

APRIL 4, 2024
MADE

SEALING APRIL 5, 2024

AABS File Number: "23-015662/AABS"

BETWEEN:

Kevin Alexander McLean

APPLICANT/APPE
LLANT

AND:

TD Insurance Meloche Monnex (Security National Insurance Company)

RESPON
DENT

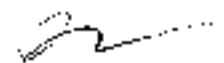
Re (APPEAL): In a matter of an **Appeal** (also defined as "Appeal") by the **Appellant** (also defined as "Applicant") under the *Insurance Act*, RSO (1990, c. I.8 et seq (the "*Insurance Act*") in the above noted AABS Claim Number, (also defined as "Proceeding")

Re (SABS): In a matter under the following regulations: 9) SABS and (10) Reg. 664 (by contextual reference without seeking any penalties or interest as no payment is sought under SABS by virtue of being a **Preliminary Motion or Jurisdictional Motion**)

Re. NOM #6: COI Disqualification Application ("COI Application").

- (i) various known individuals: (i) Andrew Papadimitropoulos (also known as "Andy Gera" and defined as the "**Divorced Husband Conflicted Lawyer**" or "Conflicted Lawyer"); (ii) Mr. David Karat ("Karat" or the "ADR Representative" or "ADRR"), (iii) Mr. Nieuwland ("Non-Respondent Representative"); (iv) Ms. Moraes (legal assistant to Ms. Klukowska and Ms. Saeed) and to the extent Ms. Klukowska and/or Ms. Saeed were required to have "effective control" over Ms. Moraes (as a non-licensee), (v) Ms. Klukowska and (v) Ms. Saeed; and
- (ii) unknown individuals
- (a) who are associated or affiliated with the **Conflicted Lawyer**;
 - (b) supervised, managed, or assigned tasks or functions by the Conflicted Lawyer;
 - (c) instructed or advised by the Conflicted Lawyer;
 - (d) Non-licensees who operate in the same premises as the Conflicted Lawyer and jointly provide services with the Conflicted Lawyer (i.e. on a regular basis);

- from any further handling of any the TD Claim Numbers, this **SNIC Proceeding** herein and any future LAT proceedings and consequential relief



APPLICANT/APPELLANT

Mr. Kevin A. McLean (B.A., J.D. CIM)

Self-Represented

410-775 King Street West,
Toronto, Ontario, M5V 2K4

Telephone 647.513.1270

Email ~~la@confidential@mclean.ca~~

mclean.k@tdinsurance.com

**RESPONDENT (NOT A PARTY^{iii iv})
(Purported SNIC Response)
Security National Insurance
Company (RESPONDENT)**

Unlicensed Non-Exempt Representative
("Non-Exempt Non-Licensee"): Mr.
David Karat, "ADR Specialist"

111 McNabb Street (no unit number)
Markham, Ontario, L3B 4H8
(t)

877 855-3767

E-mail or fax: *none listed in the Purported
SNIC Response*

**COUNSEL FOR A NON-RESPONDENT
AND NON-PARTY by way of the Purported
Newland DOR**

Legal Representative for TD General
Insurance Company ("TDGI")
Mr. Matthew Nieuwland, Barrister and
Solicitor with the LSO (LSO No. 71045A in
"private practice" with "TD Insurance Staff
Legal")

Email in Nieuwland DOR Non-Respondent
matthew.nieuwland@tdinsurance.com

AND TO:

Andrew Papadimitropoulos
LSO Licensee
Employed - Practising Law at TD Insurance
Located at SNIC Markham
101 McNabb Street,
Markham, Ontario
(e):
andrew.papadimitropoulos@tdinsurance.com

AND TO:

✓

Michelle Moraes
Michelle.moraes@tdinsurance.com

Legal assistant to Ms. Klukowska and Ms.
Saeed

TD Insurance Staff Legal
66 Wellington West, Toronto, Ontario

AND HER SUPERVISING LAWYERS

Ms. Adrianna Klukowska
66 Wellington West, Toronto, Ontario
Adrianna.klukowska@tdinsurance.com

Ms. Saeed
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Hearing Record Index:

Highly relevant pages, evidence and passages are highlighted, annotated, and emphasized for ease of reference of the served individuals and persons along with LAT

Date: April 4, 2024

Volume #1: NOM and Schedule "A"

1. Notice of Motion form, executed by the Appellant ("Moving Party") (SEE: pages 1 to 2),
2. Schedule "A" (SEE: page 3)

Volume #2: Sworn or Affirmed Evidence

3. Affidavit #15 of Applicant of April 2, 2024 (SEE: pages 4 to 113)
 - a. Served on the interested individuals on April 3, 2024

Volume #3(A): Authorities

Volume #3(A): Legislation Conflict of Interest Principles: General

4. *Law Society Act*, RSO 1990, c. L.8 et seq ("LSA"), sections 1 to 25.1
 - i. (SEE: pages 114 to 121),
5. *Talisman Resort GP Inc. v. Keyser, Uslung et al*, 2013 ONSC 1901, per Conlan J. [*"Talisman Resort"*]
 - a. (SEE: pages 122 to 132)
6. *Yellow Cedar v. Di Torio*, 2020 ONSC 5915, per Lemay J. [*"Yellow Cedar"*]
 - a. (SEE: pages 133 to 142)
 - i. citing *MacDonald Estate v. Martin*
7. *LSO By-Law 7: Business Entities* (SEE: pages 143 to 149)
 - a. made by the LSO on May 1, 2007 et seq (amendments and editorial changes with the last amendment being on February 15, 2021) with a focus on:
 - i. Part III. (Multi-Discipline Practices): sections 15 to 19; 27 to 30); and
 - ii. Part IV (Affiliations): sections 31 to 32.
8. *LSO By-Law 2.1: Operational Obligations and Responsibilities* made on October 25, 2007 (SEE: pages 151 to 157)
 - a. Part I: Supervision of Assigned Tasks and Functions, sections 1 to 6
9. *Rules Of Professional Conduct (Lawyer Licenses)* of the LSO, Chapter 3, "Relationship to Clients"
 - a. (SEE: pages 158 to 168),

Volume #3(B): COI: If a licensee or representative may be a witness at any future hearings

10. *Esso (Township) v. Guergiv; Monbery v. Hill*, 1993 CanLJ11 8756 (ON SCDC) [*"Esso"*]
 - a. (SEE: pages 169 to 179)



Volume #3(C): COI:

LAT Authorities

Volume #3(C)(I): Obligations of an insurer in *SABS* matters and **counsel** in receipt of SPI, confidential information, personal health information, private information, private affairs

11. *Personal Insurance Company v. Jia*, 2020 ONSC 6361 ["Jia"] per Justices Corbett, Ducharme, and Gomery of the Ontario Divisional Court
 - a. (SEE: pages 180 to 184);
12. *Wakeling v Desjardins General Insurance Group Inc.*, 2020 ONSC 6809 ["Wakeling"]; Paragraphs 63 to 71:
 - a. (SEE: pages 185 to 186)

Volume #3(C)(II): Power extends to **disqualification of counsel** but unlikely adjusters (but perhaps herein)"

13. *Mansuri v Dominion of Canada General Insurance Company*, 2022 CanLII 138547 ["Mansuri"]; per Vice Chair McGee
 - a. (SEE: pages 187 to 197)

Volume #3(D): Prohibition of signatures of non-lawyers in "business arrangements": what was permitted and what was not? A Historical Perspective

14. *Barnett, Re*, 1997 CanLII 851 (ON LST) ["Barnett"]
 - a. (SEE: pages 198 to 200 (select pages)
 - i. Focus is on the "old commentary under Rule 16" which was 3.11) when there were **only** lawyers and "non-lawyers"
 1. (nota bene: Non-lawyer licensees are not permitted to even sign correspondence UNLESS of a "routine administrative nature")

Volume #3(F): The Legislative Changes in 2006 by the Omnibus Bill under the *Access to Justice Act, 2006*

15. *Caruso v. The Law Society of Ontario*", 2023 ONSC 6744 ["Caruso"]; per Justices Backhouse, Corbett, and Charney of the Ontario Superior Court Divisional Court)
 - a. (SEE: pages. 201 to 219)

Volume #3(G): Signature in the modern day technological world

16. *Electronic Commerce Act*, 2000, SO 2000, c 17, s. 1 to 11
 - a. (SEE: pages 221 to 223)
17. *Felton Brushes Limited v. Atlantis Properties Hamilton Inc.*, 2020 ONSC 2315 ["Felton Brushes"]



- a. (SEE: pages 224 to 226);

Volume #3(J): LAT cannot condone violations of the LSA and its By-Laws

18. *Dankha v Intact Insurance Company*, 2023 CanLII 62892: Vice-Chair McTee
a. (SEE: pages 227 to 230)

Volume #3(K): Precedent from excluding ADR Representatives (not "claims adjusters" per se) from filings on behalf of insurance companies

19. *Moser v Belair Direct Insurance Company*, 2022 CanLII 11164: Vice-Chair Maedel
a. (SEE: pages 231 to 234)

Volume #3(L) Improperly constituted pleadings: dishonest conduct, Irremediable conduct: abuse of process;

20. *Chandrarajah vs. Economical Insurance*, 2024 CanLII 10566 ["Chandrarajah"]:
Adjudicator Jarda
a. (SEE: pages 235 to 240)

Volume #3(M) Why having properly appointed counsel for the underwriter is important

21. *Eskandari v. Raizman* 2023 ONSC 1674 ["Raizman"]: Associate Justice Todd Robinson
a. (SEE: pages 241 to 246)

Volume #3(N) LSO cases regarding licensees:

- (i) facilitating unauthorized practice or failing to prevent unauthorized practice;
- (ii) conflicts of interest;
- (iii) Abuse of process;
- (iv) Admission of evidence from other sources; and
- (v) Conduct towards ex-spouses (whether separated or divorced)

22. *Law Society of Ontario v. Collins*, 2021 ONLSTH 177["Collins"]:
a. (SEE: pages 247 to 251)
23. *Law Society of Ontario v. Sherman*, 2024 ONLSTH 26 ["Sherman"]
a. (SEE: pages 252 to 267)
24. *Law Society of Ontario v. Fudgeh*, 2020 ONLSTH 75 ["Fudgeh"], paragraphs 1 to 3; 90 to 92
a. (SEE: pages 268 to 270)

Volume #3(M) Additional Authorities: secondary source, contextual et al

25. **OPCC Bulletin**, "Interpretation Bulletin: Sensitive Information", issued in May 2022
(SEE: <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal->

[information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_10_sensible/](#)

a. SEE pages 271-278)

26. *By-Law #4* (Licensing) of the LSO made on May 1, 2007, Part I (Classes of License), section 1 to 6, Part IV (Not Practising Law Or Providing Legal Services), and Part V (Providing Legal Services Without A License), Part VI (Practising Law Without a Licence), section 35

a. (see pages 279 to 289),

27. Article by Howie, Sacks & Henry LLP (Personal Injury Law), “*Comparison Chart of Old and New LAT Rules*” issued in 2023

a. (see: pages 290 to 318),

28. Article by **Lawyers’ Insurance Association of Nova Scotia**, “**#1 – Conflict of Interest**” (see: (SEE: pages 319 to 337)

a. *Citing the following:*

i. *CNR v. McKercher*, 2013 SCC 39:

1. there cannot be a summary and unexpected dropping of a client⁵⁰¹ to circumvent conflict rules;
2. Law Society rules considered important public policy statements;
3. Bright Line Rule: does not apply to condone tactical abuses

ii. *Sun v. Shaw*, 2013 BCSC 532: disqualification turns on whether confidential information was disclosed in a manner that was used against one in a prejudicial manner

1. (*nota bene: consent is an agreement and misrepresentations (by omission or commission) vitiate consent*)

iii. *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, Binnie J (for the majority) held that the test to show conflict of interest is the possibility of adverse impact (not probability):

1. (*nota bene* however, the burden to demonstrate that the perception of a conflict of interest exists is the civil standard which is a balance of probabilities);

iv. *MacDonald Estate v. Martin*, 1990 CanLII 42

1. The legal test is whether a reasonably informed person would be satisfied NO USE of confidential information would occur

a. *Did the lawyer receive confidential information attributable to the solicitor-client relationship at hand?*

b. *Is there a risk that it will be used to the client's prejudice?*

v. *IMB v. MIB*, 2003 MBWB 146: family law litigation is emotionally charged and parties are particularly vulnerable

1. (*nota bene*: a separation and divorce between the **Divorced Husband Conflicted Lawyer** and the primary policyholder herein is a matter that the Tribunal can take judicial notice of, under section 15 of the SPPA, that would cause the handling of this LAT File to render said Conflicted Lawyer in such a conflict that there

is the appearance of a conflict of interest ("**Reasonably Perceived Conflict**"):

v. *Mariangeli v. Mariangeli* [2004] OJ 3082 (Ont. Sup. Ct.).

1. Strong inference lawyers who work together share confidences especially in "law groups" even if "internal confidentiality screens" are in place.
2. Retained lawyers (in-house are on a constant and indefinite retainer), on prior matters, must rebut inference confidential information was exchanged.
 - a. High burden to rebut
 - b. Counsel should not argue himself or herself,
 - c. Counsel must swear affidavits that no confidential information was exchange within group (nota bene: Herein, it would be within the MDP (if exists) or between affiliated entity and Conflicted Lawyer, between TD Insurance (Staff Legal) and TD Insurance (SNIC Markham and SNIC Burlington).

vi. *Montreal Trust Company of Canada v. Basinview Village Ltd.*, 1995 CanLII 4247 (NSCA) it is unethical for a lawyer to represent a client in defending a matter where the

1. Lawyer,
2. His partner, or
3. ANYONE with whom the lawyer was ASSOCIATED HAD represented
 - a. opposing party

vii. Lawyer as a witness:

1. *Brogan v. Bank of Montreal*, 2013 NSSC 76 if a lawyer may be a witness, it is a conflict for the lawyer to represent a party to a proceeding:
 - a. (NOTA BENE: it is where the "local rules" (the "LSA", the "LSO By-Laws", "RIPC Lawyers", "RIPC Paralegals", "LSO guidelines" and "LSO Policies" are instrumental in that section 1(7), passed by the Legislature, pursuant to the Access To Justice Act, 2006, is unambiguous that if any person makes EVEN the determinations of which documents to use, where to file and/or serve them, when to file and/or serve them, (see (7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following **SHALL BE CONSIDERED** to be representing a person in a proceeding. (a) Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when,



where or how to serve or file a document. . . (c) Engaging in any other conduct necessary to the conduct of the proceeding.)

- i. *(nota bene: It is where the "cover letter of "TD MM SNIC" is fatal to the Conflicted Lawyer Divorced Husband in that Mr. Karat signs (not merely files which is stated in the Response form utilized by Mr. Karat for SNIC) the Purported SNIC Response but does NOT sign the cover letter. Mr. Karat also emails the Appellant WITHOUT Mr. Nieuwland copied when Mr. Nieuwland was copied on the January 23, 2024 email and Mr. Nieuwland is conveniently out of the office from January 24, 2024 to January 29, 2024, and then Ms. Morales (not the now known Ms. Ortiz, the authentic and actual legal assistant to Mr. Nieuwland) is delivering a "FOIR" for Mr. Nieuwland with an electronic Adobe certificate on January 30, 2024. Neither Ms. Persaud nor Ms. Nurse were referenced in the cover letter but Mr. Karat was referenced. Mr. Nieuwland was not referenced as a contact in the Purported SNIC Response or the cover letter. Ironically, it is the PIPEDA response that was, in fact, authored by "Andy Gera" also known as Andrew Papadimitropoulos (defined herein as "Divorced Husband (Conflicted Lawyer") that provides more evidence of an actual conflict of interest as the Appellant referenced it in his Appeal.*
- ii. **APPLICABILITY HEREIN:** whether a lawyer licensee is "ON THE RECORD" or representing a person in a proceeding in a covert, secretive and clandestine manner is of legal consequence under section 1(7) of the LPA as if there is the appearance of a conflict of interest for his or her clandestine and "behind the scenes" representation of a party (which is likely more common with in-house counsel who act more from "behind the scenes" and may never be known), said lawyer can no longer engage in any representation of a party in a proceeding. Irrespective of which lawyer is a "mouthpiece" or the "barrister" (considering the antiquated division between a solicitor preparing a case and the barrister speaking to the matter in hearings or at

trial), those who are associated or affiliated with the conflicted lawyer are all subject to disqualification.

2.

29. Affidavit #3 of the Applicant made on October 31, 2021 with Exhibit "A", pages 555 to 557 (Re letter dated April 20, 2023 with an alleged signature of Ms. Alisha Anne Nurse inscribed as "As per A. Nurse" with initials above that are indecipherable

a (see: pages 338 to 340)

i. Nota bene: TD Insurance MM (SNIC) is using the incorrect address for LAT as correct address is: 15 Grosvenor St Ground Floor, Toronto, ON M7A 2G6; appears to be a pattern for TD SNIC of utilizing antiquated forms, rules, procedures and methods).

Volume #4: Written Submissions for Motion (Attached to Notice of Motion Form: see: supra)

30. Written submission of the Appellant (Moving Party) on this COI Disqualification Motion pursuant to the SPPA, LAT Act, New LAT Rules and LAT practice directions

"Automobile Accident Benefits Service (AABS) Claim" means an application to the LAT pursuant to s. 28(2) of the Insurance Act seeking resolution of a dispute involving statutory accident benefits

Please see: New LAT Rules or "LAT Rules", R. 2.1 and 2.2 for interchangeability between Appellant and Applicant
See: HR Index Tab 13, page 283

See: Party means a person (SNIC) which is a corporation who has the right to participate in the Proceeding (which is not disputed) but neither the Purported SNIC Response or Nieuwland EXOR notified the Tribunal of SNIC's intention to participate as the Purported SNIC Response was unauthorized and in contravention of section 84 of the L.A. section 28 of the SPPA and potentially the ECA (subject to review of the signature of Mr. Karat)

See: HR Index, Tab 4, page 120 and 121

*Ms. Nurse (SNIC Markham) and Ms. Persaud (SNIC Burlington) if the adjusters were supervised, managed, instructed or assigned by the **Conflicted Lawyer** or **Conflicted Consequence Manager**, *nota bene*: pursuant to By-Law 7, Part IV (Affiliations), section 32 (Ownership Of Practice, etc.): Conflicted Lawyer and Nurse (non-licensed professional claims adjuster) delivering services jointly from the same premises at 101 McNabb Street, Markham, Ontario (Nurse then replaced by Persaud and change of premises from SNIC Markham to SNIC Burlington in Summer of 2021 *nota bene* #2: the Purported SNIC Response then reverts back to address of SNIC Markham for the sole authorized signature of Karat for SNIC. Whether Karat (an unlicensed representative could file but not sign, as for NOM #5, but he had to be supervised by a lawyer licensee by a lawyer licensee which could not have been Mr. Nieuwland as he was away from his premises and out of office from January 24, 2024 to January 29, 2024. *Nota bene* #3: Ms. Persaud is also a non-licensed who may fall under "affiliated entity" (one or more persons none of whom are licensed or otherwise authorized to provide legal services in or outside Ontario) but it does not preclude a finding that Conflicted Ex-Husband Lawyer was affiliating with Ms. Persaud with her non-licensed services with respect to her letters and replies to the Insured Person herein (also known as the Appellant)

*Proposed interveners were: College Of Immigration and Citizenship Consultants; and Ontario Paralegal Association



¹¹ This COI Disqualification Motion seeks novel findings of law (expressly or by implication) as it relates to in-house counsel for insurance companies as to whether said counsel may engage in a variety of "ruses", "baiting and switching", "the appearance of not being involved when non-homesees are the conduits



TAB #1


Important Information

- You must complete all sections of this form and attach additional information and/or documents as required. Supporting submissions must not exceed 6 double-spaced pages exclusive of evidence and authorities. Submissions must be 12 point, Arial or Times New Roman font, with 1.5 inch margins.
- The processing of your Notice of Motion could be delayed if information or documents are missing.
- Please review Rule 15 for the requirements to file a motion.

Tribunal File No.: 23-015662/AABS

Name and Contact Information of Party making this Motion

Last Name McLean	First Name Kevin	Middle Initial A.

Name of Party

Applicant (or "Moving Party") (Mr. Kevin A. McLean (B.A., J.D., CIM))

Address:

Street Number 775	Street Name King Street West	Unit Number 410	PO Box
Municipality (City, town) Toronto		Province Ontario	Postal Code M5V 2K3
Telephone Number (647) 513-1270	Fax Number	Email Address mcleansniclat@gmail.com	

I am the (check one):

☒ Applicant ☐ Respondent ☐ Added Party

☐ I have attached a copy of the order or decision this motion relates to, if any.

Details about the Motion

Describe in detail what remedy are you seeking. Please indicate if the motion is being made with the consent of the other parties.

WITHOUT CONSENT of the other party(ies)

Generally, seeking orders of disqualification of various lawyer licensees, ADR Specialist, and support staff from handling the herein matters of the Appellant in this SNIC Proceeding and the TD Insurance Claim Number #3.

(for specific form of the orders (due to lack of space herein herein), please see schedule "A")

Please indicate the evidence and authorities you intend to rely on in support of the motion:

Evidence

✓ Affidavit #15 of the Applicant (made on April 2, 2024)

✓ Affidavit #3 of the Applicant (made on October 31, 2023), Exhibit "A", pages 555 to 557

See tab 29

at hearing
recently

Authorities (see: Hearing Record Index)

Please indicate the proposed motion hearing format:

☐ Electronically ☐ In-Person ☒ In Writing

Please advise if you wish to have the motion hearing heard at the Next Scheduled Event:

☒ No ☐ Yes, if so:

Date of Next Scheduled Event (yyyy/mm/dd)

Expedited hearing request will be made

Acknowledgement

Read carefully then check each box to confirm the statement and sign and date the form.

- ☐ I have completed all pages of this form and attached all the required documentation. I understand that if I submit an incomplete form or do not attach required documents, my motion may not be processed.
- ☒ I have served a copy of this Notice of Motion and all additional attached documents on all other parties to the appeal and where applicable, on the person who issued the order/decision/proposal that is the subject of my appeal. I have attached a completed 'Certificate of Service' to this form as proof of service of the documents. (Blank 'Certificate of Service' forms are available on the Tribunal's website at tribunalsontario.ca/fat/.)

Signature

Last Name

McLean

First Name

Kevin

Signature of Party or Representative

Date (yyyy/mm/dd)

2024/04/03

The Licence Appeal Tribunal collects the personal information requested on this form under section 3 of the Licence Appeal Tribunal Act, 1999. This information will be used to determine appeals under this Act. After an appeal is filed, all information may become available to the public. Any questions about this collection may be directed to the Licence Appeal Tribunal at 416-326-1356 or toll-free at 1-888-444-0240.

Tab 2

2025-01-01

Tab 3

This is the 15th Affidavit of Kevin A. McLean under TD's Claim Number 035325790-3 (the "Claim Number" or "TD Claim #3"). TD Insurance Policy Number #001013511806 (the "Policy Number"). LAT File Number "23-015662/AABS" (the "LAT File Number" or "LAT Proceeding") and was finalized and made on April 2, 2024.

BETWEEN

KEVIN ALEXANDER MCLEAN

APPLICANT/APPELLANT

AND

TD INSURANCE MELOCHIE MONNEX (SECURITY NATIONAL INSURANCE COMPANY)

RESPONDENT

Affidavit #15 of Kevin A. McLean

In a matter under the *Insurance Act*, RSO 1990, c. I.8, (the "*Insurance Act*")

In the matter of an "Application of an Injured Person" ("Application" or "AIP") by the Applicant pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c. I.8., in relation to statutory Accident benefits and the following regulations including but not limited to:

- i. *Statutory Accident Benefits Schedule*, O Reg 34/10 ("SABS"), and
- ii. *Automobile Insurance*, RRO 1990, Reg 664 ("Reg 664").

I, Kevin Alexander McLean, Disabled (B.A., J.D., CIM) of Toronto, Ontario **AFFIRM** THAT

VOLUME #1 affirmations

1. I am the affiant (also defined as the "Applicant", "Disabled Individual" and/or "CAT Impaired Individual") herein and I affirm, under the pains and penalties of perjury, the following facts to be true. Where I have stated information on my belief, I have cited the source of my belief by references, citations, end-noting or otherwise.
2. Where I have used square brackets (i.e. [...]), I have done so for ease of reference and to provide my evidentiary beliefs while citing the source of the same.
3. Where there are double underlined words, they are mine for ease of reference.

4. I have adopted the definitions from my served and filed evidence herein and the have same meaning herein as they do therein.
5. I adopt the definitions from the above noted legislation and regulations, including rules where not made under the SPPA, and they have the same meaning herein as they do therein
6. Where I have included definitions, I am not making a legal argument in this affirm evidence but I have included the same for consistency purposes.
7. I affirm that where I have added emphasis is "copying and pasting" from any legislation, regulation or rule, the emphasis mine.

Volume #2: Authorities (BOA for NOM #6)

8. I have read and had compiled the following authorities and they will be, with perhaps additional authorities, my book of authorities for NOM #6 herein [provided now as a courtesy]:
- Talisman Resort GP Inc. v. Keyser, Usling et al.*, 2013 ONSC 1901 per Corliss J. ["*Talisman Resort*"]
 - Personal Insurance Company v. Jia*, 2020 ONSC 6361 ["*Jia*"]
 - Yellow Cedar v. Di Tora*, 2020 ONSC 5915 citing *MacDonald Estate v. Martin* ["*Yellow Cedar*"]
 - Essa (Township) v. Guergis. Meenher v. Hill*, 1993 CanLII 8756 (ON SCDC) ["*Essa*"]
 - Eskandari v. Razman* 2023 ONSC 1674 ["*Razman*"]
 - R. v. Smith*, 2020 ONCJ 611 ["*R. v. Smith*"]
 - Felton Brushes Limited v. Atlantis Properties Hamilton Inc.*, 2020 ONSC 2315 ["*Felton Brushes*"]
 - Barnett, Re.*, 1997 CanLII 851 (ON LST) ["*Barnett*"]
 - Law Society of Ontario v. Collins*, 2021 ONLSTH 177 ["*Collins*"]
 - Law Society of Ontario v. Sherman*, 2024 ONLSTH 26 ["*Sherman*"]
 - Law Society of Ontario v. Fuhgeh*, 2020 ONLSTH 75 ["*Fuhgeh*"]
 - Law Society of Ontario v. Dinnen*, 2019 ONLSTH 33 ["*Dinnen*"], and
 - Others.

Volume 2(A): Affidavit #15 is without Exhibits

9. Now shown to me is Exhibit "A", pages 1 to 81.
- Tab 1:**
 - pages 1 to 48: emails of myself and from some of the recipients in the thread denoted under my email as NOM #6;
 - Tab 2**
 - pages 49 to 51: emails from Ms. Moraes to LAT and myself, and myself;
 - Tab 3:**
 - Pages 52 to 64:
 - Part 1: emails from Mr. Karat to myself on January 25, 2024 (see page 53 and 54);
 - Part 2: cover letter from Mr. Karat to myself (without Mr. Nieuwland copied on the previous email) with the return address of SNIC Markham and the logo of TD Insurance Meloche Monnex. The cover letter is unsigned by Mr. Karat yet the Purported SNIC Response is signed by Mr. Karat.
 - Part 3: screenshots of page 1 from the Purported SNIC Response wherein the name of THE insurance company is input, "Security National Insurance Company"
 - Part 4: page 4 of the Purported SNIC Response, By-Law 7.1, section 6(1) with a focus on section 6(1)(d) and my inclusion of an issues involving "facilitation of unauthorized practice of law but which licenses?"

- d. **Tab 4:**
 i. Pages 63 to 64: example of one of the denial letters wherein SNIC Burlington (Persaud as the reference contact) was utilized as the address with the same logo as TD Insurance Meloche Monnex as the cover letter for the attached Purported SNIC Response by Mr. Karat via email on January 25, 2024;
- e. **Tab 5:**
 i. Pages 65 to 69: the locations of LDGIC (Toronto) (an unnamed respondent and party in the Appeal and Purported SNIC Response), SNIC Markham and SNIC Burlington
- f. **Tab 6:** page 70
 i. Excerpt from *Barnett*;
- g. **Tab 7:**
 i. Pages 70 to 81:
 1. Excerpts from *R. v. Smith*, 2020 ONCJ 611

Volume 2(B): Affidavit #15

10. This affidavit #15 is an extension of the notice provided in the IRB Appendix that has been filed with LAT as it relates to the following paragraphs therein:

(*NOTA BENE* Whether there is a "ghostwriter" or not, the admissions were made and the Applicant is relying upon them. Of course, there could be further repercussions or issues arising from a lawyer not inputting his name on various documents and "supervising", "encouraging" or "facilitating" breaches of the LSA and *By-Laws*, guidelines and his ROPC. To confirm, said lawyer hyperlinked above is NOT Mr. Nieuwland. It raises distinct issues regarding abuses of process that are distinct from NOM #5 and whether a former spouse of the Applicant's current spouse, who was named as the primary insured, is or was authorized to act, even in a potentially covert or surreptitious manner, based on a potential conflict of interest, and/or abusing the process of the LAT. Perhaps, this lawyer cited above coerced Mr. Karat to complete, sign and file the Purported SNIC Response which would make such unauthorized execution of the same all the more egregious and an abuse of process. If necessary to be argued, it may speak to why the IRB's have been delayed and withheld in such an unreasonable manner. There will also be some contextual evidence provided (if necessary) that Mr. Karat purportedly provided a response to a *PIPEDA* request with his name in the letter as the author but the metadata showed the name of "ANDY GERA" which is a fictitious name. When investigating the issue, "Andy" is the short name for the first name of the above noted lawyer and "Gera" means "generated" in Portuguese. Put another way, "Generated by Andy" when the document itself has no reference to the same but the metadata did. The reference to "Portuguese" translation is yet another compelling piece of evidence considering that the assistant that Mr. Nieuwland wished to have included in emails with the Applicant (as he represented that Ms. Michelle Moraes was his legal assistant when her signature block represented that she was the legal assistant to two female lawyers) is a P1 license holder who has acted for applicants before LAT. In her current role, she is "not providing legal services" employed with TD Insurance Staff Legal. The Applicant has confirmed with Mr. Karat and Mr. Nieuwland that until Mr. Nieuwland confirms by affidavit that said individual (Ms. Moraes) is his legal assistant that she will not be included for, *inter alia*, concerns over whether Mr. Nieuwland has effective control over her non-licensee activities to him and whether they are following LSO *By Law* 7.1 et al. The Tribunal will also be aware that it was Ms. Moraes that attempted to seek an adjournment of the agreed to case conference (until the nullity issue was found

and brought to the immediate attention of SNIC (including Karat and Nieuwland) from the May 2, 2024. Interestingly, when LAT confirmed with Ms. Moraes that under the New LAT Rules that a motion was required to seek an adjournment of the case conference, no motion was brought. Of course, it would have required legal counsel in Mr. Nieuwland to explain why he was not available as the issues in the Appeal and **Purported SNIC Response** involve CAT Impairment.

Moreover, in the "purported *PIPERIA* response", there was a reference to "internal" at the bottom of the document when it was sent externally to the "requestor" under that federal legislation (but the same named individual appellant herein) which is consistent with the emails of Ms. Moraes where there is a reference to "internal".

It is a difficult legal issue to determine, which has factual elements that need resolution, as to whether a ex-spouse or divorced spouse of the Applicant's current spouse is authorized to act against him (even covertly or surreptitiously – behind the names of others) but it would appear to be a form of "bad faith" and "abuse of process" to do so in a covert manner and only be discovered with forensic investigating or general investigation. Moreover, there is no dispute that that Mr. Karat was not authorized to SIGN even correspondence unless it was correspondence of a "routine administrative nature" and "directly supervised by the supervising lawyer". What is telling about the service of the **Purported SNIC Response** is that Mr. Karat did NOT include Mr. Nieuwland on said email when he did in the initial email on January 23, 2024 when Mr. Karat referenced the "Karat LAT Assignment" which was his handling of the LAT dispute. Moreover, it cannot go unnoticed by the Tribunal that Mr. Karat has been referenced in "two reported decisions" of which one is *Quint v Security National Insurance Company*, 2023 CanLII 58482 (ON LAT) and this very lawyer hyperlinked above is named therein. In any event, irrespective of whether the current speculation is that there may be more evidence involving abuse of process of LAT by SNIC, the **Purported SNIC Response** contains the relevant admissions regarding the IRB regarding all essential elements to determine quantum for SNIC to make payments without further delaying the same.

Perhaps, it is even more concerning that from a Reg 664 award standpoint that the very hyperlinked lawyer above no longer represents himself as a lawyer on his LinkedIn but a "Consequences Manager". It is unclear if a "consequences manager" is only in the role of "providing legal services" and NOT practising law such that it would preclude him from handling matters involving "CAT Impairment". Whatever the role is of a "Consequences Manager", said lawyer who has worked with Mr. Karat on various files where he was "counsel", still leaves the undisputed issues of the admissions in the **Purported SNIC Response** and that Mr. Karat was unauthorized to SIGN the Responsive Pleading (also defined as "Purported SNIC Response").

If this lawyer (NOT Mr. Nieuwland) was the "Supervising Lawyer" of Mr. Karat, he would authorized the breaches of By-Law 7.1, section 6(1)(b) and (d) at the very least. Moreover, if this "Supervising Lawyer" (not named Mr. Nieuwland) was supervising Mr. Karat to engage in the unauthorized signing of the **Purported SNIC Response**, it provides further grounds for why the admissions are binding and cannot be retracted even though no steps have been taken to do so.

Perhaps, this is why Mr. Nieuwland included the name of a different respondent in the Nieuwland DOR. Further, it may be the reality that this is why Mr. Nieuwland was not willing to bring a motion to refute the Purported SNIC Response. While understandable as a matter of lawyer self-preservation, it does not absolve SNIC from its breaches of SABS and its continued unreasonable withholding or delay of payment of the IRB

It also raises another complex academic issue is: that the Tribunal has found that it cannot remove an adjuster from the underlying file but it certainly can find "abuse of process" on the facts that are subject to the Reconsideration Motion and certainly a separate motion if necessary involving this "ghostwriting lawyer" whilst Mr. Karat remaining the "sole signatory" of the Purported SNIC Response

Even if this lawyer or any other lawyer was completing the Purported SNIC Response, it remains Mr. Karat who executed the Purported SNIC Response without any explicit reference to any other lawyer therein or otherwise.

Perhaps, this "ghostwriting and covert supervising lawyer" was unaware that an unlicensed representative (non-lawyer or non-paralegal) was not authorized to sign a response, and certainly not a "response" involving CAT Impairment. While it may never be necessary to canvass these discrete issues in a separate motion or hearing, they will then stand as further grounds (somewhat of a pre-emptive reply) for a Reg 664 award with regard to ordering the full 50% penalty in this motion and any potential motions that deal with any periods after the IRB Denial Date (subject to it actually being a compliant denial with medical reasons and other reasons).

At the very least, they are very suspicious circumstances which further aggravating elements (if necessary) as to why a Reg 664 is required. Simply put, whether any of the above is true (or is faced with evidence in the responsive materials if tendered by the Payor in authorized fashion), it requires a strong message of deterrence - all subject to the whether the Appellant and SNIC potentially resolve the issues in the NOM #4 without the need for a hearing

Of course, if SNIC makes those payments, it avoids the risk of any costs at a hearing per se. If not, this is a certainly a form of notice to SNIC regarding the same and the requirement that any and all relevant individuals and persons provide affidavit evidence that "explains why" an unprecedented peculiar set of facts that LAT has never addressed before.

Volume #3: Timing of this motion

Volume #3(A): My acting promptly

11. I have read the decision of *Talisman Resort*. My review of *Talisman Resort* has led me to believe and act, in my view, promptly to provide advance notice to the Respondent SNIC. Karat, Nieuwland, Moraes, Russell and AP. As of April 2, 2024, Mr. Nieuwland has included an additional individual in Ms. Christina Ortiz who is unknown to me. I was about to have the previous version of this affidavit finalized and made yet Mr. Nieuwland included a new individual in his email without any formal introduction of her.

12. While I am considering filing for a judicial review, pursuant to the *JRPA* and/or appeal, pursuant to *LATA*, regarding the **Lake Motion Decision** and **Logan Reconsideration Decision**, my review of the law leads me to believe that I have 30 days from March 22, 2024 which is on or around April 21, 2024.

Volume #3(R): acting in accordance with section 2 of the SPPA (most expeditious, cost-effective and just manner)

13. I believe if this **NOM #6** is granted in full or in certain parts that such a judicial review or appeal will not be necessary.
14. I am seeking a final order in **NOM #6** that this **LAT Proceeding**, which I have defined as the "**SNIC Proceeding**" as **SNIC** was the underwriter or insurer of the Policy Number involving the Insurance Policy with the **Policy Holder** being my Spouse, Nicole Artopoulos ("**Female Spouse**" or "**Nicole**"), that this **SNIC Proceeding** has been irremediably tainted by my allegation and evidence of conflict of interest involving, *inter alia*, the ex-husband or divorced husband of Nicole in **Mr. Andrew Papadimitropoulos** (the "**Divorced Husband Conflicted Lawyer**") being involved in the following
- TD Claim Numbers,**
 - TD Claim Number 3 or TD Claim Number #3,**
 - This SNIC Proceeding or LAT Proceeding; and**
 - Others.**
15. My reason for seeking a final order, as it relates to the liability of the Respondent which is "**TD Insurance Meloehe Monnex (Security National Insurance Company)**" (see: striking the **Purported SNIC Response** from the record of proceeding without leave to refile), with quantum of benefits to be assessed, is that I am unaware of any case law or jurisprudence where the conflicted counsel was an in-house counsel or in-house manager of **SARS** matters or **LAT** matters but was involved surreptitiously or clandestinely yet a fortuitous metadata finding (along with other evidence) provide circumstantial evidence of said lawyer's involvement.
16. I define these "**Matters**" as the "**TD Claim Number #3**" and the "**SNIC Proceeding**".
17. In these **Matters**, after my finding of the metadata, particularly the "descriptive metadata" of "**ANDY GERA**" as the "actual author" in the **PIPEDA** response that was purportedly authored by **Mr. David Karat** (the "**Purported Author**") which also provided **Mr. Karat** as the purported contact point for further questions (the "**Purported Contact**"), I requested in the **PIPEDA** matter, which is also now a complaint but not relevant in the **SNIC Proceeding**, that the addressed individuals therein provide me the contact information of "**ANDY GERA**". **TD Canada Trust** (although my **PIPEDA** request was addressed to the division of "**TD SNIC**") did not respond from that time and have not responded. I provide this evidence for context.
18. Thereafter, I attempted to input and have researched the name of "**ANDY GERA**" and no name of "**ANDY GERA**" could be found as an employee, contractor or counsel to **TD Bank Group** including **TD Insurance** or any of the group of insurance companies listed: (i) Primum; (ii) **SNIC**; (iii) **TD Home And Auto**; (iv) **TDGIC**; or (v) otherwise.
19. I further could not find any licensee (lawyer or paralegal) in the **LSO** directory with said name.
20. I even input, by way of email, the name of "**ANDY GERA**" or "**Andrew Giera**" into follow-up emails under the **PIPEDA** matter and they all bounced back.
21. By way of reference to technological, investigative and research aids, I had or had others utilize various social media platforms, **RocketReach**, **ZoomInfo**, and others to determine if "**ANDY GERA**" was in any associated or affiliated with **TD Bank Group** or **TD Insurance**, and no results returned any match.

10

22. By way of previous success in this realm, I was unable to have Ms. Alisha Anne-Nurse (also defined as the "Initial Adjuster" or "Former Adjuster") provide me with an email so I researched or had researched the name. I believe that I had tried some ten different permutations associated with Ms. Nurse's email address and they all failed until I utilized alisha.anne@tdinsurance.com and it was successful.

23. I will note parenthetically that I learned on or around March 29, 2024 that Ms. Nurse's email was now causing a bounce back and was no longer active. Upon learning the same, I updated my address book to have her removed, and corresponded with Ms. Persand and others to confirm that she was no longer employed or associated with TD Insurance.

24. Upon learning of the Actual COI² or Reasonably Perceived COI, I inquired with Mr. Karat and Mr. Nieuwland as to whether the Divorced Husband or Conflicted Lawyer had any involvement in the TD Claim Numbers (which I reference because there was a requirement to have the Insured Automobile repaired in September 2022 which was handled by my Spouse (Nicole) as she was the Policy Holder under the TD Insurance Policy) and they did not respond. In that regard and for this NOM #6, I will be relying on the law of adverse inference.

Volume #3(D): Mr. Karat

25. On or around March 30, 2024, I received an auto-reply from Mr. David Karat and it was different than the previous auto-replies which I.A.F. will have in the record of proceeding demonstrating that Mr. Karat's outgoing emails to me referenced "Representing the Securite National Insurance Company" and his auto-replies referenced "Representing TDGIC." To juxtapose, Mr. Karat's auto-reply on March 30, 2024 reference that he was "authorized to represent Primmum, TD Home and Auto, and TD General Insurance Company" but NOT SNIC. I found this strange.

26. In finding the auto-reply to be somewhat strange, I followed with the individuals noted above to confirm the same and, in my view, the legal consequences of the same as it relates to this SNIC Proceeding.

The Karat auto-reply

27. I also received an auto-reply from the Karat, and I noted the same with aforementioned individuals. It was then brought to my attention that there were similarities between the one email that I had received from TDIADR@tdinsurance.com and the auto-reply of the Karat. On March 31, 2024, I provided notice of the same, and other issues which sought a response on a with prejudice or without prejudice basis for resolution purposes, and I have not received a response as of today's date.

28. For ease of reference, I now copy and paste the same with the Karat's auto-reply and the one TDIADR@tdinsurance.com response to me on my former email latg@confidentialmactan.ca.

Papadimitropoulos, Andrew

Tue, Mar 28,
10:40 PM (2 days
ago)

to me

Please be advised that I will be away from the office on March, 28, 2024 with limited access to e-mail and voicemail.

Regards,
Andrew



Wed, Jan 17,

7:15 AM

TDI ADR <TDIADR@tdiinsurance.com>

Please do not forward claims expenses to this mailbox

Internal

[no signature or name therein]

29. I believe and allege that the Karat sent me the email, albeit without revealing his name, on January 17, 2024.
30. I believe and allege that Mr. Karat's January 23, 2024 email to me which referenced the communication protocol involving directing LAT matters to himself and Mr. Nieuwland (copied on that email) was by advise or instruction of the Karat or Conflicted Divorced Lawyer.

Volume #4: Karat

Volume #4(A): Further particulars

31. I believe, based on the same public media profiles, that Divorced Husband Conflicted Lawyer has been a lawyer with TD Insurance since on or around 2018. I now believe and allege, after some 19 months after the Accident, that the Divorced Husband Conflicted Lawyer has been involved in the TD Claim Numbers and TD Claim #3 despite never providing his exact legal name.

Volume #5: Ms. Moraes is NOT the legal assistant to Mr. Nieuwland; Ms. Moraes is the legal assistant to Ms. Klukowska and Ms. Saeed

32. I affirm that I believe that Ms. Moraes is NOT the legal assistant to Mr. Nieuwland because I believe, based on review of the USA, the LSO Bylaws, the LSO guidelines and the ROPC for lawyers and paralegals that a non-licensee (such as Ms. Moraes when acting as a legal assistant for TD Insurance Staff Legal) is required to denote at all times who she is working under (by way of supervision, delegation and assignment of tasks and functions (see: By-Law 7.1. Operational Obligations And Responsibilities) – even a paralegal working under the supervision of lawyer licensee.
33. At all times herein and based upon my review, Ms. Moraes' signature block references two female lawyers (Ms. Klukowska and Ms. Saeed).
- I do not believe that either Ms. Klukowska or Ms. Saeed's names (in part or in whole) are aliases for "Matthew Nieuwland".



35. I re-affirm that Mr. Nieuwland has not provided me an affidavit (even in made form) that Ms. Moraes is his legal assistant. I do note that in a few emails that Mr. Nieuwland included Ms. Moraes' name as his legal assistant but she is not contained in his auto-reply and I believe that Mr. Nieuwland has the legal test backwards. In this regard, I do not believe it is sufficient for a lawyer to represent that an individual is his legal assistant in communications with a "third person" but rather it is the duty of the legal assistant (and the legal assistant's supervising lawyers) to ensure that in all communications with others that the role in which the legal assistant is acting and whom he or she is working under the supervision of, is clearly denoted.
36. I commenced drafting the above paragraphs prior to receiving the email from Mr. Nieuwland where he has now represented that his legal assistant is Mr. Christiana Oruz. I believe and allege that this is consistent with my position that Mr. Nieuwland was not honest with me in representing that Ms. Moraes was his assistant.

Volume #6: TD Bank's head office; the location

37. I affirm that I believe and allege that TD Bank's head office is at 66 Wellington West, Toronto, Ontario.
38. I affirm that I believe that based on the LSO Directory that Mr. Nieuwland (a lawyer licensee) and Ms. Moraes (a paralegal licensee although her current status is "employed ~~is not~~ providing legal services") are both employed or work at the private practice firm of "TD Insurance Staff Legal"
39. I believe that the locations of TD Bank and TD Insurance Staff Legal are in the same office building on Wellington Street West.

Volume #7: Ms. Moraes and her ability to speak Portuguese

40. In having Ms. Moraes public profiles review, I noted that she had promoted the country of Portugal and the Portuguese flag. I then thought to myself that the word "Gera" might be a reference to a different language so I, *inter alia*, contacted one of my Portuguese friends that I attended law school with in the mid 2000's to ask him, without influencing him, whether the word "gera" or "Gera" meant anything to him.
41. His response was to the effect, "Kev, gera, if it is a reference to a Portuguese word, means creates, generates or to make...something like that."
42. My response was one of astonishment, shock and I believe that I had that, colloquial speaking, "ah ha moment" or epiphany.
43. I believe that Ms. Moraes was the sender of the document to me, albeit by uploading, to the TD access requests portal. I believe that Ms. Moraes knows how to do the same. I believe that Ms. Moraes was advised and instructed by the Divorced Husband Conflicted Lawyer to include the following:
- a. Name of Mr. Karat as the purported author;
 - b. Mr. Karat as the purported contact point; and
 - c. To include language like solicitor-client privilege and litigation privilege but I believe there was a
 - d.
44. I believe that Ms. Moraes knows that there was and is a potential conflict of interest in the TD Claim Number and the SNIC Proceeding
45. I believe that Ms. Moraes attempt to be, in my opinion and my qualifier, "clever" by doing the following:
- a. Using a shortened version of the name "Andrew" in reference to the Divorced Husband Conflicted Lawyer; and
 - b. Her, at least, bilingualism, to use the word "Gera" for the word "generated", "created" or "made".

