CANADIAN INSTITUTE OF ACTUARIES
APPEAL TRIBUNAL
Case No. 2017-5

BETWEEN:

GENE DZIADYK, Appellant

v.

PROFESSIONAL CONDUCT BOARD
OF THE CANADIAN INSTITUTE OF ACTUARIES, Respondent

Before:	Pierre J. Dalphond, FCIArb (Chair) Micheline Dionne, F.C.I.A. William B. Solomon, F.S.A., F.C.I.A.
Heard:	April 9, 2021, by videoconference April 28, 2021, last written submissions
Present:	Gene Dziadyk, self-represented, Appellant Antoine Aylwin and Amelia Garcia, *Fasken Martineau Dumoulin*, for the Respondent Louis Martin (observer PCB) Bryan Sigurdson (observer assisting Mr. Dziadyk) Pat Johnston (observer assisting Mr. Dziadyk)
Released:	Ottawa, June 18, 2021

DECISION ON AN APPEAL ON GUILT, PENALTY AND COSTS

INTRODUCTION

[1] Bylaw 20.09 (4) of the Canadian Institute of Actuaries ("CIA") grants to its members a right of appeal before the Appeal Tribunal in respect of decisions of a Disciplinary Tribunal ("DT") ordering a temporary suspension of a Fellow, Associate or Affiliate, allowing a charge, imposing a penalty or awarding costs.

[2] Pursuant to Bylaw 20.09 (1), on 8 December 2020, within 30 days after the receipt of the decision on penalty, the Appellant filed a notice of appeal against two decisions rendered by the DT.

[3] The first one rendered on 27 August 2020 found the Appellant guilty of breaching Rule 1, Annotation 1-3, Rule 8 and Annotation 8-1 of the *Rules of Professional Conduct* ("RPC") of the CIA.

[4] The second one rendered on 9 November 2020 (corrected 9 December 2020) ordered a fine of $ 25,000 and a costs award of $ 200,000 and a 24-month suspension of the Respondent, should he get reinstated after having paid the said fine and costs to the CIA.

[5] In its second decision, the DT summarized the first one as follows:

> *2. As set out in the decision, Dziadyk was found guilty on six counts of professional misconduct relating to his behavior as an actuary and member of the CIA in releasing to the public emails, videos and various materials commenting on the behavior of another CIA member, Mr Paul Ngai.*
>
> *3. The charges may be summarized as failing to act honestly and with integrity pursuant to the duties of a CIA member in Rule 1 of the Rules of Professional Conduct of the CIA and avoiding unjustified or improper criticism of another member, pursuant to Rule 8.*

[6] In other words, this appeal is about the use of discourteous and disrespectful language by a member of the CIA about another member: is that covered by Rule 1, Annotation 1-3, Rule 8 and Annotation 8-1 of the RPC and if so, what is the proper penalty in such a case.

[7] These issues are raised for the first time in the history of the CIA. It is thus the first opportunity for the Appeal Tribunal to provide guidance on them. Like the DT decisions, this decision is precedent setting for the CIA and its members.

[8] In addition, since the amount for costs is the largest ever ordered by a DT, the Appeal Tribunal is asked to revise it and to provide guidance on this matter.

CONTEXT

[9] Most professions in Canada are regulated by provincial public acts that provide for a structure, define specific acts reserved to the members of a designated profession and regulate admission, inspection, continuous education and discipline.

[10] These public acts are designed to protect the public and contains various statutory obligations and duties imposed by law to the members of a profession. Of course, the provisions of these acts must comply with the *Canadian Charter of Rights and Freedoms* ("Charter"), like any other acts adopted by Parliament or a Provincial Legislature.

[11] The situation is quite different for actuaries practicing in Canada where there is no provincial act regulating their field of practice. This function is left essentially to the CIA.

[12] The CIA is a self-governing body incorporated by a private act of Parliament, *An Act to Incorporate Canadian Institute of Actuaries*, S.C. 1964–65, c. 76 ("Act"). Section 2 of the Act defines the purposes and objects of the CIA as follows: "to advance and develop actuarial science; to promote the application of actuarial science to human affairs; and to establish, promote and maintain high standards of competence and conduct within the actual actuarial profession." (Emphasis added)

[13] Section 5 of the Act empowers the CIA to determine by its bylaws "the qualifications of members, (…) the conditions of, circumstances and manner of entry into and termination of membership and generally the conditions, privileges and obligations attaching to membership in the Institute."

[14] Exercising this power, the CIA has enacted Bylaws, the RPC and standards of practice, documents amended from time to time.

[15] Membership in the CIA is open only to qualified person who by joining agrees to be bound by its Bylaws and various other rules and standards, including the RPC, as stated at Bylaw 21.01:

> 21.01 A Fellow, Associate or Affiliate shall comply with the Bylaws, Rules of Professional Conduct, Standards of Practice, Professional Continuing Qualification Standards, and Recommendations of the Institute as they may be from time to time, and with any order or resolution made under the Bylaws, except as provided in this Section for the practice in a foreign jurisdiction

[16] Various federal and provincial acts and regulations applicable to insurance companies request the appointment of an actuary ("Appointed Actuary") who must be a Fellow of the CIA.

[17] Relying on *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, the Alberta Queen's Bench Court ruled in *Kaplan v. Canadian Institute of Actuaries*, (1994) 28 Adm. L.R. (2d) 265 (appeal dismissed by the Alberta Court of Appeal) that the relationship between the CIA and its members is essentially contractual in nature and that the Act authorizes it to adopt Bylaws and rules on discipline, hearings, fines and costs.

[18] This approach is confirmed in the very recent decision of the Supreme Court of Canada in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, where the high court concluded, referring to *Senez*, that when membership is important for employment and when a member is legally obliged to pay dues to an incorporated body, an objective intention to create legal relations is proven and accordingly that the constitution and bylaws of said body are legally binding between it and each member.

[19] Thus, like for other contractual relationships, the Charter protections are not at play, and disputes are determined by rules and principles generally applicable to contracts, in the instant case the Ontario Law (common law and/or applicable statutory provisions to contracts) and rules of public order. However, the interpretation of unclear contractual terms may be informed by the values of the Charter, when appropriate.

[20] Hence this Appeal Tribunal, like the DT, is not a statutory tribunal but a domestic one whose powers are determined and circumscribed by the Bylaws and other rules adopted by the CIA, which are all part of the contractual relationship, once validly adopted.

[21] The Professional Conduct Board ("PCB"), previously known as the Committee on Professional Conduct, is a body created by the CIA pursuant to Section 20 of the Bylaws, made of actuaries mandated to ensure compliance with the RPC and relevant provisions of the Bylaws.

[22] The PCB receives complaints, reviews them, conducts investigations, and files charges if it deems it appropriate.

[23] If a charge is filed, the PCB acts as the « prosecutor » (Bylaw 20.06 (4)) before the DT, a panel of three neutrals made of a retired judge and two actuaries (Bylaw 20.06 (1)).

[24] The proceedings before a DT are governed by the Bylaws, the RPC and a public document adopted by the CIA entitled *Rules of Practice and Procedure of a Disciplinary Tribunal* ("RPPDT").

BACKGROUND

[25] Mr. Dziadyk has been a long-time member of the CIA. During his 40-year membership he never was the object of another alleged breach of the RPC or the standards of practice for actuaries.

[26] His expertise is related to individual life insurance.

[27] In 2000, he was retained to provide actuarial services to Colonial Life Insurance Company (Trinidad) Limited ("CLICO").

[28] In 2002, Mr. Dziadyk moved to Port-of-Spain the capital city of Trinidad and Tobago to become the CEO of CLICO. Six months later, he was dismissed and offered instead to act as a consultant. He remained a member of CIA and stayed in Port-of-Spain.

[29] Around 2007, he joined the board of CLICO but was revoked not long after. He then moved back to Ontario.

[30] On 13 February 2009, CLICO was put under the control of the Central Bank of Trinidad and Tobago ("CCTT") to be restructured and eventually sold.

[31] According to Mr. Dziadyk, he and his family suffered substantial financial losses as consequence of the demise of CLICO.

[32] Calling himself a whistle-blower, Mr. Dziadyk started commenting on the behaviour of external professionals hired by CLICO to assist in its restructuring, an auditing firm,

KPMG, and a fellow member of the CIA, Mr. Ngai, providing services as Appointed Actuary. In his opinion, they had failed investors and authorities in connection with the reclassification of assets, assessment of liabilities and approval of financial practices at CLICO in order to justify the takeover by CCTT and to deprive policyholders/shareholders like him of their equity.

[33] On 27 July 2016, he filed a complaint with the PCB against Mr. Ngai. His letter was sent not only to the CIA and Mr. Ngai, but also to the International Association of Insurance Commissioners, the Caribbean Association of Insurance Regulators, CLICO, CCTT and the SEC of Trinidad and Tobago. About Mr. Ngai, he wrote that he was "not fit to serve as an appointed actuary anywhere on the planet", "useful idiot," "illegitimate actuary providing a faux SEC 115 opinion," and a "reckless, overreaching opinion." In this letter, he identified himself as a Canadian actuary.

