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

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **THOMAS EDWARD APPLETON, CA**, a member of the Institute, under **Rule 204.2** of the Rules of Professional Conduct, as amended.

TO: Mr. Thomas Edward Appleton, CA
33392 Queen Street, R.R. 2
AILSA CRAIG, ON N0M 1A0

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision Made October 26, 2005 and Order Made December 16, 2005)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on October 26 and November 25, 2005 to hear charges brought by the Professional Conduct Committee against Thomas Edward Appleton, a member of the Institute.

2. Ms. Barbara Glendinning appeared on behalf of the Professional Conduct Committee. She was accompanied by Mr. Bruce Armstrong, CA, the investigator appointed by the Professional Conduct Committee. Mr. Appleton was in attendance and was represented by counsel, Mr. Gordon Cudmore.

3. The decision of the panel was made known to the parties at the conclusion of the hearing on October 26, 2005, and the written Decision and Order was sent to them on December 16, 2005. These reasons, given pursuant to Bylaw 574, include the charge, the decision, the order and the reasons of the panel for its decision and order.

CHARGE

4. The following charge was laid by the Professional Conduct Committee against Mr. Appleton on January 5, 2005:

> THAT the said Thomas E. Appleton, in or about the period April 11, 1997 to December 3, 2003 failed to hold himself free of any influence, interest, or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity, in that, while engaged to conduct a review of the financial statements of "ABC" Pharmacy Inc. ("ABC Inc") as at July 31 of each year, he held an 8% share of ABC Inc, contrary to Rule 204.2 of the Rules of professional conduct (as amended from time to time).

5. Mr. Appleton entered a plea of not guilty to the charge.

THE PROCEEDINGS

6. On October 26, 2005 the panel heard the case for the Professional Conduct Committee. Mr. Armstrong and Mr. Harris testified and Mr. Cudmore cross-examined both witnesses. A Document Brief, setting out relevant documents after seven numbered tabs, together with copies of the relevant Rules and Council Interpretations set out after Tabs A and B, was filed as Exhibit 5 during Mr. Armstrong's examination-in-chief. When the case for the Professional Conduct Committee concluded, Mr. Cudmore called Mr. Bates and Ms. Miatello, who testified on behalf of the member. Mr. Bates and Ms. Miatello were cross-examined by Ms. Glendinning. The hearing then adjourned to November 25, 2005.

7. On November 25th, Mr. Appleton gave evidence and was cross-examined by Ms. Glendinning. Thereafter, both counsel made submissions with respect to the issue of guilt or innocence on the charge. After hearing these submissions the panel deliberated and found Mr. Appleton guilty of the charge.

8. Both counsel then made submissions with respect to the appropriate sanction. As the panel did not have time to conclude its deliberations that day, it convened again on December 16, 2005, in the absence of the parties, to consider sanction. As said above the written Decision and Order, which set out the sanction, was sent to both parties on December 16, 2005.

9. Prior to calling her first witness, counsel for the Professional Conduct Committee sought an order excluding witnesses, with the exception of the intended expert witness, Mr. Raymond G. Harris. Mr. Cudmore had no objection to the order and it was made by the Chair of the panel.

10. There was a disagreement as to whether or not the Professional Conduct Committee should be permitted to call an expert witness to give opinion evidence of whether or not Mr. Appleton had breached the Rule and in particular, how a reasonable observer would view Mr. Appleton's conduct. Ms. Glendinning proposed to call Mr. Harris as an expert witness to give this evidence. Mr. Cudmore objected on the basis that the expert would be asked to opine on the very issue which the panel would have to decide.

11. Mr. Cudmore did acknowledge that the panel had a discretion under s.15 of the *Statutory Powers Procedure Act* to admit the evidence, and that it would be up to the panel to determine what weight it would give to it. Mr. Cudmore also acknowledged that Mr. Harris could opine on what a reasonable observer would say, but he took the position that Mr. Harris could not say whether Mr. Appleton, who exercised his professional judgement, actually lacked objectivity.

12. The panel recognized Mr. Harris as an expert qualified to give opinion evidence and ruled that he would be allowed to do so. Mr. Harris's letter of opinion was marked as Exhibit 8 to the proceedings. The panel was mindful of the fact that any weight to be given to Mr. Harris's evidence, as distinct from the question of whether or not such evidence would be admitted, was a matter for the panel to decide. Further, the panel was aware that it, not the expert, would determine the ultimate issue.