46.

I note that in reviewing Ms. Moraes' LinkedIn, she some approximately four weeks ago had posted that she was looking for new employment with a job posting that was referenced by another person by way of expressing her interest in the same. The job posting was eventually "filled"

Volume #8: Metadata

47.

The definition and interpretation of "Metadata" is end-noted above.

Volume #9: Descriptive Metadata

48.

The definition and interpretation of "Descriptive metadata" is end-noted.

Volume #10: the word "generated" in the world of metadata

49.

I believe it is self-explanatory that there is metadata that is generated and created automatically and those aspects that are input. I believe Ms. Moraes and/or the **Divorced Husband Conflicted Lawyer** input the name of the "actual author" albeit by way of what I allege is pseudonym of "Andy Gera" for the **Divorced Husband Conflicted Lawyer**.

Volume #11: TD Insurance lawyers, paralegals and ADRR's use "Outlook"

50.

After investigating the emails involving some or all of the above, I found that the individuals at TD Insurance, TD Insurance Staff Legal et al, above use "Outlook". I am more familiar with "Gmail" and "Gsuite" so I reviewed some of the metadata therein and their IP addresses.

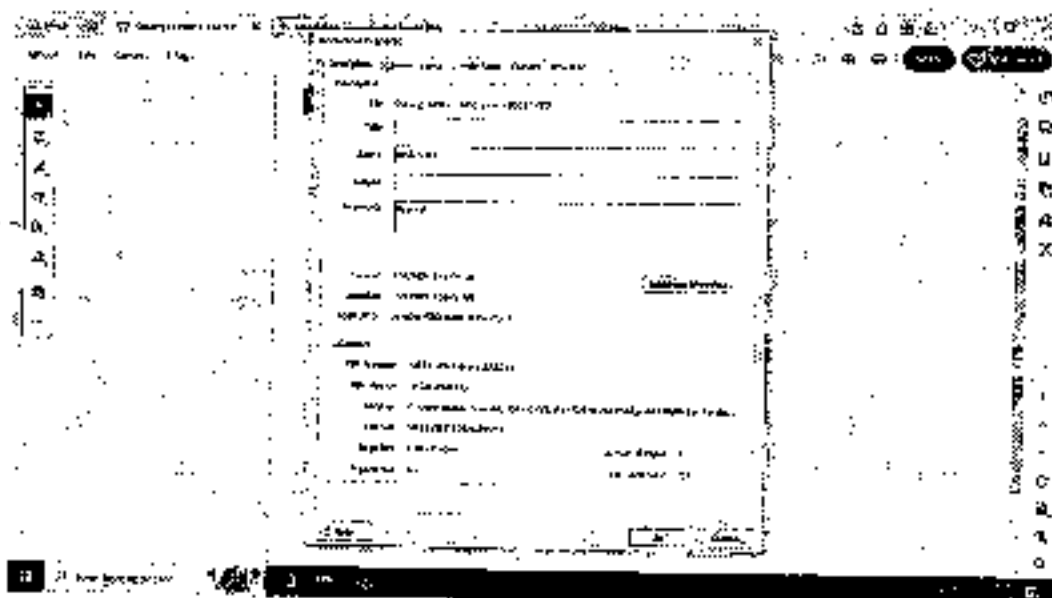
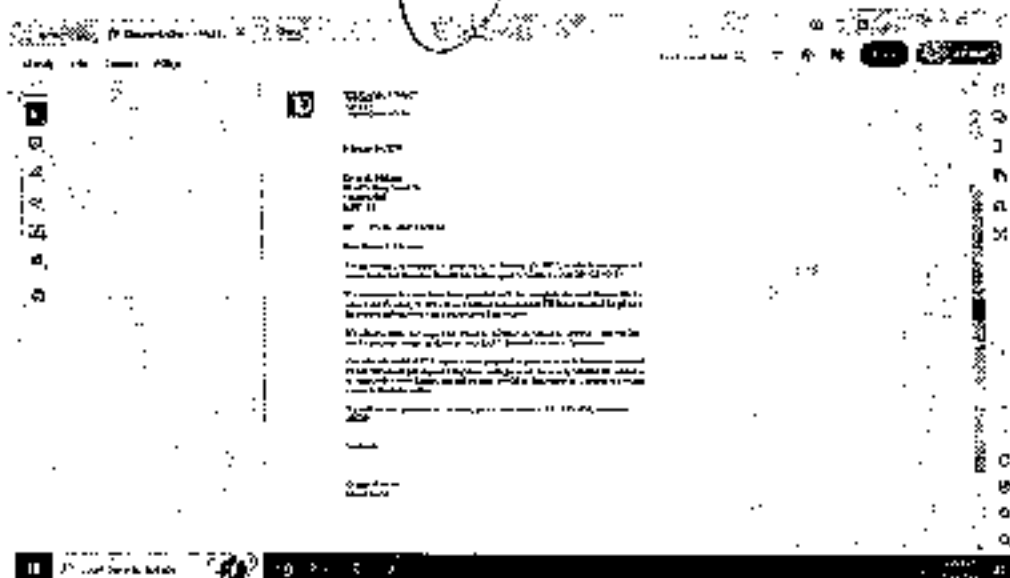
Volume #12: The "**ANDY GERA**" authored document

51.

Now shown to me is a screenshoted copy of the *PIPEDA* response by the **Purported Author (Karat)** and the **Purported Contact Person (Karat)** for the *PIPEDA* matter, and the metadata in sequence.

52.

Now shown to me is a screenshot of the letter that appears to have been authored by "David Karat" (albeit unsigned) and the metadata of that same document.



Volume #13: The File Name of the ANDY GERA Authored Document

- 53 The file name of the *PIPEDA* response letter, which includes a correct **TD Claim Number** and an incorrect TD claim file number, was and is,

"Closing+Letter+-+McL.ean+-+035325790"

- 54 I still do not know what is meant by save for "reserve information" which has been redacted for "reserves"

For context, I have sought clarification of the same but without a response from "TD-Canada Trust".

Volume #14 The ++ signs in the file name and the word "internal" (which is used for email)

After review, I count five plus signs. After review of some "Outlook" educational forums on why the usage of (+ signs), it appears that it is protocol to put (+-) when there are a total of three people in the thread. There are five plus signs in a letter but it has the "internal" at the bottom which is, in my view, indicative of an email that was then copied and pasted from email to "Word". I cannot allege whether there is an additional individual or person involved as that can only be provided by responsive evidence.

I affirm under the penalty of perjury that I believe that there are, at least, four persons involved in this file and two of them are representing, pursuant to section 1(7) of the *LSA*, SNIC and those two individuals are:

- a. Mr. David Karat by his signature of the Purported SNIC Response; and
- b. The Divorced Husband Conflicted Lawyer also known as "ANDY GERA".

Volume #15: My allegation of a "scheme" to carefully avoid the "conflict of interest" issues between Nieuwland, Karat, Moraes and the Divorced Husband Conflicted Lawyer

I now allege that the four individuals of Karat, Nieuwland, Moraes and the Divorced Husband Conflicted Lawyer were all aware of the conflict of interest issues and their professional obligations but for one person with respect to professional obligations and that is Mr. David Karat.

I now quote from the following (emphasis is mine):

Law Society of Ontario v. Collins, 2021 ONSLTH 177

[33] In *Crawford v. Law Society of Upper Canada*, [1] the hearing panel addressed the policy reasons for the rule

Former licensees are uninsured, and immune from the regulatory and disciplinary control of the Law Society... Former licensees do not contribute to the Compensation Fund, are not subject to trust accounting requirements, and are not subject to assessment of any fee taken. This presents an obvious and significant risk to the public, in that there is no recourse to the Law Society's regulatory structure and, generally, little to no recourse against the former licensee for negligent or fraudulent acts done in the course of unauthorized practice.

Volume #16: Mr. Nieuwland's continued insistence on me including Ms. Moraes in email threads and my refusal subject to an affidavit from him (see: *Escondido v. Raziman* 2023 ONSC 1674)

I again note that Mr. Nieuwland at various points requested that I include Ms. Moraes, his alleged legal assistant, in emails and I refused to do so for the aforementioned reasons. As I commenced drafting this affidavit in March 2024, I learned as of today's date that Mr. Nieuwland's actual legal assistant is Ms. Ortiz. I again do not castigate Ms. Ortiz in any manner regarding the same.

I now believe that Mr. Nieuwland was requesting the same because he knew or had knowledge of the conflict of interest issues and he wished to distance himself from the same. However, I now believe, even more forcefully, that Mr. Nieuwland was an integral part of a "plan" or "scheme" to attempt to avoid me learning that the Divorced Husband Conflicted Lawyer was involved in the TD Claim Numbers and the SNIC Proceeding.

62. However, if that is factual and correct, and he was somehow assigned or delegated this LAT Proceeding or SNIC Proceeding along with Mr. Karat, they both have my empathies to some degree but I cannot excuse or condone the same considering the **Purported SNIC Response** has my Spouse's name therein. I do not take kindly to any involvement of the **Divorced Husband Conflicted Lawyer** being involved in the TD Claim Number and/or this SNIC Proceeding.

63. I believe that there would be emails between Karat and Moraes, and Moraes and the **Divorced Husband Conflicted Lawyer**. I believe that the **Divorced Husband Conflicted Lawyer** wished to not have any emails between himself and Mr. Nieuwland or Ms. Nieuwland insisted on the same. However, I will await the final completion of an investigation into the same by the OPCC.

Volume #17: Unable to take meaningful steps:

Another legal ground seeking a final order and I am putting Mr. Nieuwland, who calls himself "counsel of record" on notice in relation to the upcoming responsive deadline date for NOM #4

64. I am providing this affidavit in made form but not yet notarized, but served and filed, for the purposes of allowing SNIC to resolve this matter in accordance with S4B5 and without the intervention of the LAT. If it is fails to do so with an authorized legal representative of SNIC, then I will proceed with my motion and require, albeit regrettably, the assistance and intervention of LAT.

Volume #18: Background on Ms. Klukowska and Ms. Saeed

65. I now copy and paste the following involving those two lawyers who Ms. Moraes represents in her signature block that she is legal assistant to:

Volume #18(A): Ms. Klukowska's cases

Ms. Klukowska appears from our research to only have been named as counsel in one case but for **Security National Insurance Company: Roharan v SECURITY NATIONAL INSURANCE COMPANY**, 2023 CanLII 84411 (ON LAT)

Volume #18(B): Ms. Saeed's cases

- Paramasany v TD General Insurance Company*, 2023 CanLII 72636 (ON LAT) ["Paramasany"]⁶;
- Hazem vs TD General Insurance Company*, 2023 CanLII 23602 (ON LAT) ["Hazem"]⁷;
- Ruchlemer v TD General Insurance Company*, 2022 CanLII 78789 (ON LAT) ["Ruchlemer"]⁸;

66. I allege that perhaps Ms. Saeed is the additional lawyer communicating with the **Divorced Husband Conflicted Lawyer**. I will provide her a copy of this affidavit in made form.

67. Now shown to me is a copy and paste involving Ms. Klukowska and Ms. Saeed, who are the two lawyers listed in the signature block of Ms. Moraes:

Mailing Name
Adrianna Klukowska
Law Society Number
82757T
Class of Licence Definitions
Lawyer (LL)
Real Estate Insured

No

Status Definitions

Practising Law - Employed

Business Name

Toronto Dominion Bank

Business Address

66 Wellington St W 38th Floor Toronto, Ontario M5K 1A2

Phone

1 416 599 3330

Arfa Saeed

Mailing Name

Arfa Saeed

Law Society Number

83824E

Class of Licence Definitions

Lawyer (L1)

Real Estate Insured¹

No

Status Definitions

Practising Law - Employed

Business Name

TD Insurance Staff Legal

Business Address

66 Wellington St W 38th Floor Toronto, Ontario M5K 1A0

Phone

1 905 201 2565

68. I note that Ms. Saeed represents that her employer is that of "TD Insurance Staff Legal" yet Ms. Klukowska represents that her employer is "TD Bank".
69. I believe that Ms. Saeed and Ms. Klukowska need to be aware that their legal assistant was also purporting to act in this SNIC Proceeding but not the TD Claim Numbers.

Volume #19: background involving Ms. Moraes in her capacity as a licensed paralegal on other files at previous employment

70. If Ms. Moraes is the same "paralegal" (see: her LinkedIn profile that her paralegal was issued in 2019 from the Canadian Business College⁽²⁾) that has appeared in cases before LAT, then the Tribunal will be well aware of her name by the following:
- a. *H.O. v Aviva Insurance Company of Canada*, 2020 CanLII 42669 (per: Nidhi Punyarthi) ("HO Aviva")⁽³⁾;
 - b. *I.W. v Coachman Insurance Company*, 2019 CanLII 122732 (ON LAT) ("Coachman Preliminary Decision") wherein Ms. Moraes is referred to as the "Legal Representative",⁽⁴⁾ and
 - c. *I.W. v Coachman Insurance Company*, 2020 CanLII 27393 (per: Adjudicator Derek Grant⁽⁵⁾) (the "Coachman Reconsideration Decision") or "Adjudicator Grant Reconsideration Dismissal").

Volume #20: Another ground why I am seeking a final order, which is different from NOM #5, in that I am alleging that the Divorced Husband Conflicted Lawyer facilitated the unauthorized practice of Mr. Karat in SIGNING the reported SNIC Response

71. While my position remains that Mr. Karat was unauthorized to SIGN the Purported SNIC Response, I am now alleging (see: supra) that the Divorced Husband Conflicted Lawyer facilitated the unauthorized practice and/or failed to prevent the unauthorized practice of Mr. Karat. I believe it is the former and I allege the same, and I challenge the Divorced Husband Conflicted Lawyer to swear evidence to the contrary.
72. If necessary, and if SNIC and I do not resolve this SNIC Proceeding (appreciating that there is a misnomer issue per se or still a substitution of name required), I will be relying not only on the LSA, By-Laws, and the ROPC but a case of *R. v. Smith* per Justice Nadel involving "fudged documents", "false documents" and uttering the same
73. To the extent that Mr. Karat proceeded to execute and sign the Purported SNIC Response, I believe it begs the question for LAT why he did not sign the very correspondence that enclosed the same when he served me with the Purported SNIC Response. Moreover, Mr. Karat is not signing the PIPEDA response.
74. In that regard, I rely on Felton Brushes, a decision of Sweeney J that finds that the requirements of an electronic signature

[22] Further, the offer to surrender was not in writing. Article 1.17 of the Lease provides that termination of the lease must be "executed in writing by the party to be bound." In this case, the Landlord is the party to be bound. The email does not constitute execution in writing by Atlantis of the agreement to terminate the lease. There is no electronic signature on the email in accordance with section 11 of the *Electronic Commerce Act, 2000*, S.O. 2000, c. 17. The point of the formality is to ensure that the true intention of a party is captured. In the circumstances of this case, an unsigned email is not sufficient.

75. I further believe and allege that the "EFiled" associated with Mr. Karat on behalf of SNIC from the following sections from the ECA (Ontario)

"electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and "electronically" has a corresponding meaning; ("électronique", "par voie électronique")

"electronic agent" means a computer program or any other electronic means used to initiate an act or to respond to electronic documents or acts, in whole or in part, without review by an individual at the time of the response or act, ("agent électronique")

"electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document; ("signature électronique") [defined herein by myself as "Electronic Signature"]

76. I affirm that I believe that the Purported SNIC Response was an electronic document but the definition of "electronic agent" does not apply because "review" is required by the individual at the time of the response or acts like the "certification". I affirm that I believe and submit that the "EFiled" is a signature that a "person" created or adopted to sign the Purported SNIC Response and that is in the document of the Purported SNIC Response. I affirm that I query whether or not Mr. Karat was the person who completed, signed and filed the Purported SNIC Response even though his name is the only name by the "signature row" on the Purported SNIC Response. I affirm that I believe that TD SNIC is NOT a public body but rather an insurance company with SNIC being the "insurer" or the "underwriter".

77. However, I allege that any document can have a signature of an individual that is purporting to bind an insurance company but it may not be that Mr. Karat, in fact, engaged in the same.
78. I note the timing between the metadata of the Purported SNIC Response and the cover letter that Mr. Karat enclosed that utilizes the "Brown:CA" system along with "opentext"
79. I now quote from Justice Nadel in *R v. Smith*, which involved former Office Darren Smith, and his, in my view, absolutely heinous conduct of signing (while may have been a matter of convenience and the intent of those individuals wishing to have their firearms surrendered and smelted) for those individuals as if they had signed the documents themselves. I would presume, and I believe that is sad if that did exist with our law enforcement in Hamilton or otherwise, that it has happened before without being noticed. In those matters, I affirm that I believe that it could be similar to this situation where the Purported SNIC Response demonstrates that Mr. Karat is the sole signatory when he may not have authorized the same
80. While I obviously disagree with Adjudicator Lake's drawing to my attention part of Rule 24.1 but not deciding the same, I would presume and I believe to be that Vice Chair Lake or any tribunal decision maker would not decline to decide an issue where a lawyer licensee has facilitated or failed to prevent the facilitation of unauthorized practice. Moreover, I would hope that LAT would not be
81. I affirm and allege that in either scenario: (i) whether Mr. Karat, in fact, completed the Purported SNIC Response in the LAT Tribunals Ontario portal and electronically signed the Purported SNIC Response; or (ii) whether the Divorced Husband Conflicted Lawyer did it "as him", either are fatal to this LAT Proceeding, and irremediably taint the proceeding with either violations of the LSA and By-Laws OR violations of the LSA, By-Laws, ROPC For Lawyers and other legislation.
82. I cannot answer that question per se but I do allege that it was a combination of the two of them in some form and I do appreciate that Mr. Karat, now no longer authorized for SNIC, may have been coerced.
83. I affirm and allege that the Divorced Husband Conflicted Lawyer "shall be considered" representing SNIC in the SNIC Proceeding as a result of section 1(7)(a) and (c) (as there have not been any examinations for discovery).
84. Again, I was not present or in the "same space", "premises" or "office" as Mr. Karat or the Divorced Husband Conflicted Lawyer when the Purported SNIC Response was complete, then certified as "true and accurate" or "true and complete" but I will defer to the evidence of either of those individuals.

Volume #21: Why I allege that Mr. Nieuwland had no role (but knew of the conflict of interest issues)

85. I now provide the timing now of Mr. Nieuwland's auto-reply which was from January 23 or 24 which was a day before Mr. Karat's signing and filing (allegedly and purportedly if not by the Divorced Husband Lawyer "as him") so I allege that Mr. Nieuwland could not have been the direct supervising lawyer of Mr. Karat:

Nieuwland, Matthew <Matthew.Nieuwland@tdinsurance.com>
to me

Please be advised that I am out of the office, returning on January 29, 2024. During this time, I will have limited access to email and voicemail. I will respond as soon as possible upon my return. Thank you, Matthew Nieuwland

NOTICE: Confidential message which may be privileged. Unauthorized use/disclosure prohibited. H

received in error, please go to www.td.com/legal for instructions.

AVIS : Message confidentiel dont le contenu peut être privilégié. Utilisation/divulgaration interdites sans permission. Si reçu par erreur, prière d'aller au www.td.com/francais/avis_juridique pour des instructions

- 86 I believe that the **Divorced Husband Conflicted Lawyer** was the or a supervising lawyer as he is located in Markham (101 McNabb Street) along with Mr. Karat. Further, they are both employed by "TD Insurance" and have worked together on files such as *Quinn v. Security National Insurance Company*.
87. Further, I note that the three cases since 2018 (when the **Divorced Husband Conflicted Lawyer** joined TD Insurance) involve SNIC (x2) and TD Insurance Meloche Monnex:

Quinn v. Security National Insurance Company, 2023 CanLII 58482 (ON LAT)

Ontario Licence Appeal Tribunal — Ontario

2023-06-29 | 14 pages

accident — psychological — treatment plan — impairments — attendant care

[...] Andrew Papadimitropoulos, Counsel Francine Papadopoulos, Counsel HEARD: by Teleconference: [...]

Mousah v. TD Insurance Meloche Monnex, 2022 CanLII 4520 (ON LAT)

Ontario Licence Appeal Tribunal — Ontario

2022-01-26 | 8 pages

reasonably suited by education — complete inability to engage — self-employment — pre-accident employment — accident

[...] Andrew Papadimitropoulos, counsel HEARD by Videconference: June 1, 2021 and October 19, 20, 21, 22, 2021 [...]

18-001613 v. Security National Insurance Company, 2019 CanLII 9628 (ON LAT)

2019-01-08 | 3 pages

conference · resumption — www.slatso.gov.on.ca — request for reconsideration — assessments

[...] For the Respondent: Andrew Papadimitropoulos Introduction [1] This request for reconsideration arises from a motion decision on December 11, 2018 denying a request to adjourn a case conference resumption on December 12, 2018 [...]

Volume #22: I continue to rely upon *TDGIC v. Bennett*

88 I continue to rely upon the principle in *Bennett* in that, and I am paraphrasing that LAT finds a wilful misrepresentation when a person remains silent when they have have a duty to notify the LAT. I believe that all of the licenses, pursuant to their professional obligations, have a duty, at the very least, to notify LAT.

Volume #23: Conflicts of Interest

89 I now quote from the conflict of interest section of the LSO website:

Conflicts of interest

A conflict of interest exists when there is a substantial risk that a lawyer or paralegal's loyalty to or representation of a client would be materially and adversely affected by competing duties to another party or competing interests between the client(s) and the licensee. Because even well-intentioned licensees may not realize that the performance of their duties has been impaired, the rules address the risk of impairment rather than actual impairment. Substantial risk means a significant and plausible risk. It need not be certain or even likely, but it must be more than a mere possibility. Conflicts of interest may fall into one of the below categories:

Personal interest conflicts

A licensee's own interests can compete with the duty of loyalty owed to their client or their ability to independently represent their client's interests. A personal interest includes not only the licensee's own interests, but also the interests of others connected to the licensee, such as the licensee's partners, associates, or family members.

(see: <https://LSO.ca/lawyers/practice-support-and-resources/topics/the-lawyer-client-relationship/conflicts-of-interest/>)

Volume #24: Another ground for why I am seeking a final order along with the return of any personal information that was inappropriately and, in unauthorized fashion, collected, used, accessed or disclosed (if LAT has authority or under PIPEDA, see: *Mansuri*)

22
 90 I now quote from the case of *Jia* which was alarming to me when considering the above about the apparent rights of insurers on the SABS side of the ledger. In *Jia*, the Ontario Divisional Court found as a matter of law [emphasis is mine]:

[6] It is established law that insurers may not use the same counsel in statutory benefits cases and in tort cases brought against them by the *same insured*. This is because the duties of an insurer (and therefore of its counsel) are different in these contexts, and as an accident benefits insurer, THE INSURER is entitled to receive, and is required to keep confidential, a great deal of sensitive personal information from claimants

91 If the Divorced Husband Conflicted Lawyer has been receiving highly sensitive confidential information from myself to what I thought was directed to Ms. Nurse and Ms. Persaud as "claims adjusters" (when I was unaware he was or I allege the "ANDY GERA") then I will determine what relief to seek and under what jurisdiction. I believe and allege that he has and I allege he knew that was unlawful. I further allege that Mr. Nicuwlund, Ms. Moraes and Mr. Karat knew that it was unlawful for them to be instructed, advised or facilitated by him, and receive documents that I delivered to Ms. Nurse and Ms. Persaud albeit under what I allege were false pretenses

92 However, I now quote from *Monsuri*, a decision of Vice Chair McGee found at paragraphs 18 to 26 with emphasis being mine

Findings on the jurisdictional issue

[18] The Tribunal is a statutory body. It is well settled that a statutory tribunal has no powers other than those it derives from legislation. The Supreme Court of Canada has long held that the exclusive jurisdiction of a statutory tribunal is subject to the residual discretionary power held by courts. [8] Because the Tribunal lacks inherent equitable jurisdiction, any authority to grant equitable remedies (such as declaratory relief) must be provided for in legislation.

[19] I am persuaded by the applicants' submission that an order disqualifying counsel for a conflict of interest falls within the Tribunal's broad authority to decide disputes under s. 280 of the *Insurance Act*. In *Siegenga*, by which I am bound¹⁶, the Court of Appeal held that the Tribunal has exclusive jurisdiction over a dispute if its "essential character" relates to entitlement to statutory accident benefits and their amount. [9] The Court also held that disputes involving an insurer's conduct¹⁷ in handling a claim satisfy this requirement. [10]

[20] This motion calls into question the respondent's handling of the applicants' claim¹⁸, and I find that its essential character relates to a claim for accident benefits. I am unpersuaded by the respondent's submission that the Tribunal lacks the power to grant declaratory relief in this case because the motion itself does not involve determination of entitlement to or quantum of benefits. The underlying and ongoing disputes between the applicants and the respondent squarely engage questions of entitlement and quantum, and the outcome of this motion will impact the course of these underlying proceedings. The questions before me are neither hypothetical nor academic, they have direct bearing on the conduct of the litigation before this Tribunal.

[21] I find that no excess of jurisdiction would flow if I were to order the relief sought in this motion. The Divisional Court in *Jo* took no issue with the Tribunal's decision to remove counsel based on a conflict of interest. I am not persuaded by the respondent's submission that it is impermissible to "read in" findings to case law that are not explicitly expressed, or that the Court of Appeal's decision in *Ridd* stands for such a proposition. *Ridd* was a case about the

principles of statutory interpretation and how ambiguity in legislative provisions should be resolved. The court's analysis in that case does not intersect with the jurisdictional issue before me. The inference the applicants ask me to draw from *Jia* is sound: If the Tribunal had exceeded its jurisdiction by declaring a conflict of interest and disqualifying counsel, the Divisional Court would have corrected that error when it directly addressed the matter on appeal.

- [22] It is not enough to satisfy the basic common law requirement that a dispute has an essential character falling within the Tribunal's jurisdiction. The Tribunal's powers are subject to limits. Its orders must comport with its enabling legislation. The way an insurer *staffs* its claims is not a matter of Tribunal procedure or practice. As such, the Tribunal's power under s. 23 of the *SPPA* to make orders to control the conduct of its proceedings is not engaged. Compelling an insurer to remove a specific adjuster from handling a claim is not necessary or expedient for the Tribunal to carry out its duties, so the Tribunal's order-making authority under s. 3(2) of the *LAT Act* likewise does not apply. In the absence of statutory authority to make such an order, I find that the Tribunal lacks the power to disqualify an adjuster¹⁹ from handling a claim. If I am wrong about the scope of the Tribunal's authority, and the Tribunal does have the power to disqualify an adjuster under the *SPPA* and the *LAT Act*, I would decline to exercise that authority on substantive grounds, for reasons I explain below.

- [23] The *Schedule* is not a complete code governing the relationship between insurers and insured persons. That relationship has also governed by private law obligations and legislative schemes outside this Tribunal's jurisdiction. The applicants submit that the alleged misconduct of the adjuster in this case could amount to civil liability for intrusion upon seclusion, a common law tort established by the Ontario Court of Appeal in the 2012 case, *Jones v Tsige* [11]. They also submit that the respondent disclosed confidential information several weeks before obtaining authorization to do so under the *Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA")*.

- [24] If the applicants believe that the adjuster's conduct constitutes a civil wrong, the appropriate forum to pursue a remedy is the civil courts, not this Tribunal. If the applicants maintain that the respondent has breached its obligations under *PIPEDA*, the federal Office of the Privacy Commissioner has jurisdiction to hear such a complaint.

- [25] The Tribunal routinely adjudicates questions of insurer conduct under s. 10 of Regulation 664. If the applicants wish to pursue a remedy from the Tribunal, it is open to them to claim an award for unreasonable withholding or delay of benefits in the underlying proceedings.

- [26] To conclude, the applicants have satisfied me that the Tribunal can disqualify counsel if it determines that a conflict of interest exists. Whether characterized as a "finding" or a "declaration," I find that an order disqualifying counsel is a *permissible exercise* of the Tribunal's authority to decide accident benefits disputes and make procedural orders in accordance with the *Insurance Act*, the *LAT Act*, and the *SPPA*. I further conclude that the Tribunal lacks the authority to bar an adjuster from handling a disputed accident benefits claim, or, in the alternative, that the facts before me do not

Volume #25: Another ground for why I am seeking a final order (abuse of process): respondent can no longer viably continue defending the Appeal

93. I now quote from *Law Society of Ontario v. Chung*, 2021 ONI 878 at 44, the Law Society Hearing Tribunal found [emphasis is mine]:

[134] **Dishonest conduct** by a licensee has a significant impact not only on the licensee's clients. More broadly, "a breach of integrity such as this has a corrosive impact on public confidence in the legal profession and the administration of justice" *Christie* at para. 37

94. I ask the question reflexively, is this why Mr. Karat was utilized by name and signature on the Purported SNIC Response?

95. I believe that this is why the Divorced Husband Conflicted Lawyer utilized a non-licencee in Mr. Karat as opposed to Ms. Moracs who is a licensed paralegal -- even though my position remains that Ms. Moracs could not sign the Purported SNIC Response for the following reasons:

- a. Paralegals are not authorized to provide legal services in claims where CAT impairment is involved or at issue (see: *Donkha*); and
- b. Ms. Moracs' current status as "employed -- NOT provided legal services".

96. I believe that these issues are far more serious than a mere nullity *per se* but rather invoke a different type of level of sanction by L.A.T. for disqualification and striking for dishonest and intentional abuses of process.

Volume #26: Further case on signing of documents by non-lawyers or non-licencees (by implication or analogy): *IC v. Barnett*

97. I note the case of *LSUC v. Barnett* (albeit prior to the *Access to Justice Act* 2006) was summarized as follows and the "rule" historically:

Particular 2(d) He entered into a business arrangement with the real estate agent and a mortgage consultant which:

- i. provided for a discount on legal fees incurred by a person who used the services of the three participants in the business arrangement;
- ii. placed him in a position where his obligations to a client might conflict with those of the other parties to the business arrangement;
- iii. called for the other members of the business arrangement to **SIGN** his letterhead;

98. In *Barnett*, the Law Society Tribunal found that the "Commentary" in "Rule 16, Commentary 3.(1) was of some assistance:

Particular 2(d)(iii) does not refer to a specific rule but the Law Society argues that Rule 16 Commentary 3.(1) is of some assistance. That Commentary reads as follows:

A lawyer may not permit a non-lawyer to

(i) **SIGN** correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may **SIGN** correspondence of a routine administrative

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nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated;

volume #27: The Karat LAT Assignment to "handle" this LAT Dispute

99. I believe that the Divorced Husband Conflicted Lawyer empowered Mr. Karat to handle this SNIC Proceeding while he had "effective control" and perhaps "absolute control" over Mr. Karat or he was engaging in the utilization of his name to avoid the Actual COI and Reasonably Perceived COI. I will await their evidence in this regard.
100. I note the following in relation to the Federal Model Code of Conduct with the "nota bene's" are 'nota benes' which are my opinions

6.1-3 A lawyer MUST NOT permit a non-lawyer [Karat] to:

(a) accept cases on behalf of the lawyer [nota bene: Karat LAT Assignment on behalf of whom], except that a non-lawyer [Karat] may receive instructions from established clients if the supervising lawyer [nota bene: who is the Supervising Lawyer] approves before [nota bene: when did work commence? Before the Karat LAT Assignment] any work commences;

(b) give legal advice [nota bene: Karat's client was SNIC; was he giving legal advice or merely given authority from SNIC? If so, who was the person at TD Insurance Meloehe Monnex (SNIC) that gave him authority; was it a lawyer? Was it a non-lawyer?];

(d) act finally [nota bene: filing a pleading that takes position of striking or withdrawing a final position] without reference to the lawyer [nota bene: no reference to any lawyer in the pleading; the cover letter is from SNIC with 'TD Meloehe Monnex' as the sender] in matters involving professional legal judgment.

(e) be held out as a lawyer [nota bene: Karat did not hold himself out as a lawyer but rather an unlicensed non-legal representative];

(f) appear in court or actively participate in formal legal proceedings on behalf of a client [nota bene: Karat actively participated in the formal legal proceedings as they commenced on December 24, 2023 by the: (i) Karat LAT Assignment on Jan. 23, 2024. (ii) the completed, executed and filed responsive pleading on Jan 25, 2024; (iii) the Purported Karat CYS] except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading [nota bene: Karat was NOT named in association with any lawyer in a pleading but on his own. This appears to be a more egregious breach], written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer [nota bene: Karat is not an employee of a lawyer or law firm per se but rather, perhaps, an employee or contractor of an insurance company];

(i) conduct negotiations with third parties, other than routine negotiations if the client [nota bene: SNIC] consents and the results of the negotiation are approved by the supervising lawyer [nota bene: who is or was the supervising lawyer?] before action is taken;

(j) take instructions from clients unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

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 (d) SIGN correspondence *[nota bene: signing a pleading is far more than signing correspondence/ containing a legal opinion [nota bene: the pleading contains legal positions, opinions, legal conclusions and points of law involving the application of legal principles and legal judgment regarding the objectives and circumstances of person]*.

(f) SIGN correspondence *[nota bene: interestingly Karat did not SIGN the cover letter enclosing the Purported SNIC Response; Karat also did not SIGN the correspondence in the purported PIPEDA response]*, unless

- (i) it is of a routine administrative nature
- (ii) the non-lawyer has been specifically directed to SIGN the correspondence by a supervising lawyer.
- (iii) the fact the person is a non-lawyer is disclosed, and
- (iv) the capacity in which the person signs the correspondence is indicated;

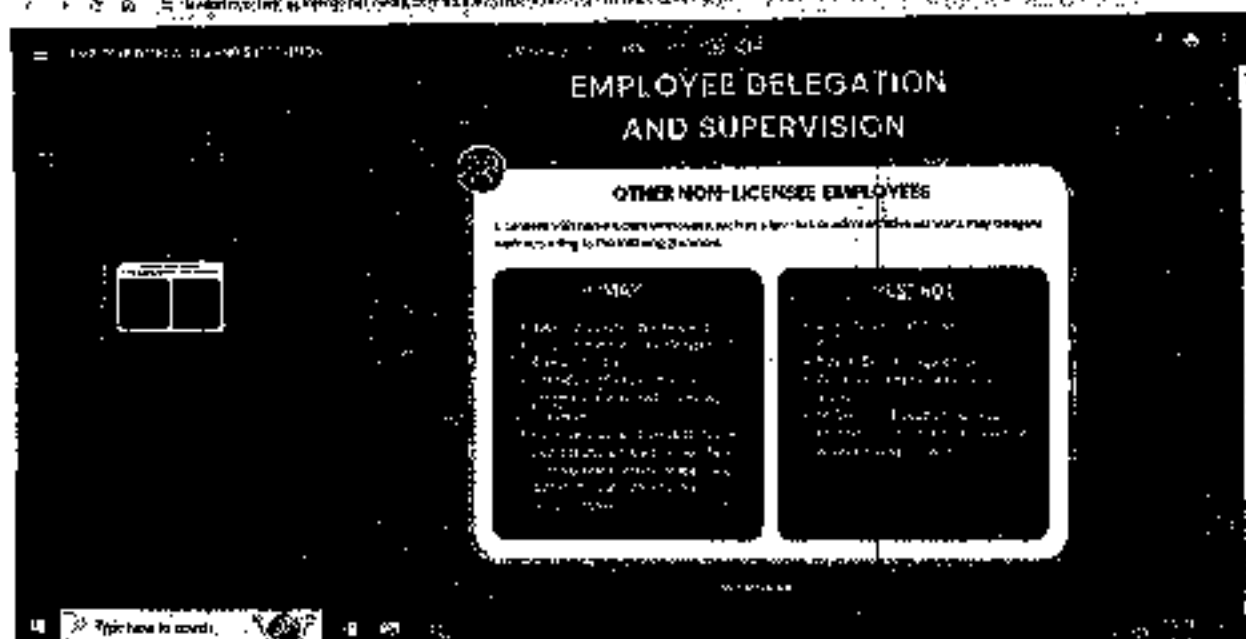
(H). Now shown to me is a copy and paste from the LSO website regarding:

Employee Delegation and Supervision

Lawyers and paralegals **MUST** assume complete professional responsibility over their practices including over the work of their employees. This **INCLUDES**:

- ensuring tasks and functions are properly delegated or assigned, and
- directly and adequately supervising any law or paralegal students, licensing candidates, and NON-LICENSEE employees (e.g., law clerks, administrative assistants, etc.) performing tasks on their behalf. *[nota bene: whose behalf was Karat performing tasks on behalf]*.

For a high-level overview of the employee delegation and supervision requirements, see the Law Society's Employee Delegation and Supervision Quick Reference Guide



However, licensees **MUST** not allow any student or *NON-LICENSEE* employee to perform any of the duties that only a licensee may perform. This rule applies at the licensee's practice and at any satellite office of the practice.

Volume #28: Tasks and functions that may not be assigned: general

102. Now shown to me is section six of By-law 7.1 and I note the following with "nota bene" and square brackets being my opinions:

6. (1) A licensee **SHALL** not permit a *NON-LICENSEE*:
 - (a) to give the licensee's client [nota bene: why Karat and Nieuwland have different clients?] legal advice;
 - (b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the *NON-LICENSEE* is authorized under the *Law Society Act* to do so;
 - (c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);
 - (d) to **SIGN** correspondence, other than correspondence of a routine administrative nature; or

(c) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee

103. I do not follow how any supervising lawyer at the LSO could believe that it could authorize a non-licensed individual to sign a responsive pleading in this LAT Proceeding; particularly involving CAT Impairment

104. While Mr. Karat appears to be no longer authorized for SNIC, I do not agree or consent that said removal of Karat resolves the issue of the **Purported SNIC Response** under NOM #5 or NOM #6 (to be served and filed).

105. I note section 3(2) of *By-Law 4* (which is Licensing):

Assignment of tasks, functions: general

3 (1) Subject to subsection (2), a licensee may assign to a non-licensed tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client.

Assignment of tasks, functions: affiliation

(2) A licensee who is affiliated with an entity under *By-Law 7* may assign to the entity or its staff, tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client only if the client consents to the licensee doing so

106. I note the language under ss 3(2) of *By-Law 7* 1 (Organizational Obligations and Responsibilities) and is "a licensee affiliated with an entity under *By-Law 7*".

107. In light of the issues with the **Purported SNIC Response** identifying SNIC as the Respondent and TDGIC being in the Nieuwland DOR, I do not know who the client is or would be when applies to those sections of *By-Law #4*.

108. *By-Law 7* does not use the language of "entity" but "affiliated entity". Affiliations is "Part IV" of *By-Law 7* (Business Entities).

109. I now quote from the above with my square brackets being my identification of a potentially relevant individual or a relevant issue by a reflexive or rhetorical question:

Interpretation:

31. (1) In this Part,

"affiliated entity" means one [note bene: Karat] or more persons none of whom are licensed or otherwise authorized to practise law or provide legal services in or outside Ontario [note bene: Karat];

"licensee" includes a permitted group of licensees.

Interpretation: "affiliation"

(2) For the purposes of this Part, a licensee [note bene: AP] affiliates with an affiliated entity [note bene: Karat] when the licensee [note bene: AP] on a regular basis [see: *Quinn v. SNIC*, six day hearing in 2022 with decision released in June 29, 2023] joins with the affiliated entity [Karat] in the delivery

or promotion and delivery of the services of the licensee [note bene: AP] and the services of the affiliated entity [note-bene: Karat as ADR Specialist]

Ownership of practice, etc.

32. A licensee who affiliates with an affiliated entity shall,

(a) own the professional business through which the licensee practices law or provides legal services or comply with Part III [note bene possibly AP];

(b) maintain control over the professional business through which the licensee practices law or provides legal services [note bene: AP ... does he?]; and

(c) carry on the professional business through which the licensee practices law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the licensee jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee.

[note bene: Karat and AP at same location, was this reason for the shift from Nurse to Persaud in Summer 2023? Was it a rouse? Was it an attempt to distance from SNIC Markham yet the Purported SNIC Response reverts back to SNIC Markham?]

VOLUME #29: Conclusion

10. I affirm that I have served and filed this affidavit as soon as I was able to do so and as promptly as I was able based on the evidence that I received, further investigations, and the lack of response from the individuals and persons named herein.

11. I now allege on this April 1, 2024 that this SNIC Proceeding has been irremediably tainted by the **Divorced Husband Conflicted Lawyer, Karat, Nieuwland and Moraes**

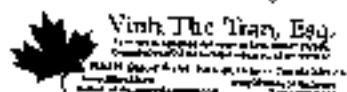
12. With due respect and objectivity, in my view, I do not say that they were all "willing participants" and some may have been "coerced" by the "consequence manager" in the **Divorced Husband Conflicted Lawyer**. I again allege that this is why Ms. Moraes was looking for employment elsewhere some four weeks ago on her LinkedIn profile. I again allege this is why Mr. Karat is now no longer authorized for **Security National Insurance Company**. I again, now, allege that this is why Mr. Nieuwland refused to bring a motion to correct the respondent's name and his filing of the Nieuwland DOR Non Respondent.

113. While I appreciate that the allegations are of a serious nature, I believe and allege that the lack of denials by the named individuals in the emails along with the substituting of "assistants", Mr. Karal's recent deauthorization for SNIC, and any appearance of a lawyer for an insurance acting against, in part, his ex-wife and her current husband is an appearance of a conflict of interest worthy of disqualification of Mr. Nienwland and Mr. Karal. I reference Mr. Karal as he is not a "claims adjuster" and Vice Chair McGee found in Mansuri (or at least on these facts) that a claims adjuster could not be disqualified by LAT. I submit that LAT has the power to disqualify not only those legal representatives who are listed as lawyer licensees or paralegal licensees but also ADR Specialists and those individuals who are decertified ("shall be considered") to be representing a person in a proceeding by their acts and conduct pursuant to section 117(a) and (c). I challenge each and every individual so named in this affidavit (where applicable to each) to swear contrary evidence to my evidence on belief herein.

114. I affirm this Affidavit #15 for no improper purpose and in relation to my NOM #6, general purposes and ancillary purposes (known and unknown)

affirmed before me at Toronto, Ontario
On this 12 day of April 2024

~~Att. Kevin A. McLean (B.A., J.D., C.M.)~~



Unpublished, No Technical Data,
No Data Propagation,
Identification Confirmation.

¹Defined as "TD SNIC" as "Security National Insurance Company" as provided as the name of the insurance company that Ms. Persaud and Ms. Nurse were acting as "claims adjusters"

²Meleche Monnex Inc. ("MMI"), carrying on business under the name of Security National Insurance Company, *He v. Meleche Monnex*, 2022 ONSC 974 (CanLII), at para 2, <<https://canlii.ca/t/9nldp-par2>>, retrieved on 2024-01-04

³*DINNEN – Conflict of Interests – Failure to Serve – Failure to Supervise* The Lawyer's office prepared a will for an elderly client – He reviewed the will but did not meet with the client to get instructions or attend when the client signed the will – The Lawyer failed to assume complete responsibility for his practice and to directly supervise non-lawyer staff when he delegated those tasks to them – He also failed to competently serve that client – The Lawyer acted in a conflict of interest when he represented the estate trustee once the will was contested on the basis that the testator was not mentally competent to sign it – He had an interest in defending the quality of his firm's services and he or his staff were likely to become witnesses – There was a substantial risk that his loyalty to, or representation of, his client would be materially affected by these personal interests – The Lawyer's licence was suspended for 45 days and he was to take three additional hours of continuing professional development in relation to conflicts of interest

⁴I note that in her [Morales] email to L.A.T, Ms. Morales only referenced being a legal assistant to Ms. Klotowska and Ms. Saoud.

⁵*Talisman Resort v. Keyser, Usting et al*, 2013 ONSC 1901 (CanLII), <<https://canlii.ca/t/fwwz7>>

⁶Defined in the NOM #6

⁷<https://en.wikipedia.org/wiki/Metadata#--text=Metadata%20means%20%22data%20about%20data.Purpose%20of%20the%20data%20Metadata%20means%20%22data%20about%20data> Metadata means "data about data". Metadata is defined as the data providing information about one or more aspects of the data; it is used to summarize basic information about data that can make tracking and working with specific data easier

⁸Descriptive metadata enables discovery, identification, and selection of resources. It can include elements such as title, author, and subjects

⁹(see: Applicant was successful against "TDIC" (not the Respondent of SNIC). Importance of issues involving "dates of denial);

¹⁰(see: Distinction when the named title is "adjuster" compared to that of Mr. Karat (ADR Specialist)).

¹¹TD having issues with receipt of documents and claiming an OCF-3 was not received: [13] I find that the applicant provided an

OCF-3 before the 104-week mark. The application can proceed to a three-day videoconference hearing; [14] The letter dated October 22, 2015 confirmed that the respondent was in possession of the OCF-3. In fact, the respondent reviewed the OCF-3 and determined that the applicant was not eligible for the IRB or NEB. In the same letter, the applicant was informed of her right to dispute the respondent's determination; [17] The respondent relies upon *JV vs. TD Insurance Meleche Monnex*, 2019 CanLII 11029, and *C.G. vs. Pembroke Insurance Company*, 2020 CanLII 51276 in support of its position that a complete claim for an IRB must be made within 104 weeks. In both cases, the OCF-3 was submitted after 104 weeks. This case is distinguishable as the applicant did submit a completed OCF-3 within 104 weeks. [18] In my view, the respondent's argument regarding Mr. Greenspan noting that she did not meet the substantial inability test in the OCF-3 as something that can be addressed at the substantive issue hearing. Preliminary issues are very technical in nature. The question here is whether or not she submitted the OCF-3 within the 104-week mark. Based on the evidence before, I find that the applicant did comply with the requirements under sections 36(2) and (3) of the Schedule. (note bene: no issue of not complying with OCF-3 herein when it relates to NOM #4)

¹²See.

