

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **GARRY WILLIAM EDWARD FUERST, CA**, a member of the Institute, under **Rules 204.2 and 206** of the Rules of Professional Conduct, as amended.

AND IN THE MATTER OF: Charges against **JOHN WILLIAM WINTERS, CA**, a member of the Institute, under **Rules 204.2 and 206** of the Rules of Professional Conduct, as amended.

TO: Mr. Garry W. E. Fuerst, CA
Winters & Company
45 King Street, Suite 2
DRYDEN, ON P8N 1B7

AND TO: Mr. J. W. Willie Winters, CA
Winters & Company
45 King Street, Suite 2
DRYDEN, ON P8N 1B7

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision And Order Made March 6, 2006)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on March 6, 2006 to hear charges of professional misconduct against Garry William Edward Fuerst and John William Winters, members of the Institute.

2. Ms. Barbara Glendinning appeared on behalf of the Professional Conduct Committee and was accompanied by Mr. Bruce Armstrong, the investigator appointed by the Professional Conduct Committee. Messrs. Fuerst and Winters were in attendance and were represented by their counsel, Mr. Peter M. Daigle.

3. The decision of the panel was made known to the parties at the conclusion of the hearing on March 6, 2006, and the written Decision and Order was sent to them on March 8, 2006. These reasons, given pursuant to Bylaw 574, include the charges, the decision, the order, and the reasons of the panel for its decision and order.

CHARGES

4. The following charges were laid against Messrs. Fuerst and Winters on December 5, 2005:

1. THAT the said John William Winters and Garry William Edward Fuerst, in or about the period December 31, 1999 through June 16, 2004, while their firm, Winters &

Company was engaged to perform a review of the financial statements of "135 Ontario Inc." as at December 31 of each year, failed to hold themselves free of any influence, interest, or relationship which, in respect of the engagement, impaired the members' professional judgment or objectivity or which, in the view of a reasonable observer, would impair the members' professional judgment or objectivity, contrary to Rule 204.2 of the rules of professional conduct (as amended from time to time), in that:

- (a) they each held an indirect interest in 135 Ontario Inc.; and
 - (b) the primary individual responsible for the engagement held an indirect interest in and was an officer, director and signing authority of 135 Ontario Inc.
2. THAT the said John William Winters and Garry William Edward Fuerst, in or about the period December 31, 1999 through June 16, 2004, while their firm, Winters & Company was engaged to perform a review of the financial statements of "135 Ontario Inc." as at December 31 of each year, failed to perform their services in accordance with the generally accepted standards of practice of the profession, in that they failed to ensure that other persons performing the review engagement were properly supervised, contrary to Rule 206 of the rules of professional conduct, (as amended from time to time).

PLEA

5. Messrs. Fuerst and Winters each entered pleas of guilty to the charges. They each acknowledged that they understood that, on the basis of the plea of guilty and on that basis alone, they could each be found guilty of the charges.

EVIDENCE

6. The evidence in this matter was presented by way of an Agreed Statement of Facts (Exhibit 4) and an accompanying Document Brief (Exhibit 5). Neither party called any further evidence.

7. The panel finds that the evidence presented in the Exhibits is clear, cogent and convincing and that it supports the allegations of misconduct as set out in the charges. In particular, the panel finds that Messrs. Fuerst and Winters held an indirect interest in an entity for which their firm performed a review engagement, and that the person primarily responsible for the engagement, not being a chartered accountant, both was an officer and director of the entity and was not supervised in the engagement by the members.

DECISION

8. On the evidence presented, the panel is satisfied that the allegations set out in the charges have been proven and that the nature and extent of the departure from the required standards of practice are so significant as to constitute professional misconduct. The panel found Messrs. Fuerst and Winters guilty of the charges as follows:

THAT, having seen, and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to the charges, the Discipline Committee finds Mr. Garry William Edward Fuerst and Mr. John William Winters

guilty of the charges.