THE FACTS

13. There were few disputes between the parties as to the relevant facts. We now set out, in paragraphs 15 to 27, the relevant facts as we find them to be.

14. Mr. Appleton, who received his designation in 1984, has carried on the practice of public accounting in London, Ontario for over 20 years. On October 13, 1998 he signed a review engagement report for a client (hereinafter "ABC Inc"), for the year ended July 31, 1997. Note 11 to the financial statements reads: "The preparer of these financial statements, held an eight percent minority share interest in the class "C" common shares as of July 31, 1997."

15. ABC Inc amalgamated and changed its name between October 1998 and December 3, 2003. Mr. Appleton continued to own an 8% interest in ABC Inc and he continued to undertake review engagements. On December 3, 2003 he signed a review engagement report for the year ending July 31, 2003. Again, note 11 to the financial statements reads: "The preparer of these financial statements held an eight percent minority share interest in the class "B" common shares as of July 31, 2003."

16. Mr. Appleton paid fair market value for his shares of ABC Inc as well as his portion of the legal costs. He received dividends from the Corporation in 1997, and in the years 2000 -- 2004 inclusive. These dividends, according to the summary found after Tab 7 of Exhibit 5, totalled $44,640. Mr. Appleton told the investigator that the investment in ABC Inc was significant to him as it was his intention that the investment would help provide income during his retirement.

17. Mr. Appleton had been recommended as an accountant to Ms. Miatello, now President and CEO of ABC Inc., about eighteen years ago. Since then he has provided professional services to Ms. Miatello and to companies in which she was a shareholder. When Ms. Miatello and some of her colleagues decided to incorporate ABC Inc, they invited Mr. Appleton to become a shareholder and director. Ms. Miatello said Mr. Appleton declined to be a director because of a possible conflict of interest. He also told her there were issues which would have to be addressed if he was to be a shareholder and that he could not have any role in the management of the company. Ms. Miatello testified that all of the other shareholders, and the company's banker, who she identified by name, were fully aware of Mr. Appleton's interest and that neither she, the banker, nor any of the other shareholders had any concern about Mr. Appleton's objectivity. She also testified Mr. Appleton provided his professional services to ABC Inc, in which he was a shareholder, the same as he had provided his professional services to other corporations in which he was not a shareholder. Ms. Miatello said that the bank usually dealt with Mr. Appleton.

18. Thomas Allan Bates, a barrister and solicitor practising in London testified that he has known Mr. Appleton professionally for eighteen or nineteen years, and that Mr. Appleton is thorough and conscientious. Mr. Bates performed corporate legal services for "ABC Inc." and discussed with Mr. Appleton the effect of his holding an interest in a client he was reviewing. Mr. Bates expressed the verbal opinion that such an interest was not a conflict if there was full disclosure made. That opinion was never placed in writing. Although he referred to "statutes" to determine whether Mr. Appleton was in breach of conflict of interest rules, he had no recollection of being directed to or looking at the Rules of Professional Conduct.

19. Mr. Appleton testified that when he was approached by Ms. Miatello he was mindful of the potential for impairment of his objectivity. He reviewed the Rule, the Forward to the Rules, the Council Interpretations, and determined that, due to his personal integrity, his professional judgment

and objectivity would not, in fact, be impaired.

20. He then considered the appearance of objectivity and applied the reasonable observer test. Mr. Appleton then spoke to everyone he thought who was important to the decision, who had knowledge of the facts, namely the shareholders and directors, the corporate lawyer, and corporate banker who was also the personal banker for other shareholders.

21. He testified that the banker had no concerns herself and consulted with her supervisor to be sure there was no problem as Mr. Appleton would not sign the guarantees. He testified that he discussed the issue with the shareholders and bankers before he decided to make the investment because he did not want there to be any surprises, particularly with respect to the fact that he would not sign guarantees. Mr. Appleton was offered an 11% or 12% interest, but restricted his interested to less than 10%, which he regarded as the ceiling for materiality. He paid fair market value, plus his portion of the legal costs, for his shares.