[34] On 25 March 2017, Mr. Dziadyk released a newsletter to the public where he identified himself as a Fellow of the CIA. In it, he made inflammatory comments about Mr. Ngai, KPMG, CCTT and the Government of Trinidad and Tobago. There is no evidence on how widespread the distribution of this newsletter was.

[35] On 19 May 2017, the PCB warned Mr. Dziadyk to use "more courteous and professional language in the future." The letter adds that the two events referred to won't be considered by the PCB.

[36] On 26 October 2017, he released a report titled "Examination of the Financial Recording of CLICO under Central Bank Control Since February 13, 2009, Part II. Orchestrated Ethical Actuarial Accounting Fraud that Certified a Statutory Fund Heist." In it, he wrote that Mr. Ngai was a rogue actuary who participated in an actuarial fraud at CLICO in connection with the reporting of a statutory required fund.

[37] The same day and in November and December, he sent 5 emails to Mr. Ngai of a similar nature, adding that he was a criminal and should end in jail. None of these emails was made public.

[38] In December 2017, Mr. Dziadyk posted on YouTube 5 long videos and 2 more in January 2018 (15 minutes or so where he presented his version of parts of the CLICO story). There was no evidence before the DT about the number of viewers for any of them.

[39] In an email from Mr. Ngai to PCB on 19 December 2017, the former wrote: "I have a look at the link you sent me. I cannot do anything with it as he never mentioned my full name/put my picture in the videos. Thank you for letting me know about that anyway." This email was filed before the DT.

[40] Five other emails of a similar nature were sent by Mr. Dziadyk on 23 February, 25 March, 31 March, 18 May and 17 June 2018 to CLICO, CCTT and other recipients, often with copy to media in Trinidad and Tobago (no indication that these media showed interest).

[41] On 29 June and 2 and 3 July 2018, unaware of the progress on his complaint (a confidential process), he sent emails to the CIA where he repeated in multiple ways his allegations of fraud against Mr. Ngai.

[42] On 1 July 2018, he released to the public another critical newsletter about Mr. Ngai. Like the first newsletter, there's no indication about how widespread its distribution was.

[43] On 3 July 2018, he sent another email to Mr. Ngai, CLICO, KPMG and various authorities and media in Trinidad and Tobago where he referred to the fraudulent actuary case and made inflammatory comments about KPMG (no evidence that the media showed interest).

[44] On 19 July, 25 September and 28 December 2018, he sent three emails to CIA full of derogatory comments about Mr. Ngai. One can infer that he was frustrated with the handling of his complaint against Mr. Ngai.

[45] To resume, 27 communications are alleged by the PCB after its warning, including 4 private emails to Mr. Ngai, 7 emails to the CIA complaining about Mr. Ngai, 7 videos posted on YouTube, 2 newsletters and 7 emails to a small group made of Mr. Ngai, CIA, CLICO, KPMG and Trinidad and Tobacco officials (including 5 copied to some media in that country).

[46] On 29 May 2019, Mr. Dziadyk was notified that the PCB had filed the following charge against him:

> At all times relevant to this charge, Mr. Gene Dziadyk (the “Respondent”) is an actuary, and a member of the Canadian Institute of Actuaries. At all times relevant to this charge, Mr. Paul Ngai is an actuary, and a member of the Canadian Institute of Actuaries.
>
> On or about July 27, 2016, the Respondent filed a complaint against Mr. Ngai regarding his behaviour as an actuary. According to the Bylaws of the Canadian Institute of Actuaries, the information related to an investigation of a complaint is confidential.
>
> Pending the investigation of the Respondent’s complaint against Mr. Ngai, as listed below, Mr. Dziadyk released to Mr. Ngai and to third parties, including to the public, emails and various materials, including videos, commenting on Mr. Ngai’s behaviour, some of them perceived as threatening to Mr. Ngai, as well as various material, including emails, commenting on the Canadian Institute of Actuaries and other associations of actuaries and government. Although he had been requested to cease releasing this material and communicating with Mr. Ngai in such manner, he persisted in doing so.
>
> In such communications, he identified himself with his name plus the words “Fellow Canadian Institute of Actuaries”. In a communication he states that “as is my duty as a fellow of the Canadian Institute of Actuaries, I reported to the CIA [my concerns]”. In addition, he describes himself as an actuary and formerly the actuary for Colonial Life Insurance Company (Trinidad) Limited (CLICO).
>
> Such communications include*, inter alia*, the following:

(a) Report entitled "*Examination of the Financial Reporting of CLICO under Central Bank Control since Feb 13, 2009*";

(b) Report dated October 26, 2017, entitled "*Examination of the Financial Reporting of CLICO under Central Bank Control since February 13, 2009*";

(c) Email dated October 26, 2017, at 13:04;

(d) "*Avenue D" / "Professional Services to a Bankrupt Financial Institution Run by a Mobster in the Mug's Game*", dated March 25, 2017;

(e) Email dated November 13, 2017, at 19:40;

(f) Email dated November 16, 2017, at 9:33;

(g) Email dated December 2, 2017, at 16:23;

(h) Email dated March 9, 2018, at 12:01;

(i) Email dated March 25, 2018, at 16:13;

(j) Email dated March 9, 2018, at 12:01;

(k) Email dated May 18, 2018, at 15:08;

(l) Email dated June 17, 2018, at 23.03;

(m) Email dated July 2, 2018, at 11:05;

(n) Email dated July 3, 2018, at 16:16;

(o) Email dated July 3, 2018, at 18:52;

(p) Video on YouTube at https://www.youtube.com/watch?v=z vTdH8tV_aA; and

(q) Video on YouTube at https://www.youtube.com/watch?v=K nEdYpZvLEQ[1].

By such conduct, Mr. Dziadyk:

1. Failed to act with integrity, contrary to Rule 1 of the current Rules of Professional Conduct;

2. Failed to act in a manner to fulfil the profession's responsibility to the public, contrary to Rule 1 of the current Rules of Professional Conduct;

3. Failed to uphold the reputation of the actuarial profession, contrary to Rule 1 of the current Rules of Professional Conduct;

[1] The charge refers to 2 videos on YouTube, although 7 were filed with the DT. But in only 2, Mr. Dziadyk identified himself as a Fellow of the CIA. Also filed one email sent to CIA on 26 July 2019 and two emails send in July 2016 and March 2017 before the May 2017 warning by the PCB.

> 4. Failed not to be associated with anything which the member knows or should know is false or misleading, contrary to Rule 1-2 of the current Rules of Professional Conduct;
>
> 5. Failed not to commit any act that reflects adversely on the actuarial profession, contrary to Rule 1-3 of the current Rules of Professional Conduct;
>
> 6. Failed to avoid unjustifiable or improper criticism of other members, contrary to Rule 8 of the current Rules of Professional Conduct.
>
> 7. Failed to conduct himself objectively and with courtesy and respect when expressing differences of opinion among members and in the discussion of such differences, contrary to Annotation 8-1 of the current Rules of Professional Conduct.

[47] It is important to note that the charge does not include a breach of Bylaw 23.03 (5) imposing on members an obligation to collaborate with an investigation team set up by the PCB.

[48] On 29 July 2019, the PCB communicated 47 documents as requested per Rule 2.01 RPPDT which states that within 60 days of the transmission of the charge, it must provide to a charged member a statement of the facts which underlie the charge and all relevant documents which are in its possession, including those which the PCB intends to introduce into evidence and those which it does not, and whether the evidence is inculpatory or exculpatory.[2]

[49] On the same day, a notice of discipline was published by the CIA regarding Mr. Ngai; a copy was sent by the PCB to Mr. Dziadyk who could see the result of his complaint made 3 years before. This public document reads as follows:

> Notice of Reprimand
>
> Paul Ngai accepts sanction from the Committee on Professional Conduct in accordance with the Bylaws of the Canadian Institute of Actuaries:
>
> 1. The Committee on Professional Conduct has laid a Charge against a member of the Institute, Mr. Paul Ngai, who practises in Toronto, Ontario, in the individual life practice area.
>
> 2. The Charge reads as follows:
>
> At all times relevant to this charge, Mr. Paul Ngai is an actuary, member, and Fellow of the Canadian Institute of Actuaries.
>
> On or about July 27, 2016, a complaint was received by the Canadian Institute of Actuaries against Mr. Ngai. Summarily, the complaint alleged* that Mr. Ngai has allowed his services to enable the Central Bank of Trinidad and Tobago to evade the laws governing financial institutions in Trinidad and Tobago, and caused grievous damage to policyholders.

[2] On 17 September 2019, 24 January and 11 February 2020, the PCB communicated additional documents, most apparently not new to Mr. Dziadyk.

Further to this complaint, a subgroup of the Committee on Professional Conduct (CPC) was appointed to review the allegations, and subsequently an Investigation Team (IT) was designated to investigate whether Mr. Ngai's conduct was appropriate when providing actuarial opinions on the resolution plan of Colonial Life of Trinidad and Tobago [Colonial Life Insurance Company (Trinidad) Limited]** (CLICO). In particular, the IT examined whether Mr. Ngai should have stated an opposition to the resolution plan on the basis of inappropriate treatment of specific categories of policyholders.

