in time to develop a full and uncompromised defence? Given the delays from various procedural motions before the Institute and courts, and the composition of their supporting reasons, as well as the difficulty in convening all parties, it is obvious that counsel had ample time to prepare its defence. Thus, this question really asks two matters: whether natural justice had already been breached when information had to be provided and questions answered by Mr. Barrington before November 28, 2003; and whether a defence of the four named particulars in Charge 1 would comprise a complete defence for the case that developed during the proceedings. The first aspect questions the Institute's investigative procedures generally; the second point will be reviewed by the panel as a separate natural justice matter.

99. Mr. Barrington knew that he had been directly involved with important client relationship issues in August 1997; with the selection of the new audit team in September to which he assigned himself for certain roles; in convening the Deloitte meeting of April 3, 1998; with succeeding meetings with senior Livent management; and with the final stages of that audit, including the meeting with the Livent Board's audit committee on April 9, 1998. If any of the investigators' questions went beyond the audit working papers, and their audit work, then each member with input into the issuance of the December 1997 audit for Livent might expect to become an individual of interest to the PCC. The investigators' questions to the Deloitte & Touche auditors were expected to be presented in writing so that answers might be reviewed by Deloitte & Touche, and not reflect on-the-spot responses given in an interview. These experienced members all had reason to know that professional charges might flow from the

Institute's review of this audit. They all knew that the drafting of charges followed after the investigative report was reviewed and after meeting with the PCC.

b) The argument that there was an unreasonable lapse of time

100. There is also the related issue of whether the members' natural justice was harmed by the length of time taken both in the initiation of this case, and by its lengthy duration. This matter was elaborated more fully in the motion to the Discipline Committee than to this panel, and this panel did not find that any new arguments had been advanced. The Discipline Committee carefully reviewed the matter, with Committee members divided on the impact of one matter before issuing a unanimous judgment.

101. The Discipline Committee concluded that while faults about delays might be found, an abridgment of rights had not occurred. Administrative and investigative resources had limits, as certainly does a review process of panels composed of volunteers. The Institute's prosecution of senior managers employed at Livent affected the start of this review. The personal desk files kept by the members were not known by the investigators and their substance only came to light during the proceedings. Many procedural motions have been heard by the Discipline Committee and Ontario's courts.

102. Any undue delay had presented no ongoing risk to the public and it was therefore appropriate to emphasize fairness and comprehensiveness. There was no evidence that the members had been prejudiced by the delay; no witnesses were thereby lost for the hearing, and the members were able to make a full defence.

103. This was an unusually complex case about four individuals with separate, albeit interconnected factual situations for each, as well as work in common that involved evidence from many parties, and intertwined issues covering the entire year. Lengthy Reasons of matching complexity have had to be determined and composed. All parties have contributed to this measured pace; concern both for the integrity of the profession and for members' rights has been balanced throughout the process.

c) The argument that the conviction was not based upon the charge and that evidence from Charge 2 influenced Mr. Barrington's conviction under Charge 1

104. Mr. Griffin had moved that the two charges be heard separately by the Discipline Committee. It would have been a departure from usual procedure in the Institute for charges to be heard separately, for the usual practice is that the evidence for all charges is heard first, and then replied to. After reviewing volumes of evidence and transcripts as mentioned above, it is clear to the Appeal panel that it would have been impossible to hold separate hearings on each charge because of the complexity of the audit environment with all of the partners, this client, and the various interconnected issues pertaining to Livent's financial information at different points during the year. This conclusion, however, still leaves Mr. Griffin's main point.

105. Charge 1 referred to the period "in or about" "January 1, 1998 to March 27, 1998." Spillover occurred. Before that date, events occurred that the Discipline Committee needed to consider for they were relevant to the members' application of professional skepticism. As well, the audit is a continuous process that involves or utilizes accounting work completed for quarterly statements. As the case unfolded, critical events in the three weeks after March 27, 1998 were disclosed, and these became fundamental factors in the decision that was rendered. At root, these matters were about the rigorous application of professional skepticism to all

pertinent information. Everyone in the Hearing room knew what these events were and their inclusion was not prejudicial.

106. The charge constitutes an allegation and fairness regarding that may be distinguished from the issue of fairness in the Discipline Committee's consideration of all of the evidence that was pertinent to the exercise of professional judgment about revenue recognition. The evidence turned to all matters that contributed to the decisions taken regarding the reliability of information provided to the auditors and the integrity of management.

107. It is evident that Charge 2 (iii) regarding the additional write-down of preproduction costs at Livent's Audit Committee meeting on April 9, 1998, became one significant factor in the Discipline Committee's ruling in Mr. Barrington's case. In his case, the concern was not the adequacy of the audit's data, but of the expeditious issuance of an unqualified audit report with the financial statements reflecting the last-minute write-down. It was not Mr. Barrington's work to determine its dollar accuracy under Charge 2, but the judgment of the Discipline Committee was that his coordinating role in those final weeks was to ensure that skepticism about its implications was thoroughly applied.

108. Key GAAP decisions about accounting principles, with Mr. Barrington playing a senior lead role, had occurred in August 1997, and again in April 1998. The nature and quality of these decisions were key elements of the case about this member. When the Discipline Committee's Reasons questioned whether sufficient professional skepticism was used, or whether sufficient time was taken in April to permit a skeptical process, or whether a determined process of rigorous skeptical review was actually implemented in April, they were reviewing key responsibilities of Mr. Barrington at that juncture as they understood them.

109. The understanding of Mr. Barrington's role developed during the Discipline hearing, and had not been fully uncovered by the PCC's investigators. It is the judgment of this panel that the Discipline Committee's reasons are clear about their reasoning in these matters that were introduced through all of the documents, testimony and questioning of all four members and other witnesses. Thus, this issue can be viewed through two lenses: that of law as in a natural justice claim; and that of findings of fact, as in the details of the case heard by the Discipline Committee.

110. Mr. Griffin argued that Mr. Barrington was found guilty of Charge 1 based on evidence that came to light under Charge 2. He argued that Mr. Barrington was not the subject of Charge 2 and ought not to have been found guilty of Charge 1 from the Charge 2 evidence. He argued that Charge 1 was a GAAP (accounting) charge, whereas Charge 2 was a GAAS (auditing) charge. Mr. Barrington was found guilty on the basis of an audit deficiency rather than an accounting deficiency, which was the subject of Charge 1.

111. Paragraph 52 of the Decision and Reasons for Decision (February 11, 2007) states that Charge 1 was referred to throughout the hearing as "the GAAP" charge. Paragraph 53 states that Charge 2 was referred to as "the GAAS" charge. This was done for identification purposes, not to confine the matters of the hearing to separate issues of accounting and auditing. In conducting an audit sufficient audit evidence must be obtained to satisfy the auditor that the financial statements comply with the accounting standards of the profession. The two facets of the auditing process are intertwined and cannot be separated. Charge 1 states that the members "failed to perform their professional services in accordance with generally accepted standards of practice in the profession…" The wording of the charge is not restricted to matters of accounting, but includes all "professional services" respecting the practice of the profession,

including auditing and accounting. Further, all evidence which came to light during the Discipline hearing is pertinent to both charges. The Appeal panel rejects Mr. Griffin's argument.