22. Mr. Appleton acknowledged that the ceiling of 10% for materiality was for indirect, not direct, investments. He testified that it was the word “may” in the Council Interpretation that led him to believe he could hold a direct interest in an assurance client. However, he did not consider the distinction between the word “may” in the Council Interpretation and the use of the word “shall” in the Rule; nor did he take into account the differences between Rule 204.2 (no impairment of objectivity with respect to a review client) and Rule 204.4 (full disclosure of an interest in a non-assurance client) when concluding any conflict was adequately addressed by making disclosure.

23. He also testified that he was aware of the subsequent change in the Rules, referring to independence and objectivity, and that he was precluded from undertaking a review engagement. He said that in the future a Notice to Reader engagement would be a possibility. In answer to a question from the panel, he said that he had not reached a conclusion with respect to the disposal of his shares. He said that under the new Rules it seemed that there could be impediments even for a non-assurance engagement and thus he was apparently apprehensive about continuing even a Notice to Reader engagement.

24. Mr. Appleton said he was aware he could have called the Institute and received guidance or a ruling from the Professional Conduct Committee. He did not do so because he was confident in his position.

25. Mr. Appleton testified that the matter came to the attention of the Institute when he, during a routine practice inspection, brought it to the attention of the inspector as an example of an out of the ordinary file.

26. Mr. Armstrong, the investigator for the Professional Conduct Committee, confirmed that the complaint had been received from the Practice Inspection Committee, not from a member of the public, and that Mr. Appleton had been completely co-operative throughout the investigation. Mr. Armstrong confirmed that Mr. Appleton did not believe his objectivity had been compromised.

27. Mr. Harris, qualified as an expert witness, opined that the interest held by Mr. Appleton in the client was significant, not merely because of the percentage of that interest, but due to the fact that Mr. Appleton was relying on the investment as a portion of his retirement portfolio. It was Mr. Harris’s opinion that a reasonable observer would conclude that Mr. Appleton was not objective because in carrying out the review engagement, he would have to make judgment calls about receivables, inventory, and goodwill and those judgment calls would be relevant to the net income and worth of the company and thus would be relevant to Mr. Appleton’s own income and worth.

28. In cross-examination, Mr. Harris agreed that the current Rule expressly prohibits holding any direct interest in an assurance client. Mr. Harris testified that, while the Rules and Council Interpretations are now un-mistakenly prohibitive, this is a clarification of the intent and meaning of the Rule as it was during the relevant period, the time set out in the charge. It was his opinion that any direct financial interest in a client precluded a member from undertaking an assurance engagement for that client. In his view, the phrase "may not be complying" in the Council Interpretations did not lend itself to doubt but was rather guidance to seek further direction.

SUBMISSIONS

29. Ms. Glendinning and Mr. Cudmore both made submissions. In doing so they referred to the Forward to the Rules, Rule 204 itself, and the Council Interpretations. Ms. Glendinning also referred to four cases: *Neinstein*; *Payne*; *Weisbrod* and *Hoecht*

30. Ms. Glendinning submitted that objectivity is a cornerstone of the profession. In her submission, a reasonable observer would conclude that Mr. Appleton could not possibly be objective when undertaking a review engagement for a client in which he held an 8% interest. Ms. Glendinning noted that a reasonable observer was a hypothetical person standing outside the situation with knowledge of all the facts, and not the other shareholders or the banker for the company.

31. Ms. Glendinning also noted that the legal opinion obtained by Mr. Appleton was not a defence to a charge of professional misconduct, particularly as Mr. Bates had not reviewed the relevant Rules of Professional Conduct.

32. Ms. Glendinning emphasized that the case for the Professional Conduct Committee was that a reasonable observer would conclude that Mr. Appleton's professional judgment or objectivity was impaired.

33. Mr. Cudmore began his submissions with the assertion that to find Mr. Appleton guilty it was necessary to conclude that the Rule was absolute and that Mr. Appleton was not entitled to exercise his professional judgment. He emphasized that the word "may" in the Council Interpretation necessarily meant that the Rule was not absolute and called for professional judgment to be exercised.

34. Mr. Cudmore observed, while reviewing the purposes of the Rules, including the protection of the public, that there was no evidence that the public had been prejudiced in any way or that Mr. Appleton had acted other than objectively.

35. Mr. Cudmore submitted that Mr. Appleton had exercised his professional judgment appropriately, that he had read the Rules, spoken with others, and limited his ownership to less than ten percent. In his view, Mr. Appleton should not be criticized for not contacting the Institute, given the other steps he had taken.

