CANADIAN INSTITUTE OF ACTUARIES

DISCIPLINARY TRIBUNAL

In the matter of charges laid against Mr. Gordon M. Hall

Before: **The Honourable Patrick T. Galligan, Q.C. (Chair)**
Nancy A. Yake, F.C.I.A.
William B. Solomon, F.C.I.A.

Heard at Toronto: **December 16 and 18, 2009 and**
January 4, 5 and 6, 2010

Counsel:

Richard H. Steinecke and Rebecca Durcan
for the Committee on Professional Conduct

V. Ross Morrison
for Gordon M. Hall

DECISION

The Committee on Professional Conduct ("C.P.C.") of the Canadian Institute of Actuaries ("C.I.A.") has filed, against Gordon M. Hall, a three-count charge sheet alleging breach of Rules of Professional Conduct. The counts contained in the charge sheet read as follows:

Mr. Hall:

1. failed to act in a manner to uphold the reputation of the actuarial profession, contrary to Rule 1 of the current Rules of Professional Conduct;

2. performed professional services without being qualified to do so and without meeting applicable qualifications standards (including Section 1440 of the Standards of Practice), contrary to Rule 2 of the current Rules of Professional Conduct; and

3. failed to ensure that professional services performed by him met applicable Standards of Practice (namely, Section 4150 of the Standards of Practice), contrary to Rule 3 of the current Rules of Professional Conduct.

Overview

The charges against Mr. Hall arise out of a prosecution brought by the Financial Services Commission of Ontario ("FSCO") against J. Melvin Norton and Aon Consulting Inc. The prosecution, as against Aon Consulting Inc., was quashed. The prosecution proceeded to trial only against Mr. Norton. The substance of the charges against Mr. Norton was that, in preparing actuarial valuation reports with respect to two pension plans, he failed to use asset valuation methods which were consistent with accepted actuarial practice. FSCO retained Mr. Hall to provide a report containing his professional actuarial opinion about whether Mr. Norton had complied with accepted actuarial practice in his preparation of the actuarial valuation reports.

Mr. Hall's opinion was that Mr. Norton had not complied with accepted actuarial practice. He delivered an actuarial report, dated July 25, 2005, expressing that opinion.

Mr. Hall's report was the only evidence on the actuarial issue which was put before the court. After examining, in detail, how Mr. Hall prepared his report, Mr. Hall's communications with FSCO, his enquiries within the profession, the fact that he had his report peer-reviewed and certain comments made by Mr. Hall, the trial judge concluded that Mr Hall's report lacked the appearance of objectivity which an expert's opinion must have. The trial judge declined, therefore, to attach any significant weight to the report. The result was that the trial judge dismissed the charges against Mr. Norton.

The Decision in *Queen v. Norton*

The trial judge made strong findings with respect to Mr. Hall. Mr. Hall was a witness in the prosecution against Mr. Norton. However, he was not a party to that proceeding. The two parties to that proceeding were FSCO, representing the Crown, and Mr. Norton. The findings made by the trial judge are binding upon them. Those findings are not binding upon this disciplinary tribunal. It is our responsibility to examine the evidence in this hearing independently and decide the case against Mr. Hall in accordance with our findings upon the evidence.

The Credibility of Gordon M. Hall

We have before us Mr. Hall's report and the transcript of his cross-examination by counsel for the defence in the *Norton* case. We also had the opportunity to see him and hear him

as he testified in our presence. We note that the trial judge, in the *Norton* case, did not have that opportunity. Because of the way in which the case was presented to him, the trial judge did not see Mr. Hall nor did he hear him as he testified. The trial judge was limited to the use of the report and the transcript of Mr. Hall's testimony.

On findings of fact and credibility, appellate courts consistently recognize the advantage of a judge who has seen and heard a witness testify over a judge or judges who only have available to them the printed transcript of the witness' testimony.

Mr. Hall testified before us at length. He was subjected to an extensive and searching cross-examination. Like most credible witnesses his answers were not always models of consistency and clarity. Nevertheless, he impressed us as a man of integrity, and this impression was confirmed by the testimony of the expert witnesses called by the defence.

This is not a case where everything turns upon the resolution of conflicts between the testimony of different witnesses. Thus, the advantage of the judge who hears and sees a witness is not as important as it is in some cases. Nevertheless, when conduct, which might be capable of more than one interpretation, is assessed we think that it is important to keep in mind that the person involved is someone of integrity. Conduct which might appear questionable, in the absence of integrity, may be seen as innocuous when done by someone known to have integrity.

The Issue in the *Norton* Case

Mr. Hall was asked by FSCO to give his professional actuarial opinion about the asset valuation method which Mr. Norton used in preparing his actuarial valuation reports. There is no dispute about what he did. In reporting upon the value of the assets in the pension plans, Mr. Norton adopted a smoothing method. As part of his smoothing method, he double counted a significant portion of the assets of the plans. That gave a distorted picture of the plans' values. There were very serious consequences.