112. The Appeal Committee holds both that the Discipline Committee's Reasons are sufficiently well explained, and that the factual components of this matter are so important that it is appropriate in this appeal case that there be considerable deference for such findings of mixed fact and law. The Appeal Committee does not conclude that there had been fundamental errors.

The Evidence of the expert witnesses as a body of professional knowledge that confirmed that the members more than met professional standards

113. Messrs. Griffin and McDougall both stressed the importance of what they termed "a principle." Four expert witnesses called by the defence testified and quite independently of each other reached similar conclusions about the quality of the audit work of Messrs. Power and Russo and the role of Mr. Barrington. Both counsel argued that it was inappropriate for the panelists to substitute their own conclusions, for the evidence of the expert witnesses may not simply be disregarded. In their view, a body of expert testimony had concluded that reasonable professional standards had been met and that this then became a sufficient test in itself for an acquittal to be required.

114. All of the experts spoke about professional skepticism appropriate to the circumstances as being the accepted standard. The Discipline Committee accepted that opinion. The real issue was whether the circumstances of this case called for the exercise of greater skepticism. On that assessment of the evidence the Discipline Committee was not bound by the expert opinions, and was in the best position to make a comprehensive determination. The theme within the Reasons was that there was a basis to doubt or to reject the opinions called by the appellants.

115. In his evidence Professor Hanna addressed the application of GAAP. He had consulted the charges, the investigators' report, the supporting briefs to the investigators and the oral evidence of Mr. Weiner. He was critical of Mr. Weiner's report, but reviewed financial accounting matters such as revenue recognition at a conceptual level. This emphasis mirrored his own background, and Professor Hanna stuck closely to the arguments of the Chant memo about naming rights recognition for assessing when all significant acts in the theatre transactions were completed. His knowledge of this case and its documents was clearly much more limited than was that of the Discipline Committee.

116. Mr. Kelly, a partner in Grant Thornton, LLP, was also asked to provide his independent view of the charges. Mr. Kelly's knowledge of the case material was more extensive as he had reviewed audit working papers back to 1994/95, the investigators' report, Mr. Weiner's and Mr. Russo's transcripts. His view was that auditors should not just look for evidence to confirm a judgment but that reasonable, competent auditors may reach different conclusions. There must be a commitment to a proper process, use of analytical tools, and appropriate use of professional judgment. Nevertheless, the auditor may still reach the wrong conclusion because "the process overrides the solution." According to Mr. Kelly, Deloitte & Touche's acceptance of Livent's recognition of the revenues was therefore within an acceptable range of alternatives that might also have included but was not limited to Mr. Weiner's choice.

117. By the time Mr. Kelly's evidence was heard, the Committee had heard much evidence that Mr. Kelly had not reviewed. Although he had briefly discussed the main Put Agreement in his report he did not deal with the side agreement of August 1997. Arguably, that might affect the accuracy of any discussion of the Pantages-Dundee hotel component of the mixed development, and indeed he was questioned at length by Mr. Bellmore who presented questions based on a theoretical model of the Put side agreement. The cross examination demonstrated that the witness had not attempted to assess the work of individuals on each charge, but had provided matters in general. Mr. Kelly emphasized the importance of consensus in an audit team, but did not know that in April 1998 Mr. Chant criticized the approach that was adopted by his colleagues on certain key points.

118. Mr. Yule, a former partner of Ernst & Young, reviewed the charges, the investigators' report, the audit working papers of 1996 and 1997, the discipline hearing transcripts and exhibits of Mr. Weiner's evidence and cross examination. He, too, did not know Mr. Chant's position. His position was that there was not sufficient evidence to compel Deloitte & Touche to reject Livent management's representations. The assessment of pre-production costs was dependent upon management's expert knowledge of this new field of entrepreneurship and of market conditions. So too, he held that there was no reason to question management's last minute $27.5 million write-down since the executives' expertise had been relied on throughout. Mr. Yule did not determine what work within the audit file and on accounting issues had been completed by each individual.

119. Mr. Vance, a retired senior national partner of BDO Dunwoody, was the last expert to be heard, and he was the only one who had had access to the transcript of the oral evidence of all four members, including that of Mr. Chant. Although he had received more evidence to review than did the other three expert witnesses, much of that review had been done directly by a colleague working with him, although Mr. Vance wrote the report. He did not review any of the materials of the desk-files. Mr. Vance offered a strong endorsement of the audit, arguing that each particular of both charges was without foundation.

120. Of note in this expert's background had been his participation in the Institute's defining of the concept of professional skepticism. In his evidence, Mr. Vance stated:

> On the one hand you're supposed to accept management's good faith, but on the other hand you are supposed to be increasingly skeptical….. skepticism is a state of mind in how you practice. All it means is that you accept that you're getting truthful answers and responses from clients… but… adopting a bit of a, I guess some say a 'show me' attitude, or ask the second question just to prove you're right.
> (Appeal Book, vol. 20, tab 190, pp 5159-60)

121. Mr. Vance was questioned closely about the theatre-naming transactions, about what steps if any would be required in the financial and construction process of the Pantages-Dundee development before all naming revenues might be recognized in 1997, and about whether, as he had asserted, Mr. Russo was entitled to take comfort from the SEC recognition of other naming transactions. His own judgment was that the foreign exchange risk was small - relevant to only one third of the transaction, and he agreed with the Power and Russo decision to record it as a sale. This view differed from Mr. Chant's advice to Mr. Russo on April 8, but because Mr. Vance thought that the value did not reach materiality, he had not included the matter in his written report.

122. Since Mr. Vance had read the oral evidence of all four members, Mr. Bellmore directly reviewed the Put issue with him. Mr. Vance was led through the evidence about the end to the Put clause in the main agreement during the period between August 1 and 27, 1997, a retraction that had been confirmed, according to Mr. Bellmore, on seven occasions by Livent's management; the overlapping signing of a conflicting side agreement on August 15; and the review with management and the Chair of Livent's audit committee in April 1998 after that side agreement became known. Essentially, Mr. Vance thought that the undertakings received in April of 1998, from Mr. Gottlieb for Livent, and from Mr. Seyffert on behalf of Dundee, showed more than sufficient skepticism when a forensic audit was not being performed.

123. Mr. Vance did not distinguish that Mr. Seyffert's letter had not responded at all about the existence of a side agreement, and effectively had been off-topic until in answer to Mr. Bellmore about whether the lawyer's letter did address the side agreement, he replied "It does not specifically say that, no." (Reasons, para. 227) The Discipline Committee quoted this. Apparently Mr. Vance saw no implications about this specific lack of confirmation that a Put did not exist at the end of the year. This exchange before the Discipline Committee, in the minds of the Appeal panel, brought into question the objectivity of Mr. Vance's assessment, despite Mr. McDougall's statement in his Reply that Mr. Bellmore's assertion in this regard was unsubstantiated, and had not been a matter of cross-examination. Mr. Vance's less-than-convincing review, moreover, clouded one significant basis of his expertise, – the standards for and application of professional skepticism. The argument of Messrs. Griffin and McDougall had been that the expert testimony stood as a representative body of professional judgment. This panel concluded however, that Mr. Vance's evidence, as read in the Hearing transcripts, had been seriously shaken. The Discipline Committee's direct quote of Mr. Vance's answer to Mr. Bellmore in paragraph 227 certainly indicates that it also thought so.