36. Mr. Cudmore submitted that the issue was not what other steps Mr. Appleton could have taken in exercising his professional judgment, but whether he was right or wrong. In Mr. Cudmore's view Mr. Appleton's actions did not even come close to professional misconduct. He asked the panel to exonerate Mr. Appleton.

DECISION

37. After considering the evidence and submissions, and deliberating, the panel was satisfied that the charge had been proven. The evidence was clear, cogent, and convincing and the departure from the required standard was so marked that it constituted professional misconduct. The panel found Mr. Appleton guilty of the charge. The Chair read the following decision:

> THAT, having seen, heard and considered the evidence, and having heard the plea of not guilty to the charge, the Discipline Committee finds Thomas Edward Appleton guilty of the charge.

REASONS FOR THE DECISION

The Standard

38. Rule 204.2, as amended, applied to Mr. Appleton when he undertook the review engagement for ABC Inc. Rule 204 sets out what is often referred to as the objectivity standard of the Chartered Accountancy profession. The Rule, together with the related Council Interpretations, as they were during the time specified in the charge, April 11, 1997 to December 3, 2003, were set out in the Document Brief (Exhibit 5) following Tabs A and B.

39. As of April 11, 1997, Rule 204.2 read:

> 204.2 Objectivity: review engagements
> A member engaged to conduct a review of financial statements or financial or other information and to issue a review engagement report shall hold himself or herself free or any influence, interest of relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.

40. In June 2000, Rule 204.1 which dealt with audits, and Rule 204.2 which dealt with review engagements, were combined and set out as Rule 204.1 which read:

> 204.1 Objectivity – assurance and specified auditing procedures engagements
> A member who engages or participates in an engagement
>
> (a) to issue a written communication under the terms of any assurance engagement, or
>
> (b) to issue a report on the results of applying specified auditing procedures
>
> shall be and remain free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional
> judgment or objectivity.

41. Rule 204.2, as amended, required that Mr. Appleton be objective in fact and in appearance. The issue in this case is whether or not Mr. Appleton was objective in appearance. More particularly, the issue is whether in the view of a reasonable observer, Mr. Appleton remained free of any influence, interest, or relationship which, in respect of the review engagement, would impair his professional judgment or objectivity.

42. The reasonable observer is defined in the Council Interpretations as follows:

> "The reasonable observer should be regarded as a hypothetical individual who has knowledge of the facts, which the member knew or ought to have known, and applies judgment objectively with integrity and due care."

43. The word "objectivity" is often used to mean "the member's professional judgment or objectivity" referred to in Rule 204. The phrases "lacked objectivity" and "objectivity was impaired" are often used to mean that the applicable requirement of Rule 204 has been breached. As only the member can know whether he or she truly lacked objectivity a charge made under this Rule almost invariably, as in this case, turns on whether or not a reasonable observer would conclude that a member lacked objectivity.

The reasonable observer

44. The panel concluded that a reasonable observer having knowledge of the facts and applying judgment objectively with integrity and due care would conclude that Mr. Appleton's professional judgment or objectivity was impaired. Mr. Appleton had a financial interest in the client and the financial statements are, or could be, highly relevant to determining the amount of both his investment and the amount of income he would receive from his investment. Accordingly, when asked to render an opinion on the plausibility of those financial statements, he was rendering an opinion, in part, on his own financial interest. A reasonable observer would conclude that a member giving an opinion on his own asset would lack objectivity.

45. Further, Mr. Appleton had known the other shareholders, or some of them, for many years. They had a mutual high regard for each other. Mr. Appleton was not a director or officer but some of the other shareholders were. But Mr. Appleton was not giving a professional opinion on the financial statements of a corporation owned by people he respected, he was giving a professional opinion on financial statements of a corporation which he and they owned. Again, we think a reasonable observer would conclude that having a shared financial interest with a relatively small number of shareholders, some of whom were officers and directors, would impair Mr. Appleton's professional judgment and objectivity.

46. Mr. Cudmore did submit that, as Mr. Appleton had turned his mind to the issue of objectivity and exercised his professional judgment, the panel could not find that he was guilty of professional misconduct. The issue was really whether or not Mr. Appleton applied the reasonable observer test appropriately.