After its investigation, the IT reported to the CPC, which took the decision on September 27, 2018, to file the present charge against Mr. Ngai.

At the time in question, CLICO was an insurer that provided both life and annuity coverage. The company's life insurance policies were standard-issue contracts. In addition, CLICO issued deferred annuity contracts called EFPAs. These contracts provided high interest rates guaranteed for up to five years and a minimum of 2 or 3 per cent per annum thereafter depending on the plan and the currency of the plan.

Mr. Ngai had both the knowledge and the experience to serve as the Appointed Actuary of CLICO. He demonstrated familiarity with the evaluation of actuarial liabilities for an insurance company and performed such valuations through several engagements and within different contexts. It must be noted that the actuarial work was conducted by CLICO internal staff with Mr. Ngai's guidance and review. Mr. Ngai performed all the actuarial analysis to come up with the actuarial assumptions, and reviewed the actuarial models and results.

Mr. Ngai states that he tried to advise CLICO's board orally about the inappropriateness of their investment policy for EFPA contracts and their associated generous guarantees. After repeated indifference around such a serious situation, Mr. Ngai should have secured written documentation with a letter to management or the board. The CPC did not find any evidence that Mr. Ngai participated in any illegal scheme.

In 2009, during the worldwide financial crisis, the categorization of EFPA products was changed, in compliance with IFRS rules, from an insured product to a pure investment product.

The CPC alleges that Mr. Ngai did not provide proper advice on the change of the accounting standards even if he had no control over what changes were made. The CPC alleges that Mr. Ngai yielded too easily to outside influences or instructions and relied on the management of CLICO for a large part of his work. His concerns on EFPA asset–liability mismatch should have been clearly documented and conveyed to higher authorities, regardless of consequences. These products ultimately caused the collapse of CLICO. Regardless of the outcome, Mr. Ngai did not fulfil his responsibility to the public.

The CPC also notes that Mr. Ngai considers his professional liability to be primarily limited to certifying numbers under a resolution plan into which he had no input or provided no insight. The CPC alleges that this approach is irresponsible, as many policyholders are impacted in different ways by the failure of CLICO. In such a situation, the CPC expects the Appointed Actuary, at the very least, to voice either concern or general approval of the fairness of the distributions. This would certainly be best practice regardless of the country jurisdiction. The CPC considers that Mr. Ngai did not fulfil his

primary role as the advocate for the policyholders. Mr. Ngai issued an actuarial certificate without proper analysis. Furthermore, by not using exact language in his actuarial reporting, he created a situation open to wide interpretation.

The CPC alleges that by his actions and inactions Mr. Ngai showed a lack of professional behaviour and has neglected to voice his opinions and provide insights on topics for which he is fully qualified. Mr. Ngai should have provided written insight for topics on which he was fully qualified to do so.

By such conduct Mr. Ngai:

1. Failed to act with competence and in a manner to fulfil the profession's responsibility to the public and to uphold the reputation of the actuarial profession, contrary to Rule 1 of the current Rules of Professional Conduct;

2. Failed to perform professional services with skill and care, contrary to Rule 1, Annotation 1-1, of the Rules of Professional Conduct;

3. Engaged in a professional conduct and committed an act that reflects adversely on the actuarial profession, contrary to Rule 1, Annotation 1-3, of the Rules of Professional Conduct;

3. Therefore, pursuant to Bylaw 20.05,

• The Committee on Professional Conduct filed the Charge reproduced above against Mr. Paul Ngai;

• Given the relative gravity of the matter and given the interest of the public and of the Institute, the Committee on Professional Conduct decided not to refer the matter to a Disciplinary Tribunal, but rather to offer Mr. Paul Ngai what is commonly referred to as the fast-track. Under this process, the Committee on Professional Conduct made the following recommendation of sanction, that Mr. Paul Ngai:

- Admit guilt for the acts and omissions that form the basis of the Charge;
- Accept a public reprimand; and
- Attend a CIA Professionalism Workshop.

4. Mr. Paul Ngai pleaded guilty to the Charge reproduced above and accepted the recommendation of sanction of the Committee on Professional Conduct described above.

(Emphasis added)

[50] On 1 October 2019, Mr. Dziadyk ceased to be a member of the CIA, ending the contractual relationship. It is now widely accepted that such a decision does not put an end to an on-going disciplinary process related to an alleged prior contractual breach (non-compliance with RPC).

[51] In May 2020, Mr. Dziadyk with the assistance of his nephew removed his videos from YouTube. However, since one of them had been reposted in 2019 on the site of a group called the CLICO Policyholders Group, it is still accessible. The DT was informed by the PCB of the removal.

[52] Now 71-year old, Mr. Dziadyk informed the DT in his written submissions that he did not intend to apply for reinstalment in the CIA.

PROCEEDINGS BEFORE THE DT ON GUILT

[53] Due to the pandemic, the DT decided to hold virtual management conferences and pre-hearings on interlocutory issues. Evidence and arguments at the merits on the charge were heard through virtual meetings.

[54] Mr. Dziadyk was not assisted by counsel before the DT. Alleging lack of financial resources, he asked the DT to order the CIA to provide financial assistance in order for him to retain a counsel. This request was dismissed by the DT. Irrespective of the procedural issue related to the proper time to challenge this decision,[3] the Appeal Tribunal is of the view that this decision is correct since to provide a form of legal aid is not part of the contractual obligations of the CIA towards its members.

[55] He then requested to be assisted by two actuaries during the proceedings. On 31 January 2020, the DT did not allow such assistance. However it is important to mention that the DT hearing on the merits was accessible to the public and thus informal assistance could then be made available to Mr. Dziadyk during adjournments and breaks and even through emails or text messages during the hearing.[4] In fact, there were 12 public attendees, including the “advisers” of Mr. Dziadyk.

[56] Irrespective of the procedural issue related to the proper time to challenge this decision, the Appeal Tribunal is of the view that this question is moot since Mr. Dziadyk choose not to participate to the public hearing on the merits held on 8, 9 and 10 June 2020. At the time he was residing temporary with his son in Thailand. The evidence shows that he could have participated virtually with some inconvenience due to the time zones but that he chose not to because of the view that the process was by then completely flawed. During the virtual hearing on the appeal, Mr. Dziadyk acknowledged that if the DT hearing had been held later, he would have participated though still in Thailand.

[57] Pre-hearing, Mr. Dziadyk sought a stay order against the charge as a result of the PCB failure to communicate all the documents within the 60-day period mentioned at Rule 2.01 RPPDT. The DT refused but granted him additional time to amend his response accordingly. Irrespective of the procedural issue related to the proper time to challenge this decision, the Appeal Tribunal is of the view that the DT granted what was

[3] A debate could be entertained about the effect of a letter sent shortly after a prehearing to the CEO of the CIA.

[4] During the whole appeal process, the Appeal Tribunal allowed the attendance of these advisers.

in the circumstances[5] of this case the right remedy, though it prolonged the duration of the proceedings and resulted in additional rewriting for Mr. Dziadyk.

[58] Pre-hearing, Mr. Dziadyk sought also an order to receive a copy of documents related to PCB members discussions and notes on the applications of Rule 8, documents related to communications between the PCB and Mr. Ngai and an all documents related to the investigation and decisions of the PCB on the complaint laid by him against Mr. Ngai. These requests were dismissed by the DT. Irrespective of the procedural issue related to the proper time to challenge these decisions, the Appeal Tribunal was not shown that the DT committed then reversible errors. Moreover some of these documents appear to be subject to solicitor-client privilege and litigation privilege.

[59] On 6 May 2020, the PCB informed the DT that it dropped count 4 of the charge alleging a breach of Annotation[6] 1-2 RPC: "to be associated with anything which the member knows or should know is false or misleading." Mr. Dziadyk considered that count the most serious of the seven and the one that he wanted to debate in public before the DT to vindicate his position on CLICO.

[60] The Appeal Tribunal is of the view that the powers granted to PCB by the Bylaws include the discretion to withdraw a count or a charge. In fact, the duty of a party to a contract to act in good faith may call for it considering the evolution of a file, including the discovery of new evidence, the death of a witness or the realization of the challenges associated to an attempt to convince a DT that a breach of a specific rule has occurred.

[61] On 26 May and 2 June 2020 by emails, Mr. Dziadyk sought an outright dismissal of the charge as consequence of what he qualified the bad faith of the PCB shown by the way the charge had been handled throughout the process.

[62] Instead the DT reserved its decision at the merits to hear all the evidence before ruling on the allegation of bad faith against the PCB.

[63] In its decision on guilt dated 27 August 2020, the DT offered a substantive analysis on the issue at paras. 41 through 60 that led it to conclude as follows:

> 61. In conclusion, on this issue, we are satisfied that the respondent has not discharged the burden on him to established the basis for a complaint of bad faith and as such there is no evidence to warrant dismissal of the charges on that basis.

