

## **Martin Keith Payne: Summary, as Published in *CheckMark***

**Martin Keith Payne**, of Ottawa, was found guilty of one charge under Rule 201.1 of failing to maintain the good reputation of the profession and its ability to serve the public interest, and two charges under Rule 204.2 of failing to hold himself free of an influence, interest or relationship which, in respect of an engagement, impaired his professional judgment or objectivity or which, in the view of a reasonable observer, would impair his professional judgment or objectivity. Mr. Payne was the trustee of a client's family trust which owned the shares of a family company. At the same time, one of his partners was engaged as the auditor of the client's family company, and he himself was a shareholder, director and officer of a public company which had been incorporated by his client for the purpose of buying the family company. In another instance, Mr. Payne owned 50 percent of the shares of a client company, which in turn owned a second client company, while he was the partner in charge of the review engagements for the two companies. While Mr. Payne's relationship was disclosed in the notes to the financial statements, he was precluded by Rule 204.2 from accepting the engagement. Once the objectivity problems were pointed out to him, Mr. Payne took steps to correct them. He was fined \$5,000 and ordered to complete a professional development course.

## **CHARGE(S) LAID re Martin Keith Payne**

The Professional Conduct Committee hereby makes the following charge against Martin K. Payne, CA, a member of the Institute:

1. THAT the said Martin K. Payne, in or about the period December 31, 2000 through March 31, 2001, while a partner in Payne Foreman Kalli Chartered Accountants, the firm engaged to audit the financial statements of D'Addario Environmental Management Solutions (EMS) Inc. ("D'Addario Inc."), failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the rules of professional conduct, in that:
  - (a) during the audit engagement he was a trustee of a family trust holding shares in a numbered company, 1301965 Ontario Limited, which in turn held shares in D'Addario Inc.;
  - (b) during the audit engagement he was a director and/or chief financial officer and/or secretary treasurer and/or shareholder in Environmental Management Solutions Inc. which company had filed a prospectus dated January 17, 2001 identifying D'Addario Inc. as a potential target for acquisition and which company, on March 16, 2001, signed a letter of intent to purchase shares of D'Addario Inc.
2. THAT the said Martin K. Payne, in or about the period July 31, 1998 through October 31, 2000, while a partner in Payne Foreman Kalli Chartered Accountants, a firm engaged to review the financial statements of Polar Motorsport International Inc. as at July 31, 1998, July 31, 1999 and July 31, 2000, failed to remain free of any influence, interest or relationship which, in respect of the engagement, impaired his professional judgement or objectivity or which, in the view of a reasonable observer, would impair his professional judgement or objectivity, contrary to Rule 204.2 of the rules of professional conduct, in that:
  - (a) during the review engagement he was a fifty percent shareholder in the company the other fifty percent being held by his brother Stephen Payne.
3. THAT the said Martin K. Payne, in or about the period July 31, 1998 through November 30, 2000, while a partner in Payne Foreman Kalli Chartered Accountants, a firm engaged to review the financial statements of Polar Performance Limited as at July 31, 1998 and July 31, 1999 and July 31, 2000, failed to remain free of any influence, interest or relationship which, in respect of the engagement, impaired his professional judgement or objectivity or which, in the view of a reasonable observer, would impair his professional judgement or objectivity, contrary to Rule 204.2 of the rules of professional conduct, in that:

- (a) during the review engagements he was a fifty percent shareholder in Polar Motorsport International Inc. which company owned Polar Performance Limited.

Dated at Toronto, Ontario this 18th day of October 2002.

D.D. MELOCHE, CA - DEPUTY CHAIR  
PROFESSIONAL CONDUCT COMMITTEE

## **DISCIPLINE COMMITTEE re Martin Keith Payne**

**DECISION AND ORDER IN THE MATTER OF:** Charges against **MARTIN KEITH PAYNE, CA**, a member of the Institute, under **Rules 201.1 and 204.2** of the Rules of Professional Conduct, as amended.