47. Members of a panel of the Discipline Committee must, in effect, be compelled by the evidence to conclude that the member charged is guilty of professional misconduct. It is particularly difficult to find a member guilty when, as in this case, the member charged is a person of integrity and competence who has identified an issue and addressed it. However, we have concluded, for the reasons set out above, that a reasonable observer would conclude that Mr. Appleton's

objectivity was impaired.

48. We do not think Mr. Appleton was indifferent to the objectivity requirements of the profession or that he was a thoughtless or careless practitioner. But we do think, in applying the reasonable observer test in this instance, he made some errors.

49. Mr. Appleton took into account the views and opinions of everyone he thought was important to the decision. But his fellow shareholders, the banker for the corporation, the banker for his fellow shareholders, and the corporate lawyer to whom he gave instructions on behalf of the client, were participants not observers. His fellow shareholders invited him to invest. They were not in a position to be objective as a reasonable observer must be. While the banker's interest was less direct, we do not think the banker was in a position to be objective.

50. Mr. Appleton did take other steps. He paid fair market value for the shares. He refused to take an interest of greater than 10% in the client. That is irrelevant. The 10% threshold for materiality is only for indirect interests, not ones which are, as here, direct. For direct interests, the rule provides that any interest may be sufficient to breach the requirement of objectivity. It is clear the investment was significant to Mr. Appleton, so much so that, if forced to make a choice, he would give up the engagement rather than the interest. That alone should have indicated to him his objectivity was compromised. Further, Mr. Appleton received dividends for his investments, a remuneration from a client other than professional fees. Again, this should have been considered by him as a factor militating against objectivity.

51. Mr. Appleton made full disclosure to all interested parties, and assured himself that none of the parties had any objection to his continuing on the engagement. While this may well be an example of his personal integrity, full disclosure of an impairment of objectivity does not cure that impairment. The rule does not require disclosure; it requires the maintenance of independence.

Legal advice

52. Mr. Appleton also raised the matter with Mr. Bates, the lawyer who was acting for the corporation. Mr. Bates' verbal legal opinion, which addressed conflict of interest but not objectivity, delivered after Mr. Bates considered statutes and corporate law but not the Rules of Professional Conduct, is clearly not a defence to a charge brought under the Rule.

53. Although he reviewed the Member's Handbook, Mr. Appleton did not discuss his Interpretations with any member of his own profession or the Professional Conduct Committee. Paragraph 6 of Council Interpretations 204, which Mr. Appleton says he read and considered states:

> If, after considering the Rules and these Interpretations, members are still uncertain as to the decision to be made, they are encouraged to discuss the matter with partners, colleagues or Institute staff. Members may also request the rulings of the Professional Conduct Committee for specific cases.

54. We concluded that in consulting a lawyer but not a chartered accountant, and in failing to consult the Institute, Mr. Appleton did not do what he reasonably ought to have done when considering the reasonable observer test.

Council Interpretations

55. The relevant portion of the Council Interpretations reads:

> A member may not be complying with Rule 204.1 and 204.2 if the member or the member's partner is engaged to provide audit or review services for a client and any of the following circumstances are present:
> (a) the member, a partner, or their immediate family, holds, directly or indirectly, through a trust or otherwise, any financial interest, including shares, bonds, debentures, mortgages, notes, advances or other instruments of investment in a client or any of its associates; …

56. Counsel for the member urges the panel to find that the word "may" means that the Rule is not absolute and that Mr. Appleton was entitled to accept the engagement even when he had a financial interest in the client. But the Council Interpretation must be read in its entirety without undue weight being put on one particular word. The Council Interpretation makes it clear that an indirect financial interest in a client, even by the member's partner or someone in the member's immediate family, which could be a small fixed debt secured by a mortgage which would not be effected by the member's exercise of professional judgment, could mean that the member would not be complying with the Rule if he or she accepted an assurance engagement. The Council Interpretation is intended to make the member aware of the breadth of the potential impairment, it is not intended to reduce what would otherwise be a clear breach of the Rule to possible compliance.

Professional Misconduct

57. Not every breach of a Rule constitutes professional misconduct. Some breaches of some Rules are not such a serious departure from the required standard that a finding of professional misconduct is required. The panel did consider whether this was such a case.

58. The objectivity requirement is fundamentally important to the profession. The panel believes the overwhelming consensus of the profession, at the relevant time, precluded any member from undertaking a review engagement for a client in which he or she held a direct interest. Further, as set out above, Mr. Appleton did not apply the reasonable observer test in a realistic or appropriate manner. Such a significant departure from the acceptable standards of practice can only be professional misconduct.