[64] The Appeal Tribunal is of the view based on the evidence made at the merits, that the DT did not commit a reviewable error in concluding that Mr. Dziadyk's allegation of bad faith against the PCB was unproven and could not justify a dismissal of the charge.

[65] The remaining of the 27 August 2020 decision of the DT, paras. 62 through 103, deals with the evidence on the language used and the scope of the rules relied upon in

[5] Most documents were communicated with the relevant period and nothing critical was missing.

[6] The charge refers to Rule 1-2 which does not exist.

the six remaining counts of the charge, starting with Rule 8, the applicability of which was contested throughout by Mr. Dziadyk.

[66] On the language used, the most relevant parts of the decision are:

> 76. Appendix B summarizes correspondence from Dziadyk and, in particular, highlights comments that he made regarding fellow actuary Paul Ngai. In addition, the appendix contains an extract from a letter dated March 9, 2017 from the PCB to Dziadyk that warns him to use "more courteous and professional language in the future." Of note, 27 of the 29 entries in the table are dated after the warning of March 9, 2017.
>
> 77. The example statements regarding Ngai in Appendix B are not a complete catalogue of objectionable statements but are meant to provide a summary. Specific objectionable statements are the following:
>
> > "Ngai was indispensable in a fraudulent 1-2 punch teamed up with KPMG's "going-concern"…"
> >
> > "I suffered because of you and you didn't care. So here's the deal. (sic) You report back that I want to be paid contractually plus 10% interest and I will go away, won't even bother with the defamation suit. I'll tell CIA I dropped charges."[7]
> >
> > "…I loathe each and everyone of you despicable cowards; may you rot in hell as you clutch your booty."
> >
> > "…you colluded in an inside job back-stabbing policyholders…"

[67] This summary of the evidence on the language used found at Appendix B includes other words such as "not fit to serve as an appointed actuary anywhere on the planet", "useful idiot," "illegitimate actuary providing a faux SEC 115 opinion," "reckless, overreaching opinion."

[68] It follows that the DT could qualify the language often used by Mr. Dziadyk in his communications as discourteous and disrespectful toward Mr. Ngai, KPMG and the Trinidad and Tobago authorities.

[69] On the link between him and the CIA, the DT stated:

> 78. In most of the correspondence, Dziadyk identifies himself as an actuary, generally as a Canadian actuary or Fellow Canadian Institute of Actuaries.

[70] However, this conclusion is not supported by the evidence since according to appendix B, he described himself as a fellow of the CIA in six of the 27 communications after the warning, including one private to Ngai and one private to the CIA. To the public, it is then only four times. In addition, he described himself as an actuary in two of the seven videos.

[7] This comment is more compatible with the act of a blackmailer than a whistleblower.

[71] Another palpable error is found at para. 69 where the DT wrote that "In the various submissions of Dziadyk, he did not identify anything that would validate any of the claims or misconduct made against Ngai or indeed anyone else." This is contrary to the evidence filed before the DT that shows that on 29 July 2019 Mr. Ngai was reprimanded for misconduct in connection with his professional services provided to CLICO, incidentally a fact acknowledged by the DT at para. 74.

[72] These palpable errors of fact should be kept in mind in the analysis to assess their impact, if any, on the DT decisions.

[73] The DT then proceeded to its analysis of the RPC.

[74] It started with Mr. Dziadyk's argument that the two counts related to Rule 8 should be dismissed since he did not, at any relevant time, made his comments in the provision of *professional services* to CLICO. The DT rejected it as follows:

> 91. Compliance with the Rules and Standards of Practice of the CIA is a safe harbour for actuaries in performance of their work. Annotation 8-1 of Rule 8 is designed to require between members constructive discussion of actuarial matters. Discussion of differences between members regarding matters, such as actuarial methods and assumptions, that are conducted according to the Rules with courtesy and professional respect will serve the public interest.
>
> 92. It is clear to the Discipline Tribunal that Dziadyk's comments and statements were intended to be perceived as coming from an actuary, a member of the CIA, and <u>that in expressing his views about Ngai and in his discussions with Ngai, he provided opinions based on actuarial considerations which is consistent with definition of professional services under the Rules</u>.
>
> 93. Dziadyk's comments and statements were directed toward another member of the CIA and were made available through YouTube to any member of the public who could access the internet.
>
> (Emphasis added)

[75] With regard to Rule 1 RPC, the DT wrote at para. 80 that "the professional conduct of an actuary contemplated in Rule 1, envisions reasoned language and civil discourse."

[76] It added in its section on the analysis of Rule 1:

> 99. To act with integrity means to act honestly; with moral uprightness. <u>Dziadyk's differences of opinion with Ngai were expressed using unreasonable language that attacked Ngai's character rather than being expressed as a reasoned and civil discussion of actuarial methods and assumptions as is envisaged by Rule 1</u>. Further, Dziadyk made untruthful statements, such as when he said of KPMG, a public accounting and auditing firm, that in connection with the auditing of the financial statements of insurer CLICO it "… covered over by fraudulent IFRS accounting consented by KPMG" and when Dziadyk described Ngai as an "…indisputably fraudulent

actuary" and "… a suicide bomber hiding in an empty statutory fund…". The Discipline Tribunal finds that Dziadyk did not act with integrity and is in breach of Rule 1.

100. The Rules identify the professional and ethical standards with which a member must comply and thereby serve the public interest. Compliance by a member of the CIA with the Rules is necessary to serving the public interest. Dziadyk failed to comply with the Rules and therefore failed to serve the public interest. In particular, Dziadyk's untruthful remarks about a firm of professional accountants and auditors consenting to "… fraudulent IFRS accounting…" did not serve the best interest of the public and harmed the integrity of the actuarial profession. The Discipline (sic) Tribunal finds that Dziadyk did not act in a manner to fulfill the profession's responsibilities to the public and is in breach of Rule 1.

101. We accept and adopt the submission on behalf of the PCB:

> "[51] The use of discourteous and disrespectful language that is associated with the status of the professional constitutes unprofessional conduct that harms the profession and is not in the public interest. We can conclude that such behaviour reflects adversely on the actuarial profession. Professionals are expected to act professionally and must express restraint and appropriateness in their comments, whether written or spoken, or they compromise the interests of society at large. It goes to the heart of professionalism and is essential to maintain the reputation and integrity of the profession. Improper criticism of another member of the CIA or of another organization (including other professionals) constitutes professional misconduct.
>
> (references to statutory tribunals omitted)

102. The language used by Dziadyk in his correspondence with Mr. Ngai and in his YouTube videos was discourteous and disrespectful. He could have chosen to express his views courteously and respectfully, but he chose otherwise. It is clear to the Discipline (sic) Tribunal that Dziadyk's comments and statements were intended to be perceived as coming from an actuary, a member of the CIA, that they were directed toward another member of the CIA, Mr. Ngai, and Dziadyk's discourteous and disrespectful expression of his point of view was made available through YouTube to any member of the public who could access the internet.

103. As indicated in the case of *McLaughlin (Re)*, 2020 ABCPA 2019065, paras. 74 to 77, a high standard of civility and conduct applies to someone holding themselves out as a member of a profession with experience and knowledge. In the case of *McLaughlin* discourteous and disrespectful language was found to represent conduct that did not maintain the good reputation of the profession and it constituted unprofessional conduct. The Discipline Tribunal finds the conduct of Mr. Dziadyk did not uphold the reputation of the actuarial profession, his conduct reflects adversely on the actuarial profession and Dziadyk is in breach of Rule 1 and Annotation 1-3.

(Emphasis added)

[77] The DT concluded as follows:

> 104. The Disciplinary Tribunal finds that Mr. Gene Dziadyk is guilty of breaching Rule 1, Annotation 1-3, Rule 8 and Annotation 8-1 of the Rules of Professional Conduct ("Rules") of the Canadian Institute of Actuaries.
>
> 105. Pursuant to s. 20.07 (6) of the CIA Bylaws the Discipline (sic) Tribunal will hold a hearing within the next 30 days with respect to penalty and fees (sic). An email will follow shortly to settle on a convenient penalty hearing date.

PROCEEDINGS BEFORE THE DT ON PENALTY AND COSTS

[78] Despite the concluding words of the decision on guilt, it seems that the parties and the DT agreed that representations on penalty and costs shall be done in writing.

[79] Both the PCB and Mr. Dziadyk submitted written arguments.

[80] It is written submissions, the PCB requested i) a 36 month suspension on each of the six counts on which Mr. Dziadyk was found guilty, to be served concurrently, should he seeks his reinstatement, ii) a fine of $25,000 to be paid within six months of the decision on penalty and iii) the reimbursement of the legal costs incurred by the PCB after the filing of the charge amounting to $269,793.12.

[81] Attached to the brief were an affidavit of a member of PCB and 7 exhibits. The affiant stated that the total fees, expenses and applicable taxes incurred by the PCB between 29 May 2019 and 29 June 2020 amounted to $ 291,670.76 and that the PCB was claiming only $ 269,793.12 and went on to explain why the costs were "significant compared to other cases before the PCB in the past." The first exhibit was made of various invoices from the counsel firm, with deleted parts for services not claimed. Other exhibits were emails between DT, counsel and Mr. Dziadyk between 4 March 2020 and 1 June 2020.