¹³Ms. Morales was fully entitled to act, in her capacity as a "licensed paralegal" as the matter involved only minor injuries and NOT CAT impairment. The Application was dismissed as the IJO applicant had injuries that were predominantly minor but there were issues of late production by the Applicant in breach of a case conference order

¹⁴(note bene: while noting Mr. Karat determined the form to use, completed and solely executed the Purported SNIC Response in "e-filed" form whilst representing and admitting that he was NOT a "legal representative". It also appears that Mr. Karat admitted in the Purported SNIC Response that he was not covered by any exemption under the LSA or By-Laws as a "non-licensure without a P1 license" to provide legal services or practise law in Ontario, and, consequently, this LAT Proceeding herein. It is further notable that Mr. Karat was never the "claims adjuster" in the underlying file with the TD Insurance Claim # and he admitted as much in his January 23, 2024 email to myself;

¹⁵Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, I have been delegated the responsibility to decide this matter in accordance with the applicable rules of the Tribunal (see: paragraph 4); 1.W.'s Request for Reconsideration is dismissed (see: paragraph 5). It was quite a technical case considering that some hoodlums engaged in violent criminal activity towards a driver of a taxi after some misunderstandings regarding directions to their desired

location albeit falling asleep in the cab at the same time. The taxi driver (1.W.) sustained injuries when his mobile was taken from him -- then four cowardly individuals engaged in assaulting and battering him. I presume (without knowing) that the 1.W. realized that -- degenerate individuals (two of which were arrested) were impetuous or judgment proof, and he advanced his rights as the incident being an "Accident" when technically the conduct of the passengers in his vehicle was not in the nature of an "motor vehicle accident" but criminal conduct

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¹⁸LAT is of the view that it is bound by stare decisis and decision of the Ontario courts

¹⁹NIC herein

although Mr. Mansuri was pointing the proverbial COI finger at counsel for the Respondent (Domination)

¹⁹What if the adjuster is merely referenced in letters and not executing the same, and was away for four months by her auto-reply and it is likely that "AP" was drafting these letters covertly?

²⁰This would presume that AP and Karal would meet the test of joining on a regular basis

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(33) AFFIDAVIT #15 Kevin A. McLean

THIS IS EXHIBIT 1A REFERRED TO IN THE
AFFIDAVIT OF KEVIN A. McLEAN
AFFIRMED BEFORE ME, THIS 2nd DAY
OF APRIL 2011

A COMMITTEE ONE

Vinh The Tran, Esq., LSUC #97761C
Lawyer, Notary, Oath Commissioner
188-639 Dupont Street, Toronto, ON
M6G 1Z4, T. 547-209-7389
vinhtranlaw@hotmail.com

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Exhibit "A", Tab 1

Re: April 2, 2024 – emails under 6th NQM

(35)

Re: 23-015662 AABS (the "LAT Proceeding") - potential sixth notice of motion – separate and distinct from 5th notice of motion – conflict of interest – the acting of "Andy Gera" – irremediably tainted this LAT proceeding – abuse of process

MOTIONS/6th NOM

Search for all messages with label MOTIONS/6th NOM

Remove label MOTIONS/6th NOM from this conversation

Kevin McLean

Wed, Mar 27 1:37 PM (6 days ago)

David, Matthew, James, V. Russell, Michelle, Andrew.papadimitropoulos, me

Dear Sirs/Mesdames: many of you herein are aware of the email issues that I have had but some are not. For an unknown reason, I was able to send emails but not receive some or all for a brief period of time. I am getting caught up to speed and do have the decision of Vice Chair Logan that I am reviewing. In brief, said Vice Chair has found that Vice Chair Lake's "Order" is not a decision that disposes of the appeal. As such, I will likely now bring this motion as that will dispose of the appeal and is imperative to be determined before any such case conference.

Apologies for the tech issues but the new email is copied herein and this email will be discontinued in about a week or sooner. Thank you.

Yours truly,

Mr. Kevin A. McLean (B.A., J.D. CIM) ("**McLean**" or "**Disabled Individual**") (he/him)

(e): lat@confidentialmclean.ca

(f): 647.370.6208

DISCLAIMER

▪ **SPECIFIED ELECTRONIC RECEIPT ADDRESS:** this secure email was solely created, by McLean (who owns the domain), as an electronic mail address for delivery and receipt of communications and records with the License Appeal Tribunal ("LAT") for the file "23-015662/AABS" involving McLean and TD Insurance and its underwriter, Security National Insurance Corporation ("**SNIC**") (defined as "**TD SNIC**");

▪ **DUTY OF CONFIDENTIALITY:** *The contents of this email, and its attachments are confidential, solely for the specified purposes above, and intended for the recipient specified in message only. It is strictly forbidden to share any part of this message with any third party, without a written consent of the sender.*

▪ **DICTATION OF EMAIL or Assistance from Third Parties (no waiver of confidentiality or privilege):** this email may have been created using voice recognition software and McLean reserves the right to correct any spelling, grammar and syntax upon further review.

On Mon, Mar 25, 2024 at 4:34 PM Kevin McLean <at@confidentialmclean.ca> wrote:
 March 25, 2024

Re: potential sixth Notice of Motion: abuse of process – independent ground – independent motion from NOM #5 – courtesy notice

Dear Sirs/Mesdames:

I hope you are well

In light of what I have discovered (see Appendix #2: in "draft form") recently involving the potential that this "Andy Gera"^{LI} is one Andrew Papadimitropoulos (defined herein after as "AP", "Mr. AP", or "Andrew P" also known as *Andy Gera*) has been engaged in the provision of legal services and the practice of law including *potential representation of a person* in a proceeding before an adjudicative body. I intend to bring a sixth notice of motion involving the above. I am still having the law reviewed in this area because it is not your "standard conflict of interest" (i.e. a lawyer against a former client) but it certainly fits within the flexible doctrine of "abuse of process" and whether the conduct offends amounts to the same. In this vein, I quote the following from CUPB:

This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

Of course, this normally happens in the context of a claimant (i.e. plaintiff) but it can occur in situations of defending a claim.

I kindly refer you to the Federal Mode Of Conduct for lawyers with my annotations and analysis (see: Appendix #3).

While the Federal Mode of Conduct for lawyer is different than the LSO By-Laws, I have included By-Law 7.1, section 6 herein:

6. (1) A licensee **SHALL NOT** permit a *non-licensee*,

(a) to give the licensee's client [nota bene: why **Karat** and **Nieuwland** have different clients] legal advice;

(b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the *non-licensee* is authorized under the *Law Society Act* to do so,

(c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);

(d) to SIGN correspondence, other than correspondence of a routine administrative nature; or

(e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

In relation to the potential representation of a persona in a proceeding component, I note that under the LSA, representation in a proceeding does not need to be "overt" or "public" but a person (authorized or unauthorized) can represent a person in a proceeding by the mere determination of what, when, whom, where and how to file and serve of documents "SHALL BE CONSIDERED" representing a person (SNIC) in a proceeding. Even though Mr. Karat's name is on the Purported SNIC Response and he was the sole signer of the Purported SNIC Response, this does not mean, by virtue of section 147(c) and (e) of the LSA that "AP" could not also be representing SNIC in this SNIC Proceeding.

This, of course, does not absolve the breach of the LSA and its By-Laws by Mr. Karat solely executing the Purported SNIC Response which is a nullity and an abuse of process in of itself as SNIC never sought to even attempt to remedy the same.

Of course, if a lawyer had stepped forward and asserted himself as counsel of record (by filing a DOR) for SNIC and bringing a motion to correct the same, we may have a different set of facts and circumstances. Unfortunately, we do not. We have an unmitigated mess as follows which includes but not limited to:

1. Mr. Karat, who is an ADR (not the Claims Adjuster as that is Ms. Persand and formerly it was Ms. Nurse) is the sole and de facto unlicensed representative, without an exemption under the LSO By-Laws of SNIC;
 - a. Mr. Karat is an unlicensed representative who has executed the Purported SNIC Response and the Purported Karat COS;
2. Mr. Nieuwland is the sole legal representative of TDGrC (a non-insurer and non-underwriter as it relates to the Insurance Policy);
3. Mr. Nieuwland has been requesting that I include Ms. Moraes as his legal assistant when her signature block does not include his name as a supervising lawyer of her (see issues surrounding "effective control" et al);
4. Ms. Moraes is a licensed PL holder but currently, in her role (with no castigation at all of her or her current role) with TD Insurance Staff Legal is "employed - not providing legal services";
 - a. It appears that she could, subject to a supervising and directing lawyer with the LSO e.g.g.e in "mediation of ancillary issues involving CAT Impairment" but there is nothing to mediate per se but rather the determination of my CAT Impairment by LAT;
5. It appears, subject to any written denial within 24 hours by any and all individuals of my assertions (which I will presume to be true and correct in substance), that one Mr. AP (the former spouse of my current spouse and whose name of the insured in the Purported SNIC Response) is also representing SNIC albeit in a covert manner; and
6. A variety of independent breaches of the LSA, its By-Laws, guidelines, rules and RUPC (where applicable).

In conclusion on this front, we have two individuals representing SNIC and one acting for a non-respondent and non party in TDGrC. We have an odd situation where Ms. Moraes already has two lawyers that she is the legal assistant to and Mr. Nieuwland claimed that Ms. Moraes is also his legal assistant when her signature block does not represent the same. We also have Mr. Karat's signature block in outgoing emails shows that he is "Representing the Security National Insurance Company" which is consistent with the Purported SNIC Response.

While it is often unlikely that any lawyer will admit to a conflict of interest, it is the appearance of a conflict of interest that offends. The factual matrix demonstrates a long list of issues that evidence a conflict of interest and non-compliance with SABS including, from the outset, the insurance benefits package being sent to the wrong address, by change of postal code, yet my Spouse (AP's former spouse) receiving her accident benefits package to the correct postal code.

It is true that precludes having bona fide and good faith settlement discussions unless I receive notice from an independent and non-conflicted lawyer licensee appointed forthwith.

-I am still looking into the issue of what a "consequences manager" entails and how that factors into the issues herein whatever that title may entail, the LSA and By-Laws are clear that Mr. Karat could not sign the responsive pleading in the form of the Purported SNIC Response.

If the "Karat LAT Assignment" was one from Mr. AP, then this will speak volumes to the abuse of process. Of course, it comes back yet again to the appearance of a conflict of interest and whether an individual lawyer's personal interests affect his ability to be impartial. This is also supplemented by Ms. Persaud being away from September to around January 2024 (which has been confirmed independently by other persons that there were no such calls from her during that time) yet the letters from September to December 2023 reference Ms. Persaud. I further note a litany of calls from Ms. Persaud to my health practitioners that were bordering on harassment, or at least redundant in nature.

Irrespective of whom assigned this LAT assignment for Mr. Karat to handle the LAT dispute, and who was the supervising lawyer of Mr. Karat (as an unlicensed individual and an ADR), supervising lawyers were NOT authorized to PERMIT Mr. Karat to represent SNIC in this SNIC Proceeding and/or SIGN the responsive pleading. If he did so on his own, then it matters not as it is a breach of the LSA and its By-Laws.

If my **Reconsideration Motion** is granted, the hearing of this motion will not be necessary. However, I felt it was only courteous to draw this to your attention (with copying of the same solely on this email and solely for these purposes) and provide a courtesy notice.

I have also provided at Appendix #4 my current analysis of the case of *Dankba* as it relates to the issues herein. It was not known to me that the lawyer who was overseeing Mr. Grabar in Mr. Fallenta was suspended from practicing law. No such issue arises here.

-Of course, this makes resolution all the more difficult and perhaps why there has not been compliance with SABS for an extended period of time and why SNIC continues to be in a state of non-compliance. I remain ready, willing and able to have substantive and productive settlement discussions with an authorized independent (also with the appearance of independence) legal representative (which must be a lawyer licensee as this Appeal involves my CAT impairment). However, the issue arises as to whether the facts to be alleged and affirmed will lead to this LAT Proceeding being irremediably tainted.

To conclude, I in no way confirm, concede or accept that Ms. Moraes is the assistant to Mr. Nieuwland. Moreover, I repeat and rely on all of my previous positions as it relates to nullities, abuse of process and the relief sought therein. However, I had to draw this notice to your attention in light of the upcoming timelines and deadlines for responses to motion, case conferences et al. I reserve the right to rely upon this correspondence should there be any further branches.

I will supplement this with further information, evidence and law as it becomes known to me but I will fully expect and require that if this motion is opposed that all relevant individuals provide evidence in response.

I cordially remind all lawyer licensees of their professional obligations and Ms. Moraes of her obligations as a licensed P1 holder. I further draw Mr. Karat's attention to the LSA and its By-Laws with specific reference to section 26.1 of the LSA.

I was looking forward to working with an ADR and Mr. Nieuwland to resolve this matter in accordance with SABS and away from the former adjusters in Ms. Niose and Ms. Persaud (with an interesting switch from Markham to Burlington by way of office locations which now appears to be disingenuous) but it appears that the underlying TD Claim # and this LAT Proceeding has had a similar individual making such deterrainations therein and in relation to section 11(?) of the LSA albeit not coming forward with his name. Why would he (AP) not do so? The question answers itself.

-Moreover, why would the metadata have the name of "Andy Gera" when Mr. David Karat is not "Andy Gera"? With the now learned evidence, that question also answers itself.

These issues must be resolved between us or by way of motion and decision of LAT before any required filings for the case conference. If I do not hear from you on a forthwith basis of what you propose and steps you (SNIC) are taking to remedy the same, I will presume that a motion is required to be served and filed.

I reserve the right to draw this correspondence to the attention of LAT or any other persons that I may deem necessary if SNIC does not comply with all of its outstanding obligations forthwith.

Thank you kindly.

APPENDIX

Appendix #1

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.
2. Conducting an examination for discovery.
3. Engaging in any other conduct necessary to the conduct of the proceeding. 2006, c. 21, Sched. C, s. 2 (10).

Appendix #2 copied and pasted from the filing of this morning with LAT and served upon you albeit in relation to the TRB Calculations

(NOTA BENE Whether there is a "ghostwriter" or not, the admissions were made and the Applicant is relying upon them. Of course, there could be further repercussions or issues arising from a lawyer not imputing his name on various documents and "supervising", "encouraging" or "facilitating" breaches of the LSA and By-Laws, guidelines and his ROPC. To confirm, said lawyer hyperlinked above is NOT Mr. Nieuwland. It raises distinct issues regarding abuses of process that are distinct from NCIM #5 and whether a former spouse of the Applicant's current spouse, who was named as the primary insured, is or was authorized to act, even in a potentially covert or surreptitious manner, based on a potential conflict of interest, and/or abusing the process of the LAT. Perhaps, this lawyer cited above instructed Mr. Karat to complete, sign and file the purported SNIC Response which would make such unauthorized execution of the same all the more egregious and an abuse of process. If necessary to be argued, it may speak to why the IRB's have been delayed and withheld in such an unreasonable manner. There will also be some contextual evidence provided (if necessary) that Mr. Karat purportedly provided a response to a PIPEDA request with his name in the letter as the author but the metadata showed the name of "Andy Gera" which is a fictitious name. When investigating the issue, "Andy" is the short name for the first name of the above noted lawyer and "Gera" means "generated" in Portuguese. Put another way, "Generated by Andy" when the document itself has no reference to the same but the metadata did. The reference to "Portuguese" translation is yet another compelling piece of evidence considering that the assistant that Mr. Nieuwland wished to have included in emails with the Applicant (as he represented that Ms. Michele Moraes was his legal assistant when her signature block represented that she was the legal assistant to two female lawyers) is a P.I. license holder who has acted for applicants before LAT. In her current role, she is "not providing legal services - employed" with TD Insurance Staff Legal. The Applicant has communicated with Mr. Karat and Mr. Nieuwland that until Mr. Nieuwland confirms by affidavit that said individual (Ms. Moraes) is his legal assistant that she will not be included for, inter alia, concerns over whether Mr. Nieuwland has effective control over her non-licensee activities to him and whether they are following LSO By-Law 7.1 et al. The Tribunal will also be aware that it was Ms. Moraes that attempted to seek an adjournment of the agreed to case conference (until the nullity issue was found and brought to the immediate attention of SNIC (including Karat and Nieuwland)) from the May 2, 2024. Interestingly, when LAT confirmed with Ms. Moraes that under the New LAT Rules that a motion was required to seek an adjournment of the case conference, no motion

was brought. Of course, it would have required legal counsel in Mr. Nieuwland to explain why he was not available as the issues in the Appeal and Purported SNIC Response involve CAT Impairment.

Moreover, in the "purported PIPEDA response", there was a reference to "internal" at the bottom of the document when it "as sent externally to the "requestor" under that federal legislation (but the same named individual appellant herein) which is consistent with the emails of Ms. Morais where there is a reference to "internal".

It is a difficult legal issue to determine, which has factual elements that need resolution, as to whether a ex-spouse or divorced spouse of the Applicant's current spouse is authorized to act against him (even covertly or surreptitiously behind the names of others) but it would appear to be a form of "bad faith" and "abuse of process" to do so in a covert manner and only be discovered with forensic investigating or general investigation. Moreover, there is no dispute that that Mr. Karat was not authorized to SIGN even correspondence unless it was correspondence of a "routine administrative nature" and "directly supervised by the supervising lawyer". What is telling about the service of the Purported SNIC Response is that Mr. Karat did NOT include Mr. Nieuwland on said email when he did in the initial email on January 23, 2024 when Mr. Karat referenced the "Karat LAT Assignment" which was his handling of the LAT dispute. Moreover, it cannot go unnoticed by the Tribunal that Mr. Karat has been referenced in "two reported decisions" of which one is *Quinn v. Security National Insurance Company*, 2023 CanLII 58482 (ON LAT) and this very lawyer hyperlinked above is named therein. In any event, irrespective of whether the current speculation is that there may be more evidence involving abuse of process of LAT by SNIC, the Purported SNIC Response contains the relevant admissions regarding the IRB regarding all essential elements to determine quantum for SNIC to make payments without further delaying the same.

Perhaps, it is even more concerning that from a Reg 664 award standpoint that the very hyperlinked lawyer above no longer represents himself to a lawyer on his LinkedIn but a "Consequences Manager". It is unclear if a "consequences manager" is only in the role of "providing legal services" and NOT practising law such that it would preclude him from handling matters involving "CAT Impairment". Whatever the role is of a "Consequences Manager", said lawyer who has worked with Mr. Karat on various files where he was "counsel", still leaves the undisputed issues of the admissions in the Purported SNIC Response and that Mr. Karat was unauthorized to SIGN the Responsive Pleading (also defined as "Purported SNIC Response").

If this lawyer (NOT Mr. Nieuwland) was the "Supervising Lawyer" of Mr. Karat, he would authorized the breaches of By-Law 7.1, section 61(g) and (d) at the very least. Moreover, if this "Supervising Lawyer" (not named Mr. Nieuwland) was supervising Mr. Karat to engage in the unauthorized signing of the Purported SNIC Response, it provides further grounds for why the admissions are binding and cannot be retracted even though no steps have been taken to do so.

Perhaps, this is why Mr. Nieuwland included the name of a different respondent in the Nieuwland DOR. Further, it may be the reality that this is why Mr. Nieuwland was not willing to bring a motion to refile the Purported SNIC Response. While understandable as a matter of lawyer self-preservation, it does not absolve SNIC from its breaches of SABS and its continued unreasonable withholding or delay of payment of the IRB.

It also raises another complex academic issue in that the Tribunal has found that it cannot remove an adjuster from the underlying file but it certainly can find "abuse of process" on the facts that are subject to the Reconsideration Motion and certainly a separate motion if necessary involving this "ghostwriting lawyer" whilst Mr. Karat remaining the "sole signatory" of the Purported SNIC Response.

Even if this lawyer or any other lawyer was completing the Purported SNIC Response, it remains Mr. Karat who executed the Purported SNIC Response without any explicit reference to any other lawyer therein or otherwise.

Perhaps, this "ghostwriting and covert supervising lawyer" was unaware that an unlicensed representative (non-lawyer or non-para-legal) was not authorized to sign a response, and certainly not a "response" involving CAT Impairment. While it may never be necessary to canvass these discrete issue in a separate motion or hearing, they will then stand as further grounds (somewhat of a pre-emptive reply) for a Reg 664 award with regard to ordering the full 50% penalty in this motion and any potential motions that deal with any periods after the IRB Denial Date (subject to it actually being a compliant denial with medical reasons and other reasons).

At the very least, they are very suspicious circumstances which further aggravating elements (if necessary) as to why a Reg 664 is required. Simply put, whether any of the above is true or is faced with evidence in the responsive materials if tendered

by the Payer in authorized fashion), it requires a strong message of deterrence – all subject to the whether the Appellant and SNIC potentially resolve the issues in the NOM #4 without the need for a hearing.

- Of course, if SNIC makes those payments, it avoids the risk of any costs at a hearing per se. If not, this is a certainly a form notice to SNIC regarding the same and the requirement that any and all relevant individuals and persons provide affidavit evidence that "explains why" an unprecedented peculiar set of facts that LAT has never addressed before.]

Appendix A3:

1. Federal Model Code Of Conduct is merely a model as the regulation of legal services

6.1-3 A lawyer **MUST NOT** permit a non-lawyer [Karat] to:

- (a) accept cases on behalf of the lawyer [nb: Karat LAT Assignment on behalf of whom], except that a non-lawyer [Karat] may receive instructions from established clients if the supervising lawyer [nb: who is the Supervising Lawyer] approves before [nb: when did work commence? Before the Karat LAT Assignment] any work commences;
- (b) give legal advice [nb: Karat's client was SNIC, was he giving legal advice or merely given authority from SNIC? If so, who was the person at TD Insurance Meloché Monnex (SNIC) that gave him authority; was it a lawyer? Was it a non-lawyer?]
- (d) act fraudulently [nb: filing a pleading that takes position of striking or withdrawing a final position] without reference to the lawyer [nb: no reference to any lawyer in the pleading, the cover letter is from SNIC with "TD Meloché Monnex" as the sender] in matters involving professional legal judgment;
- (e) be held out as a lawyer [nb: Karat did not hold himself out as a lawyer but rather an unlicensed non-legal representative];
- (f) appear in court or actively participate in formal legal proceedings on behalf of a client [nb: Karat actively participated in the formal legal proceedings as they commenced on December 24, 2023 by the: (i) Karat LAT Assignment on Jan. 23, 2024; (ii) the completion, executed and filed responsive pleading on Jan 25, 2024 (iii) the Purported Karat COS] except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;
- (g) be named in association with the lawyer in any pleading [nb: Karat was NOT named in association with any lawyer in a pleading but on his own. This appears to be a more egregious breach], written argument or other like document submitted to a court;
- (h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer [nb: Karat is not an employee of a lawyer or law firm per se but rather, perhaps, an employee or contractor of an insurance company];
- (i) conduct negotiations with third parties, other than routine negotiations if the client [nb: SNIC] consents and the results of the negotiation are approved by the supervising lawyer [nb: who is or was the supervising lawyer?] before action is taken;
- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;
- (k) **SIGN** correspondence [nb: signing a pleading is far more than signing correspondence] containing a legal opinion [nb: the pleading contains legal positions, opinions, legal conclusions and points of law involving the application of legal principles and legal judgment regarding the objectives and circumstances of person. Most importantly:
 - (i) **SIGN** correspondence [nb: interestingly Karat did not SIGN the cover letter enclosing the Purported SNIC Response; Karat also did not SIGN the correspondence in the purported PIPEDA response], unless
 - (i) it is of a routine administrative nature;
 - (ii) the non-lawyer has been specifically directed to SIGN the correspondence by a supervising lawyer;
 - (iii) the fact the person is a non-lawyer is disclosed, and

(iv) the capacity in which the person signs the correspondence is indicated;

Appendix #4: *Dankha v Intact Insurance Company*, 2023 CanLII 62892 (ON LAT),

2. It is notable that in *Dankha*, **Manveel Dankha**, was in an automobile accident in July 2016 and sought benefits, and was denied at some point thereafter. After nearly six years since the Accident, the Tribunal held a case conference on March 8, 2022 and the matter as ordered to proceed to a written preliminary issue hearing.

3. The parties (**Manveel Dankha** and **Intact**) filed their submissions and evidence in 2022.

4. The key line from Vice Chair McGee was at paragraph 2, sentence 3, "In reviewing these submission, the Tribunal identified a procedural concern as to whether the applicant's representative [Mr. Grabar] was authorized to act in this matter." It was not until June 20, 2023 (see: paragraph 5 of *Dankha*) that the Tribunal wrote to the parties asking questions as to whether the applicant's (**Manveel Dankha**) representative (**Grabar**) was acting within the permissible scope of the practice for a Class P License-holder as set out in the Law Society of Ontario's By-Law 4 and the Paralegal rules of Conduct ("Paralegal Rules"); and if Mr. Grabar is unauthorized to act in the matter, how should the Tribunal proceed?"

5. Strangely, counsel for **Intact** did not reply to the Tribunal's request.

Ms. Watson's positions advanced in Dankha v. Intact: Grabar's conduct was authorized and acceptable

6. However, Ms. Watson (presumably a lawyer: NTD) of Centennial Law Group, replied on behalf of the applicant (**Manveel Dankha**) as follows

a. "*Grabar submitting documents under Advisement of Falletta*":

i. At the time Mr. Grabar filed the preliminary issue submissions, he was authorized to communicate and submit documents under the advisement of Mr. Gerry Falletta (see: suspended lawyer¹⁴) former counsel [see: Mr. Nieuwland has represented to the Appellant that he is counsel of record but for TIOGC] of record in the matter.

1. (see: Mr. Karat filed the Purported SNIC Response with no evidence that Mr. Nieuwland was

b. "*Falletta oversaw Grabar's handling of file*":

i. Ms. Watson¹⁵ advised that Mr. Falletta oversaw Mr. Grabar's handling of the file;

1. (see: Karat LAT Assignment on January 23, 2024)

c. "*Applicant requested Grabar*":

i. Applicant (MD) had personally requested Mr. Grabar's direct involvement in the case;

d. "*Beg for forgiveness after breaches*":

i. Ms. Watson had recently took carriage of the file and asked the preliminary issue hearing proceed as scheduled.

Vice Chair McGee finds otherwise

7. Vice Chair McGee disagree and found as follows at paragraph 7:

a. Little evidence that Mr. Grabar was supervised by a lawyer in this proceeding:

i. **NO DOR FROM LAWYER FOR NAMED PARTY**: Although Mr. Falletta attended the case conference in this matter along with Mr. Grabar on March 8, 2022 where the issued of CAT IMP was "ADDED", there was no declaration of representative in association from Mr. Falletta for this specific applicant (**M. Dankha**);

ii. **REPRESENTATIVE NAME IN APPEAL**: Mr. Grabar is listed as the applicant's representative in the "APPEAL" (the word "Application" was used by Vice Chair McGee);

iii. **NAME ALONE ON A FILED AND EXECUTED DOCUMENT:**

Mr. Grabar's name alone was on the written submissions executed and filed with the Tribunal;

iv. **Correspondence from whom:** all correspondence in evidence was sent on behalf of the applicant (MD) to the respondent (INTACT) by Mr. Grabar or his legal assistant;

v. **PI outside of scope:** Mr. Grabar was and is acting outside of the scope of his practice: after the issue of CAT Impairment was added on March 8, 2022, a lawyer ATF to paralegal in relation to CAT impairment claims is found in section 5.1 of LSO By-Law 7.1

1. This subsection of By-Law 7.1 permits a PI holder to PARTICIPATE in MEDIATION of ancillary issues relating to CAT Impairment claims under a lawyer's supervision. The By-Law is explicit that ancillary issues do NOT include issues:

a. Relating to;

b. CAT IMP

i. Determination.

8. There is a technical issue in that a PI license holder must be in the non-licensee category to participate in the "mediation of ancillary issues". Further, Vice Chair McFee reference that there must be lawyer supervision of the PI license holder if that PI license holder is engaged in the mediation of ancillary issues of CAT Impairment. The Appellant believes that she is correct in that statement by reference to By-Law #4, section 4.1(1) and (2) which references "direct supervision". Further, the word "participate" relates to the non-licensee PI holder "participating" but not "representing" or "controlling" the mediation of the ancillary issues relating to CAT IMP

Importance herein: Mr. Karat had less standing than Mr. Grabar at first instance; and CAT Impairment was at issue from the time of the Appeal

9. The Appellant identified the jurisdictional and procedural concerns in early February 2024 which was only a week or so after the executing and filing of the Purported SNIC Response and a few days after the Nieuwland DOR for a non-respondent. Moreover, the Appellant did not receive a copy of the signed COS by Mr. Karat until February 14, 2024. The Appellant promptly severed his NOM #5 thereafter on SNIC, Karat and Nieuwland, and then perfected his NOM #5 a week or so thereafter.

10. The jurisdictional and procedural concern involving Mr. Karat were as follows:

a. Whether he was authorized to execute (SIGN) a "Response" with the "Response Form" he determined, complete, executed and file the same with LAT where CAT Impairment was at issue in the Appeal; and

b. Whether he was authorized to sign the Karat COS on January 25, 2024 and file the same with LAT that confirmed that he had served his solely signed Purported SNIC Response?

Did Karat execute and file the Purported SNIC Response under advisement of a lawyer? Did a lawyer oversee Mr. Karat's signing and filing of the Purported SNIC Response and Purported Karat COS?

11. There is no evidence in the record that Mr. Nieuwland, in fact and at law, oversaw Mr. Karat's completion, execution and filing of the Purported SNIC Response. Moreover, the service of the Purported SNIC Response was done exclusively by Mr. Karat (see: January 25, 2024). There is no evidence of any advisement or overseeing Mr. Karat's purported filings which involved his SIGNING of the documents with only his own name and reference to himself a long with his phone number and the address of SNIC.

12. Like in Dankha, whether SNIC requested Mr. Karat's direct involvement, and assigned him to handle the LAT dispute has no consequence in law. SNIC's instructions do not override the requirements and obligations to retain a representative that has authority under the LSA to SIGN pleadings and file the same with administrative

bodies (LAT). Even if SNIC thought that Mr. Karat was the perfect and most competent individual to handle this LAT dispute and file responsive pleadings, Mr. Karat would remain unauthorized at law.

Correspondence

13. Mr. Karat emailed the Applicant on January 23 and 25, 2024 and February 14, 2024. Mr. Karat is the only individual that has signed and filed documents of consequence herein for SNIC.

14. While Ms. Moraes purported to provide dates for a case conference, she then requested an adjournment by way of her email to the Appellant and LAT. LAT promptly informed her that she had to bring a motion if she wished to do so. Of course, since Ms. Moraes is not "providing legal services" at this time, she is unable to execute any motion at all but moreover certainly not in relation to an issue involving CAT impairment. It is now not unsurprising why no adjournment motion was advanced by Ms. Moraes but why would Mr. Nieuwland not bring a motion if that date was at issue (after already agreeing to the same)? Mr. Nieuwland filed a DOR for TDGIC and not SNIC.

15. As of late March 2024, the most Mr. Nieuwland has been able to say which is paraphrased, "I am counsel of record", "We will oppose your motions", and "please include my assistant, Ms. Moraes". After learning that Ms. Moraes was not representing that he was Mr. Nieuwland's assistant, the Appellant removed her from any emails until there was confirmation that she was Mr. Nieuwland's legal assistant as there was an issue, inter alia, of whether he had "effective control" over her provision of services (perhaps another individual who is ghostwriting).

16. If Ms. Moraes' position, based on her status of "not providing legal services – employed", is that she is deemed or, in fact, not to be providing legal services, then this speaks to the knowledge that her and Mr. Nieuwland had (if she is his assistant in fact or at law).

¹ Denuded in the metadata of a purported PIPEDA response with the name of Mr. David Karat as the alleged author of said purported PIPEDA response

^{1a} <https://lso.ca/public-resources/finding-a-lawyer-or-paralegal/directory-search/member?MemberNumber=631171>

^{1b} <https://law.societytribunal.ca/document.html?fileid=2211-1201-mv-v1>

^{1c} <https://lso.ca/public-resources/finding-a-lawyer-or-paralegal/directory-search/member?MemberNumber=748581>

Yours truly,

Mr. Kevin A. McLean (B.A., J.D., CIM) ("McLean" or "Disabled Individual") (he/him)
 (e): lat@confidentialmclean.ca
 (f): 647.370.6208

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616
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17
On Thu, Mar 14, 2024 at 11:26 AM Kevin McLean <lat@confidentialmcleann.ca> wrote:

Dear Sirs/Mesdames:

I write further to the above. I confirm that you have not denied (which I take as an admission) that the name of the individual noted above was involved in the underlying TD Claim number and this LAT proceeding. Such conduct was and is entirely unacceptable considering the above and previously noted (implicitly or explicitly).

As such, I confirm that this may be a potential sixth notice of motion if my Reconsideration Motion is not granted in full. Thank you.

Yours truly,

Mr. Kevin A. McLean (B.A., J.D. CIM) ("McLean" or "Disabled Individual") (he/him)

(e): lat@confidentialmcleann.ca

(f): 647.370.6208

Kevin McLean <mcleansniclat@gmail.com>

Tue Mar 28, 10:39 PM (5 days ago)

to carol.persaud, alisha.anne, David, Matthew, James.V.Russell, Michelle, Andrew.papadimitropoulos

March 28, 2024

Dear Sirs/Mesdames:

As I have not had any confirmation that one "AP" (defined for ease of reference) will no longer be involved in the TD Claim #, this LAT Proceeding and any future LAT proceedings, my affidavit is being finalized and then to be notarized. I may serve and file said affidavit in made form due to the long weekend for many

In this vein, I am contemplating seeking relief that will require a new adjuster on the TD Claim number for my belief, only formed recently and as a result of, inter alia, the "Andy Gera" reference albeit in the purported PIPEDA response. While I presume everyone herein is aware that administrative tribunals are more relaxed on the evidentiary formalities, I intend to bring evidence by way of "similar fact evidence" which is presumptively inadmissible but I would say admissible in this LAT Proceeding herein. I will have those particulars in my affidavit which I believe (if I am not miscounting) is affidavit #15.

When reviewing the case law, with cases like that of *Manouri*, the law is well-settled that LAT has the power to disqualify counsel. Obviously, a disqualification of Mr. Nieuwland would be in the nature of disqualifying TD Insurance Staff Legal (as he has it a "private practice firm"). However, this is where this fact pattern becomes unique in the most euphemistic sense of the word. Mr. Nieuwland would be disqualified (which is not the true essence of the NOM #6) from acting for TD General Insurance which is not the insurer. This would be weirdly of assistance in some respects as that would disqualify Mr. Nieuwland from so acting for TDGIC but then may open the door to him filing a DOR for SNIC. In a way that absolves him of the misfiled DOR for TDGIC. As such, the focus of this NOM #6 is the exclusion of "AP" from any "representation of a person in a proceeding" which would obviously be SNIC by way of his connection with Mr. Karat (see: for example, *Quinn v. SNIC*). The case of *Manouri* is quite clear that PIPEDA matters are dealt with separately from LAT and so are any potential causes of action in tort or otherwise (i.e. equitable claims or sui generis).

While I have never formally met "AP" to my knowledge, the appearance of a conflict or bias, especially when SNIC was making so many different decisions or deeming decisions by failures to respond under SABS, is sufficient. As noted, I did not have any emails with Ms. Persaud until late December 2023 and early January 2024. Upon closer review, while Ms. Persaud is mentioned in letters in 2023 and onwards, it is more by way of reference to her. I will have to inspect further but it appears that I was somewhat taking it as authored by Ms. Persaud when it is more referenced to her, phone number and fax number. Does this mean that "AP" was drafting and finalizing all of the letters since the DOL? I cannot prove that he was but my evidence will follow.

While I respect the "communication protocol" that Mr. Karat requested, and will continue to respect the same in substance, I have included Ms. Nurse and Ms. Persaud on this thread as it was brought to my attention that as it relates to this NOM #6, they are entitled to notice as per some of the relief I will be seeking. While Vice Chair McGee was of the view that LAT could not disqualify an adjuster, there were no factual issues about who the adjuster was, whether they were in contact with the insured and so on. Returning to Ms. Persaud's absence from September 2023 and onwards (with due respect for her privacy as I do not need reasons per se) as evidenced by her auto-reply (albeit unbeknownst to me), I fact checked this issue with those that Ms. Persaud had telephone conversations with prior to her absence. It was confirmed that they had not heard from Ms. Persaud since September 2023 either. If not Ms. Persaud or Ms. Nurse, then whom? I believe that question answers itself.

(19)
Returning to *Mansuri*, the applicant's counsel sought to remove the law firm of Schulz Frost LLP albeit unsuccessfully. It appears that the applicant (Mortaza Mansuri) was somewhat sensitive along with his brothers, who were also in car accidents albeit with different insurance companies, about the cross-referencing and collating of information therein to determine veracity (turning mostly on attendant care benefits). Even if Mr. Mortaza Mansuri was successful in his motion, which he was not, it would have been the disqualification of counsel for Dominion of Canada General Insurance Company ("Dominion Insurance Company"). Dominion Insurance Company would then been able to obtain new counsel and return to the defence of the Mr. Mansuri's appeal.

However the issue is much different herein because disqualification of Mr. Karat would be disqualification of a de facto representative albeit unauthorized to do so. This would leave no de facto representative for SNIC.

It is section 1(7)(a) and (c) that independently dispose of the issue because Mr. Karat admitted on January 23, 2024 that he was ASSIGNED this LAT dispute in the form of his handling of the same. He obviously went further than mere handling and SIGNED the responsive pleading. In this vein, he as a "non-licensee" and "unlicensed representative" had to derive his assigned powers, albeit in breach of the LSA and its By-Laws from some individual purporting to have those powers of assignment. Moreover, even though a lawyer may be "not on the record" or "counsel of record" at any point, it does not mean that they are NOT representing a person in a proceeding. The Legislature was clear in this regard by using the words "SHALL BE CONSIDERED". For example, if AP told Mr. Karat which form to use, when to use it, how to use it, and when, where and how to file and serve the same, AP is a de facto representative of SNIC in this SNIC Proceeding.

The blatant breach of the law was the "SIGNING" by Mr. Karat of the Purported SNIC Response. I need not get into whether Mr. Karat was "strong armed" or "coerced" but there had to be a supervising person or supervising lawyer for the steps he took.

By-Law 7.1 is clear in this regard that such powers of a non-licensee (even if that non-licensee is a P1 holder) must be in connection with providing those services to the licensee or licensee firm i.e. TD Insurance Staff (legal).

AP is not employed by TD Insurance Staff Legal but employed, by reference to the LSO Directory, by TD Insurance. SNIC is an insurance company within the TD Insurance Group of Companies. SNIC is the insurer and underwriter of the Insurance Policy. Therefore, SNIC is the only insurer, respondent and potentially "respondent party" albeit not so for failing to comply with the various pieces of legislation, regulations and New LAT Rules.

SNIC is also the only insurance company named in the Purported SNIC Response and by reference to the cover letter Mr. Karat sent to me WITHOUT Mr. Nieuwland copied therein.

There is also no dispute that AP has acted for SNIC in LAT proceedings and so has Mr. Karat. Therefore, it has become obvious now why the TD Claim # has been so mismanaged and not in accordance with the law. I say that is a form of actual bias or even malice. At the very least, it is the appearance of bias.

Again, the oddity and overriding issue is what remedy could be fashioned in this NOM #6 to allow SNIC to be represented? I say that SNIC had the opportunity to retain outside counsel or different counsel and chose not to. However, that would still not solve the conflict of interest issue if AP was still the "guiding force" or "ultimate counsel" providing instructions or even advice to the appearance of an "outside counsel".

In attempting to find cases where such a weird fact pattern has occurred, one case was brought to my attention that is *Yellow Cedar v. Di Torio*, 2020 ONSC 5915. I am still reviewing it but the analogy appears to prevail even where the defendants were seeking to remove a law firm (Bennett Jones LLP) where a lawyer at the "firm" (here a lawyer at TD Insurance) was not the lawyer with carriage of the litigation matter.

-46] This argument brings me back to the case-law that the Defendants have relied upon. One case in particular, *Talisman Resort v. Keyser, Usling et. al.* (2013) (ONSC 1901) is striking as it is a case that features in a number of the footnotes in the Defendants' factum. In that case, Conlan J. described the nature of the motion he was faced with as follows (at paragraph 5):

In essence, the argument by these Defendants is that Bennett Jones LLP ought to be removed as counsel for Talisman because of an actual or perceived conflict of interest in that a partner in that law firm (but not the lawyer with carriage of the matter), Serafini Martini ("Martini"), (i) is a witness and (ii) has a personal interest in the litigation in that Martini is the sole shareholder of Talisman's corporate shareholder and, as a mortgagee, is owed a substantial amount of money from Talisman.

What is important to note about Talisman is the timing of the motion must be promptly and I must not sit on my new knowledge or I will be estopped (colloquially speaking) from later complaining.

In my view, unless SNIC has some creative solutions as how best to mitigate these issues after an order of permanent exclusion of AP and any persons he has so tainted (I say so relating to the legal effects and consequences of the same) such as Mr. Karat, Claims Adjusters, Mr. Nicuveland and potentially Ms. Moraes (see: "Andy Gera" with "Gera" meaning "generated" in Portuguese). If there was an "Andy Gera" or "Andrew Gera" working at TD and had such an email that did not bounce back, then one could see the other side of the coin or play devil's advocate but no such individual exists.

It also seems admitted that the adjusters need to change locations so to speak by Ms. Nurse (Markham) to Ms. Persaud (Burlington) but that clearly has not had the presumed underlying effect or an attempt at the appearance of one.

My position will have to be that these are irremediable nullities and egregious violations of the law that will, for the reasons in NOM #6 and affidavit #15, strike all documents filed on behalf of SNIC without leave to amend or refile. Weirdly, there will not be any prejudice to SNIC as I will still be required (where applicable) to show evidence as to the quantum of benefits, and if another proceeding arises, the order will have an effect to govern the future proceedings.

In conclusion, I provide this courtesy notice to you of what is to come and remain available on a with prejudice or without prejudice basis to resolve with an authorized and independent lawyer licensee representative of SNIC.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM

(p): 647 513 1270

(a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

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Kevin McLean <mcleansniclat@gmail.com>

Sat, Mar 30, 2:11 PM (3 days ago)

David, Matthew James, V Russell, Michelle, Andrew, papadimitropoulos, carol.persaud, alishia.anne

March 30, 2024

Dear Sirs/Mesdames:

I have received an auto-reply which is below (see: Appendix). It is self-evident that Mr. Karat's signature block has changed from the January 23 and 25, 2024 along with the February 14, 2024 ongoing emails to me (see: **Affidavit #13, Exhibit "A", pages 4 to 6**) and his auto-reply emails to me (see: **Affidavit #13, Exhibit "A", pages 11 to 13**).

As such, this is further evidence that supports the focus of my to be served NOM 46 and the affidavit material to support the same.

We were obviously aware that Mr. Karat had been on the file in *Quinn v. SNIC*²⁶ (with counsel in AP and FP); and *Kapilets v. Primrose*²⁷ (with McCague Horlock LLP).

I will provide you with the kind notice that I may have this new and fresh evidence in a separate affidavit or combined in one affidavit. I will likely have to provide the affidavits in made form and then notarized form due to the long weekend for many.

I again urge you to provide me with any existing lawyer that has filed a DOR on behalf of Security National Insurance Company in order for me to take meaningful steps herein. Until that occurs, I am unable to do so and the entire LAT proceeding has been frustrated.

I will continue to review the jurisprudence in this regard and see how tribunals and courts handle such a unique matter to avoid any further raining of this LAT Proceeding (if possible). I am also focused on how to ensure that matters are handled in accordance with SABS after the conclusion of this LAT Proceeding.

It is true that this new fresh evidence supports my above positions and evidence filed and to be served and then filed. In particular, Mr. David Karat was and is the only "on the record" representative (albeit not authorized with the LSO to have signed the Purported SNIC Response) and now he is no longer authorized with SNIC. While this email is under this thread, I may rely on the same for "general and future purposes".

I reserve the right to bring this correspondence to the attention of LAT for any lawful purposes.

Thank you

Appendix

Karat, David

1:24 PM (9 minutes ago)

to me

Hello and Thank you for your email.

Kindly note that the office will be closed on Friday, March 28, 2024 and will be reopening on Monday, April 1, 2024. During this time I will not have access to email or phone.

Yours truly,

52
David Karat - Claim Specialist (ADRI), Claims Department | TD Insurance
 101 McNabb St., Markham, ON L3R 4H8
 T: 877-855-5767 Ext. 200263 | F: 416-754-3120 david.karat@tdinsurance.com

Also authorized to represent Primmum Insurance Company, TD General Insurance Company, and TD Home and Auto Insurance Company

- *Quinn v Security National Insurance Company, 2023 CanLII 58482*
- *Kopylets v Primmum Insurance Company, 2023 CanLII 65759*

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
 ("Appellant", "Applicant", or "Insured Person")

(e) **MCLEANSNICLAT@GMAIL.COM**

(p): 647.513.1270

(a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

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Kevin McLean <mcleansniclat@gmail.com>

Sat, Mar 30 7:19 PM (3

days ago)

→ David, Matthew, James, V. Russell, Michelle, Andrew.papadimitropoulos, carol.persaud, alisi.a.ann

March 30, 2024

Dear Sirs/Mesdames:

I write to confirm that I have received auto-replies from "AP" and Ms. Moraes which confirms that they have received the above emails. I am pleased to know the same as they will have the chance to respond to my sixth notice of motion. I will revert back with the relevant law and evidence.

I will note that if Mr. Karat was and is not authorized to have solely signed the Purported SNIC Response on behalf of SNIC, and Mr. Nieuwland is only authorized to act for TDGIC, then this leaves a lawyer at the same office address as Mr. Karat in Markham, Ontario (namely 101 McNabb Street, Markham, Ontario, L3R 4H8).

In my view and it will be my position that this was the facilitating of unauthorized practice and/or the failing to prevent unauthorized practice. I confirm that such a motion in NOM #6 is distinct from NOM #5 and focuses on those licensee(s) that facilitated, instructed, advised, or even coerced Mr. Karat to do the same by general assignment or specific assignment. In order to face this NOM #6, those individual(s) that authorized and assigned the activities and functions to Mr. Karat so that he could solely sign the Purported SNIC Response, then file it and serve it upon me, will need to swear evidence.

Thank you.

Appendix

Papadimitropoulos, Andrew

Thu, Mar 28,

10:40 PM (2 days

ago)

to me

Please be advised that I will be away from the office on March, 28, 2024 with limited access to e-mail and voicemail.

Regards,

Andrew

...

[Message clipped] [View entire message](#)

Moraes, Michelle

Thu, Mar 28,

10:40 PM (2 days

ago)

to me

59: ***ABSENCE ALERT*** Welcome to TD Insurance and thank you for your message. Please be advised that I will be out of the office starting Monday, April 1, 2024, returning Tuesday, April 2, 2024, with limited access to email or voicemail. I will respond to your message at the earliest opportunity upon my return.