124. Did the Discipline Committee members err in not reviewing the expert evidence in its reasons? Certainly a written assessment would have helped. The Committee stated that it considered the evidence of the four members as having been critical to their own deliberations, and the Discipline Committee's argumentation, including their rejection of much of the expert testimony, directly flows from their assessment of that evidence. For the determination of the facts of this case, the Appeal Committee concurs that the primary documents of the audit, and the members' own evidence, were more important.

125. On some points, the Reasons demonstrate that the Discipline Committee accepted the experts' opinions. Some rulings under GAAP, (for example the steps required before a naming rights transaction might be considered to be complete) that might not have been the Committee's own preference were accepted, for these experts had shown that an acceptable range of options existed. Also relevant to their conclusions was the experts' emphasis upon sustaining a consensus within the audit team, or holding a final discussion about the Put side agreement with other senior partners in Deloitte & Touche. This last expert testimony dove-tails with the Discipline Committee's own conclusions about a final review requiring professional skepticism when doubts about management's probity had been raised, although their conclusions about whether this actually occurred differed. Mr. Weiner, the PCC's expert who was most familiar with all of the evidence, who attended the hearing throughout, and who heard the evidence of all four of the experts commissioned by the defence, did not alter his judgment on the charges, including those areas of sharpest disagreement.

126. Were these four experts a “representative body” which demonstrated that the members had met the Institute’s professional standard? The Appeal panel does not believe so. These individuals reviewed differing slices of material. The common elements for their analyses were the audit, the charges, and the Investigators’ report. As the Decision noted, the investigators’ report was flawed and incomplete in that the investigators did not have access to all relevant documents which came to light during the Hearing, nor of other factors that emerged from the arguments and submissions of counsel and members' and witnesses' testimony. The limitations inherent in what each expert reviewed meant that their knowledge of the full case now presents these witnesses to a reviewer of their testimony as being an incomplete picture when compared to all the evidence that emerged during the hearing.

127. Under questioning, the expert witnesses’ conclusions were partially reduced in scope from their written reports’ broad disagreement with the Investigators’ report and the charges. Several documents that had not been reviewed by two of the experts were noted; and the expert nature of the background of Professor Hanna to this case’s particulars when he lacked senior practical audit experience was noted by the Appeal panelists when they discussed this matter. His expertise had thus not been specific to the factors that were emphasized in the Discipline Committee’s Reasons. The Appeal panel’s assessment of the transcript’s record was that the conclusions of Mr. Vance regarding the auditors’ application of professional skepticism had not been credibly supported when challenged.

128. Accordingly, there are sound reasons to question whether the Discipline Committee heard a representative professional assessment. It certainly did not hear a fully informed assessment. The Discipline Committee’s members were professionals who were critically examining all of the evidence. Thus the Discipline Committee was entitled to make its own conclusions of fact about both charges, and to conclude that the “expert” opinions on the ultimate issues might be dismissed as not conclusive, or even very helpful guides. The panel did accept the application of different alternatives within GAAP that were presented for the sale of naming rights to a theatre that was not yet constructed. However, it was the existence of the Put side agreement with Dundee Realty for some period of undetermined length after August 27, 2007 that undermined whether there had been a transfer of the significant risks and rewards of ownership.

129. An expert’s opinion that is based upon a faulty factual foundation can properly be disregarded. The Discipline Committee spent a considerable portion of its Reasons analyzing the faulty factual foundation for these opinions.

130. In the circumstances was the Discipline’s Committee’s silence about the expert witness testimony an error such as to undercut the validity of its findings of fact, and of mixed fact and law? For matters in which a standard of reasonableness is being differentiated from that of correctness, it seems entirely appropriate that the Discipline Committee’s analysis ought to be explained. To the Appeal panel, this however, may be distinguished from matters of assessing the credibility of witnesses in areas in which the panel is also using its own expertise evaluating the evidence. In a lengthy judgment, the Discipline Committee had sound reasons for emphasizing those facts and arguments that had driven its decision. The members of the Discipline Committee had a job to do, based in part upon their own expertise, and it is the Appeal Committee’s role to check whether this has been done reasonably. The Appeal panel believes that the Discipline Committee has done so by accepting the concept of professional skepticism appropriate to the circumstances and then in examining those circumstances. Its approach did not constitute an error of law. The Appeal Committee accepts the Discipline Committee’s finding of facts.

Hindsight regarding the Fraud and the Put, and a Standard of Correctness

131. Mr. McDougall emphasized several times that this case was all about the fraud. If there had been no fraud, no investigation into the 1997 audit by Deloitte & Touche would have been launched. If this had not been an extraordinarily high profile firm and star-filled industry, the public and the Institute would not be caught in the glare like a transfixed deer. Not only did the fraud initiate matters, it coloured everything. Other reasons may have been given, but the failure to protect the public by discovering the fraud during the 1997 audit became the over-arching matter being reviewed. He offered as proof that the three members were found guilty of a lack of exercise of professional judgment even though they successfully defended the case about accounting for the sale of theatre naming rights, and even though there is no conclusive proof that the Livent-Dundee Put existed at year-end on December 31, 1997. Erroneously, the Committee had adopted a standard of correctness for this fact situation, concluding that a complete audit ought to have uncovered the client's fraud.

132. Maria Messina's evidence during her hearing before the Discipline Committee had been that, as the new CFO, she had not known about Livent's double books, costs accounted for as assets, or other financial manipulations when Deloitte & Touche was performing the Livent audit in March 1998. An aspect of these manipulations was the deferral of significant costs from a show's production in one city to the show's production in another location that would then be charged to income in a later quarter. The ability to determine compensating revenue from estimates of ticket sales was a matter that Mr. Russo and Mr. Power had to consider in their audit. Mr. Power dealt with this directly when Mr. Chant's advice on April 8, 1998, (regarding the recoverability of preproduction costs) disagreed with Mr. Russo's conclusion.

133. The Discipline Committee reviewed this matter. At issue was Mr. Power's acceptance that a write-down would not be necessary after Mr. Gottlieb heatedly refused to consider his suggestion of a modest reduction. Also discussed was the adequacy of the review by Mr. Russo immediately after the Livent audit committee meeting of April 9, 1998 disclosed that a much larger write-down ($27.5 million) would be taken. This figure was almost double that which Mr. Power had discussed with Mr. Gottlieb. What was its basis? A changing management team with new capital? The general prudence or unease of the chair of its Audit Committee? Revised estimates of cost recoveries based upon supporting financial evidence?

134. The Discipline Committee sharply criticized how the appellants handled this matter. All three members had been satisfied because the $27.5 million write-down indicated that a new management would have a more business-like approach, and strengthened procedures would follow. Improvements in the auditor-corporate relationship for 1998 beckoned. Instead, the Discipline Committee viewed this alteration as a warning signal that management's representations by that point lacked credibility, and that the substantial figure's basis required careful re-testing. The Reasons were not stating that such testing would turn up fraudulent bookkeeping; rather the retesting might indicate whether or not management's representations were unreliable in this area, and then that such a finding might have wider implications.