SANCTION

59. The Professional Conduct Committee sought an order which included: a reprimand, a fine in the range of $2,000 - $2,500, publication in the usual course (including disclosing the member's name in *CheckMark*), and costs in the amount of $26,000.

60. Counsel for the Professional Conduct Committee submitted the applicable principles of sanction in this case were general deterrence and specific deterrence. She submitted that the reprimand, fine and notice would serve these two purposes. She also observed that there were no rare and unusual circumstances, within the meaning of the cases, which would warrant withholding Mr. Appleton's name from the notice in *CheckMark*.

61. Ms. Glendinning also identified a number of mitigating factors for the panel: no harm to the public, no indication of inaccurate or substandard work, the member considered the issue, and the member cooperated fully with the investigator.

62. With respect to costs, Ms. Glendinning submitted a bill of costs, which supported the amount requested as a partial indemnity. She submitted that Mr. Appleton, whose conduct was solely responsible for the hearing should partially indemnify the Institute for the costs incurred.

63. Mr. Cudmore submitted that there was no moral turpitude, no need for specific deterrence, and that the appropriate order would be a reprimand. He submitted a fine was unnecessary and costs were inappropriate.

64. Mr. Cudmore submitted that the harm which would be done to Mr. Appleton as a result of the public disgrace which an order disclosing his name would bring outweighed any benefit that the profession might receive by way of general deterrence by disclosing his name. He submitted that integrity was Mr. Appleton's most important asset and that publication of a notice disclosing his name would do inordinate damage to his reputation.

65. Mr. Cudmore submitted that the Rule was unclear. And, if it had been clear, as the Rule now is, there would have been no breach and no need for a hearing. He submitted that Mr. Appleton, who had acted in a professional manner throughout, but had made the wrong judgment call on the issue, should not be publicly humiliated for this error in judgment.

66. After consideration of the submissions and the circumstances of the case, the panel made the following order:

IT IS ORDERED in respect of the charge:

1. THAT Mr. Appleton be reprimanded in writing by the chair of the hearing. Further, that Mr. Appleton be directed to utilize the services of the ICAO with respect to any practice matters or Rules of professional conduct matters where there is any doubt in his mind as to the application of the Rules.

2. THAT Mr. Appleton be and he is hereby fined the sum of $2,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Appleton be and he is hereby charged costs fixed at $5,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

4. THAT notice of this Decision and Order, disclosing Mr. Appleton'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. Appleton fails to comply with any of the requirements of this Order, 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. Appleton's current or former practice, employment and/or residence.

REASONS FOR THE ORDER

67. The panel concluded that the primary objective of the sanction was general deterrence. The panel also concluded that there was a need for specific deterrence and that the reprimand, fine and notice, disclosing Mr. Appleton's name, would serve both purposes.

Notice

68. As the primary objective of the sanction is general deterrence, and as publishing the names of discipline member's is thought to be the most effective way to generally deter other members from similar conduct, publishing Mr. Appleton's name is necessary to achieve the required general deterrence. There are no rare or unusual circumstances in this case to justify withholding the publication of Mr. Appleton's name. It is not rare or unusual for the publication of a member's name to have a detrimental effect on his or her reputation.

Reprimand and Fine

69. The panel ordered that Mr. Appleton be reprimanded in writing by the Chair to stress to him that his conduct was unacceptable. The panel recognized there is no need to specifically deter Mr. Appleton from improper conduct involving moral turpitude, nor is there a need to rehabilitate Mr. Appleton in the sense that his knowledge has fallen below the standard required of the profession. There is no suggestion that he is anything but an honest competent practitioner. But even honest, competent practitioners must understand the importance of complying with the objectivity requirements of the profession and the need to consult with colleagues and the governing body with respect to such issues.

70. In the panel's view, Mr. Appleton needs to be specifically prompted to consult with professional colleagues and the Institute when dealing with such things as the appearance of objectivity. We have set out above why we think the steps Mr. Appleton took were not adequate and what steps we think he should have taken. In determining the appropriate sanction, we thought it was necessary to make it clear to Mr. Appleton that he should consult when facing such problems.

71. The fine, while at the low end of the range for misconduct of this nature, is intended to emphasize to Mr. Appleton and to the membership as a whole the importance of objectivity.