Should you require immediate assistance, please reach out to Kris Biri at kris.biri@tdinsurance.com.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM
(p): 647.513.1270
(a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

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[message clipped] [View entire message](#)

K

Kevin McLean <mcleansniclat@gmail.com>

Sat, Mar 30, 3:00 PM (3 days ago)

to David, Matthew, James, M. Russell, Michette, Andrew.papadimitropoulos, carol.berasal

March 30, 2024

Dear Sirs/Mesdames:

I confirm that I have received a bounce back from Ms. Nurse as her email is no longer active and not receiving emails. As such, I have removed her from the email thread. I wish her well.

Despite Mr. Karat's admitted lack of authorization for SNIC, I will keep him on the email thread until or if SNIC appoints a duly qualified lawyer licensee to handle the TD Claim and SNIC Proceeding which involves CAT Impairment.

In the spirit of comprehensiveness, I can alert you that I will take a page out of the "Mosa book" (see: *Mosa v. Belair Direct Insurance Company*, 2022 CanLII 11164; wherein counsel for Mr. Mekonnen Mosa in Mr. Michael Bishop, barrister and solicitor at Harvey Katz Law Group in Hamilton, with the LSO sought relief by way of his reply when an unauthorized representative in Ms. Heather Morrow (ADRR) filed materials in relation to his motion for particulars) and seek relief to strike any filed materials by any individual on behalf of SNIC or any non-respondent or non-party. This would apply to the NOM #4 as well and the LAT Order of February 14, 2024 that requires the party that responds to do so by April 11, 2024.

Obviously, if SNIC appoints a qualified lawyer to act on behalf of it, this will not detract from my previous positions and NOM #6. Any such duly qualified representative would still need to face the nullity issues, and then obtain an order to re-file the Purported SNIC Response. As this is a CAT Impairment Appeal with much outstanding, I will not consent to any attempted adjournments or delays. I do not say that to be difficult but to assure that you are aware of my position if SNIC is seeking to obtain new counsel, and said counsel is aware of the scope of the potential engagement.

Thank you.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM

(p): 647.513.1270

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Kevin McLean (mcleansniclat@gmail.com)

Sun, Mar 31, 2:17 PM (2 days ago)

→ Daviri, Matthew, James.V.Russell, Michael, Andrew.p.boudimtropoulos, carol.persaud

March 31, 2024

Re: courtesy notice – regarding NOM #6 – potential for fruitful with prejudice discussions or without prejudice discussion as a result of some of the below

Dear Sirs/Mesdames:

I write further to the above. I am sending this on a courtesy basis to hopefully open up some productive dialogue with an independent representative for SNIC so this LAT Proceeding can be handled professionally, maturely and most expeditiously. At this stage, we are certainly not even close. As always, this is dictated with voice-recognition software along with assistance so pardon some of "rough draft" and collated nature of the same. However, urgency is required on my side and there have been many developments this week that bear on the issues herein.

I am providing this correspondence as a courtesy to you and so that we do not waste further resources of LAT on matters that are uncontroversial. In my view, this should also assist with any resolution. I am also doing out of an abundance of caution and for record keeping purposes.

Part 1: Upon Further Review

Upon further review of the auto-reply from Andrew P. and the language in one email from TDIADR@tdinsurance.com to me, I note some similarities between the two emails sent in the following:

1. Font (sans serif or Arial);
2. Font size;
3. Style of writing;
4. Word choice;
5. Spelling (e-mail vs. email); and
6. Other particulars.

(see: Appendix #1).

I further note that TDIADR@tdinsurance.com has been on some 32 email threads since mid January 2024 and I believe (subject to review) that said email was included by LAT at first instance. I cannot fault LAT for doing so as that may be standard protocol especially when I had named TD Insurance (TD Insurance Meloche Monnex Security National Insurance Company)

What I can fault TD Insurance Meloche Monnex (SNIC) for doing, if this is correct that "TDIADR" and "Andrew P" both sent the emails below (which we know one is him). As you know, there is now a live issue of "conflict of interest" or at least the appearance of conflict of interest. It goes without saying that the evidence of this "Andy Gera Authored Document" under PIPEDA led to a train of inquiry and investigation.

To be objective and detailed, I have included some other auto-replies for these persons where I have received auto-replies (see: **Appendix #2 to Appendix #5**). As it is now the end of March 2024, I am required, by cases like *Talisman*, to ensure that such a motion is brought promptly subject to any resolution between myself and SNIC on what is within the ambit of the pleadings. This is obviously not the route that anyone wishes to take when trying to resolve matters with the insurer (SNIC), which must be resolved in accordance with SABS, but these are the cards I was dealt. It would be fatal for me to sit on these new facts as of the end of this week and not advance the same. Without castigating anyone, there is at least the appearance of a conflict of interest in the mind of a reasonable person. My view is that it is best that anyone who is subject to the appearance of a conflict, as the Insurance Policy has my Spouse as the primary insured along with BMW Financial Services Inc. (a division of

BMW Canada Inc.), and Andrew P. is her former husband that he has no involvement in any aspect of these files. If I do not have confirmation from Andrew P. or SNIC regarding him by the next business day (subject to any global resolution of all issues herein), then I have to proceed with my motion. It may be that it is decided on May 2, 2024 but it has to be brought.

I am not looking to point fingers but I believe LAT can take judicial notice that any time two people get divorced (as I am from a divorced family), there are aspects that one's mind may not know that conflict with that undivided duty of loyalty to their client. That being said, now that Mr. Karat is no longer authorized for SNIC, I had to turn my mind (as I am not getting direct responses or any to my queries) as to whom could have been the "supervising lawyer" for Mr. Karat. I wish to also make clear that Mr. Karat has been pleasant and professional with me but there is an issue as to whether that "signed and filed" response is authorized by the LSA and its By-Laws. It is admittedly a very lengthy affidavit that I have drafted and being reviewed as it covers a variety of areas of law and with this Ms. Moraes being an accomplished paralegal but with a different status currently, along with Mr. Nieuwland saying that she is his assistant but the signature block does not add up, I am finding some of these aspects to be deeply concerning.

I have no issue with hard fought litigation on its merits as I am getting help from a variety of sources but so long as it is hard fought on the facts and the law. There is obviously no requirement to settle but it appears that the case conference spirit is to come to said case conference ready to settle. We have had no movement there at all for obvious reasons, I appreciate we cannot discuss or put into evidence any such discussions so I will simply leave it at that and not for the truth of any contents.

I continue to find it troubling that we have SNIC as the respondent in the Purported SNIC Response and Mr. Nieuwland representing TDGIC. As you can see from my letter to LAT (without knowing of my email issues), the naming of parties is not merely cosmetic when considering enforcement of orders.

The issue of whom is behind TDIADR is even more concerning because I included said email, in good faith, for settlement offers and other correspondence. However, the only two emails of relevance to this LAT Proceeding are that of Mr. Karat (SNIC) and Mr. Nieuwland (TDGIC).

I am trying to approach this from a standpoint of being empathetic to one degree but also focused on if there is any predilection to resolve this matter before the April 11, 2024 deadline. In that vein, I am obviously not going to negotiate with Andrew P. in any way and if he has any role in this file or the TDIADR email (and I do not have confirmation he has no role moving forward by end of business day tomorrow) because that would destroy my factual and legal position.

If I do not have any type of offer or attempt to resolve the issues herein by end of business day tomorrow by an independent authorized representative for SNIC (which I presume can be Mr. Nieuwland if he is truly independent and there is no appearance of bias or conflict), then I will presume that I need to proceed with my NOM #6 which will come with an "made affidavit" and "motion form", and then the written argument. Due to the long weekend for my service providers, I will see if there is any response from SNIC on a with prejudice or without prejudice basis, and provide you copies in advance.

Part 2: Other issues that arise by not resolving any outstanding issues now – the substantial issues

As I see it, this NOM #6 has fatal consequences for SNIC in this proceeding and perhaps even some of the individuals. When using the word "fatal", I mean in the legal sense of the word. I see it as such because cases like Mansuri (where the disqualification motion failed) or cases like Jia (where it succeeded), dealt with outside counsel and had them removed. In those scenarios, the worst situation for the respondents therein was the loss of outside counsel and retaining new counsel.

However, in this SNIC Proceeding, with Mr. Karat no longer authorized for SNIC, Mr. Nieuwland acting for TDGIC, this information connection between him and Ms. Moraes as his purported legal assistant, and the "Andy Gera" authored document for a PIPEDA response (which is certainly a different name than David Karat), I am of

the view that the Tribunal will take these issues quite seriously, and find, at least, a perceived conflict of interest. The issue turns on remedies. Can the Tribunal disqualify counsel that are not "technically on the record for SNIC"? I believe that it can based on section 1(7)(a) of the LSA in that even an individual in the "background" who makes those determinations of who, when, where and how to file "SHALL BE CONSIDERED" to be representing a party in a proceeding.

I also appreciate that the "response form" does say "claims adjuster" but I do not see any way around the "signing" aspect even when it is done electronically (see: LCA, *Fenton Britches*).

It has now dawned me that it would have been impossible for Mr. Nieuwland to be the supervising lawyer for the filing and signing of the Purported SNIC Response as his auto-reply was on in colloquial terms, the minute he was copied by Mr. Karat as "counsel" on January 23, 2024. Therefore, Mr. Karat could not have done this on his own.

The question that I wrestled with is who could that be that was supervising, delegating or assigning that task to him. This is particularly apposite because had had worked with AP and FP on *Quinn v. SNIC* and Mr. Dugas in *Kopylets v. Primmum*. I see that Mr. Karat is still authorized for Primmum Insurance Company but not SNIC. I will have to check if we cannot gain any traction on resolving issues or narrowing them as to whether Mr. Dugas has any role in this SNIC Proceeding.

I have had Ms. Moraes' researched and she has acquitted herself quite well as a paralegal in LAT hearings. However, I do not see any law that would support her delegation of tasks to Mr. Karat. Obviously, Mr. Karat appears to have passed his paralegal educational requirements but has chosen to not to pursue them or obtain that PI license. I do not say that pejoratively as that is his choice.

We now have a situation of Ms. Nurse no longer being with TD with her bounce back emails and my continuous requesting of which of the six physiotherapy (of 26) that she disallowed without reasons. Is she now a witness? Can she be summoned?

I do not see this as a mere procedural concern where SNIC then obtains external counsel because who on behalf of SNIC would be giving instructions to external counsel? As such, and since there has not been any denial by Andrew P. or others on his behalf that he is involved in this file, and I say as a "cover representative of SNIC in this proceeding" (see: section 1(7) of the LSA), then the only ways to avoid such a notice of motion as I respectfully see them are:

1. Andrew P. provides an undertaking that he will no longer be involved in this LAT Proceeding or the TD Claim # (as I anticipate that there will certainly be issues beyond this LAT Proceeding irrespective of results); or
2. This LAT Proceeding and all outstanding matters are settled by consent, and I inform LAT that they are so settled to our satisfaction with the benefit of me having LLA.

While we have the NOM #5 where Vice Chair Lake declined to decide and if I am reading the "tea leaves" correctly there, it is that LAT wishes for us to move ahead with the IRB motion (as that is purely quantum) and make use of a closed door, private and without prejudice case conference. Therein again lies the problem because if there is an appearance of conflict of interest or an actual one, we are wasting the time of LAT and their astute case managers and whomever presides over a case conference. Even selfishly, I believe it will be time wasted and deepen the conflict between us.

As I am writing this, due to urgency, the authorities are being compiled for me and the draft orders sought as they are technical. It appears from Mansuri that Vice Chair McGee found that she did not feel that LAT had the authority to disqualify an adjuster but obviously could disqualify counsel. I say that in this scenario, and subject to any responsive evidence to my affirmed evidence, that LAT would have the authority to disqualify an adjuster if there was a conflict with a lawyer licensee (or the appearance of) like Andrew P. as Nicole Antopoulos' name is in both pleadings. This would mean the disqualification of Ms. Persaud although I have never received a signed document from her or an email in reply from her. We will see what this week brings in this regard. The way in

which I have thought of this is: could Andrew P. have acted as "counsel of record" or the "lawyer licensee representative of record" with Mr. Karat like he did in Quinn? I think that question answers itself.

Then, is it better or worse if a counsel, in such a situation, is acting for SNIC or representing SNIC albeit in a landmine or covert (even if using those words innocently) manner? I say it is worse for a variety of reasons that I will provide in my final affidavit albeit on belief. I will be affirming that if Andrew P.'s name was on a DOR, the first motion that would have been brought would have been for an immediate striking of the same and any consequential relief.

Part 3: Some of the case law (some new and some old) that has been found and its application for this potential NOM #6

CONFLICT OF INTEREST PRINCIPLES_V3

Re: disqualified from handling the herein claimants' matters and that separate counsel and adjusters are required to handle each separate matter.

March 28, 2024: Karat no longer authorized for SNIC

Mr. Nieuwland acting for TUDIC (IRB response due on April 11, 2024)

Nurse gone altogether

Re: AP and Persaud

Legal Test: General Principles

1. **Standard of proof: balance of probabilities**; test: objective (reasonable person test):
 - a. established on a balance of probabilities
 - b. that a fair-minded and reasonably informed member of the public would conclude that the removal of Andrew P. as a "deemed representative of SNIC" by virtue of s. 1(7) of the LSA and Karat, and any of those that Andrew P. and Karat have instructed, advised, or counselled (unauthorized or authorized) is **necessary** for the proper administration of justice (see *MacDonald Estate v. Martin*, [1990 CanLII 32 (SCC)], [1990] 3 S.C.R. 1235 at paragraph 47).
2. **Legal question**: whether there is an appearance of a conflict of interest? (see: *Pahl, supra*, at paragraph 18.)
 - a. also reasonable perceptions of conflicts of interest (*MacDonald Estate v. Martin*):
 - i. My position: an objective person would find an appearance of a conflict of interest and that it filtered or permeated down to Mr. Nieuwland, Ms. Moraes, Mr. Karat, Ms. Persaud and Mr. Nurse.
3. **Power in tribunal**, section 23(3) (see: *Mansuri*):
 - a. **Power in court**, inherent.
 - i. Test in *Mansuri*: In *Jin*, the court upheld a reconsideration decision in which the Tribunal disqualified the insurer's counsel whom it found to be in a conflict of interest [handling two distinct aspects; Tribunal and Court found that there is an extra sensitivity to the receipt of information, personal information and personal health information on the SABS side (my position: yet another issue involving conflict of interest)];

ii. relates to a dispute under the Insurance Act and, therefore, falls within the Tribunal's jurisdiction. The applicants also refer me to the Tribunal's authority under the Statutory Powers Procedure Act, RSO 1990, c. S.22 ("SPPA") to make orders with respect to the procedures and practices that apply in a proceeding, and to the Tribunal's authority under the Licence Appeal Tribunal Act, 1999, SO 1999, c. 12, Sched. G ("LAT Act") to determine all questions of fact or law that arise in matters before it.

4. **Necessary for proper administration of justice:** It is grounded in the Court's objective to safeguard the proper administration of justice, *Pohl v. Katz Group Canada Ltd.* [2006] O.J. No. 4596 (S.C.J.) at paragraph 23

a. My position: the Tribunal has the statutory power to control the same and an undertaking by AP or global resolution that avoids any further issues is the only way to avoid this NOM #6. However, would an undertaking even accomplish it? The language would be crucial.

5. **Balancing:** integrity of the legal profession and high standards as justice system as a whole vs. litigant (SNIC) has the right to choose counsel and mobility in the legal profession.

a. My position: there is no issue of mobility in the legal profession. Further, there is no issue of SNIC's right to choose counsel as it has selected external counsel before in McCague Borlack and presumably others;

6. **ROPC:** Court may consider any APPLICABLE RULES OF PROFESSIONAL CONDUCT. Where there is a rule or guideline or ethical principle directly on point, the Court ought to consider it but is not bound by it. *MacDonald Estate*, *supra*, at paragraph 21;

a. My position: I believe this is where the issues will be most damaging to SNIC and those individuals noted;

7. **Motion timing:** Motion must be brought early on (see: Toluaman Resort);

a. My position: hence the timing of the previous correspondence and this letter;

8. **Choice of counsel:** Canadian Courts exercise the highest level of restraint before interfering with a party's choice of counsel¹⁰ – *Kaiser*, 2011 CarswellOnt 12822 (Court of Appeal for Ontario) at paragraph 21

a. My position: I do not believe that this motion is about "choice of counsel" but rather a representative in AP that is "deemed to be a representative" by the LSA under section 1(7) et al.

9. **Mobility in the legal profession:** The desirability of permitting reasonable mobility in the legal profession

a. My position: this value does not arise as there is no mobility issue

10. **Tainting of evidence:**

a. My position: this is where responsive evidence by certain individuals will be required but it is likely an irreparable set of nullities and abuses of process that cannot be cured;

11. **Real possibility of mischief:** Justice Cronk of the Court of Appeal for Ontario in *Kaiser*, *supra*, "there must be a possibility of real mischief should a removal order be refused" (paragraph 21);

a. My position: this appears to be more fitting for the court context but nonetheless the appearance of conflict is there and I believe I can prove the same on the metadata (which no individual has represented that there is an "Andy Gera");

Will the representative appear as a witness? [nb: there are multiple from de-facto, deemed and de jure albeit one for a non-respondent and non-party]

12. The Divisional Court, in *Essa (Township) v. Guergis* ((1993) 15 O.R. (3d) 573, 1993 CanLJ 8756 rev'g (1993) 12 O.R. (3d) 97 1993 CanLJ 8467) set out the following criteria for the Court to consider in a motion such as this:

a) the stage of the proceedings [nb: pre case conference],

b) the likelihood that the witness will be called [nb: I will call various individuals and/or they will have to give evidence in response to the motion];

- c) the good faith (or otherwise) of the party making the application [nb: good faith is at its highest and bad faith on the licensees and others for the Respondent or a non-respondent; covert];
- d) the significance of the evidence to be led [nb: not only affects the LAT Proceeding but underlying matter];
- e) the impact of removing counsel on the party's right to be represented by counsel of choice [nb: none];
- f) whether trial is by judge or jury [nb: Tribunal decision maker];
- g) the likelihood of a real conflict arising or that the evidence will be "tainted" [nb: evidence has been tainted to some degree and can those who have interacted with Andrew P. disabuse their mind. Would a new external counsel even solve the issue? Depends on who is instructing and how covert those instructions are?];
- h) who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising [nb: strategic issue];
- i) the connection or relationship between counsel, the prospective witness and the parties involved in the litigation [nb: If Mr. Nieuwland were counsel for SNJC, then this would be a concerning connection].

Part 4: The case of *Barnett v. LSJC* (prior to 2006 under the Access To Justice Act, 2006)

In *Barnett*, the Law Society Tribunal found that the "Commentary" in "Rule 16, Commentary 3.11) was of some assistance:

Particular 3(d)(ii) does not refer to a specific rule but the Law Society argues that Rule 16 Commentary 3.11) is of some assistance. That Commentary reads as follows:

A lawyer may not permit a non-lawyer to:

- (1) SIGN correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may SIGN correspondence of a routine administrative nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated;

Barnett (albeit prior to the *Access to Justice Act* 2006) was summarized as follows and the "rule" historically was:

Particular 2(d) He entered into a business arrangement with the real estate agent and a mortgage consultant which:

- i. provided for a discount on legal fees incurred by a person who used the services of the three participants in the business arrangement;
- ii. placed him in a position where his obligations to a client might conflict with those of the other parties to the business arrangement;
- iii. called for the other members of the business arrangement to SIGN his letterhead;

Is this the modern day By-Law 7 issue as it relates to MDP's?

If so, I note the following under that By-Law #7 and its relevant sections:

By-Law 7 does not use the language of "entity" but "affiliated entity". Affiliations is "Part IV" of By-Law 7 (Business Entities) which makes it somewhat tricky to follow.

I now quote from section 31:

Interpretation:

31. (1) In this Part,

"affiliated entity" means one [nb: Karat] or more persons **none** of whom are licensed or otherwise authorized to practise law or provide legal services in or outside Ontario [nb. Karat];

"licensee" includes a permitted group of licensees.

Interpretation: "affiliation"

(2) For the purposes of this Part, a licensee [nb: AP] affiliates with an affiliated entity [nb: Karat] when the licensee [nb: AP] on a **regular basis** (see: *Quinn v. SNC*; six day hearing in 2022 with decision released in June 29, 2023^[1]) joins with the affiliated entity [Karat] in the delivery or promotion and delivery of the services of the licensee [nb: AP] and the services of the affiliated entity [nb: Karat as ADR Specialist].

Ownership of practice, etc.

32. A licensee who affiliates with an affiliated entity shall,

- (a) own the professional business through which the licensee practises law or provides legal services or comply with Part III [nb: possibly AP];
- (b) maintain control over the professional business through which the licensee practises law or provides legal services [nb: AP - does he?]; and

(c) carry on the professional business through which the licensee practises law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the licensee jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee.

[nb: Karat and AP at same location and both under TD Insurance in Markham, Ontario. There appears to be something here with the switch from Ms. Nurse (Markham) to Ms. Persaud (Burlington)]

This then take us back to the section under By-Law 47 with respect to what a non-licensed can do and it is only "supplement" which would not be signing and filing a pleading.

Part 5: The Federal Model Code of Conduct

Federal Model Code Of Conduct, section 6.1-3 with my annotations and reference to either "AP" and "Karat" or "Nieuwland" and "Karat":

6.1-3 A lawyer MUST NOT permit a non-lawyer [Karat] to:

(a) accept cases on behalf of the lawyer [nb: Karat LAT Assignment on behalf of whom], except that a non-lawyer [Karat] may receive instructions from established clients if the supervising lawyer [nb: who is the Supervising Lawyer] approves before [nb: when did work commence? Before the Karat LAT Assignment] any work commences;

(b) give legal advice [nb: Karat's client was SNIC; was he giving legal advice or merely given authority from SNIC? If so, who was the person at TD Insurance Meloché Monnex (SNIC) that gave him authority; was it a lawyer? Was it a non-lawyer?];

(d) act finally [nb: filing a pleading that takes position of striking or withdraw a final position] without reference to the lawyer [nb: no reference to any lawyer in the pleading; the cover letter is from SNIC with "TD Meloché Monnex" as the sender] in matters involving professional legal judgment;

(e) be held out as a lawyer [nb: Karat did not hold himself out as a lawyer but rather an unlicensed non legal representative];

(f) appear in court or actively participate in formal legal proceedings on behalf of a client [nb: Karat actively participated in the formal legal proceedings as they commenced on December 24, 2023 by the: (i) Karat LAT Assignment on Jan. 23, 2024; (ii) the completed, executed and filed responsive pleading on Jan 25 2024. (iii) the **Purported Karat COS**] except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading [nb: Karat was NOT named in association with any lawyer in a pleading but on his own. This appears to be a more egregious breach], written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer [nb: Karat is not an employee of a lawyer or law firm per se but rather, perhaps, an employee or contractor of an insurance company];

(i) conduct negotiations with third parties, other than routine negotiations if the client [nb: SNIC] consents and the results of the negotiation are approved by the supervising lawyer [nb: who is or was the supervising lawyer?]; before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) SIGN correspondence [nb: signing a pleading is far more than signing correspondence] containing a legal opinion [nb: the pleading contains legal positions, opinions, legal conclusions and points of law involving the application of legal principles and legal judgment regarding the objectives and circumstances of person]

(li) SIGN correspondence [nb: interestingly Karat did not SIGN the cover letter enclosing the Purported SNIC Response; Karat also did not SIGN the correspondence in the purported PIPEDA response] , unless

- (i) it is of a routine administrative nature,
- (ii) the non-lawyer has been specifically directed to SIGN the correspondence by a supervising lawyer,
- (iii) the fact the person is a non-lawyer is disclosed, and
- (iv) the capacity in which the person signs the correspondence is indicated;

Part 6: Failing to prevent unauthorized practice or facilitating unauthorized practice

Without knowing for certain if anyone facilitated unauthorized practice or failed to prevent it, I raise this for the above courtesy reasons.

The issue again is Mr. Karat's competency per se but rather the language the Legislature passed and the LSO with the By-Laws.

In *Crawford v. Law Society of Upper Canada*, [1] the hearing panel addressed the policy reasons for the rule (which also addresses non-licensees or unlicensed representatives by analogy):

Former licensees are **uninsured**, and **immune** from the regulatory and disciplinary control of the Law Society.... Former licensees do not contribute to the Compensation Fund, are not subject to trust accounting requirements, and are not subject to assessment of any fee taken. This presents an obvious and significant risk to the public, in that there is no recourse to the Law Society's regulatory structure and, generally, little to no recourse against the former licensee for negligent or fraudulent acts done in the course of unauthorized practice.

In *Collins*, the Law Society Tribunal found (see: *Law Society of Ontario v. Collins*, 2021 ONLSTH 177):

COLLINS – Working With or Employing a Suspended Lawyer – Failing to Prevent the Unauthorized Practice of Law – Joint Submission – The Lawyer acknowledged that he had allowed a suspended lawyer to assist him in relation to a judicial review of an arbitration decision – This included allowing the suspended lawyer to do research, clerical work, and drafting and filing court documents – The panel accepted the joint submission of a reprimand based on the parties' agreement and the Tribunal jurisprudence with respect to similar misconduct.

In *Law Society of Ontario v. Chang*, 2021 ONLSTH 44, the Law Society Hearing Tribunal found:

(15)
[134] Dishonest conduct by a licensee has a significant impact not only on the licensee's clients. More broadly, "a breach of integrity such as this has a corrosive impact on public confidence in the legal profession and the administration of justice": *Christie* at para. 32.

dishonest conduct is found by a licensee, it meets the test necessity of an actual conflict of interest.

In *Law Society of Upper Canada v. Khan*, 2017 ONLSH 83, the Law Society Hearing Tribunal found:

The Lawyer engaged in professional misconduct by: practising while suspended failing to prevent or facilitating the unauthorized practice of law or the unauthorized delivery of legal services, and failing to supervise

On the above admitted facts, it is clear to us that the Lawyer not only allowed or failed to prevent unauthorized practice or unauthorized delivery of legal services, but also encouraged, aided and abetted unauthorized practice or unauthorized delivery of legal services by Mr. Hatzitritafinos.

The last sentence would be a matter of sworn evidence by those so involved (if at all and where applicable).

Part 7: The issue with the lack of appointing a lawyer licensee for SNIC -- along with Mr. Karat no longer being authorized for SNIC

Eskandari v. Raizman 2023 ONSC 1674:

Case law supports that it is an appropriate exercise of the court's discretion under subrule 15.04(9) to dismiss a claim where a party does not show an active interest in prosecuting the action: *AGC v. Madeleine Rundle c.o.b. NEC Plus Ultra*, 2013 ONSC 2747 at para. 7; *Pombo v. Canac Kitchens*, 2016 ONSC 1064 at para. 17.

[24] Procedural fairness dictates that the defendants are entitled to some certainty on what claims against them are proceeding. Serving notices of intention to act in person has preserved the claims by Mr. Eskandari and Ms. Rahies in their personal capacities. However, the defendants cannot take meaningful steps to discover the minor plaintiffs' claims or take any steps affecting their interests until a lawyer is appointed. To hold otherwise would, in my view, run afoul of the requirement in subrule 15.01(1) of the *Rules* and the prohibition in s. 26.1(1) of the *Law Society Act* that procedurally preclude Mr. Eskandari from advancing the minor plaintiffs' claims without a lawyer. That is precisely what Mr. Eskandari would be doing if, for example, he were discovered on the minor plaintiffs' claims without a lawyer or he responded on the minor plaintiffs' behalf to any motions brought dealing with their interests.

[25] In my view, in circumstances such as these where there is no cogent evidence supporting reasonable efforts by Mr. Eskandari to find counsel in his capacity as litigation guardian, it is unfair to the defendants to permit the claims of the minor plaintiffs to proceed. Doing so will only continue to hold up this litigation for seemingly non-committal efforts to find a new lawyer to occur.

I respectfully say that SNIC was required to at the very least attempt to obtain permission to cure the issues of nullities. I, of course, do not consent to any adjournments to do so or to find new counsel as the time has long come and gone.

ny potential counsel must be alive to the issues here; and that such a motion would be brought in any event if there is not a global resolution with clear terms and conditions for both myself and SNIC.

Part 8: the (++++ signs) in the "Andy Gera PIPEDA Document" (along with references to internal)

As you know, I do not use any form of Outlook so I had to inquire into what the nature of the "1 + 4 + signs were and it relates to the adding of persons therein.

In referencing the letter (Andy Gera PIPEDA Document), I count five plus signs. I understand it is protocol to put (+) when there are a total of three people in the thread. There are five plus signs in a letter but it has the "internal" at the bottom which is indicative of an email that was then copied and pasted from email to "Word". This makes sense as follows as we have:

- 1. David Karat (paper author);
- 2. Andy Gera (metadata author);
- 3. Matthew Nicuwlund (referenced);
- 4. The "Andy Gera" reference which is "Andy" and "generated" in Portuguese which I say respectfully is my un-denied theory of what is which brings in Ms. Moraes (I only speak one language so it is a compliment); and
- 5. Potentially one other depending on internal protocol at TD Insurance (note: the "internal" is in the PIPEDA response letter by "Andy Gera" and in the "TDIADR" email).

Part 9: even if Andrew P. was not considered a representative under section 1(7) of the LSA

As noted by Justice Conlan in *Talisman Resort*, he found as follows with respect to the partner at Bennett Jones LLP in Mr. Mantini who did NOT have carriage of the file but who would be a material witness:

[44] There is a very high likelihood that Mantini will be a material witness at trial, and he is certainly a key witness on the summary judgment motion brought by Talisman. **NOTWITHSTANDING THAT MANTINI IS NOT THE LAWYER WITH CARRIAGE OF THE FILE, I FIND THAT THIS FACTOR IS IN FAVOUR OF THESE DEFENDANTS.**

Part 9: The Tribunal cannot condone violations of the LSA, its By-Laws, and ROPC

As we know, Mr. Karat is not subject to the ROPC but licensees are. As I have learned from Danka, the Tribunal cannot condone violations of the LSA and its By-Laws.

Part 10: Chandrarajah (see: *Chandrarajah vs. Economical Insurance*, 2024 CanLII 10566 (ON LAT))

As Adjudicator Jarda found in Chandrarajah, albeit striking a pleading of an applicant, that there was no viable authority in which the applicant could proceed without a properly constituted pleading. In this matter, there are a variety of grounds on which the Purported SNIC Response is not properly constituted and SNIC cannot proceed which are now growing.

Part 11: Conclusion

I sincerely hope that this letter was of assistance and provides a courtesy notice. If I do not hear from you, I will have to proceed and rely on this as yet another form of notice for a variety of issues. Moreover, I will continue having the materials prepared in any event.

It remains my view that no matter what the outcome of such a motion would be (if applicable) that Andrew P. cannot be involved in any manner and was not allowed to be prior. I trust that any such involvement by him will be restrained permanently on a go forward basis unless it is to provide a confirmation or undertaking regarding the same.

If any further evidence or case law is drawn to my attention, I will provide it to you as a courtesy.

Affidavit #15 will have much in the way of excerpts from the jurisprudence, legislation, by-laws, codes et al so that there is ample notice to all of you of all of the potential evidence to face.

I make unequivocally clear that I am deeply concerned about privacy issues and breaches, and it is yet another reason pursuant to Jia that these issues will have to be resolved in order to have a streamlined SARS matter post-facto this SNIC Proceeding.

Finally, I kindly remind you that I will seek relief in a reply (if applicable) to NOM #4 if Mr. Nieuwland files on behalf of TDGIC for consistency reasons et al. If a new counsel is appointed for SNIC, he or she will have to face re NOM #4 by the LAT Order on February 14, 2024, and I will not agree to any extension of time. Moreover, if any counsel is appointed for SNIC, his or her first order of business will be to bring a motion to obtain an order of permission to refile the Purported SNIC Response without any amendments. Thank you kindly and have a great rest of your long weekend!

Appendices

Appendix #1

Papadimitropoulos, Andrew

Thu. Mar. 28.
11:40 PM (2 days
ago)

to me

Please be advised that I will be away from the office on March, 28, 2024 with limited access to e-mail and voicemail.

Regards,
Andrew

AVIS : Message

[Message clipped] [View entire message](#)

N

Nieuwland, Matthew

Mon, Apr 1, 5:02 PM (21 hours ago)

to Christiana, me, David

I am the lawyer of record. The Declaration of Representative was served in January. There is no ambiguity. Please refrain from including individuals who are not involved in this LAT dispute in your correspondence.

Thanks.

Matthew Nieuwland | Lawyer | Claims Litigation Services | TD Insurance

66 Wellington Street West, 38th Floor, Toronto, Ontario, M5K 1A2

T: 905-201-4092 | F: 416-599-7439

Email: Matthew.Nieuwland@tdinsurance.com

Legal Assistant: Christiana Ortiz | T: 416-486-2547 | E: christiana.ortiz@tdinsurance.com

Privileged and/or Confidential

From: Kevin McLean <mcleansniclat@gmail.com>

Sent: Saturday, March 30, 2024 3:00 PM

To: Karat, David <David.Karat@tdinsurance.com>

Cc: Nieuwland, Matthew <Matthew.Nieuwland@tdinsurance.com>; Russell, James V <James.V.Russell@td.com>; Moraes, Michelle <Michelle.Moraes@tdinsurance.com>;

Papadimitropoulos, Andrew <Andrew.Papadimitropoulos@tdinsurance.com>; Persaud, Carol <Carol.Persaud@tdinsurance.com>

Subject: Re: 23-015652 AABS (the "LAT Proceeding") - potential sixth notice of motion – separate and distinct from 5th notice of motion – conflict of interest – the acting of "Andy Gera" – irremediably tainted this LAT proceeding – abuse of process

CAUTION: EXTERNAL MAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST.
ATTENTION: COURRIEL EXTERNE. NE CLIQUEZ PAS SUR DES LIENS ET N'OUVREZ PAS DE PIÈCES JOINTES AUXQUELS VOUS NE FAITES PAS CONFIANCE.

March 30, 2024

Dear Sirs/Mesdames:

I confirm that I have received a bounce back from Ms. Nurse as her email is no longer active and not receiving emails. As such, I have removed her from the email thread. I wish her well.

Despite Mr. Karat's admitted lack of authorization for SNIC, I will keep him on the email thread until or if SNIC appoints a duly qualified lawyer licensee to handle the TD Claim and SNIC Proceeding which involves CAT Impairment.

In the spirit of comprehensiveness, I can alert you that I will take a page out of the "Mosa book" (see: *Mosa v. BelairDirect Insurance Company*, 2022 CanLII 11164; wherein counsel for Mr. Mekonen Mosa in Mr. Michael Bishop, barrister and solicitor at Harvey Katz Law Group in Hamilton, with the LSO sought relief by way of his reply when an unauthorized representative in Ms. Heather Morrow (ADRR) filed materials in relation to his motion for particulars) and seek relief to strike any filed materials by any individual on behalf of SNIC or any non-respondent or non-party. This would apply to the NOM #4 as well and the LAT Order of February 14, 2024 that requires the party that responds to do so by April 11, 2024.

Obviously, if SNIC appoints a qualified lawyer to act on behalf of it, this will not detract from my previous positions and NOM #6. Any such duly qualified representative would still need to face the nifty issues, and then obtain an order to re-file the Purported SNIC Response. As this is a CAT Impairment Appeal with much outstanding, I will not consent to any attempted adjournments or delays. I do not say that to be difficult but to ensure that you are aware of my position if SNIC is seeking to obtain new counsel, and said counsel is aware of the scope of the potential engagement.

Thank you.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM

(p): 647 513 1270

(a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

(70)

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On Sat, Mar 30, 2024 at 2:19 PM Kevin McLean <mcjeansniolat@gmail.com> wrote:
March 30, 2024

Dear Sirs/Mesdames:

I write to confirm that I have received auto-replies from "AP" and Ms. Moraes which confirms that they have received the above emails. I am pleased to know the same as they will have the chance to respond to my sixth notice of motion. I will revert back with the relevant law and evidence.

I will note that if Mr. Karat was and is not authorized to have solely signed the Purported SNIC Response on behalf of SNIC, and Mr. Nieuwland is only authorized to act for TDGIC, then this leaves a lawyer at the same office address as Mr. Karat in Markham, Ontario (namely 101 McNabb Street, Markham, Ontario, L3R 4H8).

In my view and it will be my position that this was the facilitating of unauthorized practice and/or the failing to prevent unauthorized practise. I confirm that such a motion in NOM #6 is distinct from NOM #5 and focuses on those licensee(s) that facilitated, instructed, advised, or even coerced Mr. Karat to do the same by general assignment or specific assignment. In order to face this NOM #6, those individual(s) that authorized and assigned the activities and functions to Mr. Karat so that he could solely sign the Purported SNIC Response, then file it and serve it upon me, will need to swear evidence.

Thank you.

Appendix

Papadimitropoulos, Andrew

Thu, Mar 28,
10:40 PM (2 days
ago)

to me

Please be advised that I will be away from the office on March, 28, 2024 with limited access to e-mail and voicemail.

Regards,
Andrew

...

[Message clipped] [View entire message](#)

Moraes, Michelle

Thu, Mar 28,
10:40 PM (2 days
ago)

to me

ABSENCE ALERT Welcome to TD Insurance and thank you for your message. Please be advised that I will be out of the office starting Monday, April 1, 2024, returning Tuesday, April 2, 2024, with limited access to email or voicemail. I will respond to your message at the earliest opportunity upon my return.

Should you require immediate assistance, please reach out to Kris Biri at kris.biri@tdinsurance.com.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
 ("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM
 (p): 647 513.1270
 (a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

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On Sat, Mar 30, 2024 at 2:11 PM Kevin McLean <nicleansniclat@gmail.com> wrote:
 March 30, 2024

Dear Sirs/Mesdames:

I have received an auto-reply which is below (see: Appendix). It is self-evident that Mr. Karat's signature block has changed from the January 23 and 25, 2024 along with the February 14, 2024 outgoing emails to me (see: Affidavit #13, Exhibit "A", pages 4 to 6) and his auto-reply emails to me (see: Affidavit #13, Exhibit "A", pages 11 to 13).

As such, this is further evidence that supports the focus of my to be served NOM #6 and the affidavit material to support the same.

We were obviously aware that Mr. Karat had been on the file in *Quinn v. SNIC*³² (with counsel in AP and FP); and *Kopylets v. Primm*³¹ (with McCague Borlack LLP).

I will provide you with the kind notice that I may have this new and fresh evidence in a separate affidavit or combined in one affidavit. I will likely have to provide the affidavits in made form and then notarized form due to the long weekend for many.

I again urge you to provide me with any existing lawyer that has filed a DOR on behalf of Security National Insurance Company in order for me to take meaningful steps herein. Until that occurs, I am unable to do so and the entire LAT proceeding has been frustrated.

I will continue to review the jurisprudence in this regard and see how tribunals and courts handle such a unique matter to avoid any further tainting of this LAT Proceeding (if possible). I am also focused on how to ensure that matters are handled in accordance with SABS after the conclusion of this LAT Proceeding

It is true that this new fresh evidence supports my above positions and evidence filed and to be served and then filed. In particular, Mr. David Karat was and is the only "on the record" representative (albeit not authorized with the LSO to have signed the Purported SNIC Response) and now he is no longer authorized with SNIC. While this email is under this thread, I may rely on the same for "general and future purposes".

I reserve the right to bring this correspondence to the attention of LAT for any lawful purposes

Thank you,

Karat, David

1:24 PM
19 minutes ago

to me

(Message clipped) [View entire message](#)

K

Kevin McLean <mcleansniclat@gmail.com>

9:58 AM (4
hours ago)

to Andrew.papadimitropoulos, James.V.Russell, Michelle, Matthew, Christiana, David

Dear Mr. Nicuwlant: thank you for your email as it is appreciated. There is no ambiguity in your DOR but it is for a non-insurer and non-respondent in TDOHC. If you wish to bring a motion to attempt to obtain permission to correct the same, then please do so. Otherwise, I am simply providing notice to you as a courtesy. Mr. Karat remains the representative for SNIC by the Purported SNIC Response. I do not believe that you were his supervising lawyer for the filing, signing and serving of the Purported SNIC Response. Mr. Karat's auto-reply now shows he is not authorized for SNIC.

Please see Mr. Karat's signed Purported SNIC Response. *You have now added our Ms. Ortiz? Who is she?* (Pleasure to meet you Ms. Ortiz in any event.)

I am bringing a conflict of interest motion so I will need to include the various names of individuals who I say are in a conflict of interest. They are entitled to notice along with providing any responsive evidence where applicable. Affidavit #15 is being finalized and then notarized. Depending on timing, I will likely provide you with the "made affidavit" and then the notarized one.

I still do not have a legal representative for SNIC so I have to include the names by way of notice. They are copied yet again. Thank you in this regard. I await to hear from you on this new individual that you have included in Ms. Ortiz.

I intend to proceed with my conflict of interest motion as it must be brought promptly pursuant to cases like *Talisman Resort*.

If you say there is no ambiguity, then who is "Andy Gosa"? Kindly provide me with the legal name of that individual or I will presume exactly what I have asserted. Thank you in this regard.

Lastly, because Ms. Nurse's email is no longer active with TD Insurance, I am contemplating in my motion #6 as to whether I also seek an order of disqualification against Ms. Persad considering that I believe Mr. Andrew Papadimitropoulos, who I defined in the Affidavit #15 as the "Divorced Husband Conflicted Lawyer" (or with the same but with "Manager" in place of "Lawyer") may have influenced her and tainted her processes (and/or drafted many of the letters once she came on), and it is not possible for her to disabuse her mind from the same. While I was considering merely a motion to have him, Mr. Karat and others disqualified, this addition of a new name is all the more concerning now.

It would be improper on my part to advance such a motion and not provide notice. I do note that it may not be an "actual conflict" or the Tribunal may not find malice or actual conflict (but I say otherwise). That being said, there is a reasonably perceived conflict and it is my view you had knowledge or ought to have known of the same, and we now have another individual in your email who is unknown to me.

I appreciate your request above but I simply cannot have (as it relates to this thread herein) the Tribunal ask me if certain individuals received notice and had an opportunity to be heard. As it relates to this thread, your request is rejected in the most polite manner.

(Mr. Russell, as chief agent of Security National Insurance Company who was the insurer and underwriter for the Insurance Policy, would you kindly

674
provide a legal representative for SNIC? Once you do, I can remove you from the email thread. All the best in the interim).

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
("Appellant", "Applicant", or "Insured Person")

(e): **MCLEANSNICLAT@GMAIL.COM**

(p): 647.513.1270

(a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

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Kevin McLean <mcleansniclat@gmail.com>

10:38 AM (4
hours ago)

→ Christiana, Matthew, Andrew, papadimitropoulos, James, V. Russell, David, Michèle

Dear Sirs/Mesdames:

I write regarding the above and Mr. Nieuwland's new inclusion of Ms. Christiana Ortiz. I cannot find any lawyer or paralegal in the LSO Directory with that name. As such, I will presume that this was Mr. Nieuwland's legal assistant at all times and Ms. Moraes was the legal assistant to Ms. Klukowska and Ms. Saeed. It provides further evidentiary grounds as to why a conflict of interest motion will be advanced and this squarely puts further spotlight on Mr. Nieuwland himself. I will add this to further affidavit(s). Thank you.

Brenda Victoria Avila Ortiz

Paralegal

Oakville, Ontario

P18969

Not Eligible to Provide Legal Services - No Proof of Insurance

[View profile page on LSO website](#)

Ana Yolanda Bernal Ortiz

Paralegal

Oshawa, Ontario

P05125

Not Providing Legal Services - Employed

[View profile page on LSO website](#)

→ Julian Humberto Castro Ortiz

Lawyer

Toronto, Ontario

77258V

In Private Practice

[View profile page on LSO website](#)

David Ricardo Menendez Ortiz

Lawyer

Ottawa, Ontario

83766F

In Private Practice

[View profile page on LSO website](#)

Adriana Maria Ortiz

Lawyer

Concord, Ontario

77764E

In Private Practice

[View profile page on LSO website](#)

Carlos Alberto Ortiz

Paralegal

Ottawa, Ontario

P05269

In Private Practice

[View profile page on LSO website](#)

Sara Maria de Ortiz

Lawyer

Gatineau, Quebec

71631B

Practising Law - Employed

also known as paralegal, lawyer

Jorge Hernan Ortiz

Paralegal

Toronto, Ontario

P17543

To Be Confirmed

also known as paralegal, lawyer

Rosamaria Ortiz

Paralegal

Hamilton, Ontario

P06959

Not Providing Legal Services - Employed

also known as paralegal, lawyer

Ryan Bryce Reyes Ortiz

Paralegal

Richmond Hill, Ontario

P06840

Providing Legal Services - Employed

also known as paralegal, lawyer

Steffi Ursula Goehlich Ortiz

Lawyer

-

30475L

Licence Surrendered - Retired

also known as paralegal, lawyer

Karina Ortiz Herrera

Paralegal

-

P07323

Suspended Administratively

also known as paralegal, lawyer

Diana Alejandra Ortiz Pacheco

Paralegal

Oakville, Ontario

P16239

Suspended Administratively

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CMA)

("Appellant", "Applicant", or "Insured Person")

(e) **MCLEANSNICLAT@GMAIL.COM**

(p) 647.513.1270

(a) 410-775 King Street West, Toronto, Ontario, M5V 2K3

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(77)

Kevin McLean <mcleansniclat@gmail.com>

12:06 PM (2
hours ago)

to Matthew Andrew, papadimitriopoulos, James V. Russell, David McCreile, Christina

Dear Sirs/Mesdames: I will presume that Ms Ortiz has been the legal assistant to Mr Nieuwland since the commencement of this SNIC Proceeding. My position is that I was duped and misled with the reference to Ms Moraes being the legal assistant of Mr Nieuwland when her signature block represented otherwise. As such, this was an abuse of process and in my view and with great respect, dishonest conduct that falls right with the binding principles of law in cases like LSO v Chung.

I asked Mr Nieuwland to provide me an affidavit that Ms Moraes was his assistant and he refused. I now receive an email with Ms Ortiz copied and no explanation.

