Case No. 2011-3

CANADIAN INSTITUTE OF ACTUARIES

APPEAL TRIBUNAL

BETWEEN:

COMMITTEE ON PROFESSIONAL CONDUCT

-v.-

HARRY COHEN

Ottawa, December 11, 2015

DECISION ON APPEAL

[1] On September 11, 2015, the Committee on Professional Conduct (CPC) of the Canadian Institute of Actuaries (Institute) was granted leave to appeal from a decision of the Disciplinary Tribunal rendered after a pre-hearing conference.

[2] The decision authorizes Mr. Cohen to adduce evidence in support of his allegation that the disciplinary proceedings, which lead to the filling of a charge against him alleging his refusal to cooperate with the investigation ordered by the CPC, were initiated in retaliation for a report filed in a class action against life insurance companies. In other words, according to Mr. Cohen, the charge laid against him is an abuse of the process by the CPC.

[3] Counsel for CPC submits that the Disciplinary Tribunal then exceeded its jurisdiction according to the Bylaws. Moreover, it authorized the introduction of irrelevant facts. According to him, the decision must be reversed.

CONTEXT

[4] The Institute is a self-governing body incorporated by an act of Parliament "to establish, promote and maintain high standards of competence and conduct within the actuarial profession" (S.C. 1964-65, c. 76, s. 2). Its membership is open to qualified persons who, by joining, agrees to be bound by its Bylaws and various other rules and standards, including those contained in its *Rules of Professional Conduct*.

[5] Although the Institute is a private not for profit organization, it plays an important role in protecting the public. It is a major actor in regulating the professionalism of Canadian

actuaries and the way they fulfill various functions and tasks reserved to them by numerous federal and provincial acts and regulations.

[6] Pursuant to the Institute Bylaws, the CPC is constituted to "handle all disciplinary matters concerning its members and to provide them with counselling and education concerning disciplinary matters" (Bylaw 20.01(1)). Its mandate is two-fold: to receive general inquiries on the appropriateness of the Institute's standards and to deal with individual complaint or information regarding the practice of a member.

FACTUAL BACKGROUND

[7] Mr. Cohen, then an actuary member of the Institute, was one of the experts on behalf of the plaintiffs to support their claim for monetary remedy in two class actions initiated against London Life Insurance Company and the Great-West Life Assurance Company before the Ontario Superior Court of Justice, court files no. 46300CP and 47959CP. The classes were life insurance participating policy[1] holders seeking hundreds of million dollars of damages further to an acquisition, asset dispositions and a new mix of assets.

[8] Mr. Cohen wrote an expert report and testified at the trial held before Madam Justice Morissette of the Ontario Superior Court. In a judgment rendered on October 1, 2010, *Jeffery and Rudd* v. *London Life Insurance et al*, 2010 ONSC 4938, the judge granted about $400M to the classes.[2]

[9] In her judgment, Morissette J. expressed strong criticism of Mr. Cohen's work:

> *[298] Mr. Cohen was tendered as an expert in the life insurance industry, including the PATs, divided policies and practices, and how experience can benefit participating policyholders. Mr. Cohen is an actuary who has worked in the insurance field doe some time. He is not a qualified Certified Financial Analyst (CFA), nor is he an accountant. He has never held the position of A.A., nor has he been responsible for the management of a participating account portfolio.*
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> *[299] The evidence of Mr. Cohen was based on many errors and/or omissions and was fraught with opinions on matters without foundation and based on faulty assumptions. For example, Mr. Cohen purported to compare PAR account yields of LL, GWL and Manulife and Canada Life, but conceded that the figures used for Canada Life were dividend interest rates and not PAR account yields. Also, Mr. Cohen inaccurately portrayed different time periods or different companies. These are just a few examples of errors in his work which render his evidence unreliable.*
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> *(…)*

[1] Called PAR policies.
[2] In appeal, this amount was reduced to about $90M.