[82] On 13 October 2020, Mr. Dziadyk filed a document titled "Response to Penalty and Costs Argument Presented by PCB." In his brief, he referred to his age (71), his financial ruin as a result of the demise of CLICO, lack of any charge in 40 years of membership, whistleblowing and refusal of the PCB to use a fast track procedure for a charge of improper language and not malpractice, especially once the most serious count, "failed not to be associated with false and misleading information", had been dropped.

[83] In his view, the appropriate penalty would be a suspension for a period of twelve months from the date of reinstatement, if he were to ever choose to be reinstated, no fine (that would be vindictive according to him) and no costs.

[84] On 20 October 2020, the PCB filed a Reply Submission to Mr. Dziadyk's Response Submission.

[85] On 9 November 2020 (amended 9 December 2020), the DT released a four-page decision.

[86] At para. 2, it summarized its first decision by stating that Mr. Dziadyk "was found guilty on six counts of professional relating to his behavior as an actuary and member of the CIA in releasing to the public emails, videos and various materials commenting on the behavior of another CIA member, Mr. Paul Ngai."

[87] Its analysis is found at paras. 9 through 20:

> 9. At no time did the Respondent admit guilt on any of the charges on which he was found guilty nor did he exhibit any remorse for the injury he caused.
>
> 10. The closest to recognition that his actions might be inappropriate is the statement by the Respondent that his language may be regarded as "discourteous" while at the same time asserting that it was truthful.
>
> 11. The language set out in Appendix B to the Decision of the Discipline (sic) Tribunal to support the finding of professional misconduct extends far beyond "discourteous".
>
> 12. The submission of the PCB and the cases referred to therein set out the purpose of penalty being principally protection of the public and to provide both a specific and general deterrent against repeated conduct by the Respondent or other CIA members.
>
> 13. The secondary purpose of penalty set out in the case of *Canadian Institute of Actuaries v. A. David MacFarlane* (2009-03-23) is "to uphold and underline the professional integrity and high standards of both the Institute and its individual members."
>
> 14. Based on the above principles, the following factors should be considered in imposing penalty:
>
> i. the nature and gravity of the offence;
>
> ii. the age and experience of the actuary;
>
> iii. the attitude of the actuary through the investigation and prosecution;
>
> iv. the number of offences and whether this was a first time offender;
>
> v. if there was an admission of guilt proffered in a timely manner or was there willful defiance; and,
>
> vi. was the act deliberate, premeditated, or malicious.
>
> 15. We previously concluded that we regard the offences as serious, with little or no cooperation from the Respondent, with deliberate conduct on his part, particularly having been warned by the PCB that his deliberate conduct was inappropriate. Not only has there been no admission of guilt or responsibility but further the Respondent continues to maintain the validity of his actions.
>
> 16. We are satisfied that the numerous and repeated derogatory comments following the warning by the PCB of the inappropriate nature of the Respondent's conduct left little

choice but for the PCB to proceed in the manner that it has on behalf of the CIA and the profession.

17. We are satisfied that there is ample evidence to conclude that the penalty sought by the PCB of a 36-month suspension and fine of $25,000.00 is reasonable, in light of the above principles and the facts of this case.

18. However, given the age of the Respondent and the fact that he has not practiced since October 1, 2019, we would modify the penalty as follows, should the Respondent seek reinstatement:

i. that the Respondent complete any professional practice requirements of the CIA for reinstatement;

ii. that the Respondent pay in full the fine of $25,000.00; and,

iii. following reinstatement, that membership be suspended for a further period of 24 months.

19. On the issue of costs, we have no hesitation in concluding that much of the time and cost of the process incurred by the PCB was due to the lack of cooperation by the Respondent in the proceeding and the choices he made leading to a cost incurred by the PCB of $270,000.00.

20. The Discipline Tribunal has discretion in awarding costs. While we recognize that the PCB was appropriate in proceeding with this prosecution as important for the profession, some reduction of full cost recovery is warranted when applied to the Respondent. Applying this discretion, we reduce the cost award as part of the penalty to $200,000.00.

(Emphasis added)

[88] To resume, it ordered Mr. Dziadyk to complete any professional practice requirements should he seek reinstatement, to be suspended for a 24-month period should he obtain a reinstatement, to pay a fine of $25,000.00 and to pay costs of $ 200,000.00.

[89] On 20 November 2020, the PCB requested “an amended decision for sake of clarity of conclusions for potential homologation and execution by adding a formal conclusion” and suggested the text of said conclusion.

[90] On 9 December 2020, the DT issued an amended decision adding the proposed conclusion.

PRINCIPLES GOVERNING APPEAL

[91] Before analysing the grounds of appeal against both decisions (other than related to the prehearing decisions), the Appeal Tribunal must explain the main principles applicable in appeal.

[92] Unless otherwise ordered in exceptional circumstances and where the ends of justice require it, an Appeal Tribunal must work with the evidence properly adduced

before the DT and nothing else (Bylaw 20.10 (9)). No exceptional circumstances were shown here that could justify a derogation to this rule.

[93] The powers of the Appeal Tribunal are defined as follows at Bylaw 20.11 (1):

> 20.11 (1) An Appeal Tribunal may confirm, alter or quash any decision appealed from, and render the decision which it considers should have been rendered in the first instance.

[94] Clearly an Appeal Tribunal has been vested with the power to alter or quash any decision from the DT and to substitute to it the decision which it considers should have been rendered.

[95] The exercise of this broad contractual power is in practice guided by principles derived from those applicable to statutory appeal tribunals that distinguish between factual conclusion and question of law.

[96] It is settled law that a statutory appeal tribunal must show deference for factual conclusions drawn by a statutory tribunal of first instance from properly adduced evidence. In other words, a statutory appeal is not a new opportunity to reassess the evidence.

[97] This principle was read as implied in the provisions of the Bylaws of the CIA for the first time in *Canadian Institute of Actuaries v. Michael Cohen*, a decision of the Appeal Tribunal rendered on 26 June 1998, followed in subsequent decisions of the Appeal Tribunal. Since 1998, the Bylaws were revised on about 20 occasions and at no time the boards of directors and/or the members of the CIA did contemplate amending them to exclude this interpretation of the Bylaws by the Appeal Tribunal, confirming that they are in agreement with it. In addition, the requirement that the chair of the Appeal Tribunal be a retired judge is indicative of a desire to import an approach in the domestic process that resembles the one before statutory tribunals.

[98] Thus Mr. Dziadyk must show that the DT committed one or more palpable or clear errors in the appreciation of the evidence and that these errors are determinant in the decision-making process of the DT.

[99] However with regard to the interpretation of the Bylaws and the RPC, critical parts of the contractual relationship between the CIA and its members, the Appeal Tribunal may intervene if it is of the opinion that said interpretation by a DT is not correct.

APPEAL ON GUILT

[100] Mr. Dziadyk alleges several errors as to the merits of the decision on guilt that can be summarized, as proposed by counsel for the PCB, under four broad categories:

- failure to consider material evidence and overall misapprehension of material evidence;

- failure to consider various factors or misinterpretation of such factors;

- failure to comply with some procedural rules by the PCB and the DT; and

- interpretation and application of Rules 1 and 8 RPC.

[101] The first category rests on a misunderstanding by Mr. Dziadyk of the difference between communication of potential evidence and introducing properly evidence in the record of the DT.

[102] Properly adduced evidence means evidence that was formally filed before the DT by a witness who could then be cross-examined (or by admission between the parties) and found relevant to the proceedings and admissible according to standard rules of evidence, as provided in Rule 4.03 (6) and Section 5 RPPDT, provisions that merely reflect the rules and practice before statutory tribunals.

[103] Therefore, potential evidence referred to or disclosed by a charged member to the PCB or the DT in a written response in accordance with Rule 2.02 RPPDT or in any other communication does not become evidence unless it is formally filed during a hearing and then found relevant and admissible or by filed by joint consent.

[104] During the hearing on guilt held on 8, 9 and 10 June 2020, witnesses were heard, including Mr. Ngai, and a total of 55 exhibits were formally filed by the PCB with the DT.

[105] As mentioned before, Mr. Dziadyk choose not to participate. Thus, he did not file any exhibit, did not testify and did not cross-examine witnesses presented by the PCB.

[106] As a result, the evidence before the DT was limited to the one presented by the PCB and found relevant and admissible by the DT.

[107] Incidentally, though the process is adversarial, it is part of the contractual expectations of the members that the PCB will act in good faith and adopt a balanced and fair attitude toward a charged member. Thus, the PCB is expected to present to the DT all the relevant evidence to the disciplinary process, including evidence which could be considered exculpatory when the charged member is not present (Rule 2.01 RPPDT). That said, no breach is alleged or proven in this regard that could support an order for a new hearing by the DT.

[108] To conclude on the first category, the alleged failure to consider some documents communicated by Mr. Dziadyk before the hearing on guilt is not an error by the DT. To the contrary, it was bound to consider only the evidence presented by the parties at the hearing and found admissible and relevant as per Rule 4.03 (6) RPPDT.