**DECISION AND ORDER MADE FEBRUARY 25, 2003**

### **DECISION**

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1, 2 and 3, the Discipline Committee finds Martin Keith Payne guilty of charges Nos. 1, 2 and 3.

### **ORDER**

IT IS ORDERED in respect of the charges:

1. THAT Mr. Payne be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Payne be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within ninety (90) days from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Payne be and he is hereby required to complete, by paying for and attending in its entirety, within one (1) year from the date this Decision and Order becomes final under the bylaws, the professional development course *Staying Out Of Trouble*, made available through the Institute, or, in the event the course becomes unavailable, the successor course which takes its place.
4. THAT notice of this Decision and Order, disclosing Mr. Payne's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
  - (a) to the Public Accountants Council for the Province of Ontario;
  - (b) to the Canadian Institute of Chartered Accountants; and
  - (c) by publication in *CheckMark*.
5. THAT in the event Mr. Payne 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 thirty (30) days from the date of his suspension, and in the event he does not comply within this 30 day period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above.

DATED AT TORONTO THIS 27TH DAY OF FEBRUARY, 2003.

BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB  
SECRETARY – DISCIPLINE COMMITTEE

## **DISCIPLINE COMMITTEE re Martin Keith Payne**

**REASONS FOR THE DECISION AND ORDER IN THE MATTER OF:** Charges against **MARTIN KEITH PAYNE, CA**, a member of the Institute, under **Rules 201.1 and 204.2** of the Rules of Professional Conduct, as amended.

### **REASONS FOR THE DECISION AND ORDER MADE FEBRUARY 25, 2003**

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on February 25, 2003 to hear and decide upon the charges brought by the professional conduct committee against Martin Keith Payne, a member of the Institute.
2. Mr. Paul Farley represented the professional conduct committee. Mr. Payne attended the hearing, and was represented by his counsel, Mr. Ron Foerster.
3. The decision on the charges and the order as to sanction were made known at the hearing. The formal decision and order was dated and sent to Mr. Payne and the professional conduct committee on February 27, 2003.
4. These reasons, given in writing pursuant to Bylaw 574, set out the charges, the decision, and the order, as well as the reasons of the discipline committee.

### **DECISION ON THE CHARGES**

5. The notice of assignment hearing, notice of hearing and charges were entered as Exhibits 1, 2 and 3, respectively.
6. The charges dated October 18, 2002 read as follows:
  1. THAT the said Martin K. Payne, in or about the period December 31, 2000 through March 31, 2001, while a partner in Payne Foreman Kalli Chartered Accountants, the firm engaged to audit the financial statements of D'Addario Environmental Management Solutions (EMS) Inc. ("D'Addario Inc."), failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the rules of professional conduct, in that:
    - (a) during the audit engagement he was a trustee of a family trust holding shares in a numbered company, 1301965 Ontario Limited, which in turn held shares in D'Addario Inc.;
    - (b) during the audit engagement he was a director and/or chief financial officer and/or secretary treasurer and/or shareholder in Environmental Management Solutions Inc. which company had filed a prospectus dated January 17, 2001 identifying D'Addario Inc. as a potential target for acquisition and which company, on March 16, 2001, signed a letter of intent to purchase shares of D'Addario Inc.