Analysis and Decision

At the opening of these reasons for our decision, we set out the three counts in the charge of professional misconduct which are made against Mr. Hall. We propose to address the counts in an order different than the order set out in the charge sheet.

Count 2

For ease of reference, we set out Count 2 again.

Mr. Hall:

2. performed professional services without being qualified to do so and without meeting applicable qualifications standards (including Section 1440 of the Standards of Practice), contrary to Rule 2 of the current Rules of Professional Conduct

Rule 2 of the Rules of Professional Conduct reads as follows:

A member shall perform *professional services* only when the member is qualified to do so and meets applicable qualification standards.

Count 2 refers to section 1440 of the Standards of Practice. Section 1440 of the Standards of Practice reads as follows:

> 1440 General Knowledge
>
> .01 *The actuary should have adequate knowledge of the conditions in the practice area in which he or she is working.* [Effective December 1, 2002]
>
> .02 The relevant conditions may include legislation, accounting, taxation, the financial markets, family law, and court practices. The relevant legislation depends on the engagement, and may include legislation governing securities, pensions, insurance, workers' compensation, and employment standards.

As drafted, Count 2 charges Mr. Hall with two things. The first, contrary to Rule 2, is that he was not qualified to form the actuarial opinion, provide the actuarial report and testify with respect to the actuarial issues contained in that report. Mr. Hall was engaged by FSCO as a pension expert. A review of the evidence is unnecessary because it shows, conclusively, that not only was Mr. Hall qualified to act as a pension expert, he was very highly qualified to do so. Mr. Malcolm Hamilton, a distinguished actuary of high repute, testified that there are few actuaries in the profession who "are more qualified than Gord Hall in the area of pensions".

The terms of Mr. Hall's engagement by FSCO also required that he testify with respect to his report. We think, therefore, that he should have been familiar with the relevant standards of practice for actuarial evidence work. While Mr. Hall may not have been an actuarial evidence expert, he took steps to become familiar with the relevant standards of practice in that practice area. He referred to the relevant actuarial evidence standards of practice in his report and in his discussions. He reviewed parts of these standards with CIA legal counsel. He also selected a

peer reviewer, Mr. David Brown, who is an expert in the relevant parts of the actuarial evidence practice area. In our opinion, Mr. Hall took appropriate steps and he became familiar with the relevant standards of practice for actuarial evidence work.

The second thing that Count 2 alleges is that Mr. Hall did not have adequate knowledge of court practices in order to undertake the work. No standard of practice has been shown to us which specifies the degree of knowledge of court practices which an actuary must have before he/she can undertake to provide a report to a court. No evidence has been placed before us to show how Mr. Hall's alleged lack of knowledge of court practices had any detrimental impact on the parties involved.

The evidence shows that Mr. Hall was highly qualified to give an actuarial opinion upon the work of Mr. Norton. The evidence does not show any standard of practice, or accepted actuarial practice respecting the degree of knowledge of court practices which Mr. Hall was required to meet. The evidence does not show how Mr. Hall's alleged lack of knowledge of court practices had any detrimental impact on the parties involved. This part of the charge is so vague that no person should be required to respond to it.

The charge contained in Count 2 must fail. It is dismissed.

Count 3

For ease of reference, we set Count 3 again.

Mr. Hall:

3. failed to ensure that professional services performed by him met applicable Standards of Practice (namely, Section 4150 of the Standards of Practice), contrary to Rule 3 of the current Rules of Professional Conduct.

Rule 3 of the Rules of Professional Conduct reads as follows:

A member shall ensure that *professional services* performed by or under the direction of the member meet applicable standards of practice.

This count specifically alleges a breach of section 4150 of Practice-Specific Standards for Actuarial Evidence. That Standard reads as follows:

4150

.01 *The actuary's testimony should be objective and responsive.* [Effective January 1, 2004]

.02 The actuary's role as an expert witness in court is to assist the court in its search for truth and justice, and the actuary is not to be an advocate for one side of the matter in dispute.

.03 In the course of testifying before the court, the actuary would

present a balanced view of the factors surrounding the actuarial aspect of the questions put to him or her,

answer all the questions that are asked on the basis of his or her own best assessment of all the relevant factors, and

apply best efforts to ensure that the testimony is clear, complete, that the information the actuary is providing will not be misunderstood or misinterpreted and that the audience will be able to use it correctly.

.04 When responding to a direct question relating to any error or shortcoming the actuary perceives in the report of another actuary or expert witness, the actuary would respond candidly, notwithstanding paragraph 41605.

For completeness, we have quoted section 4150.04. However, in our view, its provisions do not bear upon the facts and circumstances of this case.

We note, and emphasize, that the standard deals specifically, and only, with the actuary's testimony in court. In the *Norton* case, counsel for FSCO and defence counsel agreed that Mr. Hall's actuarial report would constitute his evidence in chief and that defence would cross-examine him orally. Thus, Mr. Hall's testimony was his report and his cross-examination. While his cross-examination was lengthy and aggressive, very little of it was directed to the substance and quality of his professional actuarial opinion. The actuarial evidence was substantially that found in his written report. We have concluded, therefore, that we must examine his report to see whether in that report any breach of section 4150 is demonstrated.