[109] With regard to the second category of alleged errors, in his latest brief and during his oral representations at the virtual appeal hearing, Mr. Dziadyk essentially invited the Appeal Tribunal to reassess most of the evidence in a different way from the DT. As said above and in the interim decision rendered on 3 February 2021, this is not the test applicable in matters of evidence.

[110] However, in presence of a palpable error of fact, the Appeal Tribunal must then determine if the said error had a determinant impact on the decision.

[111] As indicated above, the DT made two palpable errors in its decision on guilt:

> - first, when it stated that Mr. Dziadyk described himself as a fellow of the CIA in most of his communications when Appendix B shows that he did so in 6 of the 27 communications after the warning, including one private to Ngai and one private to the CIA. To the public, it is then only four times. In addition, he described himself as an actuary in two of the seven videos;
>
> - second, when the DT wrote that "In the various submissions of Dziadyk, he did not identify anything that would validate any of the claims or misconduct made against Ngai or indeed anyone else." This is contrary to the evidence filed before the DT that shows that on July 29, 2019 Mr. Ngai was reprimanded for misconduct in connection with his professional services provided to CLICO further to the complaint made by Mr. Dziadyk

[112] However, these errors are not determinant on the conclusion of the DT that Dziadyk used discourteous language about Mr. Ngai and KPMG in communications that he authored and where he identified himself as a member of the CIA. These errors are relevant though in the appreciation of the gravity of the breaches.

[113] The third category alleges various failure to comply with some procedural rules by the PCB and the DT. The Appeal Tribunal dealt with them above in the section titled "Decision on guilt."

[114] Remains the fourth category, which raises the issue of the proper interpretation to be given to Rules 1 and 8 RPC, including Annotations 1-3 and 8-1.

[115] The relevant portions of the RPC read as follows:

> **Preamble**
>
> These Rules of Professional Conduct identify the professional and ethical standards with which a member must comply and thereby serve the public interest. The Annotations provide additional explanatory, educational, and advisory material to members of the actuarial profession on how the Rules are to be interpreted and applied. It is the professional responsibility of the member to be knowledgeable about, and to keep current with, the revisions to the Rules and Annotations. In addition to these Rules, a member is subject to applicable law and rules of professional conduct or ethical standards that have been promulgated by a recognized actuarial organization for the jurisdictions in which the member renders professional services. Professional services are considered to be rendered in the jurisdictions in which the member intends them to be used unless specified otherwise by an agreement between the recognized actuarial organization for any such jurisdiction and the Institute. The member is responsible for securing translations of such law or rules of conduct as may be necessary.

Definitions

As used throughout these Rules, the following terms are italicized and have the meanings indicated:
(…)
Professional services: The rendering of advice, recommendations or opinions based upon actuarial considerations, including other services provided from time to time by a member to a client or employer.

Professional Integrity

Rule 1 A member shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession.
(…)
Annotation 1-3 A member shall not engage in any professional conduct involving, dishonesty, fraud, deceit or misrepresentation or commit any act that reflects adversely on the actuarial profession.

Courtesy and Cooperation

Rule 8 A member shall perform professional services with courtesy and professional respect, shall avoid unjustifiable or improper criticism of other members, and shall cooperate with others in the client's or employer's interest.

Annotation 8-1 Differences of opinion among members may arise particularly in choices of assumptions and methods. Discussions of such differences, whether directly between members or in observations made to a client by one member on the work of another, should be conducted with courtesy and respect.

(Emphasis added)

[116] These rules of conduct are a part of the contract between the CIA and each of its members. Non-compliance is a contractual breach and exposes a member to the agreed disciplinary process.

[117] The interpretation of these provisions is governed by the general principles of interpretation of agreements and not by the rules of construction of statutes.

[118] Here, to facilitate interpretation, the CIA is providing annotations to the provisions of the RPC. These annotations provide "explanatory, educational, and advisory material to members of the actuarial profession on how the Rules are to be interpreted and applied." Thus they don't create additional obligation but merely help to define the obligation expressed in a specific rule.

[119] It follows that a member cannot strictly speaking be found in breach of an annotation but only of the rule to which the annotation refers to when she/he commits an act described as intended to be prohibited in the annotation.

[120] Rule 1 is entitled Professional Integrity. It is the first rule of conduct imposed on members, a sign of its importance.

[121] The wording of Rule 1 indicates that not only the public is entitled to professional act performed honestly, with integrity and competence, but that members have an interest to act in a manner that preserves the collective reputation of the profession. To avoid the argument that only the professional acts executed as actuary are contemplated, Annotation 1-3 states that a member shall not commit any act that reflects adversely on the actuarial profession.

[122] The preservation of the reputation of a profession is an obligation often imposed on members since it benefits to all of them in maintaining public trust for the said profession. To a certain extent such a rule restricts the freedom of members who are not free to act as they wish. This may even entail somewhat their freedom of speech.

[123] In *Dore v. Barreau du Quebec*, 2012 SCC 12, the Supreme Court of Canada recognized the validity of a provision of the Quebec *Code of ethics of advocates* which states that the conduct of members "must bear the stamps of objectivity, moderation and dignity" to preserve the legitimate public expectation that they will behave with civility.

[124] The Appeal Tribunal has no hesitation to conclude that if certain restrictions can be imposed pursuant to a statutory authority without infringing the Charter protected freedom of speech, it can also be part of the contractual obligations, a domain where the Charter protections are not at play, if imposed in good faith on those who want to be members of the CIA in order to preserve the honour and dignity of the profession and public trust and confidence in the actuarial profession.

[125] Sharp and taxing public comments about the professional acts of another actuary or another professional can reasonably be considered as weakening public trust and confidence in the actuarial professional and its members and can only foster tensions between different groups of professionals and mistrust towards professionals often called to work together.

[126] Therefore, the Appeal Tribunal agrees with the DT that "the professional conduct of an actuary contemplated in Rule 1, envisions reasoned language and civil discourse" and the following analysis found at paras. 101 and 103 of its decision on guilt:

> 101. We accept and adopt the submission on behalf of the PCB:
>
> > "[51] The use of discourteous and disrespectful language that is associated with the status of the professional constitutes unprofessional conduct that harms the profession and is not in the public interest. We can conclude that such behaviour reflects adversely on the actuarial profession. Professionals are expected to act professionally and must express restraint and appropriateness in their comments, whether written or spoken, or they compromise the interests of society at large. It goes to the heart of professionalism and is essential to maintain the reputation and integrity of the profession. Improper criticism of another member of the CIA or of another organization (including other professionals) constitutes professional misconduct.

(references to statutory tribunals omitted)

(…)

103. As indicated in the case of *McLaughlin (Re)*, 2020 ABCPA 2019065, paras. 74 to 77, a high standard of civility and conduct applies to someone holding themselves out as a member of a profession with experience and knowledge. In the case of *McLaughlin* discourteous and disrespectful language was found to represent conduct that did not maintain the good reputation of the profession and it constituted unprofessional conduct. The Discipline Tribunal finds the conduct of Mr. Dziadyk did not uphold the reputation of the actuarial profession, his conduct reflects adversely on the actuarial profession and Dziadyk is in breach of Rule 1 (…).

[127] Thus Mr. Dziadyk could be found in breach of Rule 1, but not in breach of Annotation 1-3. The drafting of count 5 rests on a wrong interpretation of the RPC without being necessarily fatal.

[128] Mr. Dziadyk challenges the applicability of Rule 8 since his critics of Mr. Ngai were not made while he was providing professional services to CLICO or to any other paying party but while publicly criticizing the actuarial assumptions at CLICO.

[129] The PCB responds that Rule 8 contains three separate and autonomous portions and that the need for professional services is only part of the first portion. Furthermore, it contends that Annotation 8-1 does not require the provision of professional services.

[130] As indicated above, Annotation 8-1 is not an autonomous base for a breach, but only a precision on the scope of Rule 8, the sole undertaking that can be breached.

[131] Rule 8 enunciates three obligations for an actuary: to perform *professional services* with courtesy and respect for those to be in contact with him/her, to cooperate with others in the client's interest or employer's interest (which imply the performance of *professional services* by the member) and to avoid unjustifiable or improper criticism of other members of the CIA.

[132] The first two are clearly related to the performance of *professional services* to the benefit of clients or employers.

[133] Should the third obligation which imposes restrictions only on critics directed to another member of the CIA, be considered also related to the provision of professional services by the criticizing member?

[134] Annotation 8-1 provides some explanation on how to interpret Rule 8. For the sake of clarity and simplicity, the Appeal Tribunal quotes it again:

> **Annotation 8-1** Differences of opinion among members may arise particularly in choices of assumptions and methods. Discussions of such differences, whether directly between members or in observations made to a client by one member on the work of another, should be conducted with courtesy and respect. (Emphasis added)

[135] Clearly the annotation refers to observations about a difference of opinion with another member of the CIA made to a client in the performance of *professional services* by the criticizing member. For example, a member conducting a statutory mandated peer review of certain work performed by an Appointed Actuary would be asked to comment the work of the later.