135. Was this reasoning about the write-down an example of the imposition of hindsight or did it fit into a pattern already well-established? There was evidence of a pattern. Clearly the Discipline Committee reviewed Mr. Chant's response at the April 3, 1998 Deloitte & Touche emergency meeting that the firm should resign from the audit engagement because management's probity could not be trusted to be a response to such a pattern. Mr. Barrington treated Mr. Chant's suggestion as an irresponsible solution and a reflection of his personality

rather than as a considered assessment. Two of the members in their testimony recalled his strident assertion, but everyone knew that Mr. Chant was the individual in the room who was most familiar with August's battle about the original Put, and so would be especially sensitive to the implications of the now revealed Put side agreement. The intense negotiations about revenue recognition between Livent, supported by Dundee, and Messrs. Chant, Barrington and Wardell in August, 1997, certainly are viewable as aspects of a pattern. Livent's pursuit of accounting advice from another accounting firm during its November discussions with Mr. Power might also cause reflection. Then, there was the Dundee document for the December 31st year-end, identical in all other particulars to Livent's except for its last item, and the fact that that evidence had generated the emergency meeting of April 3rd at Deloitte & Touche's office. If Mr. Gottlieb's reply that the Put had existed for only a few weeks in the fall were to be accepted, then Livent's President had deliberately lied to Messrs Wardell, Chant and Barrington in August, indeed to Mr. Chant several times. The inconsistencies in Mr. Gotlieb's explanation on April 3rd were understood by Mr. Barrington when he was cross-examined by Mr. Bellmore, and presumably had therefore been examinable at the time. The Discipline Committee's focus was this context, not the failure to find financial data that proved there was a fraud. The Reasons distinguished between not finding the fraud and the failure to apply systematically the appropriate professional skepticism.

136. However, this conclusion may still require examination, for it becomes tied to the Discipline Committee's statement about correctness for determining the existence of the Put side agreement. The Reasons stated:

> The panel heard considerable evidence about the exercise of professional judgment and what it entailed. One fundamentally important exercise of professional judgment at issue in this hearing related to the reasonable suspicions about the Put and the proper procedures, analysis and conclusions reached by the auditors to dispel these suspicions. <u>The proper exercise of professional judgment requires the auditor to reach a correct conclusion</u>. (emphasis added) It is not enough for the auditor to have an appropriate process, to identify the issues and to correctly set out what should be done. (Reasons, para. 237)

137. Mr. McDougall argued that the Discipline Committee premised in this sentence that there could be only one correct answer, namely that the Put side agreement was in place on December 31, 1997, and to so conclude was an exercise in hindsight, despite any protests to the contrary.

138. As the November 1998 re-audit of the 1997 annual statements was to demonstrate, four conclusions were available to Deloitte on April 9, 1998:

(a) the Put had been definitively removed on August 27th as asserted by Livent's senior management;
(b) the Put side agreement of August 15 may have existed in the fall but had not lasted as late as December 31, 1997;
(c) the Put side agreement was in place at the end of the year as shown by Dundee's records; or
(d) it was not possible to sort out a definitive answer amidst conflicting evidence.

If the first two scenarios were supported by clear evidence, then the Put was irrelevant to the year-end audit. If any of the last three situations existed, then the Deloitte

communication accompanying the Livent prospectus issued in the fall of 1997 was not accurate. If the Put existed on December 31, 1997, or if this fact could not be determined, then Livent's revenue was misstated.

139. The Discipline Committee did not need to conclude that the Put existed at the year end to make a finding of inadequate skepticism regarding Deloitte's acceptance of its removal by December 31st. A conclusion that Deloitte did not have adequate proof to know whether revenue recognition should be recognized is not synonymous with a finding that the Put was in place, and does not prove hindsight. This is precisely the conclusion stated in paragraph 230 of the Discipline Committee's Reasons.

140. What then was this standard of correctness? The Appeal panelists note that there is an ability among accountants when exercising professional judgment to reach a correct conclusion. That, however, does not mean that only one answer exists. The Discipline Committee's Reasons refers to a correct conclusion, not the correct conclusion. The contrary argument about this text submitted by the appellants removes it from its context.

141. Mr. Farley's argument went further. The Committee was deciding whether auditing work and GAAP decisions had been within the profession's zone of reasonableness as outlined by the Institute. Mr. Kelly had argued that the process overrides the solution and may result in an incorrect conclusion. To Mr. Farley, the Discipline Committee rejected that viewpoint. That could be a reasonable interpretation, but in any case, the complete text certainly does circumscribe the sweep of their use of the words "a correct conclusion."

The Put side agreement and the November 28, 2003 letter to the PCC

142. The Put was a comparatively minor element in the Weiner report. The word "Put" is not used in either charge. Accordingly, both Mr. Griffin and Mr. McDougall argue that this was not the case the members had prepared to defend, and not the case that was led against them from the Investigative report. By this view, the Discipline Committee's conclusions about the Put's significance are therefore unsupportable. Mr. Griffin argued that this was especially the case for Mr. Barrington, Mr. Griffin holding that the Put was about GAAS, not GAAP. After the testimony of Mr. Chant in which differences of view among the four members emerged, both counsel for the appellants have argued that the Put high jacked the case, and dominated the Discipline Committee's findings. In contrast, Mr. Bellmore argued that the Put was always critical to the case, and took on greater significance as it emerged as a primary test issue about the application of professional skepticism. The Put was a leading symptom of the difficulties with Livent's management, and was relevant to the charge that all significant acts must be completed prior to the recognition of revenue.

143. The Put was critical in two regards: it is central for assessing the quality of Deloitte's final audit review, and to the allegation that the November 2003 letter sent by Fraser Milner, counsel for the members, had been misleading. Major errors by the Discipline Committee about these two matters would quite possibly be fatal to its decision.

144. The Put, granting Dundee financial relief if the condo/hotel were not to be completed within the Pantages new theatre-condo-hotel-garage development, was part of a master agreement dated August 1, 1997 between Dundee and Livent. With great difficulty, Messrs. Chant and Wardell, supported by Mr. Barrington, were successful in persuading Livent to have it removed by August 27. Following that, Mr. Chant and Mr. Wardell broke the summer-long log jam about recognition of revenue from the sale of naming rights to the new theatre component of the

development in the third quarter, by using American GAAP, and Livent proceeded to seek fresh capital in the market. Unknown to Deloitte, on August 15, 1997, two senior representatives of Livent and Dundee had signed a new side agreement, reinstating the Put with the added condition that the existence of the side agreement not be disclosed. Livent's records provided to Deloitte & Touche for its December 31, 1997 audit had no record of this side agreement. The documents provided to another Deloitte & Touche audit team auditing Dundee Realty's accounts noted the existence of this side agreement.