While I ruminated and wrestled with whether Mr Nieuwland was in a conflict of interest by association and communication with the likes of the Divorced Husband Conflicted Lawyer, my theory was that Ms Moraes was included as a conduit, as Mr Nieuwland insisted that Ms Moraes was included on email threads of which I refused until I had confirmation in evidentiary form from Mr Nieuwland, to relay those communications to the Divorced Husband Conflicted Lawyer.

While I was going to have affidavit # 15 notarized, my theory appears proven on this ground alone.

It is now my position that Mr Nieuwland cannot act in this SNIC Proceeding even if he obtained an order to amend the style of cause. I provide this as a courtesy notice to him and reference a case like SO v Fungoh. I find this somewhat sad and tragic as I was hopeful to work with Mr Nieuwland and Mr Karat but I must now bring my motion number 6 and you are all on notice of the above. Should external counsel be retained, I provide another courtesy notice that I will not consent to any adjournments or delays in filing responsive materials to outstanding motions and timelines. You will have my affidavit 15 in short order. Thank you.

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CLM)
("Appellant", "Applicant", or "Insured Person")

(e): **MCLEANSNICLAT@GMAIL.COM**

(p): 647.513.1270

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79
 Kevin McLean <mcleansniclat@gmail.com>

3:50 PM (2 hours ago)

to Matthew, Andrew.papadimitropoulos, James.V.Russell, David, Michelle, Christiana

Re: NOM #6

Re #2: demand and notice regarding obligations of THE INSURER to only receive SPI and not "OTHER insurance companies"

Dear Sirs/Mesdames: the time is now almost 3:40 p.m. EST and have not had any denials on the above. As a courtesy, I now attach the 47 pages which are appended to Exhibit "A" to my affidavit #15. It is primarily for NOM #6 but may also be used regarding any other outstanding motions, NOM #4 or for ancillary purposes.

I shall note now that it is somewhat paradoxical that Mr. Nieuwland would represent that other persons like Ms. Moraes are not involved in this file yet he previously represented to me that Ms. Moraes was his legal assistant.

Ms. Moraes attempted to inform me (or did inform me) that Mr. Kam' was the "adjuster" when he was not. She then represented to me that she was Mr. Nieuwland's assistant but it was not in her signature block. Ms. Moraes then sought to have the case conference adjourned but now she is no longer on this file per se according to Mr. Nieuwland.

It is why the LSO has unequivocally passed by-laws and sections that speak to the issue of "effective control". It is now admitted by Mr. Nieuwland that he did not have "effective control" over Ms. Moraes activities and functions that he would assign to her or otherwise. Hence, my stern but polite position for him to provide me with an affidavit confirming, under oath, that she was his assistant. He failed to do so because he could not perjure himself in that regard.

There is now attempt to shift persons around and act as if they have nothing to do with the very underwriter in SNIC that is the PAYOR of previous benefits.

Without excluding other evidence that will be required to face this NOM #6, I look forward to his evidence and condescending upon particulars in this regard. If any persons who are named in this Affidavit #15 fail to respond to specific evidence, and my beliefs while citing the source, I will ask that the NOM #6 proceed by default.

My self-evident position was that Mr. Nieuwland could not file any responsive materials in relation to NOM #4 until he filed a DOR for SNIC. My additional position is that he is now saddled with being part of the conflict of interest issues by his written representations, which I say were incorrect at the very least, but also by his including of a new colleague in Ms. Ortiz (with no fault of her obviously as she did not include herself) to the exclusion of Ms. Moraes.

Respectfully, you cannot "run and hide" from these issues as they override any other issues in this SNIC Proceeding. They need to be faced head on by all of us and we need to get to the truth. I say this because of cases like *Jia*, and I am terribly concerned that any documents and personal information that I provided to the names that I was providing to were in good faith. You can kindly take this email as notice that nothing of a sensitive or personal nature will be provided until this issue is resolved and I have a fulsome and compliant *PIPEDA* response which may require further intervention by the Federal Privacy Commissioner of Canada.

It is unclear if LAT has the authority to grant the type of injunctive relief I would be seeking to have certain conflicted unauthorized recipients receive very sensitive personal information ("PI") and personal health information ("PHI") which is normally an order requiring an affidavit or destruction or the return of that personal information without retaining any of the same. This again leads me to my next issue as we still do not have counsel for SNIC.

I take heed of the ONSC language in *Jia* which is in my paragraph 94 of my Affidavit #15 (for full disclosure and courtesy purposes).

[94] I now quote from the case of *Jia* which was alarming to me when considering the above about the apparent rights of insurers on the *SABS* side of the ledger. In *Jia*, the Ontario Divisional Court found as a matter of law [emphasis is mine]:

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[6] It is established law that insurers may not use the same counsel in statutory benefits cases and in tort cases brought against them by the same insured. This is because the duties of an insurer (and therefore of its counsel) are different in these contexts, and as an accident benefits insurer, THE INSURER is entitled to receive, and is required to keep confidential, a great deal of sensitive personal information from claimants.

Simply put, if NOT THE INSURER, then NOT entitled to receive the SPI.

I have been more than forthcoming and in good faith that I was sending highly sensitive personal information and personal health information to Ms. Nurse (who is no longer with TD Insurance), then to Ms. Persaud (who is apparently in the Burlington office of SNIC who does not work most of the time), then Ms. Nurse, Ms. Persaud and Ms. Kaur by service of the Appeal, and then to Mr. Karal and Mr. Nieuwland. I did so to Mr. Karal as he represented to me that he was representing "THE SECURITY NATIONAL INSURANCE COMPANY". His auto-reply now says he is no longer authorized.

I continue to request that Ms. Persaud provides me a breakdown of the amounts paid by SECURITY NATIONAL INSURANCE COMPANY for medical and rehab benefits and which sessions with my former physiotherapist were denied (i.e. 6 of 26), and I still do not have a response in that regard. It is impossible to advance my rights when there are no responses of which such a response should take no more than ten minutes to say, "sessions #2, #4, #8, #15, #18, and #21" (for example as I do not know) were denied. This matters as certain physiotherapy sessions were different in scope and treatment. Moreover, it matters for the calculation of interest as well.

At no point did the Insurance Policy have any reference whatsoever to "TIGIC". Mr. Nieuwland is now acting as if this is some sort of trivial issue about which underwriter is the respondent which is absurd to say the least. Moreover, I never consented to my personal information and personal health information being received by any "conflicted individuals" or different "insurers" so that is an unequivocal breach of PIPEDA but that is for a different email account and issue. In the spirit of brevity, I provide this formal notice to any individual who was not authorized "TD Insurance Meloche Monnex" (in reference to the alumni and professional insurance program with SNIC, as the underwriter and NOT Primum although TD Insurance defines them as the same).

As you undoubtedly know, the insurance company for the tortfeasor (Ms. Carey) is that of Pembroke Insurance Company which is part of the Allstate Group of Insurance Companies. I cannot speak to the truth of the contents of our dialogue since Fall 2022 but imagine if in the middle of those discussions, it changes from any contact at Pembroke (which we are on the 9th I believe to "Allstate Insurance Company of Canada" or any of the others where Mr. London Bradley is the "chief agent". I would not have any further communication with that purported representative of "Allstate" as that is not "Pembroke". They are part of the Allstate group of companies but "Pembroke Insurance Company". Perhaps, I should not have been forthcoming with whom I thought I was communicating with Ms. Nurse because I informed her (or so I thought) that I required the SABS component to be resolved before I can attempt to settle the underlying claim with Pembroke Insurance Company.

Again, it is **THE INSURER** that is entitled to receive the sensitive personal information ("SPI") and not any insurer that is misnamed or at the whim of Mr. Nieuwland to file a DOR concerning the same. It is for some of those reasons that this NOM #6 must proceed and any ancillary relief can be determined by LAT.

What next? Someone in this email thread will inform me that Primum Insurance Company is the new "underwriter". In that scenario, at least, Primum is under the defined "TD Insurance Meloche Monnex" but this would still be flatly wrong as a matter of law.

I do not consent to any of this conduct, and thankfully, and you can be guaranteed of this point: until there is full compliance (see also: infra) with the *Insurance Act*, SABS, PIPEDA and I will NOT be disclosing (or providing access) any PI, SPI or PHI, and certainly never attending any purported request for a CIE (with of course medical reasons and other reasons being required at first instance). This in turn is the point about an "IE" that is supposed to be "independent" but we have an issue in this LAT Proceeding and TD Claim #3 as to whether there was an actual conflict of interest issue.

In conclusion, this is a formal notice to any individuals who have received PI (also defined as "PII" for the identifiable component), SPI (although not defined under PIPEDA but there are references in PIPEDA bulletins to the same), and PHI that they are to provide me a list of what they received (i.e. list of records or documents with descriptions), copies of the

same and under which insurance company they say they were acting for, associated with and/or representing. I will review that after it is received. I will have the NOM #6 tailored to what LAT can and cannot grant and what will be consistent with the SPPA with respect to being most expeditious, cost-effective and just.

I do not see anything that precludes Mr. Nietowland from filing a DOR on behalf of SNIC. I can then have assurances that he is acting for SNIC. Once he does so, then I can communicate with him separately on all other matters and we can work together. I will presume that Ms. Ortiz was and is his legal assistant and she can be copied therein. As it relates to this NOM #6, it has to proceed in light of the above and if certain matters are resolved under PIPEDA, then I can inform LAT that there is no issue of crossover on that specific issue (whatever it may be).

I may formalize this letter further but for the time being, this will suffice. I remind any and all of their distinct professional obligations (where applicable) and the requirements for "handling an insurance file" and the "handling" (colloquially speaking) of PI, SPI and PHI. Thank you

Warm regards,

Mr. Kevin A. McLean (B.A., J.D., CIM)
 ("Appellant", "Applicant", or "Insured Person")

(e): MCLEANSNICLAT@GMAIL.COM
 (p): 647.513.1270
 (a): 410-775 King Street West, Toronto, Ontario, M5V 2K3

§ **DUTY OF CONFIDENTIALITY.** *The contents of this email, and its attachments are confidential, solely for the specified purposes above, and intended for the recipient specified in message only;*
 and § **DICTATION OF EMAIL or Assistance from Third Parties (no waiver of confidentiality or privilege);** *this email may have been created using voice recognition software and the author reserves the right to correct any spelling, grammar and syntax upon further review.*

Re: Select Emails from Ms. Moraes

Re #2: no reference to Mr. Nieuwland in her signature block yet she is communicating with LAT as such

Re #3: the one lawyer, Ms. Saeed, that she is legal assistant to has acted regularly for TD General Insurance Company (perhaps this is the connection)

23-015662/AABS MCLEAN, KEVIN v. TDGI

Moraes, Michelle <Michelle.Moraes@tdinsurance.com>

Tue, Jan 30,
10:44 AM

to LATregistrar.me

Hello,

Please see attached correspondence dated January 30, 2024.

Sincerely,

Michelle Moraes | Legal Assistant to Adrianna Klukowska and Arta Saeed | Claims Litigation
Services | TD Insurance
Pronouns: she/her/hers
TD Tower, 66 Wellington Street West, 38th Floor, Toronto, Ontario M5K 1A2
T: 905-209-4439 | F: 416-599-7439

Email: michelle.moraes@tdinsurance.com

Privileged and/or Confidential

Please confirm receipt of the enclosed information via reply email.

This email and any attachments are confidential and are intended only for the person(s) to whom it is addressed. If you have received this information in error, please delete/destroy it and any attachments and notify me immediately by return email.

Internal

23-015662/AABS First Case Conference Date Selection

Moraes, Michelle <Michelle.Moraes@tdinsurance.com>

Tue, Jan 30,
10:42 AM

to me

Hello,

Our availability is as follows:

May 2, 2024 (All day);

May 29 and 30, 2024 (All day);

June 5 and 6, 2024 (All day).

Kindly advise if you will correspondence with LAT with both of our availabilities.

Looking forward to hearing from you.

Sincerely,

Michelle Moraes | Legal Assistant to Adrianna Klukowska and Arta Saeed | Claims Litigation
Services | TD Insurance

Pronouns: she/her/hers

TD Tower, 66 Wellington Street West, 38th Floor, Toronto, Ontario M5K 1A2

T: 905-209-4439 | F: 416-599-7439

Email: michelle.moraes@tdinsurance.com

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84
Exhibit "A", Tab 3

**Re: David Karat outgoing emails with reference to his
representation of "SECURITY NATIONAL INSURANCE
COMPANY"**

Karat, David <David.Karat@tdinsurance.com>

Thu, Jan 25, 10:35 AM

to me

Good Morning Mr. McLean,

I hope this email finds you well.

Kindly see the attached correspondence with today's date along with the Response from an Insurance Company.

I kindly ask that you please confirm receipt of this email.

Thank you,

David Karat | Claim Specialist (ADR), Claims Department | TD Insurance
101 McNabb St., Markham, ON L3R 4H8
T: 877-355-3767 Ext. 260254 | F: 416-774-1120 | david.karat@tdinsurance.com

Representing the Security National Insurance Company

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Internal

MCLEAN, KEVIN v. TDGI Tribunal File No.: 23-015662/AABS

David Karat, David <David.Karat@tdinsurance.com>

Thu, Jan 25
10:35 AM

to me

Good Morning Mr. McLean.

I hope this email finds you well.

Kindly see the attached correspondence with today's date along with the Response from an Insurance Company.

I kindly ask that you please confirm receipt of this email.

Thank you,

David Karat | Claim Specialist (ADR), Claims Department | TD Insurance
101 McNabb St., Markham, ON L3R 4H8
T: 877-855-3767 Ext. 260255 | T: 416-774-2120 | david.karat@tdinsurance.com

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Exhibit "A", Tab 3, Part 2

Re: Cover Letter to the served response by AN Insurance Company

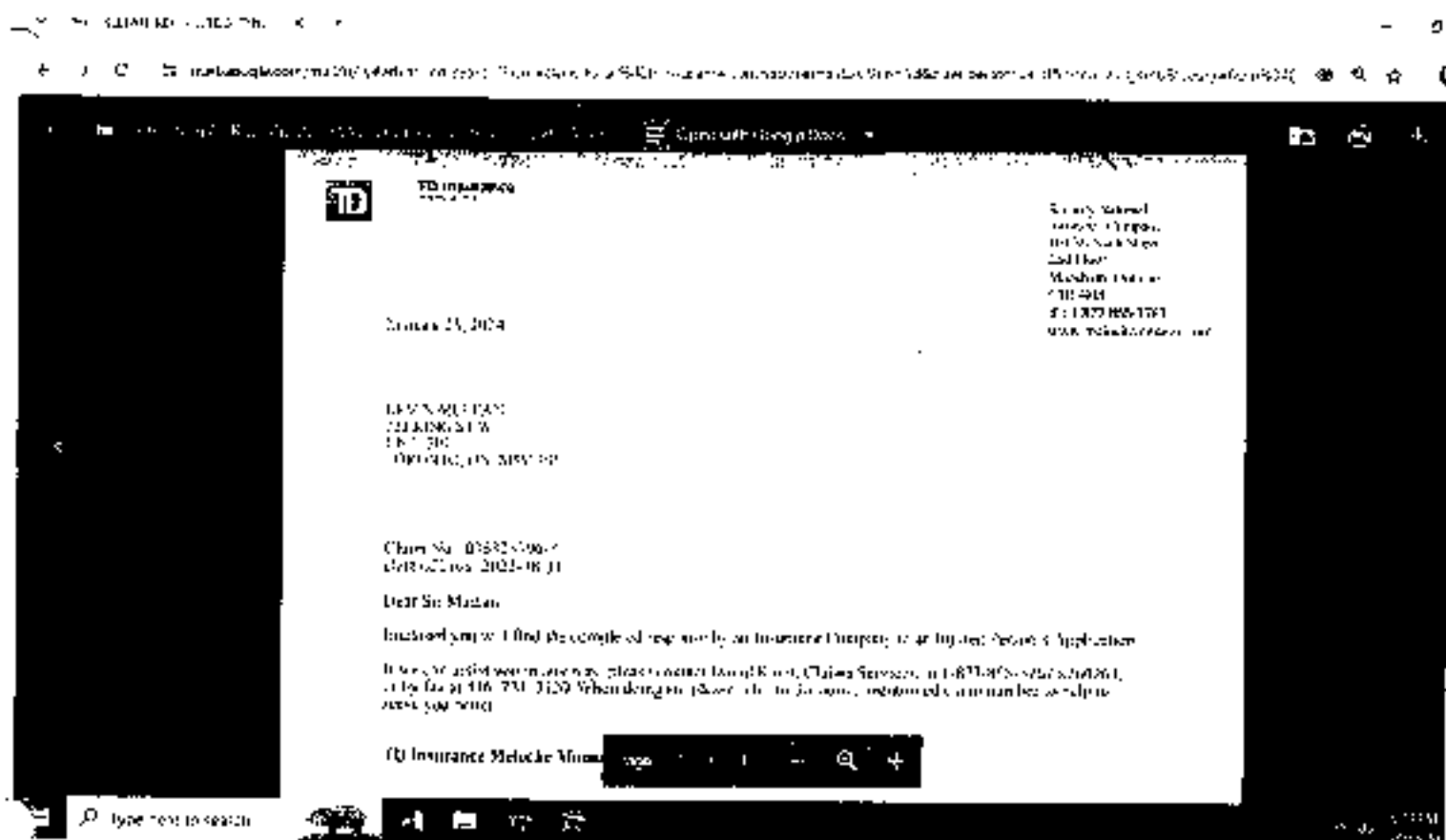
Re #2: Return address: Security National Insurance Company, 101 McNabb Street, 2nd Floor, Markham, Ontario L3R 4H8

www.meloche-monnex.com

Logo: TD Insurance Meloche Monnex

[nota bene: no signature on this correspondence by Mr. Karat]

PREMISES:



89
Exhibit "A", Tab 3, part 3

Re: Copy and Paste from the Purported SNIC Response

Insurance Company Name

Security National Insurance Company

900

Response by an Insurance Company
to an Injured Person's Application
for Auto Insurance Damage
Resolution under the Insurance Act

Personal Information

1. Name of the injured person (Last, first, middle initial)
2. Date of birth (Month/Day/Year)
3. Sex (Male/Female)
4. Address (Street, City, Province, Postal Code)
5. Telephone (Area Code, Number)
6. E-mail (Address)
7. Insurance policy number (If applicable)

Insurance Company's Response

1. Name of the insurance company (Full name)
2. Address (Street, City, Province, Postal Code)
3. Telephone (Area Code, Number)
4. E-mail (Address)
5. Insurance policy number (If applicable)

Insurance Policy Information

1. Policy number (If applicable)
2. Policy type (Auto, Home, Life, etc.)
3. Policy term (Start date, End date)
4. Policy limit (Amount)
5. Policy conditions (If applicable)

Insurance Claim Information

1. Claim number (If applicable)
2. Claim date (Month/Day/Year)
3. Claim amount (Amount)
4. Claim description (If applicable)

Insurance Claim Status

1. Claim status (If applicable)
2. Claim date (Month/Day/Year)
3. Claim amount (Amount)
4. Claim description (If applicable)

Insurance Claim Resolution

1. Resolution date (Month/Day/Year)
2. Resolution amount (Amount)
3. Resolution description (If applicable)

Insurance Claim Resolution Status

1. Resolution status (If applicable)
2. Resolution date (Month/Day/Year)
3. Resolution amount (Amount)
4. Resolution description (If applicable)

KEY LANGUAGE: IS THIS APPLICATION
BEING FILED BY IL CR?

FILED $\neq$ SIU

KARAT $\neq$ CLAIMS ADJUSTER

(91)
Exhibit "A", Tab 3, Part 4

Re: Page 4 of Purported SNIC Response

Re #2: Mr. Karat, or perhaps someone on his behalf, certified all the statements in the respondent AND attachments were TRUE and COMPLETE. (nb: there were no attachments).

Re #3: Mr. Karat, or perhaps someone on his behalf, signed (which was prohibited by By-Law 7.1, section 6 of the LSO By-Laws as non-licensees are NOT even entitled to sign correspondence UNLESS it is of a routine administrative nature. Correspondence is NOT pleadings.

(92)

By-Law 7.1

OPERATIONAL OBLIGATIONS AND
RESPONSIBILITIES<https://lso.ca/about-lso/legislation-rules/by-laws/by-law-7-1>**Tasks and functions that may not be assigned: general**6. (1) A licensee SHALL **NOT** permit a non-licensee,

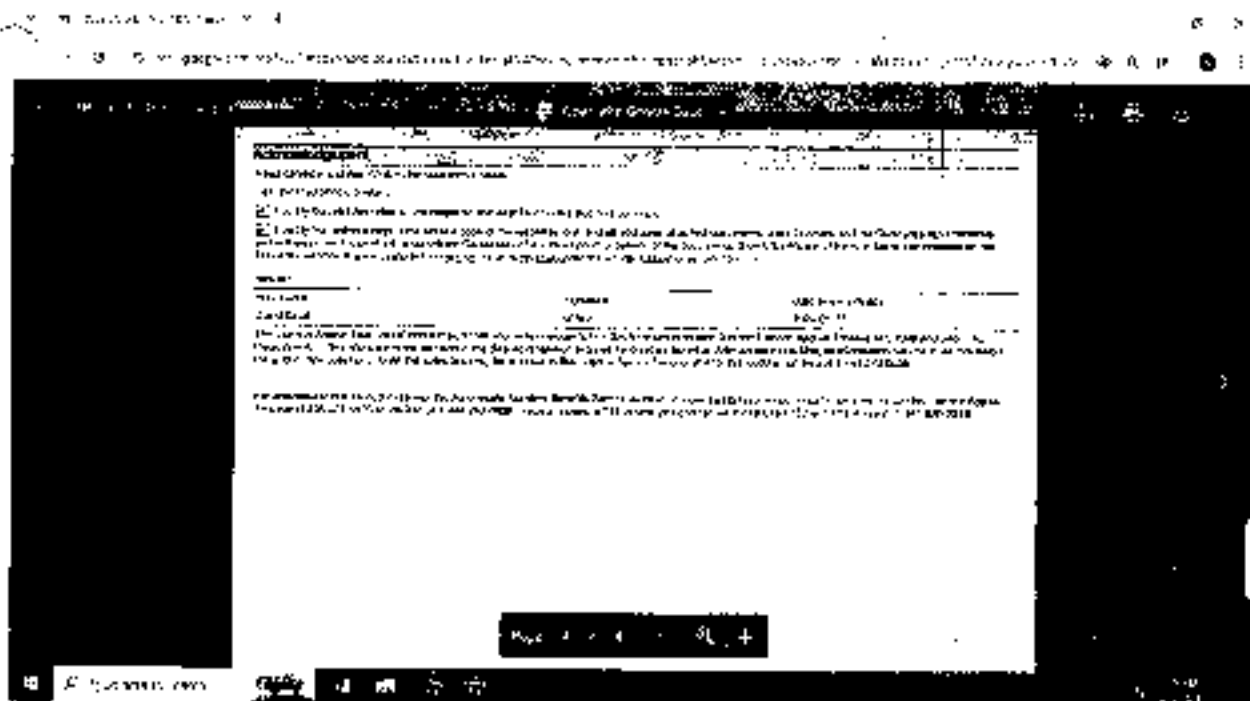
- (a) to give the licensee's client legal advice;
- (b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the non-licensee is authorized under the *Law Society Act* to do so;
- (c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);
- (d) to SIGN correspondence, other than correspondence of a routine administrative nature; or
- (e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

PLEADINGS ≠ CORRESPONDENCE

Issues: The facilitation of unauthorized practice of law but by which licensee?

1. *Is Mr. Karat considered a non-licensee under By-Law 7.1?*
 - a. Yes
2. *Is a Response filed and signed with LAT correspondence of a routine administrative nature?* No (see: *Van Hodge*, per Adjudicator Lake (as she then was; a response is considered a "responsive pleading").
3. *Does this Appeal involve the Applicant being CAT Impaired or the appearance of CAT Impaired?* Yes
4. *Would a paralegal been authorized to sign and file the Purported SNIC Response?* No (see: *Dankhko*)
5. *Therefore, which Licensee failed to prevent Mr. Karat from engaging in the unauthorized practice of law?*
 - a. This is a matter for responsive evidence to the motion.
 - b. The Appellant alleges that it was and is the **Divorced Husband Conflicted Lawyer** as he has worked with Mr. Karat on *Quinn v. SNIC*;
 - c. Perhaps, Mr. Nieuwland will confirm in evidence that it was he who was supervising Mr. Karat to execute the same. However, this would be the facilitation of unauthorized practice of law as the Appeal involves CAT Impairment. This is a different issue than that of nullity.

94



Ex. A, Tab 4

Re: Denial letter in October 2023 - Ms. Persaud as the contact person - no signature from Ms. Persaud - Address is SNIC (Burlington)

96

TD

TD Insurance

September 16, 2023

Dear Mr. [Name Redacted]

RE: [Name Redacted]

YOUR REQUEST FOR

CLAIM STATUS

URGENT CLAIM STATUS

Document: Health Insurance and BMW Financial Services Canada A Division of BMW Canada INC

Claim No: 0151219411

Policy No: 2023-0633

Claimant: Kevin McKinley

Location:

Thank you for submitting your Request for Claim Status. Below is the status of your claim as of September 16, 2023. Please be advised that the following amounts are not payable under your policy for the following reasons:

Type 1: Aug 24, 2023 - BMW - Basic	\$412,000
Type 2: Aug 24, 2023 - BMW - General	\$475,000
Type 3: Aug 24, 2023 - BMW - Motor	\$475,000
Total	\$1,362,000

We acknowledge the above noted services. However, the associated costs for the requested services are not payable under your policy for the following reasons:

Document: Health Insurance and BMW Financial Services Canada A Division of BMW Canada INC

Claim No: 0151219411

Policy No: 2023-0633

Claimant: Kevin McKinley

SNIC BURLINGTON ADDRESS

→ NOT ADDRESS FOR SERVICE IN LAT PROCEEDING

97

Ex. Tab 5: The locations of TDGIC (Toronto); SNIC (Markham) and SNIC Burlington

98
Ex, A, Tab 5, part A

1. Now shown to me is the hyperlink for the physical location of TDGIC in Toronto, Ontario:

TDGIC

https://www.google.com/maps/place/3650+Victoria+Park+Ave,+North+York,+ON+M2H+3B2/@43.8081029,-79.3381034,3a,90y,247.37h,93.6t/data=!3m1!1e1!3m5!1sS7L-yQcBves3xm_Mt5nbhg!2z0!6shups%2F%2Fstreetview.pixels-pa.googleapis.com%2Fv1%2Fthumbnail%3Fpanoid%3DS7L-yQcBves3xm_Mt5nbhg%26cb_client%3Dmaps_sv.tactile.gps%26w%3D203%26h%3D100%26yaw%3D250.34853%26pitch%3D0%26thumbfov%3D100!7t16384!8t192!4m7!3m6!1s0x89d4d374e0f0e1c7:0x8633705c38a1531f8m2!3d43.8078866!4d-79.3388681!10e5!16s%3Fg%2F!1b8v9!sq6?entry=ttu

3650 Victoria Park Ave
 Toronto, Ontario



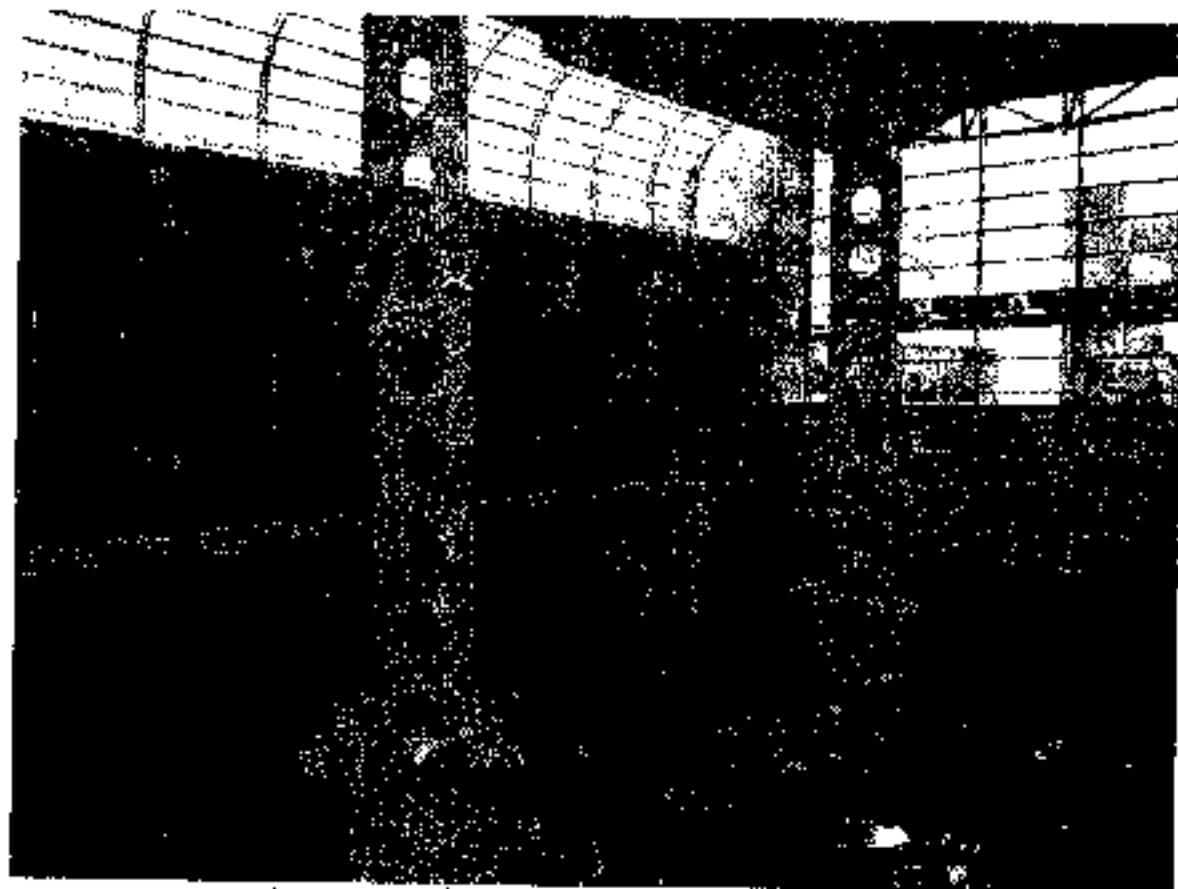
99

Ex. A, Tab 5, part B

2. Now shown to me is an image from the inside of the building of SNIC in Markham (defined as "SNIC Markham") and

SECURITY NATIONAL INSURANCE COMPANY in MARKHAM

101 McNabb St., Markham ON L3R 4H5, Canada



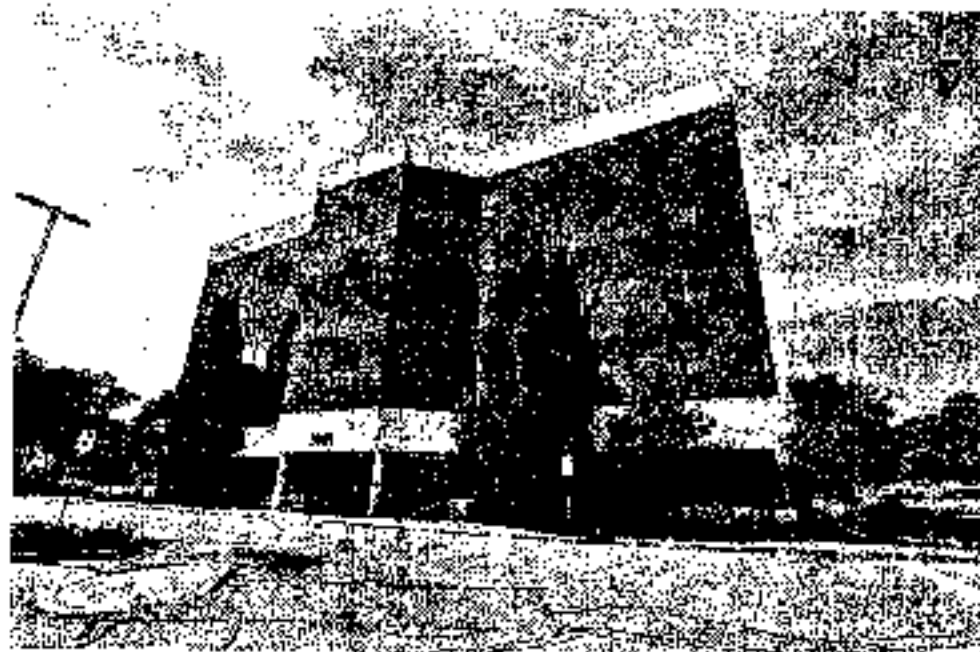


Ex. A, Tab 5, part C

Now shown to me is a copy and paste of the address of SNIC Burlington (Persaud) with an image of the office building or commercial building:

SNIC (Burlington)

5045 S Service Rd
Burlington, ON L7L 5Y7
(905) 681-6773



102

Exhibit "A", Tab 6, Barnett

Barnett, Re, 1997 CanLII 851 (ONT ST).

The Old Commentary under Rule 16 read as follows.

Particular 2(d)(iii) does not refer to a specific rule but the Law Society argues that Rule 16 Commentary 3.(i) is of some assistance. That Commentary reads as follows:

A lawyer may not permit a non-lawyer to:

(i) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated;

[2] Darren Smith, badge No. 907, is a police officer employed by the Hamilton Police Service (HPS). On two occasions, first in 2017 and then in 2018, he was dispatched to homes in Hamilton to pick up firearms for surrender to the police. On each occasion he lodged the surrendered items appropriately with the HPS property branch.

[3] Betty Grant is the HPS civilian employee responsible for, among other things, seeing to the destruction of surrendered weapons. After each surrender, she directed Officer Smith, [in police parlance she "tasked" him], to obtain and then to provide to her either a "waiver" form, a "Firearms Destruction/Receipt/Disposal Waiver", signed by the owner of the weapon documenting that owner's surrender of the weapon to the HPS for disposition of it by the HPS or a statement from the owner signed in Officer Smith's duty notebook to a similar effect.

[4] Officer Smith did neither on either occasion. Rather, he obtained the requisite waiver forms, and in each case, he completed the form *in its entirety*. He signed the name of the owner on the form in the spot where the owner of the weapon was required to sign. Then, he signed his own name to the form, attesting to having witnessed the ostensible signature of the owner. He did so without documenting in any way that he signed the name of the owner. He then uploaded the waiver forms that he had created into the HPS document management system, called NICHE, so that Ms. Grant could access them and print them out.

[5] When Officer Smith's actions came to light, he was charged with one count of forgery and one count of uttering respecting each of the waivers that he created and submitted. He was essentially charged as follows [1].

(i) that between July 7, 2018 and July 22, 2018, Darren Smith knowingly made a false document, namely, that he forged a signature with intent that it be acted upon or used as genuine and thereby committed forgery, contrary to s. 367 of the *Criminal Code*;

(ii) that on July 22, 2018, he knowingly used a forged document, namely, a Hamilton Police Service Firearms Destruction Waiver, as if the document was genuine, contrary to s. 368(1.1) of the *Criminal Code*;

(iii) that on November 30, 2017, he knowingly made a false document, namely, that he forged a signature with intent that it be acted upon or used as genuine and thereby committed forgery, contrary to s. 367 of the *Criminal Code*; and,

(iv) that on November 30, 2017 he knowingly used a forged document, namely, a Hamilton Police Service Firearms Destruction Waiver, as if the document was genuine, contrary to s. 368(1.1) of the *Criminal Code*.

105
My Findings of Facts

The Jolly Surrender, 2017

[15] Audrey Jolly is the surviving spouse of Ronald Jolly. They were married for 64 years. They operated a back-hoe business together and Mrs. Jolly was very familiar with her husband's signature.

[16] In 2017, Ronald Jolly was dying from Parkinson's disease compounded by a form of dementia. He was under palliative care in their home at 200 West 33rd Street, Hamilton. In November of 2017 Audrey opened a letter from the RCMP that was addressed to her husband. By this letter the RCMP notified Ronald Jolly of his need to renew his licences for his rifle and his shotgun. Mrs. Jolly spoke to her husband about the letter and she testified that he advised her that he did not want to renew his licences.

[17] So, she contacted the RCMP who directed her to contact the HPS to arrange to surrender the guns. She did so. She did not have Ronald Jolly's power of attorney.

[18] Mrs. Jolly did not recall the specific date when Officer Smith came to her house and picked up her husband's long guns. However, Officer Smith made cursory notes of his attendance in his duty notebook of that time. He noted that on Tuesday,

November 21, 2017 at 10:50 a.m., he attended at 200 West 33rd Street. He noted down the particulars of the two guns that he took from that residence. Later during that shift he properly lodged the weapons into the HPS property branch. A portion of Officer Smith's duty notebook from that time containing his notes about attending the Jolly home was filed as Exhibit 12.

[19] Officer Smith never spoke to or met Ronald Jolly. When Officer Smith came into the Jolly living room Ronald Jolly was lying in a hospital bed in a bedroom of the home. The door to that bedroom was open and there was a line of sight into it from the home's living room. So, Officer Smith may have been able to see Ronald Jolly, but Officer Smith never spoke to Ronald Jolly and never entered his bedroom.

[20] Officer Smith was only in the Jolly home for about five minutes to pick up the guns. He never asked Audrey Jolly to SIGN anything and she never saw him again, (other than at this trial).

[21] Some time later, on December 21, 2018, HPS Detective Brian Smyth¹ called upon Mrs. Jolly and asked her if the signature on a waiver document that he showed her was written by her husband.

[22] Smyth showed her what became Exhibit 3 at this trial. She told him and she confirmed to me at trial that it was not her husband's signature. She also gave Smyth her husband's Driver's Licence, which did contain Ronald Jolly's true signature. That was made Exhibit 4.

[23] Ronald Jolly died on November 24, 2017.

[24] As noted above, Betty Grant, the HPS civilian employee, was responsible for, among other things, seeing to the destruction of surrendered weapons. Despite being a civilian employee of the HPS she was authorized to direct police officers to complete "Tasks" arising out of weapons being surrendered to the HPS. She required a DESTRUCTION WAIVER before she could authorize and arrange for Jolly's guns to be destroyed by having them smelted at a local steel mill.

[25] On November 28, 2017 at 3:59 p.m., Betty Grant wrote to Officer Smith and directed him to provide her with documentation that she required before she could initiate the destruction of the weapons that Officer Smith had obtained from Audrey Jolly.

[26] As noted, Ms. Grant was authorized to direct Officer Smith to comply with the "tasking" directive that she sent to him. She classified the priority of the task that she had set for him as "High". She wrote to Officer Smith in the following terms:

"You submitted to (sic) long arms for destruction however I require the Destruction waiver or a copy of your signed notebook. Please scan into NICHE and advise. Thanks BGR"

[27] Officer Smith did not contact Ms. Grant to ask her what she was writing about or to ask her for any further or other information about the task that she had directed him to complete. The Destruction waiver that Ms. Grant referred to is a document available to police officers on the HPS intranet.

[28] On November 30, 2017, Officer Smith completed the waiver that Brian Smyth showed to Audrey Jolly on December 2, 2018. He wrote all of the information that was added onto the pre-printed waiver form, (other than the page number that appears on the top of the document, which is the page number of this item in the defence disclosure package.)

[29] The information and markings that Officer Smith added to the pre-printed form included signing a SCRAWLED SIGNATURE with a large "R" and a large "J" PURPORTING to be the signature of Ronald Jolly. He also signed the form with his own signature attesting to having witnessed Ronald Jolly's signature. A photocopy of this document, being Exhibit 3, is attached to these reasons.

[30] The form directs the officer witnessing the document to attach the form to the officer's original report and to then forward the document to central records. This instruction is consistent with Ms. Grant's direction to Officer Smith to scan the waiver into the NICHE system and to advise her that he had done so.

[31] Officer Smith complied with Ms. Grant's tasking directive. He documented that he had completed the waiver report on November 30, 2017 at 4:40 p.m. and he documented that he had entered the waiver into NICHE on that same date and at that same time.

[32] Officer Smith's duty notebook for November 30, 2017 contains no reference to any attendance on Ronald Jolly nor any attendance at the Jolly home.

[33] Relying on the Jolly waiver that Officer Smith created and filed in NICHE, Ms. Grant arranged for Ronald Jolly's guns to be destroyed by having them smelted at Dofasen on April 11, 2018.

The second instance of former Officer Smith engaging in forged documents

The second instance of former Officer Smith engaging in forging documents for an individual purporting to sign the document in their name albeit performed and conducted by now former

The law as articulated of forgery and uttering a forged document by Honourable Justice Natel

Justice Natel articulated the statements of law as it related to forgery and uttering forged documents or false documents at paragraphs ____ to ____:

The Shkumar Surrender, 2018

[34] Ruth Shkumar and her sister, Jean Ventura, were the surviving children of their mother and father who died in 2017 and 2018 respectively. In 2018 the sisters were in the process of emptying out their parents' home at 262 East 13th Street, in Hamilton. During those efforts Jean Ventura found her father's duck-hunting rifle as well as some ammunition, a shotgun shell and a broken flare. The sisters decided to hand in these items to the HPS.

[35] They left the items on the lid of a freezer in their parent's basement to be available for pick up by the HPS.

[36] Ms. Ventura's husband called the HPS to tell them about the items and the sisters' desire to hand them in. As a result, Officer Smith was dispatched to and attended at 262 East 13th Street on June 15, 2018. Jean Ventura recalled the date as she had arranged for a charitable furniture pick-up for that date. By coincidence, Officer Smith attended that day, too.

- [37] Officer Smith noted his attendance in his duty book. An excerpt from his duty book that documented his attendance on June 13, 2018 was filed as Exhibit 8. Subsequently, Officer Smith lodged a bolt action Cossy 78 rifle, 37 .22 calibre shells and one 12-gauge shotgun shell with the HPS property branch.
- [38] Officer Smith told the sisters that he was not certain about whether he ought to take the flare. He left the home briefly to make an inquiry about whether he could take it too. That, at least, is what Ms. Shkumat inferred, and I so find. Officer Smith came back and told her that he could take the flare and did so, although what he did with it thereafter is unknown, as he did not lodge it in property.
- [39] As noted, the flare was broken.
- [40] Before Officer Smith left Ms. Shkumat asked him if she had to sign anything. He told her, "No" and left. He was only at the home for perhaps 20 minutes and the longest period of his attendance was the time that he took to find out if he could take the flare.
- [41] Before Officer Smith left, he said that he needed a name and a number, and he took down Ruth Shkumat's name and her telephone number. The number she gave him rang at her home address at 2 Clifton Road in Dundas, Ontario.
- [42] The sisters never saw or met with Officer Smith subsequently. They sold their parents' home in September of 2018.
- [43] On June 15, 2018 at 11:19 a.m., Betty Grant tasked Officer Smith in the following terms:
 "You submitted a rifle and ammo for destruction however I require the firearm waiver or a copy of your signed notebook to destroy. Please scan into NICHE and advise. Thanks BG"
- [44] Ms. Grant went on sick leave for about two months after tasking Officer Smith with this duty. When she returned to work, she caught up with her work and on August 13, 2018 she noted that the waiver that she had tasked Officer Smith to obtain was now on file.
- [45] On July 22, 2018, Officer Smith scanned a waiver into NICHE to meet the requirements of the task that Betty Grant had assigned to him. That waiver was ostensibly signed on July 3, 2018 by Ruth Shkumat. Ruth Shkumat's purported signature was attested to by Officer Smith as a police officer witnessing that signature.
- [46] The precise date when Officer Smith created this document is unknown. It was not signed by Ruth Shkumat on June 13, 2018. It had to have been created between the date when Betty Grant tasked him on June 15, 2018 and prior to Officer Smith scanning the document into NICHE on July 22, 2018.
- [47] On December 21, 2018, Detective Brian Smyth attended upon Ruth Shkumat at her home address in Dundas, Ontario, (after first going to 262 East 13th Street in Hamilton, where, of course, he did not find her.)
- [48] Detective Smyth showed Ms. Shkumat a waiver ostensibly dated on July 3, 2018 and ostensibly signed by her. This document was filed as Exhibit 7. Smyth asked her if she had signed it. She told him and confirmed to me that the signature on the document was not her signature and that she had not signed the document.
- [49] Smyth asked her if she would sign a new version of that document and she did so on December 21, 2018, after which Smyth witnessed her signature. The waiver that she signed for Smyth was filed as Exhibit 6. The waiver that she did not sign was filed as Exhibit 7. Copies of the Jolly waiver, (Exhibit 3), and those Shkumat waivers are appended to these reasons.
- [50] Ms. Grant arranged to have the firearm that Ms. Shkumat surrendered smelted on April 16, 2019.
- [51] Ms. Grant testified at length to many of the aspects of her responsibilities for the HPS.
- [52] When a firearm is lodged for destruction she does as complete a history of the weapon and the people involved with the weapon as she can to ensure its provenance and its relevance to any other occurrences. As well she contacts the RCMP to keep them informed about the destruction of any firearm.
- [53] Ms. Grant testified that she tasked Officer Smith with obtaining the waivers because she required them before she could proceed with having the weapons smelted.

The Law by Justice Natel

The Criminal Code

False Document

[54] The Code defines "false document" in s. 321:

"false document" means a document

(a) the whole or a material part of which purports to be made by or on behalf of a person

(i) who did not make it or authorize it to be made, or

(ii) who did not in fact exist,

(b) that is made by or on behalf of the person who purports to make it but is false in some material particular,

(c) that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made: [3]

Forgery

[55] The offence of forgery is contained in s. 366 of the Code:

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Making false document

(2) Making a false document includes

(a) altering a genuine document in any material part;

(b) making a material addition to a genuine document in adding to it a false date, attestation, seal or other thing that is material; or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Exception

(5) No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government.

False Document: Materiality

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Discussion

False Document – Materiality

[68] I begin with the issue of whether the waivers that Officer Smith created were false documents.

[69] As applied in this case, a false document means a document the whole or a material part of which purports to be made by or on behalf of a person who did not make it or authorize it to be made. Obviously neither Ronald Jolly nor Ruth Shkumat made either document. They did not sign their names to the waivers, although each of the two documents created by Officer Smith purport to be signed by them.

[70] The defence contends that the purported signatures written by Officer Smith are not a material part of either document.

[71] In my view that submission is incorrect. I find that if these documents had been submitted to NCHP without a signature Betty Grant would not have accepted them nor would she have acted upon them. She would not have accepted them any more than a payee would accept a cheque without a payor's signature, or any more than a pharmacy would accept a prescription without a doctor's signature or any more than Service Ontario would accept a motor vehicle ownership transfer without a signature.