[136] In this context, should the words “discussions of such differences directly between members” be read to include a member criticizing the work of another member at a conference or in a public debate?

[137] In the Appeal Tribunal opinion, considering Annotation 8-1, Rule 8 appears designed to the benefit an employer or client. In the course of providing professional services, Rule 8 is designed to impose specific duties to the member of the CIA to the benefit of the client or employer.

[138] Then Rule 8 cannot be read to apply outside such a relationship.

[139] But if one rejects such conclusion, then the contractual provision is unclear, and a decision maker must attempt to discover the intent of the parties by resorting to common law canons of construction of agreements[8] which are:

- construction of the agreement as a whole
- giving effect to all parts of the agreement
- avoiding commercially unreasonable or absurd outcomes
- construction *Contra Proferentum* (i.e. where an agreement is ambiguous, the preferred meaning should be the one that works against the interests of the party which provided the wording)
- list of particulars followed by general language
- the restrictive effect of explicit references
- the preference accorded amendments to printed terms
- the preference accorded the earlier of two inconsistent terms.

[140] One of these rules is to try to find the proper meaning by considering the whole contract, here the RPC. Since Rule 1 is of a broad nature, Rule 8 can then be read as examples of behaviours expected in connection with specific situation, here the provision of *professional services*.

[141] The *contra proferentum* canon also means that rule 8 should not be extended to situation outside a client/employer relationship in order not to expose a member in case of doubt to potentially severe consequences, including suspension and expulsion.

[142] Moreover, since Annotation 8-1 refers specifically to comments made by an actuary providing then *professional services* to a client, this is a further indication that Rule 8 was not designed to extend beyond that.

[8] John D. MCamus, *The Law of Contracts*, Essentials of Canadian Law, Irwin Law.

[143] In fact, a reasonable outcome of the interpretation is that to prevent an actuary to denigrate in the eyes of a client the services of another member of the CIA is a way to remind to the client or employer that all members are hold to the same high standards and that membership of the CIA grants a title worthy of trust in the eye of said client or employer.

[144] Then it makes sense to ask two or more members working for the same person to show to each other courtesy and respect in their discussions on actuarial assumptions.

[145] In addition, Rules 3 to 9, all deal with professional services. In other words, Rule 8 is part of a set of rules regarding the provision of professional services.

[146] With due respect for the DT, the comments made by Mr. Dziadyk even to CLICO we're not made while he was performing *professional services*.

[147] They were for sure comments denigrating the services rendered by Mr. Ngai to CLICO contrary to Rule 1, but they were not made while Mr. Dziadyk was providing services to CLICO or another client.

[148] This means that counts number 6 and 7 should have been dismissed. Moreover count 7 is based erroneously on Annotation 8-1 instead of Rule 8, though not necessarily fatal.

APPEAL ON PENALTY AND COSTS

[149] The decision of the DT on penalty and costs is precedent setting, despite the fact that this part of the disciplinary process was conducted without a formal hearing open to the public. In addition to a 24-month suspension, should Mr. Dziadyk, 71 years old, wish to resume its membership, it orders him to pay the second largest fine ever imposed, $25,000.00 and the largest ever award on costs, $200,000.00.

[150] In its submissions to the DT, the PCB suggested a 36-month suspension on each count, to run concurrently.

[151] However, in its penalty decision, the DT did not attempt to treat each of the six counts separately. In other words, it appears that the suspension and the fine ordered were in relation to the charge as a whole, including a finding of six different breaches.

[152] Furthermore, despite the fact that counts 1, 2, 3 and 5 rest on the same communications while referring to different portions of Rule 1 RPC, there is no discussion about that and it appears to have been considered by the DT as distinct offences under the same rule resulting from different set of facts.

[153] Mr. Dziadyk raises four categories of grounds in connection with the decision on penalty and costs:

> - the DT failed to reflect appropriate factors in its decision on penalty and inappropriately apply the factors it did consider;

- the DT failed to appropriately consider the relative magnitude of the penalties and costs awarded in prior discipline cases;

- the DT makes reference to lack of remorse for “injury caused”, without evidence of injury presented of injury being caused other than Mr. Ngai having hurt feelings;

- the DT Did not appropriately reflect several relevant factors in the awarding of costs.

[154] The powers of the DT to impose penalties, including a fine, are found at Bylaws 20.07(6) and 20.08 (1):

> 20.07 (6) In the event that the Respondent has been found guilty, the parties may then be heard by the Disciplinary Tribunal with respect to the penalty within 30 days after its decision as to whether or not the Respondent is guilty of an Offence has been rendered. The Disciplinary Tribunal shall render a decision with respect to the penalty within 15 days from the date of the end of this hearing.
>
> 20.08 (1) A Disciplinary Tribunal shall impose on a Fellow, Associate or Affiliate found guilty of an Offence, one of the following penalties, in respect of one or more of the counts: (a) a reprimand; (b) a suspension from the Institute; (c) an expulsion from the Institute. A Disciplinary Tribunal may also impose a fine on a Fellow, Associate or Affiliate found guilty of an Offence, in respect of one or more of the counts.
>
> (Emphasis added)

[155] Determination of the proper penalty is a complex task. It rests on an individualized and contextual assessment of each proven counts, considering many factors often used in criminal and penal proceedings.

[156] Counsel for the PCB submitted and the Appeal Tribunal accepts that some of the important factors to consider in imposing penalty include those listed in a previous decision by the DT rendered in 2009, in *Canadian Institute of Actuaries v. A. David McFarlane*:

- The nature and gravity of the offense.

- The age and experience of the actuary.

- The attitude of the actuary through the investigation and prosecution.

- The number of offenses and whether this was a first-time offender.

- If there was an admission of guilt proffered in a timely manner or was there willful defiance.

- Was the act deliberate, premeditated or malicious.

- Similarity to other cases and precedents.

[157] The Appeal Tribunal adds these factors should inform a disciplinary process designed to protect the public, to prevent reoccurrence by the member and to ensure discipline within the membership.

[158] Nature and gravity of the breach: This factor when applied to the use of discourteous language does imply a review of the whole context.

[159] For example, a private email from a member to another may contain unacceptable language but it is different in consequences from a video message put on YouTube that may be seen by a large number of viewers. Thus, the impact may range from a mere momentary annoyance to the loss of a position or clients.

[160] According to the DT, all the communications listed in the appendix B to its decision were public communications. With due respect, the Appeal Tribunal is of the view that the DT made a palpable error when it listed as public communications letters or emails sent to the CIA/PCB to report acts attributed to Mr. Ngai and to explain why a breach of the rules was then committed according to Mr. Dziadyk, since such communications are confidential and private to the complainant and the PCB (Bylaws 20.01 (7), 20.01 (8), 20.02 (3) and 23.02).

[161] But posting a video on YouTube is clearly a public communication. Mr. Dziadyk did posted on YouTube a total of seven such videos. According to Mr. Ngai, the first five did not identify him clearly with regard to the criticisms expresses. Moreover, evidence in the file does not provide any indication on the number of viewers for each of these videos though the evidence is that all but one are no longer easily accessible.

[162] Of course, letters to state regulators in the Bahamas with copy to local media were clearly public communications. Their content was very susceptible to raise serious questions about the standards of practice of members of the CIA and the effectiveness of its complaint process.

[163] To sum up, there was evidence of many public communications likely to damage the reputation of not only Mr. Ngai but also of the Canadian actuarial practice.

[164] Attitude of the actuary through the investigation and prosecution: Mr. Dziadyk was not charged for a lack of collaboration during the investigation and there is no evidence to conclude otherwise. However, his behaviour during the DT process became somewhat obstructive and defiant. His refusal to participate in the hearing at the merits was a sign of contempt for the DT.

[165] Number of offenses and whether this was a first-time offender: During his over 40 years of membership, Mr. Dziadyk has not been charged for any professional error or malpractice. The current charge is related to financial losses suffered by him and his family and a strong resulting desire to publicly denounce the Appointed Actuary and the external auditors of CLICO.

[166] The DT considered that six offenses were proven. For the reasons given above, the counts referring to Rule 8, including Annotation 8-1, should have been dismissed. In

addition, count 4, the most serious according to Mr. Dziadyk, was withdrawn by the PCB a few weeks before the hearings at the merits on guilt.

[167] With regard to the remaining four counts, it is worth repeating that they are all related to Rule 1. However, the evidence shows the repetitive nature of the breach of Rule 1 by Mr. Dziadyk and this despite a prior warning from the PCB. There were in fact many intentional breaches of Rule 1 committed at different periods.

[168] Age and experience of the actuary: In his seventies, Mr. Dziadyk was reaching the end of his professional career. By the time of the hearing on guilt, he had ceased to be a member of the CIA and he had indicated on multiple occasions that he did not contemplate applying for reinstatement.

[169] Admission of guilt proffered in a timely manner or willful defiance: Mr. Dziadyk never admitted guilt before the DT. In fact, he has shown during the guilt determination phase willful defiance for the process.