A fair reading of the report shows, beyond any doubt, that it is both objective and responsive to the actuarial issue which was presented to him (section 4150.01). Our examination of the report, as a whole, has failed to disclose one word, one phrase or one grouping of words which could give any impression that Mr. Hall was advocating either side of the case. Moreover, the report clearly shows that the actuarial issue was explained to all readers in a clear and impartial manner (section 4150.02).

Section 4150.03 governs the manner in which an actuary must answer questions posed to him/her. We take from its wording that the standard is concerned with how, as a witness, an actuary must deal with questions relating to the actuarial aspects of the case. A reading of the cross-examination shows that there was very little interest in, or challenge to, the actuarial

aspects of Mr. Hall's report. The major exception was when he was asked to agree with counsel that asset smoothing was not necessarily inconsistent with accepted actuarial practice. However, the heart of Mr. Hall's opinion was that double counting of assets as part of asset smoothing was not consistent with acceptable actuarial practice. He was not questioned on that actuarial aspect of his report. He was not challenged on it.

When a charge puts in jeopardy a person's right to be a member of a profession or puts in jeopardy a professional person's reputation in his/her profession, the prosecution is held to a degree of particularity in the case it advances against that person. The C.P.C. has charged Mr. Hall with a breach of a specific standard of practice. That standard effectively requires an actuary, when testifying in court, to be objective, responsive and non-adversarial. It also specifies how an actuary must respond to questions relating to actuarial aspects of the case.

Our review of Mr. Hall's report convinces us that it was objective, responsive and that it did not advocate either side of the case. Moreover the questions asked by counsel in cross-examination were so minimally related to the key actuarial aspects of the case that we are satisfied that Mr. Hall complied with the requirements of section 4150.03.

We have concluded that Mr. Hall has complied with the provisions of section 4150. It follows that the charge in Count 3 must be and is dismissed.

Count 1

For ease of reference, we set out Count 1 again.

Mr. Hall:

> 1. failed to act in a manner to uphold the reputation of the actuarial profession, contrary to Rule 1 of the current Rules of Professional Conduct;

Rule 1 provides:

> A member shall act honestly, with integrity and competence, and in a manner to fulfil the profession's responsibility to the public and to uphold the reputation of the actuarial profession.

It should be noted that the charge alleges that Mr. Hall failed to uphold the reputation of the actuarial profession. There is no allegation that he failed to fulfil any of the other responsibilities which Rule 1 imposes upon actuaries. Indeed, our review of the evidence has demonstrated to us that, throughout, he acted with honesty, integrity and competence.

The case for the C.P.C. was summarized by its counsel at the opening of the hearing.

> ... This is actually a simple case. The sole issue is did Mr. Hall meet his duty of neutrality, impartiality and fairness when acting as an expert witness in the prosecution of Mr. Mel Norton in Provincial Offences Court. Mr. Justice Bassel dismissed the case against Mr. Norton on the basis that Mr. Hall's appearance of lack of neutrality, impartiality and fairness prevented the Court from putting any weight on that opinion.

We start by observing that this disciplinary tribunal has no right to comment on the decision reached by the trial judge. It would be gratuitous for us to indicate whether we agree or disagree with his decision. We are obliged to act upon the impression which the whole of the evidence has made upon us, uninfluenced by the impression which evidence in the *Norton* case may have had upon someone else. It is our responsibility to come to our own conclusion based

upon the facts before us and decide the only issue which is before us. That issue is whether Mr. Hall was guilty of the specific professional misconduct which is alleged against him.

While, in his opening, counsel for the C.P.C. said that the sole issue before us was whether Mr. Hall met his duty of neutrality, impartiality and fairness "when acting as an expert witness", the essence of the case for the C.P.C. was that, in what he did outside of his court testimony, he gave the appearance that he lacked neutrality, impartiality and fairness. We will address that contention.

Before doing so, at the risk of being somewhat repetitious of what we said in relation to Count 3, we return to Mr. Hall's report. It was his testimony in chief. That report, on its face, is a model of neutrality, impartiality and fairness. Thus, his direct evidence in the *Norton* case was neutral, impartial and fair. His opinion that double counting of assets, when smoothing asset values for solvency valuation purposes, is not accepted actuarial practice has never been challenged. There is no evidence that his opinion has ever been doubted.

There is evidence before us, which we accept, that his professional actuarial opinion was a correct one.

Malcolm Hamilton testified:

> ... I don't think there's any question that what Mel Norton did was bad practice. I think all actuaries could have quickly concluded that what Mel did was bad practice ....