> *[306] Mr. Anson-Cartwright's second range was as a result of looking at those other companies which had maintained asset mixes more comparable to what GWL and LL had in the years prior to the acquisition. In cross-examination, Mr. Anson-Cartwright agreed that if those figures which he took from Mr. Cohen's report were incorrect, then his calculations would be wrong.*
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> *[307] As indicated earlier, Mr. Cohen's calculations were shown on numerous occasions to be incorrect by the cross-examiner. Accordingly, the evidence does not support the second range or the higher parameter of damages.*

[10] Made aware of these comments, the CPC designated a sub-group to carry a fact finding mission, initially consisting of Steven Eadie and Bob Howard.[3]

[11] On June 17, 2011, the sub-group interviewed Mr. Cohen. According to him, at the end of the call, Mr. Howard, the then President of the Institute, said: "Mr. Cohen we are going to get you". He affirmed that he complained about this comment to the next President and to some other members of the CPC, but to no avail.

[12] Mr. Cohen also contended that, in March 2010, his consultant's contract with Transamerica Life was terminated by Doug Brooks, allegedly in retaliation for his report in support of the class actions. Mr. Brooks was at the time and is still a member of the CPC; he assisted the sub-group.

[13] On April 4, 2013, further to the sub-group's report, the CPC decided to lay two complaints against Mr. Cohen (complaint A alleged breach of rules 1, 2 and 3 of the *Rules of Professional Conduct* in connection with his giving evidence in the Jeffery case; complaint B alleged a refusal to cooperate with the fact finding by the CPC contrary to rule 12 of the *Rules of Professional Conduct*). These complaints were referred to a two-person investigation team consisting of Messrs. Gershuni and Mathews.

[14] Respondent was notified of these decisions and offered the possibility to challenge the appointment of the two individuals designated by the CPC to carry the investigation. He did not avail itself of that option, though he informed the investigation team that he considered to have been threatened by a member of the CPC in a telephone call on June 17, 2011.

[15] In September and October 2013, the investigation team asked twice, in writing, Mr. Cohen to provide various documents, including his engagement letter and the damage reports filed with the Ontario Superior Court. In his response letters, Mr. Cohen affirmed that he was barred by a court order from providing the requested documents.[4]

[16] On December 1, 2013, Mr. Cohen resigned as a member of the Institute. This did not end the disciplinary proceedings since Bylaw 20.02(8) states that a person who ceases to be a member shall remain subject to the disciplinary jurisdiction of the CPC for the acts or omissions committed while being a member.

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[3] Mr. Howard was replaced by Micheline Dionne and subsequently she was replaced by Ian Karp.

[4] At the appeal hearing, counsel for Mr. Cohen provided a copy of a confidentiality order issued by the Ontario Superior Court of Justice on April 20, 2009.

[17] On December 9, 2013, the investigation team filed a first report with the CPC. It expressed that without the cooperation of Mr. Cohen, it could not conduct its investigation on the complaint for breach of rules 1, 2 and 3 and that Mr. Cohen had no legitimate reason to refuse to cooperate (Bylaw 20.03(5) and rule 12 of the *Rules of Professional Conduct*). The investigation team concluded that he had breached his duty to cooperate.

[18] In the meantime, many of the requested documents were finally retrieved through a search of the court public record, including transcripts of Mr. Cohen's testimony and cross-examination and his report. The investigation team analyzed them.

[19] In a second report dated January 16, 2014, the investigation team concluded that one of the three alleged breaches to the *Rules of Professional Conduct* was ill-founded and that it could not opine on the other two without the benefit of Mr. Cohen's explanations, who had refused a request for a face to face interview.

[20] On June 4, 2014, the CPC decided to lay one charge against Mr. Cohen, alleging that he had refused to collaborate with the investigation team appointed by it.

[21] On October 14, 2014, the CPC filed its statement of the facts underlying the charge.

[22] On January 15, 2015, an annotated version of the statement of the facts was filed by Mr. Cohen. It includes allegations of bias against Mr. Howard and Mr. Brooks, two members of the CPC involved in the initial fact gathering that led to the laying of complaints.

[23] On February 24, 2015, the CPC filed its pre-hearing brief.

[24] On March 30, 2015, Mr. Cohen filed its pre-hearing brief which included two issues related to an alleged bias in the CPC process.

[25] On April 14, 2015, a pre-hearing conference was held by the Disciplinary Tribunal.