[72] Indeed, in any endeavour to be documented, a signed document demonstrates that signer's agreement to the document's terms by virtue of their signing. The signatures of Ronald Jolly and Ruth Shkumat were material to these waivers. The task Ms. Grant set for Officer Smith was to obtain a signed waiver or a signed notebook.

[73] Similarly, if the required signature was not material, there would be no need for a witness to that signature. Documents that ask for a witness to a signature require the witness to authenticate the signature precisely *because* the signature is material to the document.

[74] I am of the view that resort to the reported cases is unnecessary to determine whether the signatures on these waivers is a material part of these documents. I find and rule that in each case the signature of the maker of the document was and is a material part of the document.

[75] Nonetheless, resort to the controlling authority would require the same conclusion.

[76] In *R v. Gaysek*, 1971 CanLII 11 (SCC), [1971] S.C.R. 888, an inventory contained false entries despite being certified (ph. see the word certified in the Response Form) as true and correct. The lies about the entries did not change the nature of the document, it remained a purportedly true inventory. Yet, the inventory was false for the purposes for which it was created. Likewise, Officer Smith created these waivers and used them as purportedly true documents. But they were false documents for the purposes for which they were created.

[77] In *R v. Ogilvie* (1993), 1993 CanLII 3510 (Q.C.), 81 C.C.C. (3d) 125 (Que. C.A.) Justice Fish explained what *Gaysek* stood for. He wrote that *Gaysek* decided that "a document which is false *in reference to the very purpose for which it was created*" is one that is false in a material particular, within the meaning of s. 221 of the *Criminal Code*. So, in order to be a false document, the document in question must not simply "tell a lie"; it must be false in relation to the purpose for which it was created.[6] That is clearly true, too, with respect to the two waivers that Officer Smith created.

Authorization

Justice Nare] continued:

Authorization

[78] As noted above at paragraph [54] the *Code* defines "false document" to mean a document the whole or a material part of which purports to be made by or on behalf of a person who did not make it or authorize it to be made. (emphasis added) The defence contends that neither waiver created by Officer Smith is a false document because Ronald Jolly authorized Officer Smith to create a waiver for him and likewise, Ruth Shkumat authorized Officer Smith to create a waiver for her.

[79] Merely stating those propositions demonstrates their wrongness. Officer Smith never spoke to Ronald Jolly. Audrey Jolly did not have Ronald Jolly's power-of-attorney. Ronald Jolly was dead when Officer Smith purported to write Ronald Jolly's signature on the waiver that he (Officer Smith), created. Officer Smith never asked Audrey Jolly for her authorization to sign any documents.

on her behalf nor did he ask her for her authorization to sign any documents on her husband's behalf. Neither Ronald Jolly nor Audrey Jolly authorized Officer Smith to sign the waiver that Officer Smith created. In my view there is no basis in law or on these facts to support a finding that either Ronald Jolly or Audrey Jolly authorized Officer Smith to create the waiver that Officer Smith fabricated. I make that finding to the exclusion of any reasonable doubt.

[80] I make the same findings and to the same degree with respect to the Ruth Shkumat waiver. Officer Smith never asked Ruth Shkumat or Jean Ventura for their authorization to sign any documents on their behalves nor did he ask them for their authorization to sign any documents on behalf of their father or their father's estate. Neither Ruth Shkumat nor Jean Ventura authorized Officer Smith to sign the waiver that Officer Smith created. In my view there is no basis in law or on these facts to support a finding that either Ruth Shkumat or Jean Ventura authorized Officer Smith to create the waiver that Officer Smith fabricated.

[81] The defence contends that even if the Jollys or Ruth Shkumat or Jean Ventura did not formally authorize Officer Smith to sign a waiver as he did, by their action of surrendering weapons to the HPS they consented to Officer Smith creating the waivers. At the very least, the defence contends that Officer Smith had their implied authority to do so. Mr. McGilliv submits that support for this submission can be gleaned from *R v. Ewanchuk*, 1999 CanLII 3171 (SCC), [1999] S.C.J. No. 10. There, Major J. at paragraph [31] said: "The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law."

[82] The doctrine of implied consent is often discussed in allegations arising out of contact sports, especially hockey. The comment by Lacourciere J.A., in *R v. Leclerc*, 1991 CanLII 7389 (ON CA), [1991] O.J. No. 1533 (C.A.) is useful. He said: "The weight of judicial authority appears to be that a player, by participating in a sport such as hockey, impliedly consents to some bodily contact necessarily incidental to the game, but not to overly violent attacks, all of which should be determined according to objective criteria."

[83] While there is no similarity to the facts in this case, there is a principle that can be gleaned from Justice Lacourciere's comment, namely, attempting to determine if there is some necessary implication grounded in the act of voluntarily surrendering a firearm to a local police service.

[84] I do not find that there is any necessarily incidental obligation on a surrenderer to sign the kind of waiver required by the HPS and hence no implied consent is given by the surrenderer to have a police officer do so for them. At most a mutual signing of a bare receipt by the surrenderer and the receiving police service might necessarily be implied in turning over an unwanted firearm to a local police service. However, even that potentially limited implication is uncertain. I say that because *R v. Wicks*, 1992 CanLII 2780 (ON CA), [1992] O.J. No. 294 (C.A.) sets out the elements for a valid consent, including an implied consent, (albeit in the context of waiving the right to be secure from an unreasonable search and seizure).

[85] *Wicks* provides the elements of a valid consent whether express or implied as follows:

(i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in *Goldman*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested; [7]

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(6) the giver of the consent was aware of the potential consequences of giving the consent.

Mens Rea of Forgery

Justice Natel continued with the *mens rea* of forgery:

Mens Rea for the Offence of Forgery

[92] As noted above in paragraph [11] the defence position is it cannot be found to the exclusion of any reasonable doubt that Officer Smith had the necessary *mens rea* for the offence of forgery. Hence, a review of the law respecting the *mens rea* of forgery is required.

[92] Marshall J.A. in *R. v. Folev*, 1294 Can.L.J. 9760 (N.L.C.A.), [1994 N.L. No. 166] is my starting point. There, under the heading, "The ingredients of forgery" one finds[9]:

18 In a leading English forgery case, *Wellham v. Director of Public Prosecutions* (1961) A.C. 103, Lord Denning at pp. 132-133, singles out the following passage from Vol. 2 of East's *Pleas of the Crown* at p. 852 as best expressing the common law definition of forgery:

... Forgery at common law denotes a false making (which includes every alteration of or addition to a true instrument), a making *malum in se*, of any written instrument for the purpose of fraud and deceit. ...

20 ... [T]he making of a false document is the essence of forgery at common law. It remains so in today's Criminal Code. This is apparent from s. 366(1) which sets out the essential ingredients of forgery.

21 ... [T]he scope of the *actus reus* and *mens rea* of forgery now depend upon the provisions of the Criminal Code which supersedes the common law.

22 There is a view that the concept of deception as an element of forgery has been expanded in the Code to transcend that of fraud which the common law required to ground a forgery conviction. In this context the following distinction, ... between the intent to deceive and to defraud, ... is apropos:

To deceive is ... to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

23 Proponents of the proposition that the intent component of forgery has been expanded beyond fraud in the Code point to paragraph (b) of s. 366(1) in support of their contention.

This provision, they advocate, merely requires that the forger induce a state of mind that a document, which he or she knows to be false, is genuine. Inasmuch as this paragraph is ... expressed disjunctively from the preceding paragraph (a), which does invoke prejudice, they posit that the statutory offence of forgery requires merely an intent to deceive. Relating this specifically to s. 366(1)(b), this viewpoint asserts that the requisite intent is to falsely induce a state of mind by creating the impression that the document is genuine. *Under this submission there would be no need to go further to establish an intent to defraud or even to cause prejudice.* (emphasis added)

24 This expanded view of the intent of the offence of forgery, together with a concise résumé of the debate surrounding this subject in Canadian law over the years, is expounded in *R. v. Sebo* (1988) 1988 A.R.T.A. 200 (Can.L.J.), 60 Alta. L.R. (2d) 53 (Alta. C.A.). ...

[93] Accordingly, I next turn to *Sebo*.

[94] In *Sebo* Kerans J.A. retraced the history of the Canadian law of forgery to determine whether a conviction for forgery required proof of an intention to defraud or whether proof of an intention to deceive sufficed. Despite the legal acumen demonstrated by Justice Keran's exegesis of the law of forgery, I am content to skip to his conclusion, which I adopt. He concluded:[10]

In my view, this context leaves the question of the purpose of the words in s. 326, [now s. 388, the offence of use, trafficking or possession of forged document], beyond rational dispute even though they might be said to have a harsh effect. Today's Code reflects the view that it is better to have a definition that catches the utterer and the forger who hope never to cause harm even at the risk of catching those who ... not only did not hope to gain advantage but also did not create a significant risk of harm. ...

I accept that, as a result, s. 324(1)(a), [now s. 366(1)(a)], is anomalously superfluous. The best explanation of the anomaly is that the Code emphasises that it catches both the old and the new mental element. ...

In conclusion, I agree ... that **an intent to defraud and an awareness of the precise intent of the forger are not required mental elements of the offence of uttering** ... (emphasis added)

I must now deal with the principal argument for the defence. ...

The argument incorrectly assumes that an intent to defraud is required by the Code for a conviction for forgery. I earlier dealt with the intent for forgery and uttering in order to dispose of this. The intent required of each is the same. (emphasis added)

[95] Accordingly, the intention required to be proved to ground a conviction for forgery is merely the intention to deceive. The Crown is not required to prove the forger had an intention to defraud, which is to say that for a conviction for forgery the Crown need not prove that Officer Smith intended to cause prejudice or harm.

[96] I reject the defence submissions that Officer Smith's actions were no more than carelessness or negligence.

[97] Clearly Officer Smith was a careless forger in one respect. He knew that Ronald Jolly was very ill, but he was careless in not determining if Mr. Jolly was still alive when he forged his signature. As a result of that carelessness, he forged Mr. Jolly's signature several days after Mr. Jolly had died.

[98] These forgeries were not careless acts otherwise. A look at the ostensible signatures shows that Officer Smith scrawled signatures that started with the correct initials of Ronald Jolly's and of Ruth Sukumat's names. Those actions were obviously intentional. Moreover, merely recounting the steps he had to take shows that Officer Smith's actions were not the product of mere carelessness.

[99] Officer Smith had to, in each case, receive and read the task set for him by Ms. Grant. He had to obtain a waiver form in each case. He had to fill out the form in each case. He had to forge the signatures on each form and then he had to submit the forms that he created in NICHE. That is not a description of carelessness. That is intentionally mendacious behaviour.

[100] Likewise, Officer Smith's actions were not the product of negligence in the sense of failing to take proper care in the performance of his duties. He rejected and abdicated his sworn duty in these cases. These were not acts of negligence. They were acts of malfeasance.

[101] Regardless of what motivated Officer Smith to create these two forgeries, his intention to deceive by committing them has, in each case, been proved to the exclusion of any reasonable doubt.

Uttering

7 Justice Natel continued under uttering.

The Counts of Uttering

[102] The defence submits that Officer Smith's use of the forged waivers, viz. scanning or uploading them in the HPS NICHE system, were acts so negligible as not to amount to "using" the forgeries. Hence, he is not guilty of the two counts of uttering them contrary to s. 368(1.1) of the Code.

[103] Respectfully, I do not accept that submission. As noted by Mr. Leach in his submissions in reply, whether one hands a forged cheque to a teller in person or deposits it into an ATM that forged cheque is "used" in either case. Moreover, Mr. Leach points to the definition of

"document" found in s. 321 of the Code: "document means any paper, parchment or other material on **which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, . . .**" (emphasis added)

[104] Additionally, in *R. v. Stevens*, 1980 CanLII 2930 (ON C.A.), [1980] O.J. No. 1621 (C.A.), the court held that putting a false affidavit into a photocopy machine to copy it was a "use" of it. Further, Justice Kerans, in *Seba*, notes that *R. v. Harris*, (1965) Crim. App. R. 330 (U.K. C.C.A.) provides that when a photocopy of a forgery is made for wider distribution that too is a "use" and therefore an uttering of the forged original.

[105] I am satisfied to the exclusion of any reasonable doubt that by uploading the two waivers *that he forged* into the HPS NICHE system Officer Smith used the two waivers. I find, to the exclusion of any reasonable doubt, that Officer Smith is guilty of the two counts of uttering with which he is charged.

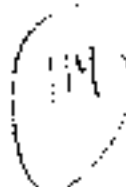
¹The "gun owner" but effectively incapacitated

²Different "Smith" and not the accused

³Is the Karat COS his "true signature"?

⁴Not publically available but "internal to the HPS"

Tab 4



Current version: in force since Mar 6, 2024

Link to the latest version : <https://canlii.org/1206/>

Stable link to this version : <https://canlii.org/1206/law>

Citation to this version: Law Society Act, RSO 1990, c L.8, <<https://canlii.org/1206/law>> retrieved on 2024-04-04

Currency: This statute is current to 2019-12-08 according to the [e-Laws](#) site

Law Society Act

RSO 1990 CHAPTER L.8

Consolidation Period: From March 6, 2024 to the [e-Laws](#) currency date

Last edited from [2024, c. 2, Sched. 14](#).

PART 01

Interpretation

1 (1) In this Act,

"**affected body**" means any body that, after the presentation of a notice of legal argument by one or more persons, engages in decision making affecting a person's legal interests, rights or responsibilities and, without limiting the generality of the foregoing, includes,

(a) a trial or a provincial court,

(b) a tribunal established under an Act of Parliament or under an Act of the Legislature of Ontario,

(c) a commission or board appointed under an Act of Parliament or under an Act of the Legislature of Ontario to conduct an inquiry or request, and

(d) an arbitrator, arbitrators panel and a

"**Appeal Division**" means the Law Society Tribunal Appeal Division constituted under Part III (Interpretation of "body")

"**brancher**" means a brancher of the Society other than an honorary brancher, "brancher"

"**by-law**" means the by-law made under the Act (regulations, administrative)

"**certificate of authorisation**" means a certificate of authorisation issued under the Act authorising the corporation named in it to practise law in Ontario, or provide legal services in Ontario or in its, both, ("terminal authorisation")

"**Chief Executive Officer**" means the Chief Executive Officer of the Society, "Chief Executive Officer"

"**Constitution**" means a regular or special meeting of the branchers convened for the purpose of the second business of the Society, ("Constitution")

"**document**" includes a paper, book, record, manuscript, sound recording, videotape, film, microfilm, microfiche, graph, map, plan, survey and information recorded or stored by computer or by means of any other device, ("document")

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"Member of an" means a person who is elected as a member under subsection 15 (1) or 16 (1) or becomes a member under subsection 15 (3) or 16 (3); (membre d'un)

"firm" means, subject to subsection (1.1), any of the following entities or not-for-profit organizations through which one or more licensees practise law, provide legal services to members of the public or both:

1. A sole proprietorship owned by one licensee;
2. A professional corporation;
3. An association of licensees, where the licensees hold themselves out as practising law, providing legal services or both, through an office or joint management;
4. An ordinary partnership;
5. A limited liability partnership;
6. Any other entity or joint arrangement specified by the bylaws; ("société").

"Hearings Division" means the Law Society Tribunal Hearing Division continued under Part II, (Division d'audience)

"Licensee" means a person registered as a licensee by the Lieutenant Governor in Council under section 23; (titulaire d'un permis)

"License" means a licence issued under the Act; ("permis")

"Licensed" means licensed under this Act; (permis d'un permis)

"Licence" means:

- (a) a person licensed to practise law in Ontario as a barrister and solicitor;
- (b) a person licensed to provide legal services in Ontario; ("titulaire d'un permis")

"Not a licensee" means a person who is not a licensee under paragraph (a) of subsection 12 (1); (non-titulaire d'un permis)

"Person who is authorized to practise law in Ontario" means:

- (a) a person who is licensed to practise law in Ontario as a barrister and solicitor and whose licence is not suspended; or
- (b) a person who is not a licensee but is permitted by the bylaws to practise law as a barrister and solicitor in Ontario; ("personne autorisée à pratiquer le droit en Ontario")

"Person who is authorized to provide legal services in Ontario" means:

- (a) a person who is licensed to provide legal services in Ontario and whose licence is not suspended; or
- (b) a person who is not a licensee but is permitted by the bylaws to provide legal services in Ontario; ("personne autorisée à fournir des services juridiques en Ontario")

"Physician" means a member of the College of Physicians and Surgeons of Ontario or a person who is authorized to practise medicine in another province or territory of Canada; (médecin) ("médecin")

"Professional business" means:

- (a) in the case of a person licensed to practise law in Ontario as a barrister and solicitor, the practice of law and the business operations relating to it;
- (b) in the case of a person licensed to provide legal services in Ontario, the provision of legal services and the business operations relating to it; ("affaires professionnelles")

"Professional corporation" means a corporation incorporated or continued under the *Business Corporations Act* that holds a valid certificate of authorization; (société professionnelle)

"Psychologist" means a member of the College of Psychologists of Ontario or a person who is authorized to practise psychology in another province or territory of Canada; (psychologue)

"Regulations" means the regulations made under this Act; ("règlements")

"Rules of practice and procedure" means the rules of practice and procedure made under this Act; (règles de pratique et de procédure)

"Society" means the Law Society of Ontario; ("Barreau")

"Treasurer" means the Treasurer of the Society; (Trésorier)

"Tribunal" means the Law Society Tribunal established under Part II, Tribunal / R.S.O. 1990, c. I.8 s. 1, 1991, c. 41, s. 1 (1996, c. 21, s. 1 (1997, 2000, c. 42 s. 20, s. 20; 2006, c. 21, s. 20; 2013, c. 17, s. 1 2018, c. 8, s. 8; 2020, c. 11, s. 11; 2020, c. 11, s. 11)

Not a firm

(1.1) Firm as defined in subsection (1) does not include:

- (a) any government or public sector entity, including for greater certainty,
 - i) a government-owned organization or municipal service entity as those terms are defined in the *Ombudsman Act*
 - ii) a broader public sector organization as defined in the *Broader Public Sector Accountability Act, 2010*;
 - iii) Legal Aid Ontario;
- (b) an entity or joint arrangement specified by the bylaws; 2020, c. 11 s. 11(2)

Documents in possession or control

(2) For the purposes of this Act, a document is in the possession or control of a person if the person is entitled to obtain the original document or a copy of it. 2006, c. 21, s. 2(1)

Hearings

(3) A hearing is not required before making any decision under this Act, the regulations, the bylaws or the rules of practice and procedure made under this Act, regulations, bylaws or rules of practice and procedure, unless it is required by the bylaws. 2006, c. 21, s. 2(1)

Licence

(4) For greater certainty, a person whose licence is suspended or is in abeyance is a licensee, but a person whose licence has been revoked, whose application to surrender his or her licence has been accepted under section 30 or whose licence is deemed to have been surrendered under section 31 or who has been 2006, c. 21, Sched. C, s. 2(1)(i)

Provision of legal services

(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment and legal or technical services or functions of a person. 2006, c. 21, Sched. C, s. 2(1)(ii)

Same

(6) Where, under a consultancy of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person;
2. Selects, drafts, completes or reviews, on behalf of a person,
 - a. a document that affects a person's interests or rights in or interest in personal property;
 - b. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person;
 - c. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, or to the constitution of a trust or other entity, or to the organization, reorganization, registration, dissolution or windup of the entity;
 - d. a document that relates to a matter under the *Bankruptcy and Insolvency Act* (Canada);
 - e. a document that relates to the custody of or access to children;
 - f. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in a subparagraph of this list;
 - g. a document for use in a proceeding before an arbitrator only;
3. Represents a person in a proceeding before an arbitrator or body;
4. Negotiates the legal interests, rights or responsibilities of a person. 2006, c. 21, Sched. C, s. 2(1)(iii)

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve in the relation to the proceeding, determining on or with whom to serve at the a document, or determining when, where or how to serve or file a document;
2. Conducting an examination for discovery;
3. Engaging in any other conduct necessary to the conduct of the proceeding. 2006, c. 21, Sched. C, s. 2(1)(iv)

Not practicing law or providing legal services

(8) For the purposes of this Act, the following persons shall be deemed not to be practicing law or providing legal services:

1. A person who is acting in the normal course of employment as a professional or assistant governed by another Act of the Legislature, or an Act of Parliament, that regulates specifically the activities of persons engaged in that profession or occupation;
2. An employee or officer of a corporation who selects, drafts, completes or reviews a document for the use of the corporation or to bind the corporation in writing;
3. An individual who is acting on behalf of another person, or who is acting in relation to a dispute in a proceeding or otherwise;
4. An employee or a volunteer representative of a trade union who is acting on behalf of the union or a member of the union in connection with a grievance, arbitration, legislative, or arbitration proceeding or a proceeding before an administrative tribunal;
5. A person or a member of a class of persons prescribed by the bylaws or the regulations made under the bylaws. 2006, c. 21, Sched. C, s. 2(1)(v)

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Terms, conditions, etc

(9) For the purposes of this Act, a term, condition, limitation or restriction shall be considered to be imposed on a licensee regardless of whether it is imposed on the licensee or on the licensee's licence and regardless of whether it is imposed by the by-laws or all functions of the society held by the licensee or is imposed on the particular licensee or on his or her licensee by an order made under this Act. 2006, c. 21, Sched. C, s. 2 (10)

Internal references

(10) A reference in this Act to something done or omitted to be done under this Act, a part of this Act or a provision of this Act shall be interpreted as referring to the Act, the part or the provision, as it read on the day the thing was done or omitted to be done. 2006, c. 21, Sched. C, s. 2 (10)

Transition

Definitions

1.1 (1) In this section,

"amendment day" means the day subsection 2 (2) of Schedule C to the *Access to Justice Act, 2006* comes into force ("jour de modification")

"member" means a member as defined in section 1, as it reads immediately before the amendment day, and "membership" has a corresponding meaning ("membre",

"qualifié de membre"; 2006, c. 21, Sched. C, s. 2

Members deemed licensees

(2) Every person who is a member immediately before the amendment day shall be deemed to become, on the amendment day, a person licensed to practise law in Ontario who is a solicitor and solicitor and to hold the class of licence determined under the by-laws. 2006, c. 21, Sched. C, s. 2

Abeyance

(3) If a person's membership in the Society is in abeyance under section 31 immediately before the amendment day, the person's licence shall be deemed to be in abeyance under section 31 on the amendment day. 2006, c. 21, Sched. C, s. 2

(4)-(7) Repealed 2013, c. 17, s. 2

Order imposing term, condition, etc.

(8) If an order imposing a term, condition, limitation or restriction on a person's rights and privileges as a member is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order imposing the same term, condition, limitation or restriction on the person's licence. 2006, c. 21, Sched. C, s. 3

Order suspending rights and privileges deemed order suspending licence

(9) If an order suspending a person's rights and privileges as a member is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order suspending the person's licence. 2006, c. 21, Sched. C, s. 3

Prohibition order

(10) If an order under section 50.2 prohibiting a person from practising under section 50 is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order under clause 26.3 (1) prohibiting the person from so having subsection 26.1 (1) or (2), as the case may be. 2006, c. 21, Sched. C, s. 3

(11) Repealed 2013, c. 17, s. 2

Licence deemed permit

(12) Any of the following licences that is in effect immediately before the amendment day shall be deemed to become, on the amendment day, a permit authorizing the holder to do the same things that were authorized by that licence:

1. A licence authorizing a limited liability partnership to practise law;
2. A licence authorizing a person to give legal advice respecting the law of a jurisdiction outside Canada;
3. A licence authorizing a partnership, corporation or other organization to engage in a practice of law with law firms or offices outside Ontario and one or more offices in Ontario;
4. A licence authorizing a partnership, corporation or other organization to practise another profession or vocation in practicing law. 2006, c. 21, Sched. C, s. 3

PART I

The Society

Law Society continued

2 (1) The Law Society of Upper Canada is renamed under the name Law Society of Ontario in English and *Barreau de l'Ontario* in French. 2018, c. 8, Sched. 15, s. 2

Status

(2) The Society is a corporation without share capital and its members at a particular time are

- an individual who is the Treasurer of the firm;
- the persons who are partners in the firm;
- the persons who are at that time licensed to practice law in Ontario as barristers and solicitors; and
- the persons who are at that time licensed to provide legal services in Ontario, who shall be referred to as *para-legal members*. 2006, c. 21, Sched. C, s. 3

Annual meeting

3 A meeting of the members of the Society shall be held annually at such place and at such time as is determined from time to time in Convention, notice of which shall be given by publication as provided by the bylaws. R.S.O. 1990, c. L.8, s. 3, 1990, c. 21, s. 2; 2006, c. 21, Sched. C, s. 3

Seat

4 The permanent seat of the Society shall continue to be at its corporate office in the City of Toronto. R.S.O. 1990, c. L.8, s. 4.

Functions of the Society

4.1 It is a function of the Society to ensure that

- all persons who practice law in Ontario or provide legal services in Ontario meet standards of learning, professional behaviour and professional conduct that are appropriate for the legal services they provide; and
- the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practice law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

- The Society has a duty to maintain and advance the cause of justice and the rule of law;
- The Society has a duty to ensure equitable access to justice for the people of Ontario;
- The Society has a duty to protect the public interest;
- The Society has a duty to act in a timely, open and efficient manner;
- Standards of learning, professional competence and professional conduct for barristers and solicitors or persons who do participate in legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

Powers of society

Acquisition and disposition of property

5 (1) The Society may purchase, acquire, lease, buy, gift, bequest, devise, determine or otherwise acquire or persons, probably for its purposes, and it may hold, sell, mortgage, lease or dispose of any of its real or personal property. R.S.O. 1990, c. L.8, s. 5 (1).

Trustee powers

(2) The Society has and may exercise all powers of trustee under the laws of Ontario. R.S.O. 1990, c. L.8, s. 5 (2).

Borrowing power

(3) The Society may borrow money for its purposes. R.S.O. 1990, c. L.8, s. 5 (3).

Capacity to hold an interest in an insurance corporation

(4) The Society may own shares or hold a membership interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to lawyers and to persons who will not practice law outside Ontario in Canada. R.S.O. 1990, c. L.8, s. 5 (4); 2006, c. 21, Sched. C, s. 3

Application of **Not-for-Profit Corporations Act, 2010**

6. The **Not-for-Profit Corporations Act, 2010** does not apply to this Society, except as may be prescribed by regulation. 2010, c. 15,

s. 230 (1)

Treasurer

7 The Treasurer is the primary and head of the Society. 1998, c. 21, s. 4

Chief Executive Officer

8 (1) The Chief Executive Officer shall, under the direction of the Corporation, manage the affairs and functions of the Society. 1998, c. 21, s. 5

(2) Repealed 2006, c. 21, Sched. C, s. 10

Liability of members, officers and employees

9 No action or other proceedings for damages shall be instituted against the Treasurer or any member, official of this Society or person appointed in Consultation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure or for any neglect or default in the performance or exercise in good faith of any such duty or power. R.S.O. 1990, c. L. 6, s. 15; 1998, c. 21, s. 6

MEMBERS

Government of the Society

10 The members shall govern the affairs of the Society. 2006, c. 21, Sched. C, s. 11

Honorary members

11 Every person:

(a) who is an honorary member on the 1st day of October, 1978; or

(b) who, after that day, is made an honorary member,

is an honorary member in as such has only the rights and privileges prescribed by the by-laws. R.S.O. 1990, c. L. 6, s. 11; 1998, c. 21, s. 7

Benevolence by virtue of their office

12 (1) The following, if and while they are lawyers, are Lawyers by virtue of their office:

1. The Minister of Justice and Attorney General for Canada

2. The Solicitor General for Canada

3. Every person who, by June 1, 2010, held the office of elected barrister for at least 16 years. 1998, c. 21, s. 8; 2006, c. 21, Sched. C, s. 12 (1); 2010, c. 1

Sched. 12, s. 2 (1)

Some attorneys general

(2) The following are Lawyers by virtue of their office:

1. The Attorney General for Ontario

2. Every person who held the office of Attorney General for Ontario at any time before January 1, 2010. 1998, c. 21, s. 9; 2006, c. 21, Sched. C, s. 12 (2); 2010,

c. 1, Sched. 12, s. 2 (2)

Same

(3) Sections 11 and 12 do not apply to a person whose tenure of an office is under section 31. 2006, c. 21, Sched. C, s. 12 (3)

Rights and privileges

(4) Lawyers by virtue of their office under subsection (1) or (2) have the rights and privileges prescribed by the by-laws but, except as provided in subsection (5), may not vote in Consultation or in committees. 1998, c. 21, s. 6

Wrong

(5) The following wrong rights apply:

1. The Attorney General for Ontario may vote in Consultation and in committees

2. Lawyers by virtue of their office under paragraph 1 of subsection (1) or paragraph 2 of subsection (2) may vote in committees. 1998, c. 21, s. 6

If elected benchler is eligible to become benchler by virtue of office

(6) An elected benchler who possesses qualifications as a benchler under subsection (1) or (2) continues to hold office as an elected benchler despite the expiration of his or her term of office. 2010, c. 1, s. 2 (3)

(7) (8) Repealed 2010, c. 1, s. 2 (4)

Attorney General, guardian of the public interest

13 (1) The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for the purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society. R.S.O. 1990, c. 1, s. 13 (1); 1996, c. 2, s. 1 (1); 2006, c. 21, s. 1 (1)

Admission

(2) Any document of any person in any document or thing produced under subsection (1) is admissible in evidence against that person in any proceedings other than proceedings under this Act. R.S.O. 1990, c. 1, s. 13 (2); 1996, c. 2, s. 1 (2)

Protection of Minister

(3) No person who is or has been the Attorney General for Ontario is subject to any proceedings of the Society or to any penalty imposed under this Act for anything done by him or her while exercising the functions of such office. R.S.O. 1990, c. 1, s. 13 (3); 1996, c. 2, s. 1 (3)

Former Treasurers

14 (1) Every licensee who held the office of Treasurer at any time before January 1, 2010 is a benchler by virtue of his or her office. 2010, c. 1, s. 1 (2)

Rights and privileges

(2) Benchlers by virtue of their office under subsection (1) have the rights and privileges provided by the by-laws. 2020, c. 11, s. 2

Benchlers licensed to practise law

15 (1) Every person who is licensed to practise law in Ontario, in accordance with the rules and regulations made by the Society, shall be elected as a benchler in accordance with the by-laws. 2006, c. 21, s. 15 (1)

Regions

(2) The benchlers elected under subsection (1) shall be elected for regions prescribed by the by-laws. 2006, c. 21, s. 15 (2)

Vacancies

(3) Any vacancies in the offices of benchlers who are licensed to practise law in Ontario as barristers and solicitors may be filled in accordance with the by-laws. 2006, c. 21, s. 15 (3)

Ceasing to be benchler

(4) A person who is elected as a benchler under subsection (1) or who holds the office of elected benchler under subsection (1) ceases to be a benchler if the person ceases to be licensed to practise law in Ontario as a barrister and solicitor. 2006, c. 21, s. 15 (4)

Benchlers licensed to provide legal services

16 (1) Every person who is licensed to provide legal services in Ontario shall be elected as a benchler in accordance with the by-laws. 2006, c. 21, s. 16 (1); 2013, c. 17, s. 3 (1)

Regions

(2) If the by-laws so require, the benchlers elected under subsection (1) shall be elected for regions provided by the by-laws. 2006, c. 21, s. 16 (2)

Vacancies

(3) Any vacancies in the offices of benchlers who are licensed to provide legal services in Ontario may be filled in accordance with the by-laws. 2006, c. 21, s. 16 (3)

Ceasing to be benchler

(4) A person who is elected as a benchler under subsection (1) or who holds the office of elected benchler under subsection (1) ceases to be a benchler if the person ceases to be licensed to provide legal services in Ontario. 2006, c. 21, s. 16 (4)

(5)-(7): Repealed 2013, c. 17, s. 3 (4)

(12)

17-21 Repealed, 1995, c. 21, s. 11

Removal for non-attendance

22 The benchers may remove from office any elected member who fails to attend six consecutive regular Convocations. R.S.O. 1990, c. L.6, s. 22.

Lay benchers

23 (1) The Lieutenant Governor in Council may appoint eight persons who are not licensed lay benchers. 2006, c. 21, Sched. C, s. 17(1)

Term of office

(2) Every appointment under subsection (1) expires immediately before the first regular Convocation following the first election of benchers under subsection 15

(1) that takes place after the expiration date of the appointment. 2006, c. 21, Sched. C, s. 17(2)

Reappointment

(3) A person appointed under this section is eligible for reappointment. 1995, c. 21, s. 12

Deemed reappointment

(4) A person whose appointment expires under subsection (2) shall be deemed to have been reappointed until his or her successor takes office. 1995, c. 21, s. 12

Termination of appointment

(5) A person's appointment under this section is terminated if the person becomes a licensee. 2006, c. 21, Sched. C, s. 17(3)

Quorum

24 Ten benchers present are entitled to vote in Convocation on matters of common law in the transaction of business. R.S.O. 1990, c. L.6, s. 24

Election of Treasurer

25 (1) The benchers shall annually, at each time as the benchers may be elected, elect one benchers as Treasurer. 1995, c. 21, s. 13

Benchers by virtue of office

(2) The Treasurer is a benchers by virtue of that office and ceases to hold office as a benchers by election. 1995, c. 21, s. 13

Re-election as Treasurer

(3) The Treasurer is eligible to be elected as Treasurer except he having ceased to hold office as an elected benchers but

(a) when a new election of benchers takes place under subsection 15 (1) a Treasurer who is a person licensed to practice law in Ontario may be re-elected as Treasurer only if he or she was elected as a benchers in that election; and

(b) after a new election of benchers takes place under subsection 16 (1), a Treasurer who is a person licensed to provide legal services in Ontario may be re-elected as Treasurer only if he or she was elected as a benchers in that election. 2006, c. 21, Sched. C, s. 18.

Paralegal Standing Committee

Paralegal Standing Committee Establishment

25.1 (1) Convocation shall establish a standing committee to be known as the Paralegal Standing Committee in English and Comité paraprofessionnel des parajuristes in French. 2006, c. 21, Sched. C, s. 19

Jurisdiction

(2) The Committee shall be responsible for such matters as the by-laws may require relating to the regulation of persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 19

Composition

(3) The Committee shall consist of 13 persons, of whom

(a) five shall be the lay elected benchers licensed to provide legal services in Ontario;

(b) four shall be elected benchers who are licensed to practice law in Ontario as barristers and solicitors; and

Tab 5

Page 10 of 10

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REASONS FOR DECISION ON MOTIONS

Conlan J.

Introduction

[1] Should the Plaintiff's counsel be removed at the request of some of the Defendants? That is the issue to be decided.

[2] The Plaintiff, Talisman Resort GP Inc. ("Talisman"), has sued the Defendants for specific performance of an alleged agreement made by the Defendants to purchase Talisman's resort property or, in the alternative, damages for breach of contract.

[3] The Statement of Claim was issued on August 24, 2009. Now, approaching four years later, the litigation has not progressed at any reasonable pace and remains nowhere close to being ready for trial. Numerous motions are outstanding including one by Talisman for summary judgment.

[4] The Defendants, Wolfgang Kyser (Pape Barristers as counsel) and Bruno Arnold, Marcins Arnold and Eurocourt Realty Group Inc. (Stevensons as counsel), all collectively referred to hereinafter as "these Defendants", move for an Order removing Bennett Jones LLP as counsel for Talisman on the basis of an alleged conflict of interest.

[5] In essence, the argument by these Defendants is that Bennett Jones LLP ought to be removed as counsel for Talisman because of an actual or perceived conflict of interest in that a partner in that law firm (but not the lawyer with carriage of the matter), Serafino Mantini ("Mantini"), (i) is a witness and (ii) has a personal interest in the litigation in that Mantini is the sole shareholder of Talisman's corporate shareholder and, as a mortgagee, is owed a substantial amount of money from Talisman.

[6] None of the other Defendants still participating in the action filed materials on these motions and presumably take no position, except the Defendant Usling whose counsel appeared in court in Owen Sound on 28 March 2013 to indicate simply that Usling supports the motions to remove Bennett Jones LLP as counsel for Talisman.

[7] These motions were heard in Owen Sound on 28 March 2013. The Court reserved its decision.

[8] I am indebted to counsel for their helpful motion materials, Facts, Briefs of Authorities and oral submissions at court. I have read and carefully considered all of the materials filed and the oral submissions by counsel.

A Brief Summary of the Positions of the Parties

These Defendants (moving parties)

[9] These Defendants argue that Mantini is a key witness in this action as evident from the fact that Talisman relies on an Affidavit sworn by Mantini in support of its motion for summary judgment, and that Mantini's evidence relates to contentious and important matters including, for example, whether Mr. Kyser misrepresented certain facts during the course of the proposed purchase of Talisman's resort property by the Defendants.

[10] These Defendants argue further that Mantini has a financial stake in this litigation in that he, through his companies, is owed several millions of dollars by Talisman.

[11] Because of either or both of Mantini's role as a witness and his financial interest in the litigation, Bennett Jones LLP ought to be removed as counsel for Talisman. So say these Defendants.

Talisman, the Plaintiff (respondent)

[12] Talisman argues that the alleged impropriety is illusory in that (i) Mantini is a witness and is a partner in the same law firm as Ms. Schatz, who has carriage of the file, and (ii) Mantini does have a financial interest in the litigation which is in common with that of Talisman, however, neither one of those facts gives rise to a conflict of interest which justifies the extraordinary Order being sought by these Defendants.

The Law

General Principles

[13] This Court's jurisdiction to remove Bennett Jones LLP as counsel for Talisman on the basis of a conflict of interest is an inherent one. It is not derived from any particular legislation or rule. It is grounded in the Court's objective to safeguard the proper administration of justice. *Publ v. Katz Group Canada Ltd.*, [2006] O.J. No. 4596 (S.C.J.) at paragraph 23.

[14] The question is whether these Defendants have established on a balance of probabilities that a fair-minded and reasonably informed member of the public would conclude that the removal of Bennett Jones

LLP as counsel for Talisman is necessary for the proper administration of justice. *MacDonald Estate v. Martin*, 1990 CanLII 33 (SCC), [1990] 3 S.C.R. 1235 at paragraph 47.

[15] In answering that question, the Court ought to balance these factors: maintaining respect for the integrity of and the high standards of the legal profession and our justice system as a whole; the principle that a litigant has a right to choose its counsel, and that right should not be interfered with lightly; and the objective of allowing reasonable mobility in the legal profession. *MacDonald Estate v. Martin*, *supra*, at paragraphs 16, 11 and 77.

[16] In answering the issue, the Court ought to consider not only whether there is an actual conflict of interest but also whether a conflict of interest could be reasonably perceived in all of the circumstances. In other words, is there an appearance of a conflict of interest? *Puhl*, *supra*, at paragraph 18.

[17] In analyzing the question, the Court may consider any applicable rules of professional conduct. Where there is a rule or guideline or ethical principle directly on point, the Court ought to consider it but is not bound by it. *MacDonald Estate*, *supra*, at paragraph 21.

The Lawyer as Witness

[18] There is nothing in the Law Society of Upper Canada's *Rules of Professional Conduct* which prohibits a lawyer from acting as counsel for a client when another lawyer in the same firm is a witness in the matter. What is generally prohibited is a lawyer as advocate also testifying before the tribunal (with some exceptions). Rule 4.02(2).

[19] The Canadian Bar Association's *Code of Professional Conduct*, Chapter IX - Commentary number 5, is wider in scope. It provides that a lawyer as advocate should not submit the lawyer's own affidavit to or testify before a tribunal (with some exceptions), and that the said guideline also applies to the lawyer's partners and associates.

[20] The CBA's Code is subject to "local rule or practice" and, thus, is subject to the Law Society's Rules.

[21] There is no jurisprudence holding that a lawyer in Ontario who appears as an advocate before a tribunal shall not tender evidence from that lawyer's partner or associate, whether testimonial or by affidavit. The matter is discretionary and requires a flexible, case by case approach which involves a consideration of some or all of these factors: the stage of the proceedings; the likelihood that the witness will be called and the

(27)

significance of his or her evidence; whether the party applying to remove counsel from the record is doing so in good faith; the impact of the order sought on a litigant's right to counsel of choice; whether the trial is by judge or judge and jury; the likelihood of a real conflict arising or that the evidence will be tainted; which party will call the witness; and the connection between counsel, the witness and the parties to the litigation. *Essex (Township) v. Guergo* (1993) 1993 CanLII 8396 (ON SCJDC), 15 O.R. (3d) 573 (Divisional Court) at paragraph 18.

The Lawyer with a Financial Stake

[22] If a lawyer cannot properly discharge his or her duties as an independent officer of the court due to the lawyer's personal interest in the litigation, then that lawyer may have to be removed from the record. The policy reason underlying that is clear: a lawyer with a personal interest in the litigation may, in fact or in perception, put his or her own interests above the obligations owed by the lawyer to the client and to the Court, thereby bringing the administration of justice into disrepute. *Karas v. Ontario*, 2011 ONSC 5151 (Ont. Ct. J.), [2011] O.J. No. 3932 (S.C.J.) at paragraphs 52, 54 and 55.

[23] Again, the Court ought to consider not only whether there is an actual conflict of interest but also whether a conflict of interest could be reasonably perceived in all of the circumstances. In other words, is there an appearance of a conflict of interest?

[24] The Law Society's Rules recognize that a lawyer who has a personal financial interest in the client's affairs or in the subject matter of the litigation may be in a conflict of interest if that personal financial interest interferes with the lawyer's duties owed to the client and/or adversely affects the lawyer's judgment: Rule 2.04(1) and the related Commentary.

[25] In deciding whether there is a conflict of interest on this ground, the question is whether the personal financial interest gives rise to a substantial risk that the lawyer's representation of the client would be materially and negatively affected by the lawyer's own interest. *Regina v. Neil*, 2002 SCC 16 at paragraph 31.

[26] Obviously, it is important in addressing that question to know whether the lawyer's personal financial interest is in any way at odds with the interests of the client. *Triple J Holdings Inc. v. Jan* (2006), 2006 CanLII 30457 (ON C.A.), 82 O.R. (3d) 430 (C.A.) at paragraphs 22 to 23.

Analysis

The Lawyer as Witness

[27] I glean little assistance from the CBA's Code because (i) it is subject to the Law Society's Rules and (ii) it is suggestive and not a directive (note that the word in Chapter IX, Commentary number 5 is "should" and not "shall").

[28] Neither the Law Society's Rules nor any jurisprudence prohibits Bennett Jones LLP from acting as counsel for Talisman when one of its partners is a witness.

[29] Thus, the issue turns on the discussion in *Essa, supra*. This is a discretionary matter.

[30] I disagree with any assertion by Talisman that some of the factors outlined in *Essa, supra* are irrelevant because Mantini is not the court advocate for Talisman. The factors remain relevant, although their importance may be affected by the fact that Mantini is not the court advocate for Talisman.

[31] It must be remembered that, to some degree, all members of a law firm are identified as one in the eyes of the law. *Forward v Zurich Insurance Co*, [2002] A.J. No. 664 (Alberta Court of Appeal) at paragraph 8 (quoting from other Court decisions).

[32] I will now discuss the *Essa, supra* factors in turn.

[33] This action is neither in the very early stage nor is it approaching trial readiness, thus, the stage of the proceeding is a neutral factor.

[34] There is a very high likelihood that Mantini will be a material witness at trial, and he is certainly a key witness on the summary judgment motion brought by Talisman. Notwithstanding that Mantini is not the lawyer with carriage of the file, I find that this factor is in favour of these Defendants. I pause here to comment on the decision of Justice Ground of the Ontario Superior Court of Justice in *Teltscher v. PTC Accounting*, 2006 CanLI 29284. That decision, in my view, should in no way be interpreted to suggest that disqualification will result once there is a finding that there is a likelihood that the lawyer will be called as a witness (see paragraph 13 in particular). Justice Ground referred specifically to the *Essa, supra* factors (at paragraph 10), and thus, it is clear that the likelihood of the lawyer being a witness is one factor.

[35] There is no evidence of actual bad faith on the part of these Defendants, however, these motions ought to have been brought much closer to the time that Bennett Jones LLP was appointed as counsel for Talisman and much earlier than the hearing of Talisman's motion for summary judgment. This factor tips slightly in favour of Talisman.

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[36] Unquestionably, the removal of Bennett Jones LLP as counsel for Talisman would have a significant impact on Talisman's right to counsel of choice. This factor is in favour of Talisman. Although I reject Talisman's argument that I should find that Talisman will not be able to continue the action if Bennett Jones LLP is removed as its counsel (because I find insufficient evidence in the record to so find), it must be emphasized that Courts ought to tread carefully when being asked to interfere with a litigant's right to counsel of choice. In fact, it has been said that "Canadian Courts exercise the highest level of restraint before interfering with a party's choice of counsel" - *Kulser*, 2011 CarswellOnt 12822 (Court of Appeal for Ontario) at paragraph 24.

[37] This action will be tried without a jury. That factor is neutral in this case.

[38] Whether a real conflict of interest is likely to arise in this case or the evidence somehow will become tainted is a factor in favour of Talisman. Tainting of the evidence of Mantini is very unlikely because his evidence is known and was adduced in support of Talisman's motion for summary judgment before Bennett Jones LLP was even on the record. Tainting of any other evidence as a result of Mantini's connection to counsel, Talisman and the litigation is, at best, speculative and certainly not likely. The possibility of Bennett Jones LLP developing a real conflict of interest vis a vis Talisman and/or the court is remote.

[39] The issue of which party will call Mantini as a witness at trial is a factor that tips slightly in favour of these Defendants even with a condition that counsel for Talisman not be permitted to cross-examine Mantini. That will be up to the trial Justice, however, it is a reasonable measure in my opinion. Counsel for Talisman has given that undertaking to the court and should be held to it. Although one partner in a law firm questioning another partner in the same law firm in direct examination is preferable over the same occurring in cross-examination, it is not ideal.

[40] On the overall connection or relationship between counsel, Mantini and the parties, that factor is in favour of these Defendants. Although Mantini is not the court advocate for Talisman, he is a partner of Talisman's litigation lawyer. And Mantini has a direct and significant connection to Talisman. He has a substantial financial interest in Talisman and in the litigation.

[41] This is not a lesson in arithmetic. We do not make decisions by adding up the checkmarks on each side.