4. THAT the said Martin K. Payne, in or about the period July 31, 1998 through October 31, 2000, while a partner in Payne Foreman Kalli Chartered Accountants, a firm engaged to review the financial statements of Polar Motorsport International Inc. as at July 31, 1998, July 31, 1999 and July 31, 2000, failed to remain free of any influence, interest or relationship which, in respect of the engagement, impaired his professional judgement or objectivity or which, in the view of a reasonable observer, would impair his professional judgement or objectivity, contrary to Rule 204.2 of the rules of professional conduct, in that:
  - (a) during the review engagement he was a fifty percent shareholder in the company the other fifty percent being held by his brother Stephen Payne.
5. THAT the said Martin K. Payne, in or about the period July 31, 1998 through November 30, 2000, while a partner in Payne Foreman Kalli Chartered Accountants, a firm engaged to review the financial statements of Polar Performance Limited as at July 31, 1998 and July 31, 1999 and July 31, 2000, failed to remain free of any influence, interest or relationship which, in respect of the engagement, impaired his professional judgement or objectivity or which, in the view of a reasonable observer, would impair his professional judgement or objectivity, contrary to Rule 204.2 of the rules of professional conduct, in that:
  - (a) during the review engagements he was a fifty percent shareholder in Polar Motorsport International Inc. which company owned Polar Performance Limited.
7. Mr. Payne entered a plea of guilty to each of the charges.
8. Mr. Farley gave a brief overview of the case against Mr. Payne. He also filed an agreed statement of facts and a document brief of relevant documents, which together constituted the case for the professional conduct committee.
9. Briefly, the facts of the case are as follows:

Re: Charge No. 1

- Mr. Payne was a trustee of a client's family trust, which directly owned all of the common shares, and indirectly some of the preferred shares, of the client's family company, for which Mr. Payne did tax work.
- At the same time, Mr. Payne was a shareholder, director and officer of a public Alberta company which had been incorporated by his client's family company, and which had filed a prospectus to buy the family company.
- Though Mr. Payne did not do audit work for the client's family company, the company was an audit client of Mr. Payne's firm.
- Mr. Payne never tried to hide his role as trustee of his client's family trust, and resigned as soon as he was made aware that his position contravened Rule 204.1. He admitted in the agreed statement of facts that he should have known that his trustee role created an objectivity problem for his firm as auditor. No party was harmed financially as a result of Mr. Payne's actions or omissions.

- Mr. Payne was aware of the possible purchase of his client's family company by the Alberta company, and that such a transaction raised objectivity issues for his firm's audit partner. He came to the conclusion, however, that the possibility of purchase was too remote to raise an objectivity problem. Mr. Payne stated in the agreed statement of facts that he would reach a different conclusion today.
- Once the remote possibility of a purchase became less remote and more likely, Mr. Payne's firm resigned the audit of the client's family company.

Re: Charges Nos. 2 & 3

- Mr. Payne owned 50 per cent of the shares of a client company, which in turn owned a second client company. Mr. Payne was the partner in charge of the review engagement for each of the two companies. The financial statements of each company contained a note disclosing Mr. Payne's non-controlling interest in the company.
- The review engagement of the non-parent company was eventually downgraded to a compilation engagement. When this was done, however, the conflict of interest which continued to exist was not disclosed.
- Mr. Payne stated in the agreed statement of facts that he now knows that an objectivity problem cannot be cured through note disclosure.

10. Mr. Payne confirmed that he had signed the agreed statement of facts and did not dispute those facts. Neither Mr. Foerster nor Mr. Farley had anything further to add to the documentary evidence filed.

11. Upon deliberation, the panel concluded that the facts set out in the agreed statement of facts and supported by the documents in the document brief proved the allegations set out in the charges, and that Mr. Payne's departure from the required standard constituted professional misconduct. Accordingly, when the hearing reconvened the chair read into the record the following decision:

**DECISION**

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1, 2 and 3, the Discipline Committee finds Martin Keith Payne guilty of charges Nos. 1, 2 and 3.

**ORDER AS TO SANCTION**

12. Neither Mr. Farley nor Mr. Foerster called evidence with respect to sanction but both made submissions.

13. Mr. Farley said the professional conduct committee had concluded that the three principles to be considered when imposing sanction, namely general deterrence, specific deterrence and rehabilitation, were all applicable in this case. He submitted that though Mr. Payne had demonstrated a fundamental misunderstanding of independence and objectivity standards, it was the position of the professional conduct committee that he was capable of rehabilitation.