145. In late March or early April 1998, very close to the meeting with Livent's audit committee on April 9, 1998, the Deloitte auditors of Livent learned from the Deloitte Dundee audit partner about the Dundee evidence of a previously unknown continuing Put side agreement. That new agreement was part of the Dundee 1997 audit papers. A Deloitte conference of its Livent audit team, senior partners, and legal counsel occurred, and clarification was then sought from several parties. Management assurances that satisfied these three members were received, but among these came an explanation about Dundee's reasoning that made little sense (the Discipline Committee quoted the cross-examination of Mr. Barrington, Reason, paras. 222-223), as well as a legal letter from Mr. Seyffert on behalf of Dundee that addressed only the master agreement, not the side agreement. The oral response from Mr. Gottlieb when he was questioned by Mr. Barrington in front of Mr. Drabinsky did not square with the written Dundee evidence, for he stated that the side agreement was null before the end of the year and had existed only for about two months in the fall – including some of the period after a prospectus had been released that was based in part on a repeated commitment by Livent officers that the Put had been discarded by August 27, 1997.

146. Messrs. Griffin and McDougall argued that the intense focus of the Reasons supporting the Discipline Committee's decision upon the Put is an error of law such that no deference to the Discipline Committee is due. They noted that the master agreement containing the deletion of the Put had been known to the investigators and was referenced in their notes; accordingly, the PCC cannot claim that it came as a surprise. The PCC countered that crucially, the side agreement of August 15, 1997 was not disclosed to Mr. Weiner, and the differences between Mr. Chant's views and the other partners were not known before Mr. Chant gave evidence. The PCC had argued that the prepared answers to the investigators' questions had been carefully minimized and Mr. Chant's less-than-full reply to Mr. Weiner was also quoted in the Reasons (para. 255) as an example of such careful construction.

147. The "standards" responsibility to ensure that all significant acts are completed before recognizing revenue was a central charge, although the other large issue – recognition of revenue from naming rights for theatre construction - was the one detailed. The broad area of concern had certainly been signaled, and the application of professional skepticism was central to the case. The Put side agreement emerged during evidence, and then was pursued by Mr. Bellmore, both to elicit more specific information and to examine opinions and roles. The Appeal Committee concludes that the Discipline Committee's detailed examination of the Put side agreement was essentially about facts and credibility. This also raises the issue of the fairness of the allegation or charge versus that of the evidence that was heard. In this panel's view, the Put side agreement and its implications were new evidence arising from the defence.

148. The Fraser Milner letter of November 28, 2003 to Mr. Farley (Reasons, para. 257) was also debated. Mr. Griffin argued that the Discipline Committee's findings about the letter are inaccurate and totally unfair, because it replied to a fairly specific query. The letter, while written by counsel, was Deloitte's answer, (although not reviewed by all four members who were charged) and limited any direct role in the audit responsibilities to the four named individuals.

Two of them, Mr. Barrington and Mr. Chant, acted in a consultative capacity and the direct responsibility of Mr. Power for the audit was noted, but the reply emphasized that the Livent audit was a Deloitte & Touche engagement and that "decisions reached by the client services team were very much a matter of consensus" (Reasons, para. 257).

149. The letter bound Mr. Chant to the Deloitte consensus, and he clearly tried to avoid a break with the firm. However, Mr. Chant was not party to the April 3-4 1998 inquiries made of Livent management. In his testimony Mr. Chant doubted the wisdom of some of the assignments for these inquiries, or of having some meetings carried out by a single individual. These were Mr. Barrington's decisions; he had also decided according to his own testimony that Mr. Chant had "too much skin in the game", in other words, that quite likely he might not remain calm or join in a consensus approach. Mr. Chant also did not attend the April 9, 1998 meeting with Livent's audit committee. However, despite his own objections, Mr. Chant was asked by Mr. Barrington to review Mr. Russo's work at the latter's request. Mr. Chant was consulted by Mr. Russo because of his special expertise. While Mr. Chant expressed a reservation about Livent's ability to recover the preproduction costs, this was the extent of his involvement after April 3, 2008, other than to receive a phone call from Mr. Power telling him of the $27.5 million write-down decision announced at the April 9, 1998 Livent audit committee meeting.

150. The Discipline Committee found that Mr. Chant considered himself outside the stated consensus, as he clearly was at the close of the Deloitte April 3, 1998 emergency meeting. His dissent about the accuracy of the November 28, 2003 Deloitte response to Mr. Farley was delivered to Deloitte's senior management in a letter dated April 29, 2005 (Reasons, para. 259). In it he noted that he had previously "communicated in writing … my request that the firm correct the misstatements in the Fraser Milner letter to the PCC" and stated that his evidence at a Discipline hearing was bound to differ from the contents of the November 28, 2003 letter. He had sought legal advice of his own during the April 1998 crisis. None of this emerged until Mr. Chant began his own testimony in 2007, many months later.

151. The Discipline Committee saved its most critical judgments for this Deloitte silence, casting it in terms of lack of forthrightness. Effectively, their judgment was that full cooperation with the Institute's investigation had been lacking. Their principal blame for this fell upon Mr. Barrington, because he was the most senior member of this audit team and a senior partner of Deloitte & Touche, and had reviewed the accuracy of the November 28, 2003 letter before it was sent to the PCC by Mr. Leonard.

152. The Discipline Committee's findings on these points were relevant to credibility, even though they were not a separate allegation. The Discipline Committee's findings were relevant to rebut a defence of consistent and reasonable exercise of professional judgment.

153. Unless the Discipline Committee findings herein were so erroneous as to be wrong, they are not an issue of law. Absent that, they are a matter of ascertaining a fact situation and making judgments about credibility. There can be no doubt that their conclusions resulted from listening to evidence and from observing witnesses, as well as from reading Mr. Leonard's letter and the subsequent entreaty written by Mr. Chant that they included in their Reasons. The Appeal Committee concludes that this finding is fully explained and should stand.

An Inconsistent Decision that misinterpreted the Advisory Role?

154. Mr. Griffin emphasized that the advisory partner role was one developed within Deloitte. He stated that it could only be understood within this firm's structure, and that Mr. Barrington was the most experienced witness about this role; his view had not been contradicted. He argued that the acquittal of Mr. Chant coupled with the finding of fault for Mr. Barrington was contradictory.

155. While called advisory partners, it is evident that these two members played significantly different roles in two of the three critical junctures in 1997 with Livent. During the deliberations of August, 1997 about issuing a second quarter report, the lead audit partner was Mr. Wardell; the GAAP specialist was Mr. Chant, and Mr. Barrington's carefully limited role was to demonstrate to Livent that senior management of Deloitte had full confidence in their work. Because of the nature of the prospectus work, Mr. Chant for a short time held the lead role in accounting discussions with the client.

156. The need to return Mr. Chant to other responsibilities was one factor in the choice of Mr. Power to replace Mr. Wardell when Mr. Richmond, chair of Livent's audit committee, requested a change. When difficult negotiations about a revenue recognition issue occurred during November 1997, Mr. Power took the lead, and apparently this continued until April 3, 1998. Mr. Chant's advisory role was as a GAAP expert, and as the only continuity to the audit team for the first eight months of that year. Mr. Barrington's advisory role was as a client-relations leader when called upon.