[26] Mr. Cohen denied the charge affirming that he collaborated to the extent that it was possible considering the court orders and the instructions received from the lawyer acting for his clients. According to him, the charge was the result of a bias process instigated in retaliation for his support to the class actions against large insurances companies, comparing it to a malicious criminal proceeding. He added that considering his age, his health condition and his previous impeccable membership, his resignation from the Institute should have been the end of the matter. In other words, the CPC abused his discretion by laying a charge for refusal to cooperate against him before the Disciplinary Tribunal.

[27] Counsel for the CPC strongly denied any allegation of impropriety by the CPC or any of its members. In any case, this was not relevant to the mandate of the Disciplinary Tribunal which is limited to determine if Mr. Cohen effectively refused to cooperate with the investigation team. By permitting Mr. Cohen to try to adduce evidence in support of his allegation of bias, the Disciplinary Tribunal would not only authorize totally irrelevant evidence but would exceed its limited jurisdiction. Finally, counsel emphasized that the resulting hearing would not be timely and cost-efficient.

DECISION OF THE DISCIPLINARY TRIBUNAL

[28] On June 4, the Disciplinary Tribunal issued an interlocutory decision authorizing Mr. Cohen to present evidence to support his allegation of bias. According to the Disciplinary Tribunal, case law did not support the contention that such an allegation was irrelevant to the issues to be decided by it and it was part of a full and fair trial, even if it could result in a longer hearing.

[29] Relying on various cases, including the Manitoba Court of Appeal decision in *Histed* v. *Law Society of Manitoba*, 2006 MBCA 89, penned by Helper, J.A., the Disciplinary Tribunal wrote:

> *[32] Helper J.A.'s analysis starts with undisputed principle that all hearing bodies, even if they are purely administrative, owe a duty of fairness to those affected by their decisions. Bias or a reasonable apprehension of bias on the part of, or arising from the conduct of a member of an administrative body is a breach of the duty of fairness and is potentially prejudicial to an affected party. If, as the CPC submits, a reasonable apprehension of bias at the investigative stage is irrelevant, that should have been the end of the matter since the allegations in Mondesir clearly related to that stage.*
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> *[33] But according to Helper J.A. it is not the end of the matter because "a finding of irregularity at the inquiry stage does not necessarily result in the court's intervention in the administrative process". It is necessary for the court to decide whether the interest of the person prejudiced can adequately protected by the administrative scheme.*
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> *[34] At para. 27 of the reasons set out above she describes how the discipline committee can adequately protect Mr. Mondesir against the prejudice. That description contemplates that the committee is not limited to finding that the charge was proved or not (as the CPC submits is our sole function in this case) but it could also determine that "the referral to it was unwarranted." Helper J.A. does not explicitly describes the circumstance under which such a determination should be made. However the use of the word "or" suggests that it would be different from the situation where the charge was just not proved at the hearing but rather to a defect in the manner in which the charge was referred. In the context of the facts in Mondesir it is likely that she was referring to a case where the referral process was so tainted with bias that it was the only means available to cure the prejudice. It is obvious that such a determination could only be made if the tribunal heard evidence relevant to the allegation of bias.*
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> *(…)*
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> *[37] There is also another important distinction between the cases relied on by the CPC and the case before us. In those cases the impropriety and the resulting prejudice alleged, related to the manner in which the investigative body dealt with a complaint that ultimately resulted in the laying of a charge relating to that complaint, i.e. professional misconduct. In that situation the impropriety and prejudice could adequately be remedied by the tribunal in the manner*

described at para, 27 of Mondesir. Namely, by holding that the charge was unwarranted if the impropriety and prejudice alleged was proved. This would of course require the hearing of evidence relevant to the allegations of impropriety.

[38] In the present case however the Respondent's allegations relate to the manner in which a complaint of an alleged breach of Rule 1, 2 and 3 was instigated and investigated. But no charge was laid in respect of that complaint. Instead, he was charged with failing to cooperate with the CPC in the course of its investigation of a complaint that he claims was baseless and would not have been initiated or entertained but for the impropriety alleged. Consequently, he claims that he was prejudiced by being improperly asked to cooperate in the investigation of a specious complaint and then being charged for allegedly failing to do so. He submits that if he is able to establish that claim, the only way the Disciplinary Tribunal can adequately remedy the prejudice is to find that the laying of the charge was unwarranted, as it could have done had he been charged with a breach of Rule 1, 2 and 3.