[170] However, at the penalty stage, his behaviour appeared respectful.

[171] Were the act deliberate, premeditated or malicious: There cannot be any doubt about the fact that many public communications of Mr. Dziadyk were deliberately discourteous and made despite a warning by the PCB about the way to express his views.

[172] Similarity to other cases and precedents: As said before, there is no precedent regarding a charge related to use of improper language by a member of the CIA.

[173] Need to protect the public: The need to protect the public against such a behaviour is obvious. By attacking maliciously Mr. Ngai, KPMG and the complaint process at the CIA, instead of raising concerns or expressing critics in a respectful way, Mr. Dziadyk raised doubt about the Canadian actuarial profession and its standards of practice.

[174] By the repetitive nature of his unprofessional critics of another fellow of the CIA and reputable auditors, Mr. Dziadyk was trying to discredit two highly regarded professions necessary to the confidence of the public in the insurance business.

[175] To avoid repetition: There is no evidence that Mr. Dziadyk intends to repeat is unprofessional behaviour. In any case, being no longer a member of the CIA, the penalty cannot be imposed to restrain him in the future while not a member.

[176] To ensure discipline: Mr. Dziadyk's behaviour appears unique. The need to stop an emerging trend in the membership has not been shown. But it is also important to remind members of the importance to behave professionally, to be very mindful of warnings given by the peers through the PCB and the need to show respect for the disciplinary process.

[177] In appeal, the Appeal Tribunal shall review a penalty only if shown unreasonable considering precedents and the particular circumstances of each case.

[178] In the instant case, the Appeal Tribunal is of the view that a significant suspension was necessary.

[179] In his own submissions on penalty, Mr. Dziadyk proposed a one-year suspension and the PCB a three-year suspension.

[180] The two-year suspension imposed by the DT is reasonable considering the repetitive nature of the behaviour of Mr. Dziadyk and his age and status (a fellow with 40 years of experience and a former CEO and consultant of CLICO), the number of public communications and the defiant attitude of Mr. Dziadyk toward the DT during the guilty phase.

[181] A fine in addition to expulsion or suspension is not automatic as stated at Bylaw 20.08 (1) quoted above. It must rest on a conclusion that it is necessary to add it to have a penalty that fits the proven breaches.

[182] In the instant case, a suspension of a 71-year-old former member who stated that he did not intend to ask for reinstatement has not the same impact that a similar suspension of a 45-year-old active member who is then deprived of a title necessary to earn a good living in the prime years of an actuarial career.

[183] In such a context, the decision of the DT to impose a fine was justified.

[184] The fine of $ 25,000 proposed by the PCB was on the high side of fines. It was found “reasonable” by the DT without any analysis.

[185] In the opinion of the Appeal Tribunal, a fine of $ 15,000 is reasonable considering the repetitive nature of the behaviour of Mr. Dziadyk and his age and status, the range of fine imposed generally by the DT and the two-year suspension.

[186] Remains the issue of costs.

[187] Bylaw 20.07(7) authorizes expressly a DT to order costs:

> 20.07(7) A Disciplinary Tribunal shall have the power to order any of the parties to pay all or part of the fees and expenses of legal counsel of the other party incurred to commence and complete the proceedings.

[188] The wording of that provision makes it clear that an order for costs is essentially discretionary and not the application of any automatic rule.

[189] But that discretion must be informed by the contractual nature of the relationship between the charged member and the CIA, including the reasonable expectations of the members of the CIA.

[190] Of course, the PCB is free to choose its counsel. But if it decides to go for a Cadillac while a Chevrolet could do the job, is it reasonable to see in the contractual obligations of the charged member, should she/he lose, the obligation to assume the costs associated with such a choice?

[191] The Appeal Tribunal is also of the view that good faith in the exercise of their contractual rights is expected of both parties. Thus, if the charged member makes it necessary for the CIA to incur additional and otherwise avoidable costs, she/he should be expected to reimburse them.

[192] In other words, there is a contractual expectation that the CIA and its constituents will exercise in good faith their right to enforce discipline, including acting in reasonable and cost-efficient manner and a similar obligation on the charged member.

[193] No doubt the PCB enjoys broad discretion in the conduct of disciplinary proceedings before a DT which are, to a large extent, adversarial, including prosecutorial discretion. Withdrawing a count of the charge is part of that prosecutorial discretion.

[194] However, the Appeal Tribunal considers that it would be unfair to Mr. Dziadyk to order him to repay the legal fees incurred by the PCB in connection with a count that has been withdrawn (if kept and rejected by the DT, Mr. Dziadyk could not be expected to pay costs associated with it).

[195] Mr. Dziadyk made much of the fact that the PCB failed to disclose all the evidence in its possession, inculpatory or exculpatory, within the time frame provided in the Bylaws and this required the intervention of the DT more than once. An analysis of the invoice filed to support the claim for legal fees incurred by the PCB shows that a substantial amount of time was devoted to that issue by a team of lawyers to assist the PCB to counter the arguments of Mr. Dziadyk.

[196] Once more, the Appeal Tribunal considers that it would be unfair to Mr. Dziadyk to order him to repay the legal fees incurred by the PCB to prepare arguments in connection with its failure to meet the RPPDT requirements in matter of communication of the evidence. This requirement is part of the contractual undertakings of the CIA towards a member who has been charged of a breach of the Bylaws, RPC or standards of the CIA. Had the requirement been met, Mr. Dziadyk could not have complaint about it and seek a remedy.

[197] The analysis of the invoice of the counsel team also shows substantial time devoted to the scenario of no participation of Mr. Dziadyk in the hearing on guilt. Considering that such a scenario is not exceptional in disciplinary proceedings, the PCB and its counsel should have been familiar with it without the need to educate themselves. If it wasn’t the case, they are now ready, and it will be useful in the future. Thus, it’s not fair to Mr. Dziadyk to order him to repay for that.

[198] Furthermore, one cannot ignore that there was no precedent for a similar charge under Rule 1 and that there was an inherent ambiguity in Rule 8. In other words, the

PCB was looking for a precedent setting decision for the benefit of the whole profession in connection with two rules. In these circumstances, it would be unfair for the first member to be charged to assume the full cost of a process designed to send a message to all members of the CIA and to provide some certainty about the scope of Rules 1 and 8. Precedent setting in such a context should be considered to the benefit of the whole membership and thus to be assumed at least in part by it.

[199] Finally the DT didn't did not consider that, despite the important distinction in purpose between a fine and an order for costs, at the end of the day both amounts are paid to the CIA and benefit to it as stated at Bylaw 20.09(8):

> (5) When a decision of a Disciplinary Tribunal obliges a party to remit a sum of money for costs or a fine, or both, the Respondent must pay the amount in question to the Institute or the Institute must pay the amount in question to the Respondent within 10 days after the expiry of the period for appeal, provided no notice of appeal is filed, unless otherwise ordered by the Disciplinary Tribunal. Should the party fail to pay the amount within the specified period, said party shall be liable to interest charges, at the prime rate of the Institute's chartered bank or trust company plus two percentage points, as well as collection costs. If the party is a Fellow, Associate or Affiliate, said Fellow, Associate or Affiliate shall be automatically suspended from the Institute until such time as all amounts have been paid in full.

[200] In conclusion, while an order for costs remains largely discretionary, it was a reviewable error by the DT not to take into consideration the factors described above instead of relying on the principle applicable in civil proceedings in Ontario that the loser must generally pay the (reasonable) costs of the winning party.

[201] Had it done so, the DT wouldn't have awarded such a high amount for costs.

[202] Considering all these factors, the Appeal Tribunal is of the view that an amount for costs of $50,000 is sufficient here to cover the reasonable costs associated with the lack of collaboration of Mr. Dziadyk during the pre-hearing phase of the guilt process.

[203] With regard to this appeal, considering the results no costs will be awarded.

Conclusion

[204] **For these reasons, the Appeal Tribunal**:

- ALLOWS the appeal of Mr. Dziadyk as follows:

- SETS ASIDE the decision declaring Mr. Dziadyk guilty on the counts of breach of Rule 8 and Annotation 8-1 RPC and **DISMISSES** the two counts related to Rule 8 and Annotation 8-1 RPC;

- **DECLARES** Mr. Dziadyk guilty of various and intentional breaches of Rule 1;

- **ORDERS** a 24-month suspension of Mr. Dziadyk, if he gets reinstated to the CIA;

- **SETS ASIDE** the fine of $ 25,000.00 and **ORDERS** Mr. Dziadyk to pay a fine of $ 15,000.00;

- **SETS ASIDE** the award for costs of $200,000.00 and **ORDERS** Mr. Dziadyk to pay costs of $ 50,000.00;

- **ORDERS** Mr. Dziadyk to complete any professional practice requirements of the CIA for reinstatement should he seek such reinstatement;

- **ORDERS** that Mr. Dziadyk's reinstatement be also conditional upon the execution of the three conclusions above;

The whole without costs in appeal.

The Honourable Pierre J. Dalphond

For: Mr. William Solomon, F.S.A., F.C.I.A.

Mrs. Micheline Dionne, F.C.I.A.