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[42] This is a close call. But, having considered the factors outlined in *Esso, supra*, I exercise my discretion to permit Bennett Jones LLP to remain as counsel for Talisman.

[43] To borrow an expression from Justice Cram of the Court of Appeal for Ontario in *Kaiser, supra*, "there must be a possibility of real mischief should a removal order be refused" (paragraph 21). Despite the very able submissions of counsel for these Defendants, I disagree that such exists here.

The Lawyer with a Financial Stake

[44] Taken alone, this argument by these Defendants has very little merit. There is no reason to remove Bennett Jones LLP as counsel for Talisman on the sole basis that Mantini has a personal financial interest, no matter how sizeable, in Talisman and in the litigation.

[45] It is without question that Mantini's personal financial interest is *ad idem* with the interests of Talisman. They are not at odds with each other. There could not possibly be any likelihood, real or perceived, that Mantini's own interests will be given priority to the duties owed by Bennett Jones LLP to Talisman and to the court, thereby bringing the administration of justice into disrepute.

[46] Put bluntly, if Talisman wins then Mantini benefits. If Talisman loses then Mantini does too.

[47] There is nil evidence that Bennett Jones LLP, during its representation of Talisman in this action, is likely to do something or omit to do something that will prejudice Talisman because of the fact that Mantini has a personal financial interest in Talisman. Indeed, I suspect that Talisman is very content to have Bennett Jones LLP as its counsel because of the fact that Mantini has a personal financial interest in Talisman.

[48] This argument is relevant, however, in the overall contextual analysis required and in the assessment of the *Esso, supra* factors, including that dealing with Mantini's relationship with and connection to Talisman, Bennett Jones LLP and the subject matter of the litigation. As can be seen from my reasons above, I have taken this argument into careful consideration, however, my conclusion remains unchanged.

Conclusion

[49] In balancing the factors outlined by the Supreme Court of Canada in *MacDonald Estate, supra*, and recognizing that the Court must be concerned with not only actual conflicts of interest but also reasonable perceptions of conflicts of interest, I conclude that these Defendants have not established on a balance of

probabilities that a fair-minded and reasonably informed member of the public would conclude that the removal of Bennett Jones LLP as counsel for Talisman is necessary for the proper administration of justice

[50] It was stated a few times by counsel for these Defendants that not a single court decision was filed by them or the Plaintiff on the motions which, on the same or very similar facts, allowed counsel to remain on the record. That may be true, but that is no reason to grant the motions. Not a single Parliament of Canada decided to extend the right to vote to women before that happened either.

[51] The motions by these Defendants are therefore dismissed. Bennett Jones LLP shall be permitted to remain as counsel for the Plaintiff, Talisman.

[52] Talisman is entitled to its costs. If the parties are unable to settle the issue of costs, counsel may contact the Trial Coordinator in Owen Sound to schedule a further court attendance of sixty minutes in length, maximum, to hear submissions and consider filings in that regard. Arrangements can be made for that further court attendance, if necessary, to be by teleconference if the parties so desire. I shall consider the matter of costs resolved between the parties if the Trial Coordinator is not contacted by counsel within two weeks of the release of these reasons.

[53] I encourage the parties to move this action along. It is time to get on with the substantive motions and, if necessary, the trial.

Conlan J.

Released: April 2, 2013

CITATION: Talisman Resort v. Keyser, Usling et al, 2013 ONSC 1901
COURT FILE NO.: 09-238
DATE: 20130402

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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TALISMAN RESORT GP INC.

Plaintiff

- and -

WOLFGANG KYSER, GARY USLI
NG, BRUNO ARNOLD, MARCUS A
RNOLD, TIMOTHY J.W. HODGE
S, EUROMART REALTY GROUP IN
C., AMBIANCE CAPITAL CORP. and
J KHB INTERNATIONAL CORP

Defendants

**REASONS FOR DECISION
ON MOTIONS**

Conlan J.

Released: April 2, 2013

Tab 6

Yellow Cedar v. Di Torio, 2020 ONSC 5915 (CanLII)

Date: 2020-09-30
File number: CV-16-3908-00
Citation: Yellow Cedar v. Di Torio, 2020 ONSC 5915 (CanLII),
<<https://canlii.ca/7/j9vbl/>>, retrieved on 2024-04-03

CITATION: Yellow Cedar v. Di Torio, 2020 ONSC 5915
COURT FILE NO.: CV-16-3908-00
DATE: 2020 09 30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Yellow Cedar Investment Limited,
d, 2440733 Ontario Inc. and 24
41296 Ontario Inc.

Plaintiff

- and -

Egidio Di Toro, Rosanna Di Toro
and Stonebrook Homes Ltd.

Defendants

HEARD: September 9th, 2020

REASONS FOR DECISION

[1] The Plaintiffs held mortgages on two properties owned by the Defendants. In 2013, there was a default on both mortgages. The Plaintiffs assumed title to the properties and sold them. When the Plaintiffs sold the property, there was a shortfall from the amounts owing by the Defendants. The Plaintiffs are claiming that shortfall in this action. The Defendants claim that they transferred the properties to the Plaintiffs in complete satisfaction of the debts that they owed the Plaintiffs.

[2] This dispute will be decided at a trial in November of this year. It is common ground, however, that the properties were transferred from the Defendants to the Plaintiffs after the mortgages had gone into default. The dispute is over the significance of that transfer.

[3] Counsel for the Plaintiffs in this action is from the RZCD law firm. The lawyers who acted for the Plaintiffs on the transaction when the properties were transferred were also from the RZCD law firm. The Defendants assert that, since lawyers from the RZCD law firm acted for the Plaintiffs on the mortgage transaction, the Plaintiff's current counsel Mr. Smith who is from the RZCD law firm, is disqualified from acting for the Plaintiffs on the lawsuit that flows from the mortgage transaction. The Defendants have brought a motion to recuse the RZCD firm from acting in this matter.

[4] For the reasons that follow, the Defendants' motion is dismissed.

Background Facts

a) The Parties

[5] The Plaintiffs are a series of companies that were originally controlled by the late Robert (Bob) Winn. Mr. Winn passed away on February 11th, 2020. He was able to swear an Affidavit for this motion, and for a summary judgment motion, prior to his passing.

[6] The personal Defendants, Egidio and Rosanna Di Torio, have interests in the two properties that are the subject of this action. They were friends with Mr. Winn and his wife, and had a relationship that spanned more than ten years.

[7] Part of that relationship was that Mr. Winn would, on occasion, provide financing to the Di Torios. This financing would be secured by mortgages that were placed on properties owned by the Di Torios and/or their companies.

[8] The Defendant Stonebrooke is a company that is owned by the Di Torios. It held title to one of the properties in question. The current President of Stonebrooke is Robert Di Torio, who is the son of the personal Defendants. Robert provided an Affidavit on this motion, but there is no Affidavit from either Egidio or Rosanna.

b) The Properties and the Transaction

[9] There are two properties in issue. One is the property municipally known as 61 Earl Street, Wasaga Beach Ontario. Egidio was the registered owner of this property, and granted a mortgage on the property to Yellow Cedar, one of Mr. Winn's companies, in November of 2012.

[10] The second property is municipally known as 0 Maple Avenue East, Halton Hills, Ontario. It was owned by Stonebrooke. Stonebrooke granted a mortgage on one of these properties to Yellow Cedar in 2007.

[11] The Defendants went into significant default on the mortgage payments on both properties in and around October of 2013. An agreement was reached between the parties to extend the mortgages for six months and to impose a penalty clause for missed payments.

[12] There was some back and forth between the parties and their counsel about the terms of the transfer, and the question of ownership between the parties. Eventually, in 2014 the properties were transferred from the Defendants to Yellow Cedar. Mr. Winn was concerned about the liabilities associated with each property. Therefore, he transferred them to the numbered companies that are co-plaintiffs in this action, with Yellow Cedar continuing to hold the mortgages on the properties.

[13] When the properties were transferred to Yellow Cedar, the law firm of Parnes Rothman acted for the Defendants. RZCD had two partners, Dilreet Singh Dandiwal and Eric Dionne, who acted for the Plaintiffs on the transfer.

[14] The properties were ultimately sold by Mr. Winn's companies, and Yellow Cedar's mortgages were discharged. The sale of the Wasaga Beach property closed in January of 2015, and the sale of the Maple Avenue property closed in July of 2016. There was a shortfall of approximately \$400,000.00 from the amounts owing on the two mortgages.

c) The Litigation

[15] The litigation commenced with the issuance and serving of a Statement of Claim on September 1st, 2016. The Plaintiffs claimed the shortfall from the Defendants. The Defendants served their Statement of Defence on September 27th, 2016.

[16] A motion for summary judgment was brought by the Defendants in January of 2017, with a return date of June 19th, 2017. Responding materials were filed by the Plaintiffs. Those responding materials included both an Affidavit from Mr. Winn and an Affidavit from Mr. Dandiwal.

[17] The June 19th, 2017 summary judgment motion was adjourned at the request of the Defendants so that their then counsel could obtain instructions. It was returnable on July 25th, 2018.

[18] On June 4th, 2018, Mr. Lo Faso replaced the Defendants' previous counsel on the file. The summary judgment motion was abandoned by way of a Notice of Abandonment of Motion which was served nine days before the summary judgment motion was intended to proceed. I was

(136)

advised that the parties have recently been able to resolve the costs of this summary judgment motion.

[19] The motion to remove RZCD as counsel was originally returnable on July 30th, 2019 as a short motion. The Defendants served their motion materials on June 10th, 2019. The Plaintiffs served their responding materials, including the Affidavit of Mr. Winn, around July 22nd, 2019. On receipt of this responding motion record, the Defendants' counsel sought an adjournment to a long motion date. May 20th, 2020 was originally booked for a long motion.

[20] In the meantime, the Plaintiffs served their Trial Record on August 3rd, 2019. The matter was spoken to in assignment Court on December 16th, 2019 and a trial date of November 23rd, 2020 was set on consent of the parties.

[21] In the meantime, an action against the Defendants' lawyers Parnes Rothman ("the Solicitor's action") was also proceeding as the Defendants were claiming that their lawyers had acted negligently on the transaction. A motion was brought to either have the Solicitor's action heard together with the main action or to have it consolidated with the Solicitor's action. This motion was heard by Doi J. on July 9th, 2020. On July 14th, 2020, Doi J. issued a decision in which he directed that the matters be consolidated (see 2020 ONSC 4303).

[22] In addition, Doi J. directed that a timetable be set to ensure that the action could proceed to trial in November of 2020, as scheduled. That timetable was outlined in an endorsement sent on July 17th, 2020. Part of the timetable was that this motion was returnable for a two hour long motion on September 9th, 2020. That motion was duly argued before me by video conference.

d) The Potential Factual Dispute

[23] Put simply, the potential factual dispute is over the question of whether the properties were transferred to the Plaintiffs in complete satisfaction of the monies owing under the mortgages, or whether the Plaintiffs were entitled to sell the properties and then claim any shortfall from the Defendants.

[24] The parties have advanced substantially different versions of the facts in this case. These different facts are supported by Affidavits from people who were, at one point or another, involved in the transaction.

[25] I acknowledge that both counsel spent a significant portion of their argument on this factual dispute. However, for the reasons that follow it is not necessary for me to resolve this dispute. All that is necessary in this case is for me to accept that the parties have different versions of the facts, and that those differences have the potential to affect the outcome of the litigation. I also accept that those factual differences make it almost certain that at least Mr. Dhandiwal will be called as a witness. It is also quite possible that Mr. Dionne will be called as a witness.

[26] There is a significant factual dispute that will have to be resolved at trial. Therefore, I am not prepared to make any findings with respect to credibility on this motion and my reasons should not be read as making any such finding. I do acknowledge, however, that the trial judge may be called upon to make credibility findings. These credibility findings could include adverse findings respecting the lawyers from RZCD who acted on the transaction.

Analysis and Disposition

a) The Positions of the Parties

[27] The Defendants argue that there will be significant issues with respect to credibility in this case that will involve RZCD counsel. As a result, the Defendants argue that the right of the Plaintiffs to be represented by their counsel of choice must give way to the integrity of the legal system. Counsel for the Defendants also argues that procedural problems may well arise, and that there may be a temptation on the part of Mr. Dandiwal or Mr. Dionne to tell a white lie to assist the Plaintiffs. For these reasons, the Defendants argue that the RZCD firm should not be permitted to act for the Plaintiffs at the trial of this matter.

[28] The Plaintiffs argue that there is no disqualifying conduct on the part of the RZCD law firm, as Mr. Smith was not involved in any of the discussions relating to this transaction. The Plaintiffs also assert that the significant delays in bringing this motion raise questions as to whether the Defendants have brought the motion in good faith. In that regard, the Plaintiffs point out both that Mr. Smith has done a considerable amount of work on this file, and that Mr. Dandiwal swore an Affidavit setting out his evidence more than two years before the motion to remove RZCD from the record was brought.

[29] In addition, the Plaintiffs' counsel Mr. Smith has provided an undertaking that he will not cross-examine Mr. Dandiwal or Mr. Dionne. As a result, there is not likely to be a conflict in this case. In any event, any risk that Mr. Dandiwal or Mr. Dionne are not going to tell the truth is no bigger or smaller than it would be if there was a different counsel from a different firm prosecuting the case.

b) The Law and Its Application

[30] The guiding case in this matter is *MacDonald Estate v. Martin* (1990 CanLII 32 (S.C.C. [1990] 3 S.C.R. 1235). In that decision, the Supreme Court set out the three competing values that arise on a case such as this:

- a) The concern to maintain the high standards of the legal profession and the integrity of our system of justice;
- b) The countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause;

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- c) The desirability of permitting reasonable mobility in the legal profession.

[31] In this case, the third value does not arise as there is no mobility issue. All three of the lawyers involved in this motion are, and at all material times have been, at RZCD.

[32] The difficulties that can result from counsel representing a party and appearing as a witness in the same manner are described by Gillese J. (as she then was) in *Urquhart v. Allen Estate* ([1999] O.J. No. 4816 (S.C.J.)) (paras 27 and 28):

When counsel appears as a witness on a contentious matter, it causes two problems. First, it may result in a conflict of interest between counsel and his client. That conflict may be waived by the client as indeed, was done in this case. The second problem relates to the administration of justice. The dual roles serve to create a conflict between counsel's obligations of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible. This is a conflict that cannot be waived by the client as the conflict is between counsel and the court/justice system.

Counsel are independent officers of the court. The trial judge must be able to rely upon plaintiff's counsel for a high degree of objectivity. The overriding value, in these circumstances, is concern for the proper administration of justice. A distinction must be drawn between the role of counsel as an independent officer of the court and the role of a witness whose objectivity and credibility are subject to challenge. The dual roles that [counsel] intends to fulfill compromises the integrity of the system. As I can see no way to alter the process that respects the rights of both parties, fulfills the needs for due process and maintains regard for the dictates of the proper administration of justice, in these circumstances plaintiffs' counsel cannot be permitted to continue. I note that even if I were to exercise my discretion and permit him to continue, procedural problems may very well arise. If they did so, it is likely that it would require me to abort the trial at that time. Such a course of events would result in more prejudice to the plaintiff than does dealing with the issue now.

[33] The Divisional Court, in *Essa (Township) v. Guergis* ((1993) 15 O.R. (3d) 573, 1993 CanLII 8766 rev'g (1993) 12 O.R. (3d) 97 1993 CanLII 8467) set out the following criteria for the Court to consider in a motion such as this:

- a) the stage of the proceedings;
- b) the likelihood that the witness will be called;
- c) the good faith (or otherwise) of the party making the application;
- d) the significance of the evidence to be led;
- e) the impact of removing counsel on the party's right to be represented by counsel of choice;
- f) whether trial is by judge or jury;
- g) the likelihood of a real conflict arising or that the evidence will be "taunted";
- h) who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising;
- i) the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

[34] The decision in *Essa* goes on to observe that the Court should adopt a flexible approach taking into account all of the relevant factors. I will now consider each of those factors.

[35] I start with the stage of the proceedings. In their factum, the Defendants argue that "this action is essentially at the pleadings stage." I see no factual basis to support this submission. There is a trial in less than two months. Further, considerable pleadings, documentation and other steps had been taken before this motion was even brought. This factor strongly favours dismissal of the motion.

[36] The next factor to consider is the likelihood that the witness will be called. It is clear that Mr. Dandiwal will be called as a witness. It is also quite possible that Mr. Dionne will be called as a witness. This factor favours disqualification. However this factor should be given less weight because of the undertaking not to cross-examine either witness that the Plaintiffs have given, and the fact that Mr. Dandiwal's evidence has been known for some considerable time.

[37] This brings me to the good faith of the parties bringing the motion. In that regard, I have two concerns. First, the factual dispute between the parties was known for some considerable time prior to this motion being brought. The Affidavits of Mr. Dandiwal, and the opposing Affidavits from the Defendants clearly showed the conflict in evidence as far back as mid-2017. This brings me to my second concern. I have no substantial explanation as to why this motion was not brought for a year after Mr. Lo Faso became counsel of record. The combination of the knowledge and the delay raise issues of whether this motion is being brought in good faith. This is a factor that weighs in favour of dismissing the motion.

[38] On this point, the recusal motion may have been, as noted in the Defendants' factum, the "first substantive step taken by the Defendants upon retaining current counsel" but there was a significant delay nonetheless. The fact that it was the first substantive step does not explain the delay between June of 2018 when Mr. Lo Faso came on the record and June of 2019 when the motion was first brought.

[39] The next factor is the significance of the evidence to be led. I do not intend to wade too far into a consideration of the evidence, as there are issues of credibility. I would simply observe that the case could hinge on the factual dispute. On a motion such as this, however, the Court should not be inquiring too far into the merits of the factual dispute. This is a factor that favours disqualification.

[40] The next factor is the impact of the removal of counsel. In my view, this is a factor that significantly favours dismissal of the motion for two reasons:

- a) The case law makes it clear that the importance of the choice of counsel is considerable, and the RZCD law firm has a long-standing relationship with the Plaintiffs.
- b) The timing of this request will result in both a considerable waste of the work that Mr. Smith has done to become familiar with the case and the delay of the trial.

[41] Although there was some suggestion from the Defendants' counsel that the trial could still proceed in November, I see no basis to accept this suggestion. Even if the motion had been granted a month ago, it would still be unlikely that the Plaintiffs would have been able to find and brief new counsel in time for the trial. It is less likely now.

[42] This brings me to the question of whether the trial is by judge or by jury. This is a judge alone trial, which is a factor that is, on the best case for the Defendants, neutral. In my view, it is a factor that favours dismissal of the motion. Any prejudice that may result from having lawyers from the same firm as witnesses and as trial counsel will be lessened because the trial judge will be able to separate those issues and manage them in a way that is fair to all parties.

[43] The next factor is the likelihood of a real conflict arising or that the evidence will be tainted. I accept the submissions of the Plaintiffs on this point that the evidence of Mr. Dandiwal and Mr. Dionne is no more or less likely to be tainted if RZCD continues to represent the Plaintiffs. This factor is neutral.

[44] The next factor is who will call the witness. The Plaintiffs have undertaken not to cross-examine either Mr. Dandiwal or Mr. Dionne. I also understand that the Plaintiffs will be calling either or both of them, and that the examination of Mr. Dandiwal will generally follow his previously filed Affidavit. As set out in a number of other cases, this is not an ideal situation. However, the steps that the Plaintiffs have taken to mitigate the risk are significant. As a result the weight to be given to this factor is lessened.

[45] This brings me to the final factor, which is the connection between counsel, the prospective witness and the parties involved in the litigation. This is the factor that, in the Defendants' submission, "makes RZCD's acting for the Plaintiffs incongruent with the proper administration of the [sic] justice."

[46] This argument brings me back to the case-law that the Defendants have relied upon. One case in particular, *Talisman Resort v. Keyser, Using et. al.* (2013 ONSC 1901) is striking as it is a case that features in a number of the footnotes in the Defendants' factum. In that case, Conlan J described the nature of the motion he was faced with as follows (at paragraph 5):

In essence, the argument by these Defendants is that Bennett Jones LLP ought to be removed as counsel for Talisman because of an actual or perceived conflict of interest in that a partner in that law firm (but not the lawyer with carriage of the matter), Serafino Mantini ("Mantini"), (i) is a witness and (ii) has a personal interest in the litigation in that Mantini is the sole shareholder of Talisman's corporate shareholder and, as a mortgagee, is owed a substantial amount of money from Talisman.

[47] In *Talisman*, Mr. Mantini was a law partner in the firm that the Defendants were seeking to remove from the file. In addition, however, he was a witness and the principal shareholder in the Plaintiff. As a result, Mr. Mantini was even more closely connected to the file and the case than the potential witnesses in this case. In addition, *Talisman* was not as far along in the litigation process

1-11
as the case before me. There was no impending trial date, and the litigation had not been going on for as long as this case has been going on.

[48] Even with all of these distinguishing features that suggested a stronger case to have Mr. Mantini's law firm removed from the record, Conlan J. declined to recuse Bennett Jones. Although there are connections between the witness, the law firm and the client in this case, they are weaker than they were in *Talisman*.

[49] Overall, the last factor of the relationship between the witness, counsel and the client may favour the removal of the RZCD law firm but it is only one consideration. It is not the overriding consideration.

[50] I must conduct a balancing of all of the relevant factors in arriving at my decision. As I have set out above, the factors in this case support the Plaintiff's position that RZCD should not be removed as the law firm of record for this trial. In particular, the turning of the motion, the stage of the action and the steps that the Plaintiffs are willing to take to mitigate the risks. The facts I have set out above and Conlan J.'s analysis in *Talisman*, supra support the same conclusion.

[51] As a result, the Defendants' motion is dismissed.

Conclusion

[52] For the foregoing reasons, the Defendants' motion is dismissed.

[53] The parties are encouraged to agree on the costs of this motion. Failing agreement, the Plaintiffs shall have fourteen (14) days from the release of these reasons to provide their costs submissions. Those costs submissions are not to exceed three (3) single-spaced pages, exclusive of bills of costs, offers to settle and case law.

[54] The Defendants shall have fourteen (14) days from the receipt of the Plaintiffs' costs submission to provide their own costs submissions. Those costs submissions are also not to exceed three (3) single-spaced pages, exclusive of bills of costs, offers to settle and case law.

[55] There shall be no reply submissions without my leave. If costs submissions are not received in accordance with this timetable, then there will be no costs of the motion. If the parties require an extension to these deadlines, even on consent, they must seek my leave.

LEMAY J

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Yellow Cedar Investment Limited, 2
440733 Ontario Inc. and 2441296
Ontario Inc.

Plaintiff

- and -

Egidio Di Toro, Rosanna Di Toro an
d Stonebrook Homes Ltd.

Defendants

REASONS FOR JUDGMENT

LEMAY, J

Tab 7

By-Law 7

Made: May 1, 2007

Amended: June 28, 2007

September 20, 2007 (editorial changes)

February 21, 2008

October 30, 2008

November 27, 2008

April 30, 2009

June 28, 2012

April 25, 2013

December 4, 2014 (editorial changes)

June 23, 2016

February 28, 2019 (effective April 1, 2019)

February 25, 2021

AFTER OMNIBUS
BILL
ACCESS TO
JUSTICE
ACT 2006

1-14

PART III

MULTI-DISCIPLINE PRACTICES

Interpretation

15. (1) In this Part,

"licensed activity" means the practice of law in Ontario, the provision of legal services in Ontario or the practice of law and the provision of legal services in Ontario;

"licensee" includes a partnership of licensees, a professional corporation established under the Law Society Act and any other business entity that is permitted to engage in a licensed activity;

"professional" means an individual or a professional corporation established under an Act of the Legislature of Ontario other than the Law Society Act the services of whom or which a licensee may, under section 17, provide to a client in connection with the licensee's licensed activity.

Application of certain sections

(2) Subsection 18 (2) and sections 19, 29 and 30 do not apply in respect of a partnership or an association that is not a corporation entered into by a licensee with a person authorized to practise law, provide legal services or practise law and provide legal services in any province or territory of Canada outside Ontario.

Prohibition against providing services of non-licensee

16. A licensee shall not, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee except in accordance with this Part.

Permitted provision of services of non-licensee

17. A licensee may, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the licensed activity.

Partnership, etc. with professional

18. (1) Subject to subsection (2), a licensee may enter into a partnership or association that is not a corporation with a professional for the purpose of permitting the licensee to provide to clients the services of the professional.

Same

PARTNERSHIP or ASSOCIATION

(2) A licensee shall not enter into a partnership or an association that is not a corporation with a professional unless the following conditions are satisfied:

1. The professional and where the professional is not an individual every individual who practises through the professional is qualified to practise a profession, trade or occupation that supports or supplements the licensee's licensed activity.

1.1. In the case of entering into a partnership with the professional, the professional and where the professional is not an individual every individual who practises through the professional is of good character.

2. The professional agrees with the licensee in writing that the licensee shall have effective control over the professional's practice of his, her or its profession, trade or occupation in so far as the professional practises the profession, trade or occupation to provide services to clients of the partnership or association.

3. The professional agrees with the licensee in writing that, in partnership or association with the licensee, the professional will not practise his, her or its profession, trade or occupation except to provide services to clients of the partnership or association.

4. The professional agrees with the licensee in writing that, outside of his, her or its partnership or association with the licensee, the professional will practise his, her or its profession, trade or occupation independently of the partnership or association and from premises that are not used by the partnership or association for its business purposes.

DIFF
PREMISES

5. The professional agrees with the licensee in writing that, in respect of the practice of his, her or its profession, trade or occupation in partnership or association with the licensee, the professional will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

6. In the case of entering into a partnership with the professional, the professional agrees with the licensee in writing to comply with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the

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professional practising his, her or its profession, trade or occupation independently of the partnership.

Interpretation: "effective control"

(3) For the purposes of subsection (2), the licensee has "effective control" over the professional's practice of his, her or its profession, trade or occupation if the licensee may, without the agreement of the professional, take any action necessary to ensure that the licensee complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

Interpretation: "good character"

(4) For the purposes of subsection (2), an individual is of good character if there is a reasonable expectation, based on the individual's record of integrity and professionalism in the practice of his or her profession, trade or occupation and on the individual's reputation in the community, that the individual will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct and the Society's policies and guidelines.

Responsibility for actions of professional

19. Despite any agreement between a licensee and a professional, the licensee shall be responsible for ensuring that, in respect of the professional's practice of his, her or its profession, trade or occupation in partnership or association with the licensee,

(a) the professional practises his, her or its profession, trade or occupation with the appropriate level of skill, judgement and competence; and

(b) the professional complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

20. - 26. [Revoked.]

Dissolution of partnership: breach of certain provisions

27. If a licensee who, under subsection 18 (1), has entered into a partnership with a professional breaches section 19 or section 30, the Society may require the licensee to dissolve the partnership.

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Notice to licensee of requirement to dissolve partnership

28. (1) If the Society requires a licensee to dissolve a partnership under section 27, the Society shall so notify the licensee and, subject to subsection (2), the licensee shall dissolve the partnership.

Appeal

(2) If the Society requires a licensee to dissolve a partnership under section 27, the licensee may appeal the requirement to dissolve the partnership to the committee of benchers appointed under section 37 if the licensee believes that there has been no breach of section 19 or section 30.

Time for appeal

(3) An appeal under subsection (2) shall be commenced by the licensee notifying the Society in writing of the appeal within thirty days after the day the Society notifies the licensee that the partnership is to be dissolved.

Decision of committee of benchers

(4) After considering an appeal made under subsection (2), the committee appointed under section 37 shall,

(a) if it determines that there has been no breach of section 19 or section 30, cancel the requirement to dissolve the partnership; or

(b) if it determines that there has been a breach of section 19 or section 30, take any of the following actions:

(i) Confirm the requirement to dissolve the partnership.

(ii) Permit the partnership to continue, subject to such terms and conditions as the committee may impose.

(iii) Any other action that the committee considers appropriate.

Stay

(5) The receipt by the Society of the notice of appeal from the requirement to dissolve the partnership stays the requirement until the disposition of the appeal.

Association with professional: multi-discipline practice

29. (1) A licensee who, under subsection 18 (1), has entered into an association that is not a corporation with a professional may refer to the association as a multi-discipline

practice.

(14/6)

Partnership with professional: multi-discipline practice or partnership

(2) A licensee who, under subsection 18 (1), has entered into a partnership with a professional may refer to the partnership as a multi-discipline practice or multi-discipline partnership.

Insurance requirements

30. (1) Subject to subsection (2), a licensee who, under subsection 18 (1), has entered into a partnership with a professional shall maintain professional liability insurance coverage for the professional, in an amount equal to the total of the amount of coverage that is required of the licensee and the amount of coverage that the licensee maintains for herself, himself or itself in excess of that required of the licensee.

Insurance to be maintained under policy issued by the Lawyers' Professional Indemnity Company

(2) If any services through a partnership entered into under subsection 18 (1) are to be provided by a licensee who holds a Class L1 licence, the licensee who has entered into the partnership shall maintain that portion of the professional liability insurance coverage for the professional that is equal to the amount of coverage that is required of the licensee through the Lawyers' Professional Indemnity Company.

PART IV

AFFILIATIONS

Interpretation:

31. (1) In this Part,

PERSON = INDIVIDUAL

"affiliated entity" means one or more persons none of whom are licensed or otherwise authorized to practise law or provide legal services in or outside Ontario:

NON-LICENSED

"licensee" includes a permitted group of licensees.

LICENSEES = 1. LAWYER
2. PARALEGAL

1119
Interpretation: "affiliation"

(2) For the purposes of this Part, a licensee affiliates with an affiliated entity when the licensee on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity.

Ownership of practice, etc.

32. A licensee who affiliates with an affiliated entity shall,

own (a) own the professional business through which the licensee practises law or provides legal services or comply with Part III;

control (b) maintain control over the professional business through which the licensee practises law or provides legal services; and

(c) carry on the professional business through which the licensee practises law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the licensee jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee.

33. - 35. [Revoked.]

PART V

COMMITTEE OF BENCHERS

Interpretation

36. For the purposes of determining when to commence an appeal under this By-Law, the Society will be deemed to have notified a person of the decision that is subject to the appeal,

(a) in the case of oral notification, on the day that the Society notified the person; and

(b) in the case of written notification,

Tab 8

Law Society
of Ontario

Barreau
de l'Ontario

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By-Law 7.1

OPERATIONAL

OBLIGATIONS

AND RESPONSIBILITIES

Made: October 25, 2007

Amended: November 22, 2007

January 24, 2008

April 24, 2008

June 26, 2008

October 30, 2008

January 29, 2009

January 29, 2009 (editorial changes)

March 20, 2009 (editorial changes)

October 28, 2010

November 10, 2010 (editorial changes)

September 25, 2013

June 25, 2015

February 23, 2017

March 2, 2017 (editorial changes)

January 25, 2018

May 27, 2021 (effective January 1, 2022)

January 20, 2022 (editorial changes)

OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES

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PART I

SUPERVISION OF ASSIGNED TASKS AND FUNCTIONS

Interpretation

1. (1) In this Part,

"Canadian Law student" means an individual who is enrolled in a degree program at a law school in Canada that is accredited by the Society;

"catastrophic impairment" means a catastrophic impairment within the meaning of the *Statutory Accident Benefits Schedule*;

"claim" means a claim for statutory accident benefits within the meaning of the *Insurance Act*;

"clinical education course or program" means

(a) a course, program, project, placement or partnership that is organized or accepted by an Ontario law school and that provides Ontario law students with an opportunity to gain practical and applied legal experience, or

(b) a course, program, project, placement or partnership that is organized or accepted by an Ontario educational institution that offers a legal services program and that provides Ontario paralegal students with an opportunity to gain practical and applied legal experience;

"impairment" means an impairment within the meaning of the *Statutory Accident Benefits Schedule*;

"licensee firm" means a partnership or other association of licensees, a partnership or association mentioned in Part III of By-Law 7 [Business Entities] or a professional corporation established under the *Law Society Act*;

"non-licensee" means an individual who,

- (a) is not a Canadian law student, an Ontario law student or an Ontario paralegal student,
- (b) is engaged by a licensee to provide her or his services to the licensee,
- (c) expressly agrees with the licensee that the licensee shall have effective control over the individual's provision of services to the licensee, and
- (d) in the case of the assignment of tasks and functions by a person licensed to practise law in Ontario as a barrister and solicitor, is not a person licensed to practise law in Ontario as a barrister and solicitor and, in the case of the assignment of tasks and functions by a person licensed to provide legal services in Ontario, is neither a person licensed to practise law in Ontario as a barrister and solicitor nor a person licensed to provide legal services in Ontario;

"Ontario law student" means an individual who is enrolled in a degree program at a law school in Ontario that is accredited by the Society,

"Ontario paralegal student" means an individual who is enrolled in a legal services program in Ontario approved by the Minister of Training, Colleges and Universities that is accredited by the Society;

"*Statutory Accident Benefits Schedule*" means the *Statutory Accident Benefits Schedule* within the meaning of the *Insurance Act*.

Interpretation: "effective control"

(2) For the purposes of subsection (1), a licensee has effective control over an individual's provision of services to the licensee when the licensee may, without the agreement of the

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individual, take any action necessary to ensure that the licensee complies with the Law Society Act, the by-laws, the Society's rules of professional conduct and the Society's policies and guidelines.

Application: provision of legal services by student

2. This Part does not apply to the provision of legal services by a student under the direct supervision of a licensee pursuant to section 34 of By-Law 4.

Assignment of tasks, functions: Canadian law student or Ontario paralegal student

2.1. (1) A licensee who practices law or provides legal services within any of the following settings in Ontario may assign to a Canadian law student or an Ontario paralegal student tasks and functions in connection with the licensee's practice of law or provision of legal services within that setting:

1. The licensee's professional business.
2. A licensee firm.
3. The Government of Canada.
4. The Government of Ontario.
5. A municipal government.
6. A First Nation, Métis or Inuit government.
7. A clinic, within the meaning of the *Legal Aid Services Act, 2020*, that is funded by Legal Aid Ontario.
8. Legal Aid Ontario, pursuant to Part III of the *Legal Aid Services Act, 2020*.
9. A program established by Pro Bono Students Canada.
10. An in-house legal department.

Assignment of tasks, functions: Ontario law student or Ontario paralegal student

(2) A licensee who practises law or provides legal services within any of the following settings in Ontario may assign to an Ontario law student or an Ontario paralegal student tasks and functions in connection with the licensee's practice of law or provision of legal services within that setting:

1. A student legal aid services society, within the meaning of the *Legal Aid Services Act*,

2. A clinical education course or program.

Assignment of tasks, functions: direct supervision required

(3) A licensee shall assume complete professional responsibility for her or his practice of law or provision of legal services and shall directly supervise any Canadian law student, Ontario law student or Ontario paralegal student to whom the licensee assigns tasks and functions under this section.

(4) Without limiting the generality of subsection (3),

(a) the licensee shall assign only tasks and functions that the assignee is competent to perform;

(b) the licensee shall ensure that the assignee does not act without the licensee's instruction;

(c) the licensee shall give the assignee express authorization and instruction prior to permitting the assignee to act on behalf of a person in a proceeding before an adjudicative body;

(d) the licensee shall review the assignee's performance of the tasks and functions assigned to her or him at frequent intervals;

(e) the licensee shall ensure that the tasks and functions assigned to the assignee are performed properly and in a timely manner; and

(f) the licensee shall assume responsibility for all tasks and functions performed by the assignee, including all documents prepared by the assignee.

Non-application of sections to assignment of tasks and functions under this section

(5) For greater clarity, sections 3, 4, 5 and 5.1 and subsection 6 (1) do not apply with respect to a licensee assigning tasks and functions under this section.

Application of sections to assignment of tasks and functions under this section

(6) Subsection 6 (2) and section 7, with necessary modifications, apply with respect to a licensee assigning tasks and functions under this section.

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Assignment of tasks, functions: general

3. (1) Subject to subsection (2), a licensee may assign to a non-licensee tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client.

Assignment of tasks, functions: affiliation

(2) A licensee who is affiliated with an entity under By-Law 7 may assign to the entity or its staff, tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client only if the client consents to the licensee doing so.

Assignment of tasks, function: direct supervision required

4. (1) A licensee shall assume complete professional responsibility for her or his practice of law or provision of legal services in relation to the affairs of the licensee's clients and shall directly supervise any non-licensee to whom are assigned particular tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of each client.

(2) Without limiting the generality of subsection (1),

- (a) the licensee shall not permit a non-licensee to accept a client on the licensee's behalf;
- (b) the licensee shall maintain a direct relationship with each client throughout the licensee's retainer;
- (c) the licensee shall assign to a non-licensee only tasks and functions that the non-licensee is competent to perform;
- (d) the licensee shall ensure that a non-licensee does not act without the licensee's instruction;
- (e) the licensee shall review a non-licensee's performance of the tasks and functions assigned to her or him at frequent intervals;
- (f) the licensee shall ensure that the tasks and functions assigned to a non-licensee are performed properly and in a timely manner;
- (g) the licensee shall assume responsibility for all tasks and functions performed by a non-licensee, including all documents prepared by the non-licensee; and
- (h) the licensee shall ensure that a non-licensee does not, at any time, act finally in respect of the affairs of the licensee's client.

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Assignment of tasks, functions: prior express instruction and authorization required

5. (1) A licensee shall give a non-licensee express instruction and authorization prior to permitting the non-licensee,

- (a) to give or accept an undertaking on behalf of the licensee;
- (b) to act on behalf of the licensee in respect of a scheduling or other related routine administrative matter before an adjudicative body; or
- (c) to take instructions from the licensee's client.

Assignment of tasks, functions: prior consent and approval

(2) A licensee shall obtain a client's consent to permit a non-licensee to conduct routine negotiations with third parties in relation to the affairs of the licensee's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

Assignment of tasks, functions: mediation of ancillary issues relating to catastrophic impairment claims

5.2. (1) Despite clause 6 (1) (c), a licensee who holds a Class L1 licence may permit a non-licensee who holds a Class P1 licence to participate in mediation of ancillary issues relating to a claim of an individual who has or appears to have a catastrophic impairment, but only if the non-licensee is employed by the licensee or by the licensee firm of which the licensee is a member.

(2) For the purposes of subsection (1), ancillary issues do not include issues relating to the determination of whether an impairment is a catastrophic impairment.

Tasks and functions that may not be assigned: general

6. (1) A licensee shall not permit a non-licensee,

- (a) to give the licensee's client legal advice;
- (b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the non-licensee is authorized under the *Law Society Act* to do so;

(c) to conduct negotiations with third parties, other than in accordance with subsection 5

(2);

L7 A3 PC law 1101

- (d) to sign correspondence, other than correspondence of a routine administrative nature; or ¹⁵⁷¹ **SHALL NOT PERMIT A NON-LICENSEE TO SIGN CORRESPONDENCE**
- (e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

Tasks and functions that may not be assigned by Class L1 licensee

(2) A licensee who holds a Class L1 licence shall not permit a non-licensee to access the system for the electronic registration of title documents by using the personalized security package assigned to the licensee for purposes of the licensee accessing the system for electronic registration of title documents.

Collection letters

7. A licensee shall not permit a collection letter to be sent to any person unless,

- (a) the letter is in relation to the affairs of the licensee's client;
- (b) the letter is prepared by the licensee or by a non-licensee under the direct supervision of the licensee;
- (c) if the letter is prepared by a non-licensee under the direct supervision of the licensee, the letter is reviewed and approved by the licensee prior to it being sent;
- (d) the letter is on the licensee's business letterhead; and
- (e) the letter is signed by the licensee.

PART II

OBLIGATIONS RESULTING FROM SUSPENSION

Interpretation

8. In this Part,

"existing client" means,

- (a) a person who is a client of a suspended licensee when a suspension order is made

Tab 9

DNCS 158 to 168

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Rules of Professional Conduct — Chapter 3

Relationship to Clients

- **3.1 Competence**

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- Competence

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Chapter 3 — Relationship to Clients

SECTION 3.1 COMPETENCE

Definitions

3.1-1 In this rule,

"competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including

[Amended - October 2014]

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises.

[Amended - June 2007]

MR. JAMES RUSSELL
(b) if necessary, because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the wrongful conduct, withdraw from acting in the matter in accordance with rules in Section 3.7.

[Amended - October 2014]

Commentary

[1] The past, present, or intended misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Section 3.3)

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal

[3] Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes this rule.

[4] In determining their responsibilities under this rule, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

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[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer shall report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer shall withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from their position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

[Amended - October 2014]

Client with Diminished Capacity

3.2-9 When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

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[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC - not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[4] [FLSC - not in use]

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

[Amended - October 2014]

Medical-Legal Reports

3.2-9.1 A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

[1] The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician

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SECTION 3.4 CONFLICTS

ACTION =

Duty to Avoid Conflicts of Interest

DIVORCED HUSBAND

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

CONFLICTED CANNOT

Commentary

MUST EXCUSE HIMSELF FROM ANY ACTION

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

[3] A client may be unable to judge whether the lawyer's duties have actually been compromised. Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of impairment rather than actual impairment. The expression "substantial risk" in the definition of "conflict of interest" describes the likelihood of the impairment, as opposed to its nature or severity. A "substantial risk" is one that is significant and plausible, even if it is not certain or even probable that it will occur. There must be more than a mere possibility that the impairment will occur. Except as otherwise provided in Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

Personal Interest Conflicts

[4] A lawyer's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a lawyer is asked to advise the client in respect of a matter in which the lawyer, the lawyer's partner or associate or a family member has a

(165) material direct or indirect financial interest. But other situations may not be so obvious.

For example, the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer.

[5] Lawyers should carefully consider their relationships with their clients and the subject matter of the retainer in order to determine whether a conflicting personal interest exists. If the lawyer is a member of a firm and concludes that a conflicting personal interest exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work without the involvement of the conflicted lawyer.

Current Client Conflicts

[6] Duties owed to another current client can also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict. Conflicts may also arise in a joint retainer where the jointly represented clients' interests diverge. Acting for more than one client in separate but related matters may risk impairment because of the nature of the retainers. The duty of confidentiality owed to one client may be inconsistent with the duty of candour owed to another client depending on whether information obtained by the lawyer during either retainer would be relevant to both retainers. These are examples of situations where conflicts of interest involving other current clients may arise.

[7] A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. *c.f. Canadian National Railway Co. v. McKercher LLP*, [2013] 2 S.C.R. 649. The bright line rule holds that a lawyer cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent. The bright line rule applies even if the work done for the two clients is completely unrelated. The scope of the bright line rule is limited. It provides that a lawyer cannot act directly adverse to the immediate legal interests of a current client. Accordingly, the main area of application of

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the bright line rule is in civil and criminal proceedings. Exceptionally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that the client's law firm will not act against the client in unrelated matters.

[8] The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. This type of conflict may also arise outside a law partnership, in situations where sole practitioners, who are in space-sharing associations and who otherwise have separate practices, hold themselves out as a law firm and lawyers in the association represent opposite parties to a dispute.

[9] A lawyer should understand that there may be a conflict of interest arising from the duties owed to another current client even if the bright line rule does not apply. In matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies but whether there is a substantial risk of impairment. In either case, there is a conflict of interest.

Former Client Conflicts

[10] Duties owed to a former client, as reflected in Rule 3.4-10, can impair client representation and loyalty. As the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter. Lawyers also have a duty not to act against a former client in the same or a related matter even where the former client's confidential information is not at risk. In order to determine the existence of a conflict of interest, a lawyer should consider whether the representation of the current client in a matter includes acting against a former client.

Conflicts arising from Duties to Other Persons

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[11] Duties owed to other persons can impair client representation and loyalty. For example, a lawyer may act as a director of a corporation as well as a trustee. If the lawyer acts against such a corporation or trust, there may be a conflict of interest. But even acting for such a corporation or trust may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, make it difficult if not impossible to distinguish between legal advice from business and practical advice, or jeopardize the protection of lawyer and client privilege. Lawyers should carefully consider the propriety, and the wisdom of wearing "more than one hat" at the same time.

Other Issues To Consider

[12] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation or in a transaction can give rise to new conflicts of interest that must be addressed.

[13] Addressing conflicts may require that other rules be considered, for example

(a) the lawyer's duty of commitment to the client's cause, reflected in Rule 3.7-1, prevents the lawyer from withdrawing from representation of a current client, especially summarily and unexpectedly, in order to circumvent the conflict of interest rules;

(b) the lawyer's duty of candour, reflected in Rule 3.2-2, requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. Even where a lawyer concludes that there is no conflict of interest in acting against a current client, the duty of candour may require that the client be advised of the adverse retainer in order to determine whether to continue the retainer;

(c) the lawyer's duty of confidentiality, reflected in Rule 3.3-1 and owed to current and former clients, may limit the lawyer's ability to obtain client consent as permitted by Rule 3.4-2 because the lawyer may not be able to disclose the information required for proper consent. Where there is a conflict of interest and consent cannot be obtained for this reason, the lawyer must not act; and

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(d) rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

[14] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary and other principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by the Law Society even where a court dealing with the case may decline to order disqualification as a remedy.

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

Tab 10

Essa (Township) v. Guergis; Membrey v. Hill, 1993 CanLII 8756 (ON SCDC)

Date: 1993-10-27
 Other citations: 15 OR (3d) 573 — 22 CPC (3d) 63 — 52 CPR (3d) 372 — [1993] CarswellOnt 473 — [1993] OJ No 2581 (QL)
 Citation: Essa (Township) v. Guergis; Membrey v. Hill, 1993 CanLII 8756 (ON SCDC), <<https://canlii.org/7ggj87/>>, retrieved on 2024-04-03

Corporation of the Township of Essa et al. v. Guergis et al.; The Advocates' Society et al., Interveners
 Membrey v. Hill et al., The Advocates' Society et al., Interveners
 [Indexed as: Essa (Township) v. Guergis; Membrey v. Hill]

15 O.R. (3d) 573

[1993] O.J. No. 2581

Action No. 27703/93 and 28667/93

Ontario Court (General Division), Divisional Court,

O'Brien, MacFarland and Smith JJ

October 27, 1993

Civil procedure -- Counsel -- No judicial policy prohibiting counsel from appearing on application where member or associate of same firm provides affidavit evidence -- Whether counsel should be prohibited from appearing on application where member or associate of same firm is or is likely to be trial witness a matter for trial judge to decide -- Flexible approach to be taken and each case to be considered on its merits.

Civil procedure -- Pre-trial conference -- Pre-trial judges should not (as general rule) make order relating to significant substantive issues at pre-trial hearing in absence of formal notice of motion and opportunity for party to respond.