SANCTION

9. Counsel for the Professional Conduct Committee submits that a sanction of a written reprimand; a fine in the range of \$10,000 to \$15,000 each; professional development by attending at a course on quality control or *Staying Out Of Trouble*; the usual publication of notice; and costs of the hearing and investigation would serve both to rehabilitate the members and to further the principles of specific and general deterrence. She submits that costs in the range of \$5,000 to \$10,000 each would be appropriate and files a Costs Outline (Exhibit 6) in support.

10. In mitigation, Ms. Glendinning notes that the members cooperated with the investigation and that they both pleaded guilty. On the other hand, she notes that they acted in a clear conflict of interest, and without considering the existence or effect of that conflict. She also notes that neither member considered that the non-chartered accountant member of their firm (Mr. Owchar) had an even greater conflict, as he was both an officer and director of the client and the person actually conducting the review. Further, she submits that the members had no regard for the integrity of their designation, by permitting a non-chartered accountant to act as a public accountant without being qualified to do so.

11. With respect to the quantum of the fine, Ms. Glendinning acknowledges that it is significant, but draws the attention of the panel to the fact the Professional Conduct Committee is not seeking a period of suspension, as it normally would in such circumstances. She states that a suspension is not being sought due to the fact that, given the community in which the members practise, any suspension would have a disproportionately significant impact on their clients. Messrs. Winters and Fuerst practise in a small and somewhat isolated community which is serviced by a limited number of C.A.s. The quantum of the fine is intended to provide the deterrence otherwise achieved by a suspension and, on the issue of hardship, she points out that each of the members sold their shares for more than twelve times what they were purchased for.

12. Mr. Daigle, on behalf of the members, takes no issue with most of the sanction recommended by the Professional Conduct Committee, although he submits that the monetary sanctions (fines and costs) should not exceed a global figure of \$5,000 to \$10,000 for both members. In mitigation, he too notes the cooperation of the members and the pleas of guilty. He also submits that the members took the investigation and charges quite seriously, and addressed the issue of lack of supervision as soon as it was brought to their attention. He also notes that the investigation itself did not reveal any deficiencies in the members' practice, nor were there any complaints made about them or damages suffered by any client or third party.

13. Mr. Daigle submits that the members have a limited ability to pay. The location of their practice, Dryden, has neither a healthy economy nor economic outlook, and the members bill at a very modest hourly rate. Further, the members have borne a disproportionately high cost to travel to and attend the hearing, including the amount of time away from their practice, due to the location of that practice. Mr. Daigle concludes by urging the panel to take these factors into account and submits fines in the range of \$2,500 to \$5,000 and no costs would be appropriate.

ORDER

14. After consideration, the panel made the following order:

IT IS ORDERED in respect of the charges:

1. THAT Mr. Fuerst and Mr. Winters each be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Fuerst and Mr. Winters each be and he is hereby fined the sum of \$10,000, to be remitted to the Institute as follows:
 - (a) \$5,000 within twelve (12) months from the date this Decision and Order becomes final under the bylaws; and
 - (b) \$5,000 within twenty-four (24) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Fuerst and Mr. Winters each be and he is hereby charged costs fixed at \$3,000, to be remitted to the Institute as follows:
 - (a) \$1,500 within twelve (12) months from the date this Decision and Order becomes final under the bylaws; and
 - (b) \$1,500 within twenty-four (24) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Fuerst and Mr. Winters each be and he is hereby required to complete, by paying for and attending in their entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the following professional development courses made available through the Institute, or, through the Manitoba Institute, once the Office of the Registrar determines equivalency, and in the event the course becomes unavailable, the successor course which takes its place:
 - (a) *Staying Out of Trouble*; and
 - (b) *Quality Assurance Workshop* or a course relating to quality control.