157. During April 1998, apparently little call was placed upon Mr. Chant, and Mr. Chant's unique GAAP expertise was not directly pertinent to the audit until Mr. Russo wanted aspects of the financial statements reviewed. By contrast, Mr. Barrington convened the April 3, 1998 emergency meeting, and excluded Mr. Chant from subsequent client meetings, thereby downplaying the continuity Mr. Chant could have provided concerning the existence of the Put. Mr. Barrington assigned assurance tasks among various other parties including himself rather than concentrating all of these in the hands of the lead auditor, Mr. Power with another's support. Some of these meetings were with a single Deloitte accountant. Mr. Barrington drafted briefing notes of how to proceed and why; and then made the key decision about sufficient client assurance. The Discipline Committee in par. 184 noted Mr. Barrington's 6:45 p.m. April 3rd voice message sent to Mr. Chant (and he thought to others); Mr. Chant's note regarding it stated "Put subsequently eliminated." In this critical period Mr. Barrington, not Mr. Power, made the key decisions about how to handle the Put side agreement. In accepting the adequacy of assurance, he, not Mr. Power made the key audit decision (although Mr. Power's subsequent audit work demonstrated his agreement).

158. Mr. Chant was Deloitte's, and perhaps one of Canada's, leading GAAP experts, but his authority did not exceed that of Mr. Power, a very experienced auditor, for the Livent engagement. For several years Mr. Barrington had been one of the most senior managing partners within Deloitte & Touche; from 1992 to 1996 he was Chairman of the Board. He had selected the audit team, and his work included the annual performance reviews of the other three partners. Thus, his management role in Deloitte's was always present as one that might potentially trump his advisory role on the audit team and turn that role into a coordinating one. On April 3rd, 1998, quite clearly this occurred. Given the senior role in this audit group that he had assigned himself, any scenario with a negotiating component was sure to place him in the lead position in such meetings. He assumed the ongoing task of managing a relationship with a public company in a new and high-risk industry led by forceful and prominent people.

159. The Appeal Committee finds that the Discipline Committee did not err when it concluded that it had to address the supervisory components of Mr. Barrington's interventions. Nor did it err when it distinguished between the differing advisory roles assigned to Mr. Chant and Mr. Barrington after September 1997. Decisions were made in quick succession in early April 1998, and no concluding meeting of all Deloitte parties was convened to review matters after the various meetings with Livent officials, or after the audit committee meeting on April 9, 1998, or after Mr. Russo was satisfied with the evidence supporting the figure of $27.5 million for the write-down of pre-production costs.

160. Critically, Mr. Barrington shouldered the responsibility for deciding that his own brief outline of satisfactory assurance requirements had been completed. The Discipline Committee agreed with the PCC that he had not thoroughly completed these requirements as set out by himself, noting that the minutes of the audit committee meeting of April 9, 1998 did not report any discussion of the Put. Whether this matter was reviewed with members of the Livent audit committee separately, the matter thus was not discussed as an agenda item in the meeting. Surely, that is the step that would have gone a long way to complete his outline's goals.

161. Mr. Griffin argued that Mr. Barrington's memo should be thought of as in the nature of an aide memoire, not as an audit plan. It did, however, outline reasonable steps which, if completed, would have gone some distance toward achieving professional skepticism regarding the Put side agreement. They were all reasonable steps in the circumstances; the Discipline Committee concluded that the follow-through was not systematic. That conclusion did not mean that the memo was being reviewed as an audit plan. This issue is primarily an assessment of facts and witness credibility, and the Appeal panel has no basis to interfere when the panel concludes as it does that a factual error has not occurred.

The Adequacy of the Reasons

162. Mr. McDougall, in his reply submissions emphasized that a panel cannot just prefer the evidence of one witness over another; the choice must be explained in some detail. He described the Discipline Committee's review about Charge 2, v) regarding fixed assets (par. 146-148) as "a totally barren description of facts" that provided no evidence of its reasoning. Mr. Farley immediately interjected that this description should be matched up with the Committee's subsequent explanation in paragraphs 316-319. The explanations of Charge 2, vi and viii were the briefest.

163. Those sections of the Reasons outlining particulars that the Discipline Committee considered to be straight-forward factual findings received the least attention, but those in which a judgment was being made assessing the importance of a weakness tended to be fuller. As examples, the comparison of nine months' results rather than for twelve months' results was a factual finding obviously at odds with standards. So, too, was the failure to obtain the signature of the CFO on the letter of representation. The troubling concern for the Discipline Committee, however, was that in both instances an opportunity was lost as part of the auditing process to assess management's statements. In that context, the defence that there was no point in comparing a twelve month financial result against an out-of-date budget (which did not reflect the change in the nature of revenue generation) did not satisfy the Committee. The Discipline Committee reached the reasonable conclusion that it did not accept the auditors' mindset.

164. Regarding the issue of inconsistent findings of guilt respecting similar charge particulars (Charges 1 (i) and (ii)), the subject of these particulars, namely the naming rights agreements,

were between Livent and two different parties, and contained different provisions regarding conditions to be met before the revenues could be recognized. The Discipline Committee found the provisions of the two agreements sufficiently different to find different conclusions as to guilt. In the one agreement sufficient acts had been complied with and in the other, the required acts had not been complied with. The Appeal finding is that there is no inconsistency in the Discipline panel's finding.

165. A lengthy Hearing with 37 days of evidence had produced a Decision and Reasons from the Discipline Committee of 343 paragraphs and 76 pages. Its final review of each specific charge tended to be brief, but this followed a lengthy presentation of the structure of the case as viewed by the Discipline Committee. That description is not simply an outline; it is a winnowing, a sorting of evidence and documents, a review that includes assessments and editing judgments throughout.

166. Both counsel for the appellants argued that the emphasis of the Decision and Reasons was on the Put, unfairly so as a matter of law, and to the detriment of explaining the decisions of each particular. Certainly, those aspects that the Discipline Committee had considered particularly cogent and important received lengthy attention and explanation, and this was their right and duty. Their basis for reaching their conclusions about Charge 1 and 2 did have depth, even if some particulars might have been presented more fully by others. With evident application, the Discipline Committee completed an extraordinarily taxing task. The Appeal panel could ascertain the Discipline Committee's reasoning.

Were excessive Penalties assigned?

167. The fines that were assessed are significant, and the assigned disclosure in Toronto's presses thorough. Counsel for the members argued that the fines are outside the Institute's norms and cannot be supported. The argumentation explaining the Discipline Committee's supporting Reasons in this regard is lengthy. The Appeal panel reviewed these Reasons closely, and found that they were supported: paragraphs 27-35 were particularly compelling. The Appeal panel also agrees with previous practices and decisions of the Institute that afford the conclusions of Discipline Committees a high degree of deference in this area. No revision is recommended regarding the fines, for the quantum is well explained in terms of previous judgments, the comparative nature of relevant cases, inflation over a period of years since the most comparable case, and the trend gradually to increase the quantum of fines in recent decisions.

168. Mr. Griffin criticized the focus upon Mr. Barrington's responsibility for the November 28, 2003 reply to the PCC. That reply to Mr. Farley was unknown to Mr. Chant according to his letter to Deloitte management, and was not revised after his written protest in 2005. The 2003 letter to the PCC, and Mr. Barrington's failure to follow through systematically with Livent and Dundee to obtain assurance on April 3, 1998 and in the following three weeks directed the Committee to make a finding of both specific and general deterrence. The sharp criticism of Mr. Barrington's work – much of it in a fairly short but critical period – is painful to read about such a senior member of the profession. It is, however, a critical assessment that no subsequent reviewer is equally well placed to make or therefore to revise. While different assessors might find differing nuances regarding the assigning of penalties for these three individuals, the approach of a common penalty was logical.