Costs

72. Mr. Appleton's failure to call on the resources of the Institute, either before making his decision to invest in the client corporation or when issues arose, and his refusal to admit to possible correctness of any position but his own, have largely contributed to the costs incurred for this hearing. It is relevant that Mr. Appleton called no evidence, other than his own, in support of his view. It is appropriate that the member charged and found guilty, rather than the membership at large, bear a portion of those costs. The costs awarded will not fully indemnify the Institute for the costs of the proceedings and are less than the costs usually awarded on a partial indemnity basis for a single day hearing.

DATED AT TORONTO THIS 8TH DAY OF JUNE, 2006
BY ORDER OF THE DISCIPLINE COMMITTEE

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

MEMBERS OF THE PANEL:

S.F. DINELEY, FCA
A.D. NICHOLS, FCA
H.G. TARADAY, CA
B. RAMSAY (Public Representative)

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

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **THOMAS EDWARD APPLETON, CA**, a member of the Institute, of the Decision made on October 26, 2005 and the Order made on December 16, 2005, of the Discipline Committee, pursuant to the bylaws of the Institute, as amended.

TO: Mr. Thomas E. Appleton, CA
33392 Queen Street, RR 2
AILSA CRAIG, ON N0M 1A0

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision Made April 5, 2007)

1. This appeal was heard by a panel of the Appeal Committee of the Institute of Chartered Accountants of Ontario on April 5, 2007. Mr. Paul Farley appeared on behalf of the Professional Conduct Committee. Mr. Appleton did not attend but was represented by Mr. Gordon Cudmore.

2. The following charge was laid against Mr. Appleton by the Professional Conduct Committee on January 5, 2005:

> THAT the said Thomas E. Appleton, in or about the period April 11, 1997 to December 3, 2003 failed to hold himself free of any influence, interest, or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity, in that, while engaged to conduct a review of the financial statements of "ABC" Pharmacy Inc. ("ABC Inc.") as at July 31 of each year, he held an 8% share of ABC Inc., contrary to Rule 204.2 of the rules of professional conduct (as amended from time to time).

3. The Decision and Order appealed from, dated December 16, 2005, reads as follows:

DECISION

> THAT, having seen, heard and considered the evidence, and having heard the plea of not guilty to the charge, the Discipline Committee finds Thomas Edward Appleton guilty of the charge.

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Appleton be reprimanded in writing by the chair of the hearing. Further, that Mr. Appleton be directed to utilize the services of the ICAO with respect to any practice matters or rules of professional conduct matters where there is any doubt in his mind as to the application of the rules.

2. THAT Mr. Appleton be and he is hereby fined the sum of $2,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Appleton be and he is hereby charged costs fixed at $5,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

4. THAT notice of this Decision and Order, disclosing Mr. Appleton'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. Appleton fails to comply with any of the requirements of this Order, 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. Appleton's current or former practice, employment and/or residence

4. On this appeal, Mr. Appleton seeks to have the finding of guilty overturned and a finding of not guilty substituted therefor. In the alternative, he seeks to have the sanction vacated, and a sanction of a reprimand without any publication or public notice be imposed.

Submissions

5. On behalf of Mr. Appleton, Mr. Cudmore submitted that the Discipline Committee misconstrued the *Rules of Professional Conduct* in general and Rule 204.2 in particular in finding Mr. Appleton guilty of the appearance of impaired professional judgment or objectivity for reviewing the financial statements of a company while holding 8% of the shares in that company.

6. In his submissions, Mr. Cudmore placed great weight on the fact that the Council Interpretation supporting Rule 204.2 uses the word “may” in the phrase determining compliance with objectivity if the member has an interest in a company, while the Rule itself uses “shall” as the standard for objectivity.

7. He characterized “shall” as prohibitive, and “may” as permissive, and argued that the Interpretation left it open for Mr. Appleton to conclude he was not breaching the Rule when he reviewed a company in which he had an interest, particularly when he was aware of his obligation and took steps to satisfy himself that he was not in breach.

8. Mr. Farley, on behalf of the Professional Conduct Committee, submitted that the Discipline

Committee found as a fact that Mr. Appleton had breached the appearance of objectivity and thus had breached Rule 204.2 as it then was. He further submitted that the Appeal Committee should not disturb that finding unless it had been made without an evidentiary basis.