Should Mr. Fuerst and/ or Mr. Winters have made every reasonable effort to take these courses at the first practicable opportunity and been unable to complete the courses within the time allotted, he may apply to the Chair or at an assignment hearing for an extension of up to a further twelve (12) months.
5. THAT notice of this Decision and Order, disclosing Mr. Fuerst's and Mr. Winter's names, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
6. THAT in the event Mr. Fuerst or Mr. Winters fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within the three (3) month period, he shall thereupon be expelled from the membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr.

Fuerst's or Mr. Winter's employment and/or residence, as the case may be.

REASONS FOR THE ORDER

Reprimand

15. Messrs. Fuerst and Winters acted in a clear conflict of interest and failed to safeguard the integrity of the profession. A reprimand is necessary to stress to them how significant their lapses were and how seriously such actions are viewed by both the profession and the public.

Fine

16. The actions of Mr. Fuerst and Mr. Winters are serious and disclose a lack of professionalism which reflects poorly on themselves and on the chartered accountancy profession. They accepted an engagement unequivocally prohibited by the Rules; they allowed a member of their firm to act as though he were a chartered accountant in that he conducted the engagement without the oversight and approval of a chartered accountant; and they failed to even turn their minds to their professional responsibilities in such circumstances. The panel agrees with the submission of the Professional Conduct Committee that such a disregard for the requirements of the profession would normally require a period of suspension as a specific and general deterrent. The panel, however, also agrees with the submission that, in these circumstances, a suspension would cause undue hardship to the clients of the firm. The members practise in a small community with limited access to professionals, including C.A.s. A suspension of one member of a firm no doubt causes disruption to that member's clients but, if other members of the firm are not suspended, that disruption is minimized. A suspension in this case of both members of the two member firm, one of the few firms servicing the community, would create an undue hardship on that community. A fine of \$10,000 to be paid by each member is sufficient to satisfy the principles of specific and general deterrence, and is so ordered.

Costs

17. The panel appreciates the costs incurred by the members to attend this hearing. However, it must also consider that those costs were incurred by reason of the members' own misconduct. It is appropriate that these members, as opposed to the membership as a whole, bear a portion of the costs of the process they caused to be engaged. Weighing all the factors, including the totality of the monetary sanction, the panel finds that \$3,000 should be paid by each of Mr. Fuerst and Mr. Winters towards those costs, and so orders. In doing so, the panel notes this amount does not approach even partial indemnity for those costs.

Professional Development

18. As was pointed out by their counsel, the investigation of Messrs. Fuerst and Winters revealed no substantive defects with their practice. Further, it appears they took immediate steps to rectify their conduct, when it was brought to their attention. In order to focus that attention on their professional obligations and to rehabilitate them, professional development courses would be of great assistance, and the panel orders their attendance at two relevant courses. Taking into consideration their physical location, the panel makes the unusual order that, with certain restrictions, they may attend courses offered by the Manitoba Institute.

Notice

19. The Professional Conduct Committee seeks the usual notice to be published, an order not opposed by the members. Chartered accountancy is a self-governing profession. It is essential that it not only discipline its members effectively, but that it be seen to do so. Publishing the names of members found guilty of professional misconduct is one of the best mechanisms for so doing. It also serves to counsel other members of the profession and to emphasize to the members found guilty the unacceptability of their conduct. For these reasons, publication is only withheld in rare and unusual circumstances. No such circumstances having been urged upon us, the usual order for notice is made.

Failing to Comply

20. To encourage compliance with this order, and to provide an immediate sanction should either member not comply, the panel orders that the member failing to comply shall be suspended for a period of time and then, should the lack of compliance continue, be expelled.

DATED AT TORONTO THIS 6TH DAY OF JUNE, 2006
BY ORDER OF THE DISCIPLINE COMMITTEE

M.B. MARTENFELD, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

M.S. LEIDERMAN, CA
A.D. NICHOLS, FCA
G.R. PEALL, CA
P.WONG (Public Representative)