Sanction and Costs

Sanction

169. The Discipline Committee set out its sanctions in a separate 148 paragraph document titled REASONS FOR SANCTION AND COSTS dated September 27, 2007 (hereinafter referred to as Sanction Reasons). Among other sanctions, each of the appellants was fined $100,000 and the appellants argued that the quantum of the fine was excessive and outside the Institute's norms and cannot be supported. The Appeal panel reviewed the reasons set out in the Sanction Reasons closely and found that the rationale of the Discipline Committee was supported.

170. The seriousness of the conduct and the importance of the roles the members fulfilled in a publicly traded company must be borne in mind. Therefore, there was a consideration of general deterrence for members cannot allow themselves to be overly influenced by management or not to follow-up on evidence.The Appeal panel finds that considerable deference is afforded the Discipline Committee in fixing sanctions. The explanation of the Discipline Committee's reasoning is lengthy and explains the rationale for the sanctions in terms of previous judgments, the comparative nature of the relevant cases, inflation, and the trend in recent decisions. This Appeal panel finds that there should be no revision to the quantum of fines levied against the appellant.

Costs

171. Costs of $417,000 were assessed against each of the three appellants for a total award of $1,251,000.

172. On the issue of the assessing of costs the appellants argued that the Discipline Committee erred as follows:

1. The costs charged to the three members were excessively large, to the point of being without precedent and of a punitive character.
2. Three members were assessed costs, without a proportionate reduction to reflect that the Professional Conduct's prosecution had been laid against four members.
3. The Discipline Committee had no authority to assess costs of the investigation and hearing because this entire area is *ultra vires* the amendments to the Statutory Powers Procedures Act that came into force on February 14, 2000.

Costs assessed were excessive

173. This case was long and complicated and this contributed to the enormity of the costs. In addition the Discipline Committee found, as a matter of fact, that:

> the length of the investigation was primarily the result of the complexity of the issues compounded by the less than transparent way the members (or their firm) dealt with the investigators and the Professional Conduct Committee. The members were not forthcoming with respect to the relevant facts including, and in particular, the relevant events of April,

> 1998 and Peter Chant's dissent. It is the members who should bear the costs that resulted from their conduct in this regard. (para. 137)

There was a clear explanation in the decision not to require the members found guilty to meet the full investigative and hearing costs. At the Discipline Committee hearing the Professional Conduct Committee submitted that the costs outlined in their submission did not include all costs of the investigation and hearing. In addition the Discipline Committee reduced the calculated costs by 25%. The Appeal panel rejects Mr. Griffin's argument that the quantum of costs is punitive.

Proportionality of the assigned costs

174. The rationale for the Discipline Committee's assignment of costs to the three members was clearly outlined in their Sanction Reasons beginning at paragraph 118. Mr. Griffin's written submission argued that it was inappropriate that costs related to charges against four members should be assigned to the three who were found guilty of charges. Mr. Farley countered that the non-staff costs had been reduced by one quarter, and that a large degree of deference must be afforded to the Discipline Committee by this panel and therefore the allocation should remain. While accepting that considerable deference to the Discipline Committee ought to be shown in this area, this panel concluded that there remained a substantive issue.

175. All parties – the Institute as an entity, its members, the members charged and the public – have an interest in the fairness and completeness of an investigation and hearing. The costs of completing this are assignable by the amended *Chartered Accountants Act, 1956 (CA Act)* to two parties: the members through an order and the Institute, through its member fees. It is reasonable for a Discipline Committee to bear this in mind when allocating responsibility for costs.

176. No single section of the Hearing reviewed work by Mr. Chant that stood on its own, apart from the cases against the three appellants. No single section of this investigation or of the Hearing concerned Mr. Chant separately. If Mr. Chant had not been included as one of four members in the Livent audit group, he might have become a witness instead of being charged. The case argued against him as well as the evidence that he provided proved to be critical to the Discipline Committee's findings, both of acceptable accounting procedures for the recognition of revenue from theatre naming rights, and of fault for insufficient professional skepticism by the three appellants. The interconnectedness of the case that was heard therefore undercuts the force of Mr. Griffin's submission. This was a complex interconnected story. Its being viewed as a whole is perfectly logical, and a division of costs into three of some lesser portion of costs is not easily determinable.

177. The decision stated clearly that the members found guilty should not bear the full investigative and hearing costs. This panel rejects Mr. Griffin's argument that the quantum of costs is punitive.

Jurisdiction to award costs

178. Mr. Leonard presented the members' case regarding the Institute's lack of jurisdiction to assess costs. Mr. Farley immediately made a procedural challenge to Mr. Leonard's opening presentation to the Panel. Mr. Leonard wished to refer the Panel to the opinion previously rendered by Mr. Scott, counsel to the Appeal panel that heard the Brian Cloney case. (Exhibit 25 ,vol.1, tab 6) On September 19, 2007, Mr. Scott presented his opinion on this precise issue in the Brian Cloney case. When Mr. Scott concluded his submission, Mr. Farley had expressed reservations about those arguments, and these had not been included in Mr. Leonard's submission. The issue was not resolved in this matter because the member was successful in his appeal and therefore the issue of authority to assess costs was moot. Mr. Farley argued that Mr. Scott's advice should not be presented orally as an authority under such circumstances.

179. The panel ruled that it would not regard Mr. Scott's opinion as an authority and most especially not as a precedent. Thus, its standing would be comparable to other submissions by counsel, terming Mr. Scott's opinion as "reference information."

180. Mr. Leonard stated there is little case law covering this issue**;** in reply Mr. Farley argued that there is no case law.

181. Mr. Leonard submitted that the Discipline Committee lacked jurisdiction to assess costs because the Institute's bylaws do not conform to the *Statutory Powers Procedures Act (SPPA*) and the circumstances of this case do not meet the requirements of the *SPPA* to assess costs.

182. Mr. Leonard submitted that the Institute's authority to assess costs is outlined in the *SPPA*. In order to be able to assess costs the tribunal must make rules regarding their assessment. Subsection 17.1(2) of the *SPPA*, as amended in 1999 states that a tribunal is precluded from assessing costs against a party unless:

> (a) the tribunal has made rules respecting the awarding of costs, including the circumstances in which costs may be ordered and the amount of costs or the manner in which the amount of the costs is determined; and
> (b) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious, or was in bad faith. (Exhibit 18, p. 109, para. 323).
>
> The Institute's bylaw 530(3)(c) fails to set out in detail the circumstances under which costs may be ordered and therefore does not meet the requirements of 17.1(2) of the *SPPA*.

183. A second amendment to the *SPPA* enacted in 2000 provided that tribunals might assess costs outside the stated limitations if the tribunal had statutory provisions to do so prior to the enactment of the amendment of the *SPPA* on February 14, 2000. Mr. Leonard submitted that the Institute's bylaw with respect to assessing costs is not in accordance with the requirements of the *SPPA* and therefore the Discipline Committee had no authority to order costs against the appellants.