[39] To deprive the Respondent of the opportunity to establish that claim would in our opinion, be an infringement of his right to a full and fair trial on the charge before us.

[40] Without the benefit of an evidentiary record, we find it is premature to rule on the CPC's submission that there is no factual basis for the Respondent's allegation of bias related to the charge of failing to cooperate or the submission that the matters described in paragraph. 27 of the CPC's written argument are inadmissible.

[41] Therefore, despite Mr. Aylwin's very capable argument we find that the Respondent is not precluded from adducing evidence at the hearing to support his allegation of impropriety.

[42] We are mindful that our decision may result in a longer hearing than it would, had we adopted the CPC's position, but the right to a full and fair trial must always prevail over expediency.

[Emphasis added]

[30] The CPC disagrees and wants the Appeal Tribunal to set aside this decision.[5]

ANALYSIS

I- The Mandate of the CPC

[31] To be credible a profession must have criteria for admission, *rules of professional conduct*, professional inspection, continuous education and an effective mechanism for the treatment of complaints against members.

[5] On June 12, 2015, before the CPC notice of appeal was filed, the Disciplinary Tribunal ordered the CPC to disclose to Mr. Cohen any document related to its treatment of the "information/complaint" laid by Mr. Cohen against Mr. Howard.

[32] The Bylaws of the Institute provide for quite an elaborate process for the treatment by the CPC of complaints or information related to a potential improper conduct by a member:

- Reception of a complaint alleging that a member has committed an offence or of any information concerning the conduct of a member (Bylaws 20.01(1); 20.02(1));

- Requiring additional information from complainant or informant (Bylaw 20.02(4));

- Seeking a response or explanation from the member (Bylaw 20.02(5));

- Determining the proper treatment that can be: i) to dismiss the complaint or information with or without a letter of advice to the member; ii) to refer the complaint to an investigation team; iii) to lay a complaint as a result of the information and referring it to an investigation team; iv) based on all the information obtained, to file a charge and proceed with private admonishment (Bylaws 20.02(6), (7), (8));

- If the matter has been referred to an investigation team, appointing no more than three persons to compose the team, none of which shall be a member of the board of the Institute (Bylaw 20.03);

- Receiving the report of the investigation team and providing to the member an opportunity to respond in writing to the report (Bylaw 20.03(2));

- After a review of the report and the response provided by the member, if any, deciding: i) to dismiss the complaint with or without a letter of advice to the member; ii) to file a charge and to proceed with a private admonishment; iii) to file a charge and to make a recommendation of a sanction to the member subject to an admission of guilt; iv) to file a charge and to refer it to the Disciplinary Tribunal (Bylaws 20.04, 20.05, 20.06).

[33] These stages and options represent a spectrum of consequences for the member ranging from less to more serious, the CPC having to choose the one most appropriate "having regard to the gravity of the matter and the interests of the public and the Institute". In other words, the Bylaws confer a substantial degree of discretion to the CPC.

[34] Thus the CPC plays a critical role to the protection of the public and the maintenance of high standards of professionalism by the members of the Institute. In fact, it is responsible to ensure that the Canadian actuaries act professionally in the discharge of their functions.

[35] Because the CPC is vested with substantial discretionary powers and can make decisions having a serious impact on a member, members of the CPC must refuse to participate in any matter in which they consider themselves to be in a position of conflict of interest (Bylaw 20.01(5)).

[36] Furthermore, a quorum of seven members of the CPC is required for the conduct of a vote to file a charge (Bylaw 20.01(2)).

[37] Obviously the process is meant to be serious and overall neutral, mindful of the important competing interests at stake, namely the protection of the public and avoidance of unjustified harm to a member (this is the reason why the deliberations of the CPC are confidential (Bylaw 20.01(7)).

[38] Finally, when a charge is filed before the Disciplinary Tribunal, the CPC instructs a counsel whose it has selected to conduct the prosecution (Bylaws 20.06(4), (10)).