Mr. Hall's peer reviewer, David Brown, testified that the double counting was not appropriate. The heart of Mr. Hall's actuarial report was that what Mr. Norton had done was wrong. From an actuarial perspective, Mr. Hall's opinion was correct. It is correct beyond reasonable actuarial challenge. His evidence to the court, his report, was not only correct; it was presented to the court in neutral, impartial and fair language.

We have already quoted Practice-Specific Standards section 4150. Its requirements are very similar to the law that applies to all expert witnesses who testify in judicial proceedings. That law is summarized in the recent Superior Court decision, *Frazer and Smith v. Haukioja* (August 27, 2008). At paragraph 141, the following appears:

> In England and also in Canada, courts have identified and applied several factors relevant to the receipt of expert evidence including:
>
> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ....
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise .... An expert witness ... should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumptions upon which his [or her] opinion is based. He [or she] should not omit to consider material facts which could detract from his [or her] concluded opinion ....
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.
>
> 5. If an expert's opinion is not properly researched because he [or she] considers [there to be] ... insufficient data ... available, then this must be stated with an indication that the opinion is no more than a provisional one .... In cases where an expert witness who

> has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ....
>
> [Footnotes omitted]

There are two of those factors which require examination in this case. They are factors 1 and 2. There can be no doubt that Mr. Hall complied with factor 3. His report sets out the undisputed facts upon which his opinion was based. There was never any doubt that Mr. Norton double counted certain assets. There were no facts which Mr. Hall could have considered which could have detracted from his opinion. Factors 4 and 5 are not pertinent to this case.

Before discussing factors 1 and 2, we will refer to some of the conduct, which the C.P.C. contends affected the appearance of objectivity of Mr. Hall's evidence. The evidence of that conduct is extensive. However, we do not intend to review it or analyze in any detail. The evidence deals with his use of and communications with his peer reviewer; his communications with various committee chairs of the C.I.A. and with its counsel; his communications with FSCO's chief actuary, George Ma, and its counsel, Deborah McPhail, and the nature and tenor of those communications; changes in the report as it went through a series of four drafts; comments by Mr. Hall upon the course of the litigation and his hope that the C.I.A. might intervene in it.

On August 9, 2005, within a few days after Mr. Hall's report was delivered to defence counsel, they asked FSCO to make disclosure of the prosecution's case. One of the requests for disclosure related to the preparation of Mr. Hall's report. The following is that request:

> All documents related to the expert report of Gordon Hall. We require copies of all correspondence exchanged between FSCO or Crown counsel and Mr. Hall with respect to his retainer and the preparation of his expert report. This would include, at a minimum, copies of any retainer letter by which he was engaged, any instructions provided to him, all background documents and other materials provided to him, any notes of meetings in which Mr. Hall participated, as well as copies of his notes, working papers and drafts. Also, if Mr. Hall's expert report was the subject of a peer review, we require copies of all documents related to that peer review, including notes, working papers, drafts and correspondence exchanged between Mr. Hall and the other people involved in the peer review.

The defence was clearly entitled to all of that material. See *R. v. Friskie*, [2001] S.J. No. 216 (Prov. Ct.). Ultimately, months later and just before the date scheduled for Mr. Hall's cross-examination, FSCO did make the disclosure requested. That disclosure included all of the e-mail communications between Mr. Hall and FSCO.

We would make no comment about FSCO's delay in making timely, as well as full, disclosure if it were not for one fact. There was an innuendo throughout the trial of the *Queen and Norton* that, somehow, Mr. Hall was responsible for the delay and for the unfavourable impression which the delay cast upon FSCO's case. That innuendo became an explicit suggestion during submissions made by FSCO's counsel to the trial judge. She said:

> ... It's all what I would refer to as collateral issues and at the end of the day <u>his initial lack of full disclosure</u> doesn't affect the substance of his report and the substance of his conclusions.
>
> [Emphasis added]

Prosecution disclosure in the case of *Queen v. Norton* is really irrelevant to the issues which we have to decide. However, in fairness to Mr. Hall's good name and integrity, we must

say something. First, in this case FSCO was representing the Crown. The legal obligation to make full and timely disclosure to the defence rested solely on the Crown, and thus upon FSCO. That obligation never ended and it never shifted. Second, and far more important, Mr. Hall, with FSCO's knowledge, kept FSCO fully in the picture as he worked on his report. He contemporaneously told FSCO about his communications with C.I.A. officials, who they were and the substance of his discussions with them. He told FSCO that he had had his drafts peer-reviewed and that his peer reviewer was David Brown. The retaining agreement between FSCO and Mr. Hall required that Mr. Hall have his report peer-reviewed. Mr. Hall told FSCO that he received suggestions from Mr. Brown and incorporated some of them into his work. His communications with Mr. Brown were available and would have been given to FSCO if it had asked for them. Very importantly, of course, FSCO was a party to all of the communications, and there were many of them, between it and Mr. Hall. All of this information was either in FSCO's possession, or readily available to it, before it received the defence request for disclosure on August 9, 2005.