14. The recommendation of the professional conduct committee was that Mr. Payne be reprimanded, fined \$5,000, and required to take a specified professional development course, and that costs be levied against him in the amount of \$4,190. Mr. Farley also asked for the usual order as to publicity.

15. Mr. Foerster, on behalf of the member, confirmed that his client took no issue with the terms of the requested order other than the monetary terms, which taken together amounted to \$9,190.

16. After hearing submissions from both parties, the panel deliberated and made the following order:

### **ORDER**

IT IS ORDERED in respect of the charges:

1. THAT Mr. Payne be reprimanded in writing by the chair of the hearing.
3. THAT Mr. Payne be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within ninety (90) days from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Payne be and he is hereby required to complete, by paying for and attending in its entirety, within one (1) year from the date this Decision and Order becomes final under the bylaws, the professional development course *Staying Out Of Trouble*, made available through the Institute, or, in the event the course becomes unavailable, the successor course which takes its place.
6. THAT notice of this Decision and Order, disclosing Mr. Payne's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
  - (d) to the Public Accountants Council for the Province of Ontario;
  - (e) to the Canadian Institute of Chartered Accountants;
  - and
  - (f) by publication in *CheckMark*.
7. THAT in the event Mr. Payne 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 thirty (30) days from the date of his suspension, and in the event he does not comply within this 30 day period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above.



The panel agreed that the three principles of sanctioning were applicable in this case, and took them all into account in fashioning its order.

### **Reprimand**

17. The panel was of the view that a reprimand is necessary as a specific deterrent to the member, to stress to him the importance of maintaining the standards of the profession, and the unacceptability of this conduct as a chartered accountant.

Fine

18. The panel concluded that the appropriate fine in this case was \$5,000. Although this was not a case of moral turpitude, the panel agreed with the submissions of counsel for the professional conduct committee that Mr. Payne's breaches of the rules went to the very foundations of the CA profession, namely the maintenance of independence and objectivity in the performance of audit and review engagements, and placed the member in very clear conflict of interest situations. The panel was of the view that a fine was necessary to serve as both a specific and general deterrent, and determined that the quantum ordered was in keeping with fines levied in prior similar cases.

### **Professional Development Course**

19. The discipline committee believes that one of the purposes of the disciplinary process, in appropriate cases, is to encourage rehabilitation, for the benefit of both the member and the public which the member serves. Agreeing that this was an appropriate case for rehabilitation, the panel ordered that Mr. Payne complete the professional development course *Staying Out Of Trouble*. The object of the course is to increase the awareness of sole practitioners and CAs in small firms of a number of professional risks which they face in their practices without the benefit and protection of the support mechanisms typically found in large firms. The panel determined that completion of this course would help Mr. Payne to update his skills and would assist in his rehabilitation. While given a year to take the course, the chair suggested that Mr. Payne take it at its earliest offering.

Notice

20. The panel ordered notice of its decision and order in the manner specified, including disclosure of the member's name, as a specific and general deterrent. The panel also considered such notification necessary to demonstrate to the public that the profession is regulating itself, so as to retain public confidence in the profession's ability to self-govern.

21. In its deliberations, the panel took into consideration that there did not appear to have been any harm done to any client or member of the public.

Non-Compliance

22. All orders of the discipline committee provide ultimately for expulsion in the event the disciplined member does not comply with its terms. Some orders – and this is one of them – interject a short period of suspension prior to expulsion in order to afford the member one last opportunity to comply. In this case, if the member fails to comply with

the order he will be suspended from membership for thirty days, and in the event he still does not comply within the thirty day period of suspension, he will be expelled.

23. In the event Mr. Payne is expelled for failure to comply with the order, notice of his expulsion, disclosing his name, will be given in the manner specified in the order.