184. Mr. Leonard stated that Section 32 of the *SPPA* states that the *SPPA* would prevail over the Institute's bylaws unless the bylaws specifically stated that they would supersede the *SPPA.* Since there is no such provision, the *SPPA* prevails. Mr. Leonard concluded that the Institute's bylaw with respect to assessing costs is not in accordance with the requirements of the *SPPA* and therefore the Discipline Committee had no authority to order costs against the appellants.

185. In reply, Mr. Farley argued that the committee was being asked to conclude that nine months after a general act had been amended by an omnibus act, the specific clause added to the *CA Act* had been nullified even on the date that it was to come into force. He argued that section 17.1 of the *SPPA* does not apply to the Institute; it is a generic act that applies to hundreds of bodies, most of which do not have any government legislation related to costs. The 1999 amending clause to the *SPPA* setting out required conditions is outlining factors that simply do not apply to the procedures of the Institute. He submitted that the Institute's Act was "totally clear" in its power, and Mr. Scott's review had cited the standards in the *Murphy v. Welch*; *Stoddard v. Watson* case (Supreme Court, 1993) in which courts had concluded that the express intent of the legislators was to be respected. Applying the argument of paragraph 9 of that case, Mr. Farley noted that clauses cannot be interpreted so as to read in a word, and posited that Mr. Leonard's argument regarding section 17.1 of the *SPPA* really was effectively adding in the word "only" before sections 2 and 3. He concluded that the panel should not interfere with the express intent of the legislators, noting that Mr. Scott in his opinion had also had trouble with the clarity of the *SPPA* clause. In his view, more than this would be required to strike down the *CA Act.*

186. To clarify, the legislature had amended the *SPPA* twice. *The Red Tape Reduction Act* of 1999 had added the new standard for all administrative reviews unless specifically exempted by a body's own existing legislation. This statement about the exemption was removed and revised again in *The Red Tape Reduction Act* of 2000 to exempt all bodies that had authority in their own legislation prior to February 14, 2000. In 1999 the *CA Act* did not include any clause about its relationship to the *SPPA* since it predated that Act; its amendments giving this precise power to the Institute were not in force before February 14, 2000. During this period in which the *SPPA* was twice amended, the *CA Act* was also being reviewed comprehensively and amended, and ten months later was proclaimed without any reference to the almost concurrent changes in the *SPPA.*

187. The Appeal Committee sought Mr. Steinecke's advice, as well. In his view, if there was a conflict, the *SPPA* was meant to be the authority. Was Section 17.1 one of several authorities or was it meant to be comprehensive, the exclusive provision for this issue? In his view, the language used suggests that there are other sections or provisions, but the legislature is presumed to know the law. Accordingly, section 17.1.6 does imply a specific intent, and the *CA Act's* provision did not exist then. With this conflict, in his view the *CA Act* likely loses.

188. In reply, Mr. Farley briefly reiterated his disagreement, urging that the quality of the review and debate on the specific CA legislation almost certainly would be in sharp contrast to that of the generic amending legislation. The Appeal panel, however, heard no analysis about the quality and nature of the debates about the *SPPA* amendments of 1999 and 2000 or of the *CA Act* amendments.

189. A legislative conflict may have resulted from these three enactments. Two dispassionate assessments by Mr. Scott and Mr. Steinecke identify that section 17.1 of the *Red Tape Reduction Act, 2000* was meant by its drafters to have general application and that the *CA Act* did not have a pertinent clause to be grandfathered by this amendment to the *SPPA*.

190. Mr. Leonard argued that the Institute's bylaw must then fall because the Institute's bylaw was inconsistent with the amended *SPPA*. Mr. Farley countered that the Institute's power came from the *CA Act* itself, not the bylaw, and that the language of this legislation was "crystal clear."

191. This argument brought the panel back to other general principles enunciated by counsel: that when legislation seems to disagree, courts are mindful of the wording of the most recent and the most specific legislation; that when there is a discrepancy between legislation that is somewhat unclear and an act that is perfectly clear, courts favour the latter; and that legislators are presumed to be knowledgeable and intentional. Clearly, both the *SPPA* and the *CA Act* are pieces of legislation that have been and continue to be revised, and the panel concluded that these principles might provide it with a pertinent guide.

192. The Appeal panel accepted the portion of Mr. Steinecke's advice that legislators are deemed to be informed and thought that was a decisive factor; they would enact clauses only with the intent to provide for the need being addressed in each piece of legislation. In the Committee's view, this argument speaks both to the intended pre-eminence of the *SPPA* and to the intended specificity of the *CA Act* as amended in 2000.

193. The Appeal panel members also knew from previous experience on panels considering many judicial cases, as well as from court decisions presented for this case that courts use both analogous and background evidence to ascertain the intention and scope of legislation. Textual analysis, the specific fact situations, and the broader context all become aspects of one's review.

194. Mr. Leonard's presentation of the intent of the *Red Tape Reduction Acts* was that the government was cleaning up administrative inconsistencies, and he pointed out several examples of this nature, such as dated "sexist" terminology. Mr. Farley adduced the care taken in the adoption of the comprehensive amendments to the *CA Act***.** When these amendments were finally adopted, the lengthy consultation process with the Institute and the clause providing the Institute the power to assess costs were specifically drawn to the attention of the profession.

195. The panel is being asked to weigh amendments to the *SPPA* that likely were meant to affect all administrative tribunals (unless grandfathered) and the amendments to the *CA Act* that were proclaimed subsequently. On the one hand, the *SPPA* is intended to take general precedence. On the other hand, are the countervailing judicial indices that the *CA Act* is the specific legislation, that it is absolutely clear, that it is the most recent amendment, and that it is directly pertinent legislation. The Committee finds these principles of judicial review to be compelling corollaries to that already accepted by the panel: that legislation states the direct intention of its legislators.

196. The Committee is further persuaded by the combined issue of the quality of ministerial review and the clear indication of the legislature's intent. It is unthinkable that the legislature intended for the *CA Act* other than what its amendments say. Legislatures enact; they also re-enact, or subsequently enact, and when doing so may or may not always thoroughly reference previous legislation that might thereby be affected.

197. The power to assess costs contained in the *CA Act* revisions cannot be disregarded as unintentional, erroneous and of no consequence. Whether a legislative misstep may have occurred or not, the intent of the legislators regarding the Institute is definitively stated in the revised *CA Act.*

198. The Appeal Committee therefore concludes that the province's legislature fully intended the *CA Act* to confer this responsibility upon the Institute and its disciplinary panels. That statement then becomes determinative in the resolution of this conflict. Accordingly, the Appeal Committee holds that the Institute has the authority to assign costs upon a guilty member.

DECISION

This panel of the Appeal Committee considered all the submissions, as well as the documents filed in this matter and, after deliberation, orders as follows:

> HAVING heard and considered the submissions made on behalf of J. Douglas Barrington, Claudio B. Russo, and Anthony Power, and on behalf of the Professional Conduct Committee, and upon reviewing the documentation filed by the parties, and after deliberation, the Appeal Committee dismisses the appeal.

DATED AT TORONTO THIS 13th DAY OF FEBRUARY, 2009
BY ORDER OF THE APPEAL COMMITTEE

B.W. BOWDEN, PhD – ACTING DEPUTY CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

C. DANCHUK, CA
A.D. NICHOLS, FCA
J.F. OLAFSON, CA
M.A. PORTELANCE, CA