We have heard conflicting testimony about whether Mr. Hall knew about defence counsel's disclosure request to FSCO. Based on the evidence presented, we must conclude that Mr. Hall knew nothing about FSCO's decision to resist and delay disclosure. He knew nothing about the disclosure issue and was not consulted about it until mid March 2006 just prior to the date scheduled for his cross-examination. Thus, we feel bound to say that any innuendo, suggestion, allegation or finding anywhere in the record of *Queen v. Norton*, that Mr. Hall was in any way responsible for, or implicated in, the late disclosure by the Crown is unjust and is patently unfair to him.

The evidence, upon which the C.P.C. bases its contention that Mr. Hall lost the appearance of being neutral, impartial and fair, is found in the material provided on disclosure by FSCO in fulfilment of its duty to disclose. There is good reason why such evidence is relevant and admissible at a trial. The reason is that it may show that, in fact, the expert was not being neutral, impartial and fair in the presentation of his/her opinion. The jurisprudence is reviewed by Madam Justice Gillese in *Conciecao Farms against Zenaca* (2006), 82 O.R. (3d) 229 (Ont. CA in Chambers). The evidence is made available to the defence to enable the court to assess whether instructions or information "affected the objectivity and reliability of the expert's opinion". The evidence is also relevant to enable opposing counsel to explore with an expert whether the expert changed his/her opinion from draft to draft "and, if so, why?". In the *Queen v. Stone,* [1999] 2 S.C.R. 290, judges of the Supreme Court of Canada, in reference to expert opinions, have stated that the opposing party must be given access to the foundations of such opinions to test them adequately.

The purpose of such evidence is not to explore whether the process looked nice, it is to see whether there is good reason to doubt the value of the opinion. One judge has, pithily if rather crudely, observed that the reason why the evidence of circumstances surrounding the creation of an expert opinion is important is to ensure that an expert opinion is not bought.

It is well to remember, when considering all of the circumstances surrounding the creation of Mr. Hall's report, that when a person is to give an expert opinion that person does not cease being a human being. All human beings have their personal preconceptions, biases,

whether recognized or subconscious, and personal opinions on many matters. Because an expert has personal views or concerns, that person is not disqualified to give a professional opinion upon a matter within his/her field of expertise. What the expert must do is put aside personal views and opinions, and express only an objective professional opinion. If the expert is able to, and does do that, there is no bar to the opinion being acted upon by a court.

We return to factors 1 and 2 which were set out in the *Frazer* case. For ease of reference, we will repeat them.

Factor 1 reads:

> Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ....

When we consider this factor, we keep in mind that the opinion which Mr. Hall formed was an unassailable one. He formed that opinion and clearly expressed it before he first put pen to paper to begin working on his first draft. The heart of his opinion was the professional inappropriateness of what Mr. Norton did. Mr. Hall never varied from that opinion.

There is no question that FSCO's senior actuary, George Ma, and Mr. Hall had, at one time, been colleagues at an actuarial firm and that they held one another in high professional regard. It is almost a slur on both of them to contemplate that one would seek to improperly influence the other and that the other might accede to that influence. It should be no surprise that they agreed with each other's opinion about the inappropriateness of Mr. Norton's professional conduct. It was an opinion with which no one disagrees.

Practice-Specific Standard 4150.03, among other things, requires an actuary to apply best efforts to ensure that his/her testimony, in this case Mr. Hall's report, is clear, complete and that the information which the actuary is providing will not be misunderstood, or misinterpreted, and that the audience will be able to use it correctly. In the light of that obligation, Mr. Hall's frequent communication with Mr. Ma and FSCO's counsel does not appear to us to be sinister. It appears to us that Mr. Hall sought their input into how he could best explain his opinion in his report. Malcolm Hamilton testified that this was "a tough report to write". He said it was a tough report to write because, while the inappropriateness of Mr. Norton's double counting was beyond question, at the time, there were no standards of practice which bore on asset smoothing in relation to pensions. It was entirely reasonable, therefore, that he would seek help in the expression of his opinion so that it would not be misunderstood or misinterpreted.

It obviously would have been better had he sought help from persons other than Mr. Ma and FSCO's counsel. Some of the language which Mr. Hall used in his communications with FSCO could have been better chosen so that his real objectivity would not have been obscured. However, in the circumstances of this case, where his core opinion was independent and never changed, and, where that opinion was obviously correct, we are not prepared to say that in the context of the whole case that his opinion could have given the appearance of being other than independent and uninfluenced by any improper consideration. While the suggestion that Mr. Hall got too close to FSCO is not without merit, on balance we are satisfied that his opinion was completely independent and should be seen as such.

The onus of proof in this case rests upon the C.P.C. It is a significant onus. We are not satisfied that the C.P.C. has satisfied its onus to establish that Mr. Hall's report did not meet the requirements of Factor 1.

Factor 2 reads:

> An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise .... An expert witness ... should never assume the role of an advocate.