II. The Importance of the Duty of Members to Cooperate

[39] A critical element to the process carried out by the CPC is the collection of as much as possible relevant information, including from the member concerned. Members must cooperate with the CPC, including an investigation team; failing to do so is an offence under Bylaw 20.03(5) (see also Rule 12 of the *Rules of Professional Conduct*).

[40] By refusing to answer questions or to provide documents, a member could prevent the CPC to carry out its public interest mandate. Accordingly, the Bylaws provide that a member must cooperate to any request from the CPC and failing to do so constitutes an offence. By adhering to the Institute, the member voluntary agrees to fulfill this fundamental obligation.

[41] Non-cooperation is in fact a serious offence because it compromised the ability of the CPC to fulfill its mission to protect the public.[6]

[42] This duty to cooperate is not unique to actuaries. In fact, it is common to all professions, irrespective of the fact that they are self-governing or state regulated (see for example, ss. 114 and 122 of the *Professional Code*, CQLR, c. C-26, for Quebec professionals governed by that Code).

[43] This means that a member must always collaborate even if he/she has concerns about any decision of the CPC leading to a fact gathering, to an investigation or to any other stage of the process.

[44] As counsel for the CPC puts it: "collaborate now and fight later". We agree with this principle.

[45] To conclude otherwise would mean that each time an investigated member considers that an investigation was wrongly ordered by the CPC, he/she could refuse to collaborate. This proposition in untenable as it would deprive the CPC of its ability to fulfill its mandate in an efficient way.

[6] *Investment Industry Regulatory Organization of Canada* v. *Séguin*, 2014 QCCA 247 (QC CA), at para. 14.

III. The Role and Functions of the Disciplinary Tribunal

[46] Counsel for the CPC is right to argue that one must distinguish between the investigative functions of the CPC, essentially administrative, and the role of the Disciplinary Tribunal that is purely adjudicative.

[47] He is also right to point out that the case law indicates that the Courts will not interfere with the disciplinary process, even when there is an allegation of bias by those who conducted the investigation, if there is a proper independent internal forum available to hear the charge (*Harelkin* v. *University of Regina,* [1979] 2 S.C.R. 561).

[48] A review of the current Bylaws of the Institute, in light of the reasons of the Manitoba Court of Appeal in *Turnbull et al.* v. *Canadian Institute of Actuaries et al.*, (1995), 107 Man. R. (2d) 63, leads firmly to the conclusion that they provide a comprehensive process to deal with charges against its members, including a neutral and independent Disciplinary Tribunal.

[49] This tribunal consists of three persons, two of whom are members of the Institute Tribunal Panel and one of whom is a retired judge (Bylaw 20.06(1)). It must provide a full and fair public trial to a member charged by hearing the parties, their legal counsel, and their witnesses and, of course, their arguments (Bylaw 20.06). In addition, the Disciplinary Tribunal has inquisitorial powers authorizing it to inquire into the relevant facts and to call any person to testify on such facts (Bylaw 20.06(10)).

[50] Its mandate is to decide, to the exclusion of any court or tribunal, whether or not the member charged is guilty of an offense (Bylaw 20.07(2)) and to impose on a member found guilty, the proper penalty (Bylaw 20.08). An appeal of its decisions can be made before the Appeal Tribunal, as of right or on leave (Bylaw 20.09).

[51] In this context, the Courts will generally not intervene until the administrative process is exhausted, even if the member charged alleges that the investigation leading to the laying of the charge was biased (*Histed*, supra).

[52] The parties seem to agree up to that point. However, they strongly disagree on the impact of a biased investigation process, should one be proven.

[53] Counsel for the Appellant argues that the mandate of the Disciplinary Tribunal is limited to determine if Mr. Cohen committed the alleged refusal to collaborate with the investigation team, a duty that must be complied with, irrespective of the reasons of the CPC to order such an investigation. Thus the allegations made by M. Cohen cannot be relevant because they cannot in any way excuse his refusal to collaborate. Furthermore, he submits that any impropriety that may have existed at the CPC stage will be corrected by the mere fact that the charge will be decided by a neutral and independent forum, the Disciplinary Tribunal.

[54] Counsel for Mr. Cohen responds that it is relevant since it could either provide a defense to his client or authorize the Disciplinary Tribunal to grant a proper remedy.