#### Costs

24. The discipline committee has not yet made many costs orders since being enabled to do so by recent amendments to the *Chartered Accountants Act* and the Institute's bylaws. While the committee's experience with the making of such orders will evolve and mature over time, in this case the panel decided not to make an order as to costs.

25. Mr. Farley referred the panel to the recent *Weisbrod* decision of the discipline committee (currently under appeal), and to the judicial cases of *Hoff v. Alberta Pharmaceutical Association*, a 1994 decision of the Alberta Court of Queen's Bench, and *Jaswal v. Newfoundland Medical Board*, a 1996 decision of the Newfoundland Supreme Court - Trial Division.

26. Mr. Farley quoted the last paragraph of Justice Dea's reasons in the *Hoff* case:

As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting.

27. In the *Jaswal* case referred to by Mr. Farley, Justice Green of the Newfoundland Supreme Court outlined what he termed a non-exhaustive list of factors which ought to be considered in a given case before deciding to order the payment of costs. Adapted to our context, as they were in the reasons of the discipline committee in *Weisbrod*, the factors cited are:

- the degree of success, if any, of the member in resisting any or all of the charges;
- the necessity for calling all of the witnesses who gave evidence, or for incurring other expenses associated with the hearing;
- whether the professional conduct committee could reasonably have anticipated the results based on what it knew prior to the hearing;
- whether the professional conduct committee could reasonably have anticipated the lack of need for certain witnesses, or for incurring certain expenses, in light of what it knew prior to the hearing;
- whether the member cooperated in the investigation and offered to facilitate proof; and
- the financial circumstances of the member, and the degree to which his or her financial position has already been affected by other aspects of any penalty that has been imposed.

28. While noting the words of Justice Dea in the *Hoff* case, the panel found the factors set out by Justice Green in the *Jaswal* case – specifically the last two bulleted items set

out in paragraph 27 above, which were the only factors relevant to this case – to be more helpful in its determination as to whether or not to levy costs.

29. There were various aggravating circumstances in this case. Mr. Payne's misconduct affected more than one client, his objectivity problems should have been obvious to him, independence and objectivity are pillars of the profession, and he knew the statements he was preparing were going to be relied on by others besides his clients. These aggravating circumstances were taken into account by the panel in the imposition of the fine which it levied against Mr. Payne. The panel also took into account the mitigating circumstances in this case. Mr. Payne fully cooperated in the professional conduct committee's investigation, he provided no resistance whatsoever to the charges laid against him, he signed an agreed statement of facts, and he entered a plea of guilty to the charges at his first possible opportunity. The panel concluded that the expenses incurred for the half-day hearing were minimized as much as they possibly could have been by the cooperation of the member. Mr. Payne was never obstructive, treated the investigation and charges very seriously, and took remedial action immediately when he realized his misconduct. No witnesses were called, and it was not necessary for the investigator to attend the hearing. The behaviour in this case was in contrast to that described in the *Weisbrod* case, in which costs were assessed against the member.

30. While it is unequivocal that independence and objectivity standards are fundamental to the profession, it must be stated that in the panel's view Mr. Payne's breaches were relatively minor. We were mindful of the fact that Mr. Payne will have to pay substantial sums of money on account of these relatively minor breaches, to his lawyers and for the fine, and that he will also suffer a loss of reputation when the notice of this decision and order are published in *CheckMark*.

31. After considering all of the facts and circumstances in this case, the panel decided not to levy costs against Mr. Payne.

32. We wish to emphasize that our decision not to award costs was based on the particular circumstances of this case, and should not be taken as establishing any general principles or guidelines for determining when costs should and should not be imposed.

DATED AT TORONTO THIS 2ND DAY OF APRIL, 2003  
BY ORDER OF THE DISCIPLINE COMMITTEE

B. A. TANNENBAUM, FCA – DEPUTY CHAIR  
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

P. A. GOGGINS, CA  
B. L. HAYES, CA  
G. R. PEALL, CA  
D. J. ANDERSON (Public representative)