We have no hesitation in finding, on the evidence, that Mr. Hall provided independent assistance to the Court and that his report was an unbiased one. The only issue that Factor 2 raises is whether Mr. Hall assumed the role of an advocate for FSCO. In his report, which we have said constituted his evidence in chief, he clearly did not.

It is contended that, because of a number of his communications with FSCO and its counsel, because of a number of things he said, and because of some of the issues he raised, he became part of the prosecution team and, thus, became an advocate. What must be kept in mind is that he never played the role of an advocate to the court. In that respect, this case differs materially from such cases as *Aegon Canada Inc. et al. v. ING Canada Inc. et al.* (2003), CanLII 943 (Ont. S.C.). In *Aegon* there was a difference of actuarial opinion. The trial judge found that the two actuaries on one side of the case "stepped over the line between actuarial practice and legal interpretation". He found an element of legal advocacy present "which does not become an expert's testimony". He chose to accept the evidence of the opposing actuary because:

> He directly addresses the actual issue before me in terms of actuarial practice, leaving the advocacy to the advocates and the legal interpretations to the court.

None of the conduct which was criticized in *Aegon* occurred in the *Norton* case. Mr. Hall did nothing but express objectively his professional actuarial opinion.

In communications with FSCO, Mr. Hall expressed interest in the litigation and was anxious to know how it would develop and what positions might be taken by the defence. He also expressed concern about the consideration which the C.I.A. should give to the issue and to the litigation. There was some unfortunate choice of language but his conduct was a far cry from advocating a position to the court.

At their worst, some of the language in his communications with FSCO can be seen as showing that he was personally concerned about the outcome of the litigation and was personally concerned about the effect that conduct, such as Mr. Norton's, could have upon his profession. Mr. Hall was as entitled as was anyone else to have personal opinions about those issues. What he, as an expert witness, could not do, and in our opinion did not do, was carry his personal opinions into his professional actuarial opinion.

Mr. Hall worked his report through four drafts until he finalized it. As would be expected he made some changes. Many of them were minor. Some have been said to be important. We think that it is a matter of actuarial opinion as to whether or not they were important. Some of his changes were suggested by his peer reviewer, David Brown. Some were suggested by

Mr. Ma and Ms. McPhail. What is crystal clear, from a review of all of the communications, is that he formed his crucial opinion independently and objectively. It is also clear that from the time he formed his crucial opinion until he delivered his final report he did not change that opinion.

Doubtless, there are cases where changes in a report, through the drafting stage, could indicate that the expert has uncertainty about the validity of his/her expert opinion. There could be changes which might lead to a fair inference that the expert's opinion had been affected by some untoward influence. In such cases, the changes would require minute examination.

In this case the communications reveal nothing of the sort. This disciplinary tribunal is not here to preside over a debate among actuaries about whether the report would have been better of worse if S.O.P. 5.01 had been put in or left out. We are here to decide whether the essence of Mr. Hall's report was neutral, impartial and fair, and to see whether there are appearances which would suggest otherwise.

We have concluded that, notwithstanding some actuarial debate during the drafting process about whether something should be in or not in the report, there is nothing which would give the appearance that the heart or, as Mr. Brown puts it, the guts of Mr. Hall's report was other than neutral, impartial and fair.

While the C.P.C. does not rely upon Mr. Hall's use of a peer reviewer as evidence of professional misconduct, much was said about it in the *Norton* case. We just say a word about it.

Peer review is accepted actuarial practice in the actuarial profession. In his testimony, Malcolm Hamilton testified as follows:

> Q. And when you do prepare a report for filing with the court, do you generally have it peer-reviewed?
>
> A. I'll always have it be peer-reviewed. Yeah, Mercer doesn't let important, or at least we're not suppose to let important documents out the door without a peer review.
>
> Q. And when you do have your report peer-reviewed, have there been occasions where you have used comments or input of the peer reviewer, incorporated those comments or input into your report?
>
> A. Yes.

The use of a peer reviewer and the incorporation of input from him into Mr. Hall's report was proper professional conduct which could not give an appearance of impropriety.

In the course of his work, under the retainer from FSCO to provide his opinion, Mr. Hall spoke to the chairpersons of three committees of the C.I.A. and to its legal counsel. He did so because, at the time, smoothing was not dealt with in pension standards nor in education notes. This was eminently reasonable research and, in our view, cannot give any appearance of impacting upon the independence and objectivity of his report.

At this hearing, during the cross-examination of Mr. Hall, counsel for C.P.C. referred Mr. Hall to three specific passages from his testimony in the *Norton* case. We understand that his purpose in doing so was to demonstrate that Mr. Hall was an evasive witness. In fact, these three passages illustrate the lack of focus on the key issues by the defence counsel, as well as by Mr. Hall. We will refer to the three extracts, but will only quote one of them.