[55] Though it is true that the refusal to cooperate cannot be excused by the perception of bias by the investigated member, we don't see the jurisdiction of the Disciplinary Tribunal as narrowly defined as proposed by counsel for the CPC.

[56] First, the Disciplinary Tribunal clearly has jurisdiction on costs, including fees and expenses of legal counsel incurred in connection with the proceedings before it (Bylaw 20.07(7)). If for example, a charge was dismissed by the Disciplinary Tribunal, proof that the charge was laid following a bias process could certainly be relevant to decide if the charged member shall have his/her legal fees and expenses fully repaid.

[57] For the sake of a better understanding of this principle, we would refer to a purely hypothetical and extreme scenario. A member charged of an offense before the Disciplinary Tribunal finds out that the investigation team wrote a false report after having been bribed by a third party. Unaware of it and relying on the said report, the CPC laid a charge against the member. In such a case, we fail to see why these elements could not be presented to the Disciplinary Tribunal since they would be relevant not only to explain the dismissal of the charge, but to the awarding of costs and fees to the wrongly charged member (Bylaw 20.07(7)).

[58] Second, the Disciplinary Tribunal must have the inherent jurisdiction to render any order to preserve the integrity of the disciplinary process before it considering the exclusive jurisdiction vested upon it (Bylaw 20.07(2)).

[59] To illustrate that point, we shall refer to another hypothetical scenario. The CPC decides to lay a charge against a member instead of a private admonishment, as it is usually the case for a similar offense, because the member belongs to an ethnic community or had previously expressed critical views about the work of the CPC. In our opinion, such evidence could justify a stay of the charge by the Disciplinary Tribunal, if the laying of the charge was considered abusive in that context, to preserve the overall integrity of the disciplinary process.

[60] To hold otherwise, would mean that the parties will be invited to seek a relief in the Superior Courts, before, pending or after the proceedings before the Disciplinary Tribunal. This could result in delays, redundancy, contradictory decisions, additional substantive fees for the parties, *etc*.

[61] The better view is to hold, as the Manitoba Court of Appeal did in *Turnbull*, supra, that the Bylaws empower the Disciplinary Tribunal to entertain a jurisdictional challenge related to an allegation of bias or any similar ground.

[62] It follows that the Disciplinary Tribunal is empowered to grant the appropriate relief should it conclude that the investigation process was improper and that a full and fair hearing before it is not sufficient to cure the said impropriety. The Disciplinary Tribunal concluded that the reasoning of the Manitoba Court of Appeal decision in *Histed* v. *Law Society of Manitoba,* 2006 MBCA 89 suggested that. We agree.

[63] In other words, we should construe the mandate of the Disciplinary Tribunal as including the jurisdiction to review the circumstances surrounding the laying of a charge, when there are sufficient indicia of a potential abuse of the process that cannot be cured by a full and

fair hearing by it, a heavy burden that rests on the member against whom a charge has been laid.

[64] Incidentally, to hold that the existence of an impropriety authorizes a member to refuse to cooperate with an investigation team would mean that the said member would be *de facto* determining the proper remedy for the impropriety. This should be left to an independent forum, such as the Disciplinary Tribunal. It is another reason to exclude an apprehension of bias as an excuse for a lack of cooperation with the CPC.

IV. Application of these Principles to the Case at Bar

[65] There is no doubt that the comments about Mr. Cohen made by Madam Justice Morissette in her judgment released on October, 2010, once communicated to the CPC, commanded it to look at the matter. They constituted serious information about what appeared to be an improper conduct by a member of the Institute. Nowhere Mr. Cohen denies that.

[66] In 2011, the CPC initiated the first phase of the process by appointing two of its members to collect information. Mr. Cohen was contacted and it seems that he provided some explanations and comments but did not fully cooperate.

[67] It is during that period that he affirms that an initial member of the information team would have said: "Mr. Cohen, we are going to get you". In addition, a member of the CPC involved in the information gathering process is alleged to have previously terminated a consultant contract with Mr. Cohen allegedly in retaliation for his involvement in the class proceedings.

[68] Mr. Cohen sees in these two events, which remain to be proved, indicia that the CPC was not acting then and subsequently in a neutral way but instead was determined to punish him for his participation in the class actions against major life insurers.