9. Mr. Farley also submitted that the Interpretation is intended as guidance and not to supplant the requirements of the Rule. Further, the Interpretation should not be used to circumvent the intention of the Rule.

10. Mr. Farley pointed out that, at the time he performed the review engagement, Mr. Appleton held a direct interest in the company, and he submitted that that was sufficient evidence upon which the Discipline Committee could and did find that a reasonable observer would not believe him objective.

11. On the issue of sanction, Mr. Cudmore submitted that the sanction imposed is “draconian” and “excessive” given Mr. Appleton’s attempts to comply with the Rule and the fact there was no issue of competence or integrity.

12. Mr. Farley submitted that the sanction imposed was well within the range of sanctions for similar matters. The sanction should only be disturbed if it were clearly unreasonable or demonstrably unfit.

Decision

13. This panel of the Appeal Committee considered all the submissions, as well as the material filed in this matter and, after deliberations, dismissed the appeal. The parties were informed of the decision at the conclusion of the appeal, and were provided with a written order dated April 12, 2007, as follows:

> HAVING heard and considered the submissions made on behalf of Thomas E. Appleton, and on behalf of the Professional Conduct Committee, upon Mr. Appleton's appeal of the Decision made on October 26, 2005 and Order made on December 16, 2005 of the Discipline Committee, and upon reviewing all of the documentation filed by the parties, the Appeal Committee upholds the Decision made on October 26, 2005 and Order made on December 16, 2005 of the Discipline Committee.

Reasons

14. It has been stated on numerous occasions that the role of this Committee is not to retry the matter before it, but to determine whether the Discipline Committee committed any errors in its consideration of the evidence before it. We have concluded they did not.

15. Essentially, the uncontested evidence is that Mr. Appleton conducted a review engagement of a company while holding an 8% share of the stock in that company. That fact, in and of itself, would have been enough for the Discipline Committee to find that Mr. Appleton had breached his duty of objectivity, as set out in Rule 204.2 (as it then was).

16. The Discipline Committee correctly considered the “reasonable observer test”, and concluded any reasonable observer would have believed Mr. Appleton’s objectivity had been compromised by his interest in the company he was providing an opinion on. Not only is that conclusion reasonable on the evidence, it is impossible to see how the Discipline Committee could

have reached any other conclusion.

17. Mr. Appleton has argued that he considered objectivity and took steps to ensure that he was not in breach of the Rule. The Discipline Committee found that those steps were insufficient, and perhaps even self-serving. For the reasons set out in their judgment, we agree. This is not a matter of Mr. Appleton's personal integrity; it is one of how his conduct would be seen by members of the public.

18. On the issue of sanction, the sanction imposed is well within the appropriate range for such conduct and, indeed, is at the low end of the spectrum. The Discipline Committee considered all relevant factors and circumstances in determining the sanction, and there are no grounds to alter it.

19. Before leaving this issue, we would comment on the publicity order, as that aspect of the sanction was argued vigorously before us. While the Discipline Committee has the discretion whether or not to order publication of a matter and a member's name, precedents establish the principle that such publication will normally be ordered except in rare and unusual circumstances. In the present case, we are of the view that the Discipline Committee did not err in its decision to order that notice of the decision, including Mr. Appleton's name, would be published.

20. Chartered accountancy is a self-governed profession. The public has placed its trust in the profession that members will be held to the standards of the profession and that lapses will be corrected and sanctioned. Without such public trust in the procedures and outcomes of the disciplinary process, self-regulation is both hollow and undeserved. To maintain the public trust, the Institute must not only govern its members in the public interest, it must be seen to so govern them. Transparency is crucial, and is achieved in part by ensuring the public is made aware of the regulating. That Mr. Appleton will suffer consequences as a result of the publication is not a reason to withhold that publication. Balancing Mr. Appleton's desire to protect his reputation against that of the public interest, as the Discipline Committee did, weighs in favour of the order made by the Discipline Committee.

DATED AT TORONTO THIS 10TH DAY OF JULY, 2007
BY ORDER OF THE APPEAL COMMITTEE

A.R. BYRNE, FCA – DEPUTY CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

A.D. BOSSIN, CA
S.F. MITCHELL, CA
J.J. LONG, CA
K.N. ARMSTRONG (PUBLIC REPRESENTATIVE)