The first extract begins at p. 54 of the transcript (Exhibit 4, Book 2, Tab 3). In it counsel for Mr. Norton sought to have Mr. Hall agree with his interpretation of what Mr. Ma had said to him in one of their communications. Mr. Hall declined to agree with counsel's interpretation of Mr. Ma's words and said, in effect, that Mr. Ma's words spoke for themselves. We would have thought that Mr. Hall's response should have ended the matter. Nevertheless, counsel persisted, for another 3-1/2 pages of transcript, in his attempt to get Mr. Hall to agree with his interpretation of Mr. Ma's words. The exchange came to an end when Mr. Hall said, "You'd have to ask Mr. Ma." The exchange appears to us to be largely irrelevant. One can only wonder what the sparring match was intended to prove.

The third extract appears at pp. 119-20 of the transcript. It seems to us to an equally irrelevant exchange about whether and for how long Mr. Hall and David Brown were on a first-name basis. The purpose of the line of questioning escapes us.

The second extract bears quoting in full. It is found at pp. 96-98 of the transcript:

> Q. I'm going to suggest to you that your decision not to disclose any of your sources from the CIA, from Mr. Ma or Mr. Brown was a deliberate decision on your choice – on your part? Isn't that right, Mr. Hall?
>
> A. What do you mean by a deliberate decision?
>
> Q. You don't know what a deliberate decision is? You're an ex –
>
> A. It's my report.
>
> Q. You do not, excuse me, you do not as experienced actuary, with your biography, understand what the word deliberate means? Is that your evidence?
>
> A. It's a conscious decision –
>
> Q. Is that your evidence, that you don't understand what the word means?
>
> A. No, that's not my ....
>
> Q. 'Cause you knew exactly what I was asking you, didn't you, Mr. Hall? I'm going to count the seconds until the question's answered.

A. You might want to repeat your question.
Q. It was a deliberate decision on your part not to include the fact that you had used as source of your report, Mr. George Ma, Mr. David Brown, or any of the Chairs of the CIA, or legal counsel, Tina Hobday, that was a deliberate decision on your part, wasn't it, Mr. Hall? Wasn't it?
A. I'm prepared to say it's a conscious decision that I didn't reference any of these sources that I spoke with.
Q. Right. And it was a conscious decision, I'm going to suggest to you, because you knew, if you did, defence lawyers like me would be asking for that material and you didn't want us to have it? Isn't that right, Mr. Hall?
A. No, that's not true.

That extract starts with defence counsel quibbling with Mr. Hall about whether Mr. Hall's decision not to name certain persons in his report was a "deliberate" one or a "conscious" one. How it could have made any difference is beyond us. The words have much the same meaning and defence counsel did finally accept Mr. Hall's word "conscious".

There are, however, two very serious aspects of the exchange. The first is, that counsel implied to Mr. Hall that he was under some obligation to state in his report that he had communicated with Mr. Ma, Mr. Brown, the C.I.A. chairs and Ms. Hobday. That implication was wrong. There was no duty imposed upon Mr. Hall to set out, in his report, the persons with whom he communicated in connection with its preparation. There is no standard of practice which requires this type of disclosure in an actuarial report. Nor is there any accepted actuarial practice requiring the disclosure, in the report, of persons with whom the actuary has communicated. An experienced actuary, Patrick Flanagan, testified that it is not necessary to name the peer reviewer in an actuarial report.

There are three essential requirements of all expert reports. There must be a clear statement of the facts and assumptions upon which the expert's opinion is based. There must be a clear statement of the expert's opinion. And there must be an explanation of why the expert holds the opinion which he/she has expressed. Mr. Hall's report fulfilled each of those requirements.

The circumstances giving rise to an expert's report will determine how much detail will be necessary to meet the three requirements. The factual situation upon which an expert is asked to opine may be a very complex one. In such a case, the outline of the facts upon which the expert is going to express an opinion may have to be set out at length and in considerable detail. If there is a dispute as to what the facts are, the report must clearly set out which of them the expert is relying upon to found his/her opinion.

This case is a unique one. There is no dispute about the facts. Nor is there any dispute about the correctness of the opinion. In most cases, there will be a difference of expert opinion. In those cases, the report should identify any conflicting opinion and explain why the author does not agree with it.

The circumstances upon which expert opinions are sought are many and varied. Those circumstances will determine what is required to fulfil the essential requirements of an expert's report. One thing is clear. There was neither professional nor legal obligation upon Mr. Hall to disclose, in his report, that he had consulted or communicated with Mr. Ma, Mr. Brown, the chairs of the C.I.A. committees or with Ms. Hobday.

There was, however, a clear duty upon FSCO to make timely and complete disclosure of all of that information to the defence. The penultimate question asked by counsel for Mr. Norton conflated the responsibility of Mr. Hall, as the author of the report, with the Crown's obligation to disclose. He then insidiously implied that Mr. Hall was in breach of some obligation which, in fact, was non-existent. As counsel's last question shows, the implication was used to set up the last question which was manifestly intended to impeach Mr. Hall's personal and professional integrity.