[69] Further to the reception of a report from those who completed the informal investigation, of which, as a matter of fact Mr. Howard was no longer part, and against whom no specific allegation of bias were made, the CPC concluded that there was enough to lay two complaints against Mr. Cohen and to appoint an investigation team made of two of its members, none of which involved in the gathering of information conducted about two years before.

[70] Could in these circumstances the decisions to lay two complaints and to appoint an investigation team be further indicia that the members of the CPC acted in bad faith in the pursuit of a plan to punish Mr. Cohen for having acted against major life insurance companies two years before?

[71] Though this appears to us very doubtful, it remains a pure question of facts that is beyond the scope of review by this Appeal Tribunal and it must be left to the Disciplinary Tribunal.

[72] It is however worth noticing the lack of any allegation by Mr. Cohen specific to the conduct of the investigation team. As a matter of fact, in its January 16, 2014 report, the

investigation team concluded that the trial judge was wrong to say that Mr. Cohen was not qualified to opine on PAR policies and that there should be no charge laid in connection with rule 3 of the *Rules of Professional Conduct*. With regards to a potential breach of rules 1 and 2, the investigation team's report is very balanced and thorough. It tends to be favorable to Mr. Cohen. However, it is inconclusive because Mr. Cohen had refused to be interviewed. It is difficult to see in this report any sign of bias against Mr. Cohen.

[73] Further to the review of this second report, the CPC did not lay a charge against Mr. Cohen in connection with his conduct before the Superior Court.

[74] It remains that, according to the first report made by the investigation team in December 2013, Mr. Cohen had refused to collaborate with it. This is the only charge laid against Mr. Cohen by the CPC.

[75] Mr. Cohen does not deny his refusal to provide the requested information by the investigation team, but he initially submitted two arguments: i) he did not have to collaborate with a vitiated process and ii) he was, pursuant to a court order, under the obligation to refuse to provide the requested documents and information.

[76] For the reasons indicated above, the first argument is devoid of any merit.

[77] The second could possibly constitute a defense. But it requires first that Mr. Cohen establishes the existence of such an order and its scope. This requires some factual determination, not yet made, to be left to the Disciplinary Tribunal.

[78] In the pre-hearing phase of the Disciplinary Tribunal process and before us, counsel for Mr. Cohen has raised a third argument: the CPC was acting throughout in bad faith, including when it decided to lay a charge against his client for refusal to cooperate. According to him, this amounts to an abuse of the process and calls for a remedy by the Disciplinary Tribunal. Thus he should be entitled to adduce evidence to demonstrate it.

[79] The Disciplinary Tribunal decided that it should not prevent Mr. Cohen to attempt to prove that. It added that the "right to a full and fair trial must always prevail over efficiency".

[80] Though we agree with the latter principle, it should be said that the decision of the Disciplinary Tribunal to authorize a charged member to attempt to prove an alleged abuse of the disciplinary process by members of the CPC must rest on the factual conclusion that there is an air of reality to the allegation.

[81] In the case at bar, one may dispute the existence of such an air of reality considering that the charge laid against Mr. Cohen is related to an indisputable fact, the refusal to cooperate with the investigation team and to no more. But it remains a factual conclusion, thus beyond the scope of review by this Appeal Tribunal.

[82] In these circumstances, we feel necessary to add that the decision of the Disciplinary Tribunal is not a license to conduct a fishing expedition in the inner workings of the CPC. The Disciplinary Tribunal shall manage that aspect of the file closely to prevent it.

[83] Considering the whole context of this case and the mitigated success of both sides, the Appeal Tribunal is of the view that each party should support its costs and expenses.

[84] Finally, considering the principles outlined above, the Appeal Tribunal invites the parties to consider retaining a mediator prior to a hearing at the merit before the Disciplinary Tribunal (Bylaw 20.06(3.1)).

CONCLUSION

[85] For these reasons, the appeal is dismissed without costs.

The Honourable Pierre J. Dalphond
Chairperson

(s) Pierre J. Dalphond

Mr. William Solomon, Fellow

(s) Bill Solomon

Mr. Allan Shapira, Fellow

(s) Allan Shapira