The last question is what is called a suggestive question. At one time, the rule was that it was improper to ask such a question unless counsel had evidence available to support the allegation made in the question. Unfortunately, the rigours of that rule have in recent times been somewhat relaxed. Defence counsel's question suggests that Mr. Hall attempted to hide something from him which it was his duty to disclose. There was, as we stated above, no duty to mention those persons in his report. Most importantly, however, there was no evidence to suggest that Mr. Hall ever tried to hide his communications with those persons from anyone. The question amounts to nothing more than a craftily designed slur upon a descent man's character. The other nefarious thing about those questions is that they contribute to the omnipresent innuendo, throughout the *Norton* case, that Mr. Hall was the cause of, or implicated in, FSCO's late disclosure of relevant information to the defence.

C.P.C. introduced those three extracts from Mr. Hall's cross-examination at trial, presumably, to show that he was professionally deficient as a witness. The exchanges do not

reflect particularly well on either defence counsel or Mr. Hall. Given these circumstances we cannot conclude that, as a witness, he was professionally deficient. What the second extract shows is that he was unfairly maligned.

We do not intend to discuss, any further, the circumstances surrounding what Mr. Hall said and did from the time he was retained until his report was actually filed as part of the court record. We have considered it all. We think it obvious that Mr. Hall got too close to FSCO for comfort. He talked to FSCO too much. He said some injudicious things. We keep in mind, however, the purpose for which that evidence could be used. It was to determine whether the opinion expressed by the expert was, or appeared to be, other than neutral, impartial and fair. Mr. Hall's failings, if they were such, resulted from his professional desire to make his report as complete and comprehensible as possible, and to arrive at the truth.

It is also important to look at his conduct in the context of the result of his work. That result was a report which is fair, objective and unquestionably correct. That is the appearance which his report gives. We have decided that none of the conduct of Mr. Hall, which has been so rigorously examined, taken individually or collectively, could justify us in coming to the conclusion that his professional actuarial opinion either was, or appeared to be, anything other than neutral, impartial and fair.

The case against Mr. Hall has never called into question his competence, integrity or the quality of his actuarial work and report. It is all about appearance. Counsel for C.P.C. said that process is important, because if a process is bad the result may be bad. That is a correct

statement. But it is not correct to go further and hold that because there are some flaws in a process, which arrives at an obviously correct result, that result should be rejected. Objective truth does have a role to play in the administration of justice. There were some missteps and flaws in the process which arrived at Mr. Hall's report dated July 25, 2005. If we were to say that those missteps and flaws should lead to Mr. Hall being found guilty of professional misconduct, we would be allowing form to triumph over substance. That we are not prepared to do.

It follows that the charge in Count 1 is not substantiated. It must fail. That charge is dismissed.

A Final Observation

This has been a public hearing. All of the evidence before us can be examined by members of the public. The Investigation Team Report ("the ITR") and the submissions of defence counsel to the trial judge are part of the hearing record. Paragraph 3.3.4 of the ITR sets out ten scandalous allegations made about Mr. Hall by Mr. Norton's defence counsel in his submissions to the trial judge. We will not repeat them because we do not want to spread the defamation any further. In fairness to Mr. Hall, a man of integrity and good repute, we feel that we must address them.

We have reviewed the record in *Queen v. Norton* and we have had substantial additional materials placed before us. In all of that, there is no evidence which would lend any support to any one of those allegations. They are unfounded. They are unjust and unfair to a good man.

Result

The result of our deliberations is, that all charges against Gordon M. Hall are dismissed.

We reserve the jurisdiction conferred upon us by By-Law Section 20.07(7).

Dated at Toronto, this 2nd day of February 2010.

The Honourable Patrick T. Galligan, Q.C

Nancy A. Yake

William B. Solomon

CANADIAN INSTITUTE OF ACTUARIES
DISCIPLINARY TRIBUNAL

THE HONOURABLE PATRICK T. GALLIGAN, Q.C. (Chair)
NANCY A. YAKE, F.C.I.A.
WILLIAM B. SOLOMON, F.C.I.A.

____day, May ____, 2010

CANADIAN INSTITUTE OF ACTUARIES

v.

GORDON M. HALL

ORDER ON COSTS

FURTHER TO the Decision of the Disciplinary Tribunal dated February 2, 2010, and CIA By-Law, Section 20.07(7), and the consent filed by the parties,

1. THIS DISCIPLINARY TRIBUNAL ORDERS that the Committee on Professional Conduct pay to Gordon M. Hall, all of the fees and expenses, including applicable taxes, of his legal counsel incurred to commence and complete these proceedings in the amount of $139,688.71.

2. THIS DISCIPLINARY TRIBUNAL ORDERS that the Committee on Professional Conduct remit the $139,688.71 to counsel for Gordon M. Hall, in trust, forthwith upon the making of this Order.

P K Galligan

THE HONOURABLE PATRICK T. GALLIGAN, Q.C.

NANCY A. YAKE, F.C.I.A.

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[illegible], Q.C. (Chair) ___ day, May , 2010

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