Two appeals, raising related questions, were heard together.

In contempt proceedings by the plaintiff township against the defendants G and O. T. a lawyer from the firm representing the township, swore affidavits. It was not intended that T would argue the contempt motion; his position was that of junior counsel. On the return of the contempt motion, the defendants moved to strike the contempt proceedings on the ground (among others) that T would act as counsel, or would assist senior counsel, and argument on the contempt motion would rely, to some extent, on T's affidavits. The motions judge ruled that plaintiff's counsel was not entitled to argue the motions relying on T's affidavits and adjourned

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the motions to permit filing of new affidavits, or to permit the plaintiff to retain new counsel. The plaintiff appealed.

- In a real estate transaction, the plaintiff purchaser, M, refused to complete the transaction and sued for the return of his deposit. The defendant vendors counterclaimed for specific performance. It was claimed on behalf of the plaintiff that he was mentally ill and incapable because of his mental condition of entering into the transaction. A member of the law firm which represented the plaintiff in the litigation drafted the purchase agreement. After the agreement was executed, the plaintiff consulted two other lawyers in that firm and refused to complete the transaction. Counsel proposing to conduct the plaintiff's case at trial was one of those two lawyers. After the action was commenced, defence counsel served a demand on plaintiff's counsel pursuant to rule 13.03 of the Rules of Civil Procedure requiring plaintiff's counsel to make a declaration of his authority to commence proceedings. G, who, it was anticipated, would be plaintiff's counsel at trial, provided a written response stating that he had authorization.

A pre-trial memorandum filed on behalf of the defendants indicated that they intended to call all three lawyers the plaintiff had consulted and would question them as to the plaintiff's competency. The memorandum also indicated that defence counsel at the pre-trial hearing would seek an order removing the plaintiff's solicitors from the litigation because of the difficulties posed by having counsel testify. No formal notice of motion or other supporting affidavit material was served. The judge who conducted the pre-trial hearing ordered that no present or former members of the law firm acting for the plaintiff could appear as counsel at trial. The plaintiff appealed.

The issues raised on these appeals were: (1) Should there be a judicial policy prohibiting counsel from appearing on an application where a member or associate of the same firm provides affidavit evidence? (2) Should there be a judicial policy prohibiting trial counsel from appearing on an application where a member, or associate, of the same firm is, or is likely to be, a trial witness? (3) Should a pre-trial judge make an order relating to significant, substantive issues at pre-trial where there is no formal notice of motion or material filed in support of the motion?

Held, the appeals should be allowed.

(1) The rules and commentary of the Code of Professional Conduct adopted by the Canadian Bar Association (CBA Code) prohibit the use by counsel of an affidavit of his partners or associates; the Professional Conduct Handbook of the Law Society of Upper Canada (LSUC rules) do not mention the matter. Courts should be reluctant to adopt the CBA Code in preference to the LSUC rules in such matters.

As it appeared T did not intend to act as counsel on the township matter, the order of the motions judge should be set aside.

(2) Courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. An application to remove counsel can be made to the trial judge when it is certain there is a problem. In the M case, G might not be subpoenaed to testify. A trial judge would be in a much better position to determine if G's firm should be disqualified.

- It is not the case that when a lawyer is compelled to testify against the other side in a lawsuit the lawyer's firm must always be prevented from acting in the lawsuit. A court should follow a flexible approach and consider each case on its merits. Among the factors which should be considered are: the stage of the proceedings, the likelihood that the witness will be called, the good faith (or otherwise) of the party making the application; the significance of the evidence to be led; the impact of removing counsel on the party's right to be represented by counsel of choice; whether trial is by judge or jury; the likelihood of a real conflict arising or that the evidence will be "tainted"; who will call the witness; the connection or relationship between counsel, the prospective witness and the parties involved in the litigation. Applying that approach to the M case, the order removing the law firm was prematurely made and should be reversed.

(5) As a general rule, pre-trial judges should not make significant, contentious rulings at pre-trial hearings in the absence of clear notice and opportunity to meet and respond to the ruling sought. In the M case, the application to remove solicitors should not have been dealt with at pre-trial on the basis of the information available.

Carlson v. Loraas Disposal Services Ltd. (1988), 1988 CanLII 5377 (SK KB), 30 C.P.C. (2d) 181, 70 Sask. R. 161 (Q.B.), apud

Bilson v. University of Saskatchewan, 1984 CanLII 2143 (SK KB), [1984] 4 W.W.R. 238, 38 Sask. R. 1 sub nom. Re Bazant (C.A.); Kitzerman v. Kitzerman (1993), 37 A.C.W.S. (3d) 1282 (Ont. Gen. Div.); Planned Insurance Portfolios Co. v. Crown Life Insurance Co. (1989), 1989 CanLII 4228 (ON SC), 68 O.R. (2d) 271, 58 D.L.R. (4th) 106, 36 C.P.C. (2d) 218 (H.C.J.), consd

MacDonald Estate v. Martin, 1990 CanLII 52 (SC), [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, 48 C.P.C. (2d) 113, [1991] 1 W.W.R. 705, 70 Man. R. (2d) 241, 121 N.R. 1, distd

Other cases referred to

Imperial Oil Ltd. v. Grabarchuk (1974), 1974 CanLII 899 (ON CA), 3 O.R. (2d) 783 (C.A.); Shell Canada Products Ltd. v. Barrie (City) Chief Building Official (No. 2) (1992), 13 M.P.L.R. (2d) 270 (Ont. Gen. Div.)

Statutes referred to

Law Society Act, R.S.O. 1990, c. 18, s. 63, para. 4

Rules and regulations referred to

R.P.O. 1991, Reg. 708 (Law Society Act), s. 20(1) Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 15.02, 50.01, 50.02, 59.06

Authorities referred to

Canadian Bar Association, Code of Professional Conduct, c. IX, commentary 5 Law Society of Upper Canada, Professional Conduct Handbook, Rule 10

APPEAL from a judgment of the Ontario Court (General Division) (Weekes J., unreported) ordering that plaintiff's counsel was not entitled to argue a motion relying on the affidavit of a lawyer from the same firm; APPEAL from a judgment of the Ontario Court (General Division), 12 O.R. (3d) 111, 15 C.P.C. (3d) 173 (D.S. Ferguson J.), and 1992 CanLII 5437 (ON SC), 15 O.R. (3d) 127n (supplementary reasons), ordering the removal of counsel.

E. Marshall Green, for appellants, Township of Essa and Edward Mernbery.
M. Sehart, for respondents, George Guergis, Robert O'Brien, Walter Thomas Hill and Marita Andrea Hill.
Neil Finkelstein, for intervenor, Advocates' Society.
Gavin MacKenzie, for intervenor, Law Society of Upper Canada.

The judgment of the court was delivered by

O'BRIEN J.: -- These two appeals were heard together as there were overlapping issues. The issues on the appeals were:

(1) Should there be a judicial policy prohibiting counsel from appearing on an application where a member or associate of the same firm provides affidavit evidence?

(2) Should there be a judicial policy prohibiting trial counsel from appearing on an application where a member, or associate, of the same firm is, or is likely to be, a trial witness?

---(3) Should a pre-trial judge make an order relating to significant, substantive issues at pre-trial where there is no formal notice of motion, nor material filed in support of the motion?

The Law Society of Upper Canada and the Advocates Society were granted intervenor status and made submissions on the first two issues only. That intervention was most helpful

The appeal involving the Township of Essa (Essa) primarily concerned the first issue; the appeal of Edward Membery concerned the second and third issues.

I will briefly outline the factual backgrounds of each appeal:

ESSA TOWNSHIP APPEAL

Essa commenced proceedings alleging the defendants Guergis and O'Brien were using property they owned contrary to Essa zoning by-laws. An interim injunction was granted on consent restricting the defendants' use of that property. Essa subsequently commenced contempt proceedings alleging a breach of the interim injunction.

Affidavits were filed in support of the contempt proceeding. There was extensive cross-examination, undertakings were given and there were subsequent motions dealing with procedural matters arising therefrom.

---The affidavit filed in support of the contempt application was sworn by a township official. Subsequent motions involving an application to receive oral evidence on the return of the contempt motion, and to amend the contempt application were brought on Essa's behalf.

In support of the subsidiary motions, Peter Thompson, a counsel from the firm representing Essa, swore affidavits. Mr. Thompson described himself as "co-counsel" in those affidavits. He was familiar with the matters and had conducted some of the cross-examinations and followed up on undertakings given. It was not intended that he would argue the contempt motion. His position appears to be that frequently referred to as "junior counsel". The use of the phrase "co-counsel" seems to have created many of the problems which subsequently arose.

On the return of the contempt motion, the defendants brought motions seeking to strike the contempt proceedings for failure to answer undertakings and also on the basis Mr. Thompson would act as counsel, or would assist senior counsel, and argument on the contempt motion would rely to some extent on Mr. Thompson's affidavits.

Weekes J. presided on the return of the motions. He ruled plaintiff's counsel was not entitled to argue the motions relying on Mr. Thompson's affidavits and adjourned the motions to permit filing of new affidavits, or to permit Essa to retain new counsel. Leave to appeal that decision was granted.

EDWARD MEMBERY APPEAL

---This matter involved a real estate transaction. Edward Membery (Membery), the plaintiff purchaser, refused to complete the transaction and sued for the return of his deposit. Walter and Marita Hill, the defendant vendors, counterclaimed for specific performance.

Membery is 81 years old. It is alleged he suffers from a manic/depressive syndrome, normally controlled by medication. It is alleged at the time of entering into the transaction he was having problems with his medication and was suffering dramatic mood swings. The pleadings allege he was incapable of entering into

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the transaction because of his mental condition. In the alternative, it is claimed the defendants, aware of his condition and his age, exerted undue influence in persuading him to enter into the transaction.

Membery is represented in this litigation by the law firm of Graham, Wilson and Green. He consulted a member of that firm before entering into the transaction. A member of the firm apparently drafted the purchase agreement. After the agreement was executed Membery again consulted that law firm, consulted two other lawyers in that firm, and then refused to complete the transaction.

Counsel proposing to conduct Membery's case at trial is one of the two lawyers consulted prior to the refusal to close.

After the action was commenced, defence counsel served a demand on plaintiff's counsel pursuant to rule 15.02 requiring plaintiff's counsel to make a declaration of his authority to commence proceedings. In his written response Mr. Green, plaintiff's counsel, stated he had authorization, that he had met with Membery prior to the date for closing the transaction, and prior to commencement of the lawsuit. Counsel stated he had assessed Membery's state of mind and satisfied himself as to Membery's ability to give instructions. It is anticipated Mr. Green will be plaintiff's counsel at trial.

A pre-trial conference was held after examinations for discovery were completed and a trial date scheduled. The positions of both sides were outlined as above, in pre-trial memoranda filed by both sides.

The memorandum filed on behalf of the defendants indicated the defendants intended to call all three lawyers Membery had consulted at the Graham, Wilson firm and would question them as to Membery's competency. The defence claimed in that memorandum such evidence would not be subject of solicitor-and-client privilege. The defendants' memorandum also indicated defence counsel at the pre-trial hearing would seek an order removing the plaintiff's solicitors from the litigation because of the difficulties posed by having counsel testify. No formal notice of motion or other supporting affidavit material was served, plaintiff's counsel did not respond to that issue in the plaintiff's pre-trial memorandum.

D.S. Ferguson J. conducted the pre-trial hearing. He ordered no present or former members of the law firm then acting for the plaintiff could appear as counsel at trial. That decision was subsequently reported as *Huck v. Royal Bank of Canada, Membery v. Hill* (1993), 12 O.R. (3d) 111, 15 C.P.C. (3d) 173 (Gen. Div.). D.S. Ferguson J. subsequently amended his reasons [1993 (1) 11 S.A.S. (ON SC), 15 O.R. (3d) 127n]. He deleted statements suggesting counsel could not argue a motion where he had given any earlier evidence. D.S. Ferguson J. then limited his prohibition to counsel not appearing on a motion or at trial relying on counsel's own evidence.

These amended reasons were delivered eight months after the initial decision on D.S. Ferguson J.'s own initiative. Leave to appeal the original decision had been granted four and one-half months before the amended reasons were issued.

Issue (1) Counsel appearing on motions relying on affidavit evidence from members of counsel's firm

Counsel all agree that it is improper for the deponent of an affidavit to act as counsel and rely on that affidavit. This has clearly been the law in this province for many years and is succinctly stated in *Imperial Oil Ltd. v. Grabarchuk* (1974), 1974 O.R. 869 (ON C.A.), 3 O.R. (2d) 783 (C.A.). That point was not in issue in this appeal.

To a large extent the problem issue on this point stems from differences between the rules and commentary of professional conduct of the Law Society of Upper Canada (LSUC) and the rules and commentary of the Code of Professional Conduct adopted by the Canadian Bar Association (CBA). The essential difference relates to counsel using an affidavit of his partners or associates. The CBA Code prohibits it, the LSUC rules do not mention it.

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The relevant sections, both headed "The Lawyer as Advocate" are as follows:

LAW SOCIETY OF UPPER CANADA CODE

RULE 10

When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law

.....

COMMENTARY

The Lawyer as Witness

16(a) The lawyer who appears as advocate should not submit the lawyer's own affidavit to the tribunal.

(b) The lawyer who appears as advocate should not testify before the tribunal save as may be permitted by the Rules of Civil Procedure or as to purely formal or uncontroverted matters. Nor should the lawyer express personal opinions or beliefs, or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. The lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

(c) The requirements of this paragraph are at all times subject to any contrary provisions of the law or the discretion of the tribunal before which the lawyer is appearing.

CANADIAN BAR ASSOCIATION CODE, CHAPTER IX

RULE

When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law

.....

COMMENTARY

The Lawyer as Witness

5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applied to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the

lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

The LSUC rules [Professional Conduct Handbook] are enacted by the Society pursuant to s. 20(1) of R.S.O. 1990, Reg. 768 under the Law Society Act, R.S.O. 1990, c. L.8. These are as follows:

63. Subject to the approval of the Lieutenant Governor in Council, Convocation may make regulations respecting any matter that is outside the scope of the rule-making powers specified in section 62 and, without limiting the generality of the foregoing,

4. authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics;

In his decision Weekes J. noted the differences between the LSUC rules and the CBA Code and followed a decision of the Saskatchewan Court of Appeal, applying the CBA Code. That decision was *Bilson v. University of Saskatchewan*, 1984 CanLII 2443 (S.K.C.), [1984] 4 W.W.R. 238, 38 Sask. R. 1 sub nom. *Re Bazant*.

In *Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 1989 CanLII 1228 (ON SC), 68 O.R. (2d) 271, 58 D.L.R. (4th) 106 (H.C.J.), there are statements conflicting with those in the *Bilson* decision. Rosenberg J., at p. 273, noted the differences between the LSUC rules and the CBA Code and suggested LSUC rules appeared to deliberately delete the reference to the lawyer's partners.

Counsel for the LSUC on this appeal produced material indicating this was in fact so. He produced an extract from a report from the committee established by the LSUC to consider the matter which expressed concerns about the CBA Code on that point. The CBA Code was adopted in 1974. The LSUC adopted but amended the code in 1976.

In *Planned Insurance* Rosenberg J. noted at p. 274:

All counsel acknowledge that the local practice in Ontario is that lawyers frequently appear on motions where their partners have filed affidavits even when the matters are extremely controversial and where there have been long and contentious cross-examinations on the affidavits.

The CBA Code commentary specifically provides local rules of practice take precedence over the Code.

The CBA Code has been adopted by some provinces. Saskatchewan is one of those. The court in *Bilson* was thus following a code which had been specifically adopted by the Law Society in that province.

In Ontario, lawyers are not required to abide by the CBA Code but are required to abide by the LSUC rules. They are at risk of being reprimanded, suspended or disbarred (depending on the nature of the infraction) if they breach those rules.

I accept the submissions of LSUC counsel that courts should be reluctant to adopt the CBA Code in preference to the LSUC rules in such circumstances.

CONCLUSION

As it appears Mr. Thompson did not intend to act as counsel on this matter, I conclude the order of Weekes J. should be set aside and the matter directed to proceed on the affidavits filed.

As a matter of interest I note that counsel for the defendants in this matter relied on affidavits sworn by secretaries in the office of that defence counsel. Those affidavits contained statements of information and

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belief based on what the secretaries had been told by defence counsel who was appearing on this motion. Some of that information, and belief went to the root of the contempt matters.

--[The issue of that counsel appearing on the contempt motion was not raised on this appeal and I therefore do not deal with that point specifically. I understand the problem frequently arises in the offices of counsel practising alone. I suggest, however, the use of such affidavits should be avoided]

Issue (2) Trial counsel acting where firm member or associate is, or is likely to be, a trial witness

There is some overlap of this issue with the discussion above. The point arises directly from the Membership appeal.

The arguments raised in favour of removing the law firm representing Membership include a possible appearance of impropriety, or, that counsel calling, or questioning his own partner is representing in more than the usual way, that the evidence is true.

There is also an argument that a conflict of interest occurs when such a witness is called by the other side. The argument is that the witness will be called to assist the party against whom his firm is acting. As a firm member the witness has an interest in seeing the plaintiff succeeds. If called as a defence witness, he must testify honestly even if that will assist the defendants. It is argued this may result in a conflict of interest.

This latter argument was accepted in *Kitzerman v. Kitzerman* (1993), unreported decision of Master Donkin, Ont. Ct. (Gen. Div.), Action No. 72584/91 Q at Toronto [summarized 37 A.C.W.S. (3d) 1282].

In argument in this case, defence counsel argued there would be an appearance of impropriety if the Graham, Wilson and Green firm was not removed and relied heavily on statements made in *MacDonald Estate v. Martin*, 1990 CanLJ 32 (S.C.C.), [1990] 3 S.C.R. 1235 at p. 1263, 77 D.T.R. (4th) 249, per Sopinka J.

In that decision Sopinka J. noted the importance of public confidence in the integrity of the legal profession and the administration of justice.

The facts in this case are significantly different from those in *MacDonald*. There, the issue involved the removal of a firm of solicitors where a junior lawyer changed firms. While with one firm the lawyer assisted counsel acting for one side of the litigation, the firm the lawyer joined subsequently acted for the opposing side. The Supreme Court upheld the disqualification of the second firm.

Many of the issues in that case do not arise in this appeal. In particular there is no reasonable apprehension in the mind of a client that confidential information given to one law firm would be disclosed to the opposite party.

I believe courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. In view of the expense of litigation and the enormous waste of time and money and the substantial delay which can result from an order removing solicitors, courts should do so only in clear cases. I adopt the approach taken on this point in *Carlson v. Loraas Disposal Services Ltd.* (1988), 1988 Car 111 537 (S.K.B.), 30 C.P.C. (2d) 181 at p. 188, 70 Sask. R. 161 (Q.B.).

As discussed in the *Carlson* decision, an application to remove counsel can be made to the trial judge when it is certain there is a problem. In this case Mr. Green may, or may not be, subpoenaed to testify. Concessions or admissions may be made which will obviate the need to call him as a witness. The evidence he could give may be readily obtainable from other witnesses. As issues are developed, or resolved during trial, his evidence may not be required at all. A trial judge will be in a much better position to determine if his firm should be disqualified.

I do not accept the argument that when a lawyer is compelled to testify against the "other" side in a lawsuit the lawyer's firm must always be prevented from acting in the lawsuit. There are a variety of scenarios which might develop at, or during, trial. The possible conflict as discussed in the Kitzerman decision, supra, should not automatically result in a law firm's removal. In the course of litigation an honest witness is often compelled to give evidence which will assist a party that witness feels is "opposite". I do not agree that such a possible conflict requires removal in all cases. There may be some where it does. I am not persuaded that decision should be made at this pre-trial stage of the proceedings in this case.

It should also be borne in mind that all applications to remove solicitors from the record are not brought with the purest of motives. The expense and delay involved in retaining new counsel may work to the substantial benefit of an opposing party in some cases.

Courts should also carefully consider the right of a client to be represented by counsel of choice.

I accept submissions made by counsel for the Advocates Society that in these applications a court should approach the matter by following a flexible approach and consider each case on its own merits. A variety of factors should be considered. These will include:

- the stage of the proceedings;
- the likelihood that the witness will be called;
- the good faith (or otherwise) of the party making the application;
- the significance of the evidence to be led;
- the impact of removing counsel on the party's right to be represented by counsel of choice;
- whether trial is by judge or jury;
- the likelihood of a real conflict arising or that the evidence will be "tainted";
- who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising;
- the connection or relationship between counsel, the prospective witness and the parties involved in the litigation

CONCLUSION

Applying that approach to this case it is my view the order removing the Graham, Wilson and Green firm was prematurely made in this case and should be reversed.

Issue (3) Orders to be made by a pre-trial judge

Rules 50.01 and 50.02 are relevant. They are as follows:

50.01 In an action or application, a judge may, at the request of a party or on his or her own initiative, direct the solicitors for the parties, either with or without the parties, and any party not represented by a solicitor, to appear before a judge or officer for a pre-trial conference to consider,

- (a) the possibility of settlement of any or all of the issues in the proceeding;
- (b) the simplification of the issues;

- (c) the possibility of obtaining admissions that may facilitate the hearing;
- (d) the question of liability;
- (e) the amount of damages, where damages are claimed;
- (f) the estimated duration of the hearing;
- (g) the advisability of having the court appoint an expert;
- (h) the advisability of fixing a date for the hearing;
- (i) the advisability of directing a reference; and
- (j) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

50.02(1) At the conclusion of the conference,

- (a) counsel may sign a memorandum setting out the results of the conference; and
- (b) where the conference is conducted by a judge, the judge may make such order as he or she considers necessary or advisable with respect to the conduct of the proceeding.

and the memorandum or order binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustices

(2) A copy of a memorandum or order under subrule (1) shall be placed with the trial or application record

As a general rule it is my view that pre-trial judges should not make significant, contentious rulings at pre-trial hearings in the absence of clear notice and opportunity to meet, and respond to, the ruling sought. The obvious purpose of pre-trials is to facilitate settlement and expedite trials where there is no settlement. This will obviously include consideration of issues and removing those which are not genuine issues for trial.

On one hand, many judges are concerned by the multiplicity and expense of interim applications and motions which, in some cases, seem tactically motivated to harass and delay.

This must be balanced with the necessity of giving a fair opportunity to meet, and deal with, serious issues.

In this case I conclude the application to remove solicitors should not have been dealt with at pre-trial on the basis of the information available.

SUMMARY

In *Essa (Township) v. Energis*: order to go reversing the order of Weekes J. and directing the motions proceed on the basis of material filed.

In *Membership v. Hill*: order to go reversing the order of D.S. Ferguson J. removing firm of Graham, Wilson and Green. Such order is without prejudice to the defendant's right to make further application to the trial judge

There will clearly be cases in which trial or motion judges will be requested to amend judgments or reasons, as, for example, *Shell Canada Products Ltd. v. Barrie (City) Chief Building Official* (No. 2) (1992), 13 M.P.L.R. (2d) 279 (Ont. Gen. Div.). Rule 59.06 specifically provides for this in some cases. This will normally be on motion with supporting material.

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On the facts of this matter, however, I believe D.S. Ferguson J. should not have delivered amended reasons on his own initiative after the original decision had been appealed.

COSTS

Costs to solicitors for *Esso* and *Membery* fixed on a party- and-party basis at \$3,500 in each case, such costs to include disbursements.

I note that leave to appeal was resisted in *Membery*. In my view, it should not have been and that resulted in unnecessary expense. Leave had been granted earlier in the decision of *Heck v. Royal Bank of Canada* by White J. That decision was a companion decision to *Membery*, made by D.S. Ferguson J. and the issue identical. In granting leave in *Membery*, Taliano J. noted leave had already been granted in *Heck v. Royal Bank of Canada*.

Counsel for the Advocates Society and the LSUC did not request costs and, properly, took the position they should not be liable for costs. The intervention of those groups was most useful to the court and is an excellent example of the benefits from intervention in proper cases.

Appeals allowed

Tab 11

JIA v THE PERSONAL
INSURANCE
COMPANY

2010 ONSE

6301

The Personal Insurance Company v. Jia, 2020 ONSC 6361 (CanLII)

Date: 2020-10-22
 File number: 763/18
 Citation: The Personal Insurance Company v. Jia, 2020 ONSC 6361 (CanLII),
<https://canlii.ca/4jb7qm>, retrieved on 2024-04-03
 Most recent unfavourable mention: Penny v. The Co-operators General Insurance Company, 2022 ONSC 3874 (CanLII)

CITATION: The Personal Insurance Company v. Jia, 2020 ONSC 6361
 COURT FILE NO.: 763/18
 DATE: 20201022

ONTARIO
 SUPERIOR COURT OF JUSTICE
 DIVISIONAL COURT

D.L. CORBETT, DUCHARME and GOMERY JJ.

BETWEEN:)
)
 THE PERSONAL INSURANCE) Erik K. Grossman and Patrick M.
 COMPANY) Baker,
) For the Appellant
 Appellant)
)
 - and -)
)
 PEI YU JIA and LAN JIA) Asha Ismail, for the Respondents
)
 Respondents) Heard at Toronto: November 20,
 2019

REASONS FOR DECISION

D.L. Corbett J.:

[1] The appellant insurer appeals the Reconsideration Decision of Vice-Chair Inyck of the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO") overturning the motion decision of Adjudicator Msoa of the Licensing Appeals Tribunal ("LAT"). At the conclusion of oral argument, the court dismissed the appeal with these reasons to follow.

Discussion

[2] On June 2, 2015, Xiu Zhe Xu was involved in a fatal collision. Her husband, Pei Yu Jia and her daughter, Lan Jia, (collectively the respondents) sought death and funeral benefits from the appellant insurer.

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These benefits were denied. The respondents disputed this decision before the LAT (the "benefits dispute").

[3] In a separate proceeding under O. Reg. 283/95, the appellant insurer initiated a dispute with CAA Insurance over which insurer is responsible for the respondents' accident benefits claims (the "priority dispute").

[4] The appellant compelled the respondents to examinations under oath (referred to in the decisions below as "EUOs") in connection with the priority dispute.

[5] The appellant used the same lawyer as its counsel in the priority dispute and the benefits dispute. That counsel filed transcripts of the respondents' evidence compelled in the priority dispute on behalf of the appellant in the benefits dispute.

[6] It is established law that insurers may not use the same counsel in statutory benefits cases and in tort cases brought against them by the same insured. This is because the duties of an insurer (and therefore of its counsel) are different in these contexts, and as an accident benefits insurer, the insurer is entitled to receive, and is required to keep confidential, a great deal of sensitive personal information from claimants.

[7] In the case at bar, the respondents took the position that the requirement for separate counsel applies where an insurer is involved in a priority dispute with another insurer and a benefits dispute with the insured. The respondents took the position that the insurer was not permitted to use evidence compelled from them in the priority dispute in the benefits dispute and the appellant's counsel's filing of that evidence in the benefits dispute was in breach of the applicable statutory scheme.

[8] At first instance, the LAT dismissed the respondents' motion, finding that there was no conflict in counsel acting in both proceedings, and that the filing of a transcript of evidence in non-compliance with the statutory scheme should not lead to exclusion of that evidence because the evidence is relevant and there is no prejudice to the respondents.

[9] SLASTO reversed on both decisions. It found that there is a conflict in counsel for the insurer acting in both the priority dispute and the benefits dispute. It found that breach of the statutory scheme was improper and prejudicial to the respondents, defeating the carefully balanced process prescribed by law.

Jurisdiction and Standard of Review

[10] Section 11(6) of the *License Appeal Tribunal Act* provides for an appeal to this court from LAT on a question of law.[1] This applies to a reconsideration decision of SLASTO from a LAT decision and, as at the time that this appeal was heard and decided, the standard of review of the reconsideration decision was considered to be "reasonableness" in this court.[2]

[11] The appellant argued that the appropriate standard of review in this case was correctness, because the issue of a lawyer's conflict of interest "implicates professional responsibility and the legal profession in Ontario". The court did not accept this submission; the conflict issue that arises in this case is contextually driven: the nature of conflicts that arise in accident benefits insurance cases, a context specifically within LAT's mandate and expertise.

Analysis

[12] We agree with the appellant that the conflict alleged in this case is not so clear as the conflict that arises if counsel defends an insurer in both a statutory accident benefits case and a tort case arising from the same loss. However, we also agree with Vice-Chair Trojek that the situations are sufficiently analogous that the principle in the latter circumstance should apply in the former.

[13] Even if it was thought that the conflict identified by the Vice-Chair is not inevitable and should not, as a matter of general practice, preclude an insurer using the same counsel in a priority proceeding and a subsequent liability proceeding, in this case the potential conflict came to pass when the insurer misused transcripts gathered in the priority dispute in the subsequent benefits dispute.

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[14] In this regard, Vice-Chair Trojek found that requirements set out in s.33 of the *SABS Schedule* cannot be circumvented by reliance on a transcript obtained during a priority dispute. Otherwise the procedural protections afforded to an insured in the *SABS Schedule* would be frustrated. Although not relied upon by the Vice-Chair, we note that principles underlying the implied undertaking that applies to compelled disclosure in civil proceedings also militate against an insurer being able to file a transcript compelled in the priority dispute in a subsequent liability proceeding without first obtaining leave to so do. The Vice-Chair found that the specific protections provided in the *SABS Schedule* cannot be avoided by the general discretion granted to an Adjudicator under s.15 of the *SPPA*.⁵ Otherwise the protections enacted in s.33 of the *SABS* would be largely illusory. This decision is reasonable.

[15] Finally, both aspects of the Vice Chair's decision are interlocutory. This court will not ordinarily hear an appeal from interlocutory decisions of LAT, unless the consequences of the decision cannot be rectified on appeal from a final decision. We would exercise our discretion to hear an appeal from the conflict decision, because it is evasive of appeal and it is potentially a matter of general practice important in proceedings before LAT. We would not, however, exercise our discretion to hear the appeal in respect to whether the EUOs ought to be received in evidence.

[16] In conclusion, I would find:

- a. The Vice-Chair's finding that the appellant's lawyer was in conflict of interest acting in both the priority dispute and the liability dispute was reasonable;
- b. The Vice-Chair's finding that the EUOs obtained by the insurer in the priority dispute should not be permitted to be used in the liability dispute because they were not obtained in compliance with s.33 of the *SABS Regulation* was reasonable.
- c. This appeal was in any event premature as it relates to the use of the impugned transcripts.

[17] This appeal was heard and decided prior to release of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*. Our reasons are framed on the basis on which this decision was reached on November 20, 2019, when it was rendered. We considered and decided against conducting a re-hearing on the basis of *Vavilov* because our decision would be the same in any event. Even if we had concluded that SLASTO erred as a matter of law on whether there is an inherent conflict in the same lawyer acting for an insurer in a priority dispute and a benefits dispute arising from the same events, on the facts there was a conflict in this case. This misuse of evidence obtained in the priority dispute in the benefits dispute, contrary to the checks and balances prescribed in the statutory scheme, placed the appellant's lawyer in a position where he could not continue to represent the insurer in the benefits dispute.

[18] I would also find that it is not necessary to re-hear this appeal or to receive supplementary submissions on the effect of *Vavilov* because of the improper filing of the EUO transcripts. The improper use of the transcripts arose because of the dual role played by counsel for the insurer in the two proceedings. These facts raise a conflict of interest in this case, as a matter of fact. No purpose would be served by reconsidering the parties' arguments in this case through the correctness lens brought to bear on questions of law as a result of the *Vavilov* decision.

D.L. Corbett J.

I agree: _____
Ducharme J.

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I agree: _____
Gomery J.

Date of Release: October 22, 2020

CITATION: The Personal Insurance Company v. Jia, 2020 ONSC 6361
COURT FILE NO.: DC SS1-16
DATE: 202010xx

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Ducharme and Gomery
y JJ.

BETWEEN:

The Personal Insurance Company

Appellant

– and –

Pei Yu Jia and Lan Jia

Respondents

REASONS FOR DECISION

D.L. Corbett J.

Date of Release: October 22, 2020

[2] *Taylor v. Aviva Canada Inc.*, 2018 ONSC 5472 (Div. Ct.).

[3] *Dervisholli v. Cervenak*, 2015 ONSC 2286.

[4] *Statutory Accident Benefit Schedule*, O. Reg. 34/10.

[5] *Statutory Powers Procedures Act*, RSO 1990, c. S.22, s. 5.

(16)

Tab 12

indecide

Wakeling v. Desjardins General Insurance Group Inc., 2020 ONSC 6809 (CanLII)

Date: 2020-11-06
 File number: CV-19-1633-00
 Citation: Wakeling v. Desjardins General Insurance Group Inc., 2020 ONSC 6809 (CanLII), <<https://canlii.ca/1/1n3z/>>, retrieved on 2024-04-03

CITATION: Wakeling v. Desjardins General Insurance Group Inc., 2020 ONSC 6809
 BARRIE COURT FILE NO.: CV-19-1633-00
 DATE: 20201106

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOAN WAKELING and BARB
 ARA EVISON

Plaintiffs/Responding Parties

-- and --

DESJARDINS GENERAL INS
 URANCE GROUP INC. and NA
 DIA LUCIA COSTANTINO, RI
 SHI MAHARAJ,
 JOE CRNGAROV, TARA DAVI
 DSON and JACQUELINE THO
 MPSON

Defendants/Moving Parties

Ashu Ismail, for the Plaintiffs/Re
 sponding Parties

Gillian Kerr and William Mann, f
 or the Defendants/Moving Parties

HEARD: October 8, 2020

RULING ON MOTIONS

HEALEY, J.

OVERVIEW AND NATURE OF THE MOTIONS

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It is established law that insurers may not use the same counsel in statutory benefits cases and in tort cases brought against them by the same insured. This is because the duties of an insurer (and therefore of its counsel) are different in these contexts, and as an accident benefits insurer, the insurer is entitled to receive, and is required to keep confidential, a great deal of sensitive personal information from claimants.

[64] While agreeing that the conflict alleged was not as clear as the conflict that arises if counsel defends an insurer in both a statutory accident benefits case and a tort case arising from the same loss, the court agreed with Vice-Chair Tsjek that the situations are sufficiently analogous that the principle in the latter circumstance should apply in the former. An actual conflict arose when the insurer misused transcripts gathered in the priority dispute in the subsequent benefits dispute.

[65] At para. 14, the court noted that the principles underlying the implied undertaking that applies to compelled disclosure in civil proceedings also militate against an insurer being able to file a transcript compelled in the priority dispute in a subsequent liability dispute without first obtaining leave to do so.

[66] By analogy, without deciding this and leaving it for the trial judge to do so, there may be an argument that, without leave, Desjardins is prevented from using the compelled witness list in its defence of the wrongful dismissal claim. But Costantino, to the extent that she provided the list to Desjardins, did so in the context of the LAT proceeding only, as alleged in the Claim. This is entirely distinguishable from the lawyer's actions in *Isa*. By further distinction, it is obviously not Costantino who represents Desjardins in the wrongful dismissal action. *Isa* is not helpful to the plaintiffs in establishing a conflict of interest on the part of Costantino.

[67] Further, a list of witnesses that must be exchanged in a LAT proceeding is not sensitive personal or medical information, nor is the fact of Wakeling's participation. In *Jones*, at para. 72, the court defined the strict parameters of this tort, including the type of matters that should be considered "private affairs or concerns":

These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded; it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive. [Emphasis added.]

[68] In addition to there being no invasion of private affairs or concerns, the second branch of the test also requires that there be an absence of legal justification for the invasion. Although I have already decided there was no invasion of private affairs or concerns, it has been pled that the exchange of witness lists was mandated by tribunal disclosure requirements. Here, then, there was a legal requirement for the witness list to be disclosed to Desjardins; the plaintiff complied with that requirement and disclosed it.

[69] In similar circumstances, where the law mandates disclosure that becomes the subject of an alleged intrusion, courts have held that the tort cannot be made out: See *Grech v. Scherrer*, 2018 ONSC 7796 at paras. 26 and 32-34; *Garrett v. Oldfield*, 2014 ONSC 508 at paras. 22-34; *Edgeworth v. Shapira et al.*, 2019 ONSC 5792 at para. 63.

[70] Accordingly, I must conclude that there was a legal justification for Desjardins to be in possession of the witness list, which Costantino was likewise entitled to receive in her capacity as counsel to Desjardins.

[71] The opening paragraph of the plaintiffs' factum states:

Tab 13

My friend Sam

Mansuri v Dominion of Canada General Insurance Company, 2022 CanLII 138547 (ON LAT)

Date: 2022-09-28

File number: 21-011918/AABS; 20-002907/AABS; 21-012045/AABS; 20-001365/AABS; 21-006952/AABS

Citation: Mansuri v Dominion of Canada General Insurance Company, 2022 CanLII 138547 (ON LAT). <<https://canlii.org/ott/j2v5/>>, retrieved on 2024-04-03

**Licence Appeal Tribunal File Number: 21-011918/AABS
20-002907/AABS
21-012045/AABS
20-001365/AABS
21-006952/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c 1.8., in relation to statutory accident benefits

Between
n:

Murtaza Mansuri

Applicant

and

The Dominion of Canada General Insurance Company

Respondent

MOTION DECISION

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Ryan Naimark, Counsel

For the Respondent: Kadey B. Schultz, Counsel

**Motion heard in writing August 24, 2022
and via videoconference on:**

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BACKGROUND

- [1] Murtaza Mansuri, Javid Mansuri, and Mohammad Mansuri ("the applicants") are brothers. Murtaza Mansuri was involved in two separate accidents, one on April 28, 2016, and the other on January 6, 2018. Javid Mansuri and Mohammad Mansuri were involved in an accident on May 4, 2018. Each of the applicants sought benefits pursuant to the applicable version of the *Statutory Accident Benefits Schedule, Effective September 1, 2010* [1].
- [2] The applicants were denied certain benefits by the respondent, and they applied individually to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal"). The applicants currently have five applications before the Tribunal arising from the 2016 and 2018 accidents.

MOTION

- [3] On March 1, 2022, the applicants filed a Notice of Motion concerning all five files. The Notice of Motion requested the following relief:
- A. a declaration that the respondent and Schultz Frost LLP breached its duties of privacy and confidentiality owed to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri, respectively;
 - B. a declaration of a conflict of interest, or alternatively potential conflict of interest on the part of Schultz Frost LLP and Ms. Policelli in all three of the herein claimants' matters; and
 - C. an order that Schultz Frost LLP and Ms. Policelli are disqualified from handling the herein claimants' matters and that separate counsel and adjusters are required to handle each separate matter.

RESULT

- [4] The applicants' motion is denied.

ANALYSIS AND REASONS

Request to amend Notice of Motion

- [5] At the commencement of the oral motion hearing on August 24, 2022, the Tribunal invited supplementary submissions from the parties on the issue of whether the Tribunal has authority to grant declaratory relief. Oral argument was held down to give the parties time to address this issue.
- [6] During the applicants' supplementary submissions, their counsel requested leave to amend their Notice of Motion, adding the following forms of relief to the existing request:
- D. an order removing Schultz Frost LLP as counsel for Travelers / The Dominion General Insurance Company of Canada, as a result of a conflict of interest and/or a breach of privacy and confidentiality; and
 - E. an order that Ms. Policelli be disqualified from adjusting and handling the accident benefits claims pertaining to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri as a result of a conflict of interest and/or a breach of privacy and confidentiality.
- [7] The respondent opposed this request

- [8] After hearing from both parties, I denied the request to amend orally, with written reasons to follow. These are my reasons.
- [9] First, the Tribunal has a duty to adjudicate matters justly, cost-effectively, and on their merits. The underlying applications range in case age from approximately 350 to 900 days. All adjudicative events pertaining to these matters have been stayed pending the result of this motion. Two oral hearings have been adjourned, and a third is scheduled to proceed within a month. Permitting the applicants to redefine the relief requested at this late stage in the motion proceedings would have necessitated further procedural accommodations to facilitate the respondent's full participation. This would have resulted in further and unacceptable delay to the underlying disputes.
- [10] Second, the substance of the proposed amendments to the Notice of Motion would have changed little in the Tribunal's analysis. In his own submissions on the request to amend, counsel for the applicants characterized the changes to the requested relief as "semantic." I agree. Paragraphs D. and E. in the proposed Amended Notice of Motion essentially re-state paragraph C. in the original Notice of Motion. The applicants' requests for disqualification and/or removal of counsel and the adjuster are, in essence, the same relief expressed in different terms.
- [11] Third, if the Tribunal were to find that it lacked jurisdiction to issue the declaratory relief sought, the proposed amendments would do little to preserve the applicants' request for a remedy. Merely omitting the word "declaration" does not change the substance of the remedy. However, as I explain below I am satisfied that the Tribunal has the authority to disqualify counsel where a conflict of interest can be established. And although I am not satisfied that the Tribunal has the jurisdiction to disqualify the adjuster, it is not because the Tribunal cannot, in principle, make declarations related to an insurer's handling of an accident benefits claim. I explain my reasons for these findings below.

Jurisdiction to issue relief sought

- [12] Relying on the Ontario Court of Appeal's decision in *Stegenga v. Economical Mutual Insurance Company* ("Stegenga") [2], the applicants submit that the Tribunal has broad jurisdiction under s. 280 of the *Insurance Act*, RSO 1990, c.1.8, to adjudicate disputes in respect of entitlement to, or quantum of, statutory accident benefits.
- [13] The applicants submit that the Tribunal's authority to grant the requested relief is implied in the Divisional Court case of *The Personal Insurance Company v. Jia* ("Jia") [3]. In *Jia*, the court upheld a reconsideration decision in which the Tribunal disqualified the insurer's counsel whom it found to be in a conflict of interest.
- [14] The applicants submit the relief they seek relates to a dispute under the *Insurance Act* and, therefore, falls within the Tribunal's jurisdiction. The applicants also refer me to the Tribunal's authority under the *Statutory Powers Procedure Act*, RSO 1990, c. S.22 ("SPPA") to make orders with respect to the procedures and practices that apply in a proceeding, and to the Tribunal's authority under the *Licence Appeal Tribunal Act*, 1999, SO 1999, c.12, Sched. G ("LAT Act") to determine all questions of fact or law that arise in matters before it.
- [15] The respondent submits that there is no statutory or common law authority for the relief the applicants seek. The respondent submits that the *Schedule* is silent on any declaratory power or ability to make findings on conflicts of interest. Relying on *Dominion of Canada General Insurance Company v. Ridd* ("Ridd") [4] the respondent submits that one cannot impute information into legislative provisions that is not expressed therein and cannot read findings into case law. The respondent submits that it is improper to infer from *Jia* that the Tribunal possesses disqualification powers.

- [16] The respondent submits that the case of *Raffaella de Rosa v. Wawanesa Mutual Insurance Company* ("de Rosa"),[5] demonstrates that no implied power to remove counsel for a conflict of interest exists. In *de Rosa*, the arbitrator found that the insurer's counsel had misused information, but no conflict of interest existed, and no disqualification order was made. The respondent submits that *de Rosa* supports its position that the appropriate remedy for improper information sharing is not removal of counsel, but an order that the parties comply with the prescribed process for the exchange of documents.
- [17] The respondent also relies on the Tribunal's reconsideration decision in *M.I. v. Coseco Insurance Company*,[6] in which the Tribunal held that it lacks the jurisdiction to award declaratory relief when entitlement and quantum of benefits are not in issue. The respondent submits that there are no benefits in dispute that are tied to this motion, and that the applicants' request for relief cannot be characterized as falling within the scope of the Tribunal's jurisdiction. The respondent submits that the applicants are asking the Tribunal to make declarations akin to the "hypothetical" and "academic" issues which the Tribunal determined in *B.E. v The Personal Insurance Company and Ministry of the Ontario General (Ontario)*[7] that it lacked the jurisdiction to decide.

Findings on the jurisdictional issue

- [18] The Tribunal is a statutory body. It is well settled that a statutory tribunal has no powers other than those it derives from legislation. The Supreme Court of Canada has long held that the exclusive jurisdiction of a statutory tribunal is subject to the residual discretionary power held by courts.[8] Because the Tribunal lacks inherent equitable jurisdiction, any authority to grant equitable remedies (such as declaratory relief) must be provided for in legislation.
- [19] I am persuaded by the applicants' submission that an order disqualifying counsel for a conflict of interest falls within the Tribunal's broad authority to decide disputes under s. 280 of the *Insurance Act*. In *Stegenga*, by which I am bound, the Court of Appeal held that the Tribunal has exclusive jurisdiction over a dispute if its "essential character" relates to entitlement to statutory accident benefits and their amount.[9] The Court also held that disputes involving an insurer's conduct in handling a claim satisfy this requirement.[10]
- [20] This motion calls into question the respondent's handling of the applicants' claim, and I find that its essential character relates to a claim for accident benefits. I am unpersuaded by the respondent's submission that the Tribunal lacks the power to grant declaratory relief in this case because the motion itself does not involve determination of entitlement to or quantum of benefits. The underlying and ongoing disputes between the applicants and the respondent squarely engage questions of entitlement and quantum, and the outcome of this motion will impact the course of these underlying proceedings. The questions before me are neither hypothetical nor academic; they have direct bearing on the conduct of the litigation before this Tribunal.
- [21] I find that no excess of jurisdiction would flow if I were to order the relief sought in this motion. The Divisional Court in *Jia* took no issue with the Tribunal's decision to remove counsel based on a conflict of interest. I am not persuaded by the respondent's submission that it is impermissible to "read in" findings to case law that are not explicitly expressed, or that the Court of Appeal's decision in *Ridi* stands for such a proposition. *Ridi* was a case about the principles of statutory interpretation and how ambiguity in legislative provisions should be resolved. The court's analysis in that case does not intersect with the jurisdictional issue before me. The inference the applicants ask me to draw from *Jia* is sound: If the Tribunal had exceeded its jurisdiction by declaring a conflict of interest and disqualifying counsel, the Divisional Court would have corrected that error when it directly addressed the matter on appeal.

[22] It is not enough to satisfy the basic common law requirement that a dispute has an essential character falling within the Tribunal's jurisdiction. The Tribunal's powers are subject to limits. Its orders must comport with its enabling legislation. The way an insurer staffs its claims is not a matter of Tribunal procedure or practice. As such, the Tribunal's power under s. 23 of the *SPPA* to make orders to control the conduct of its proceedings is not engaged. Compelling an insurer to remove a specific adjuster from handling a claim is not necessary or expedient for the Tribunal to carry out its duties, so the Tribunal's order-making authority under s. 3(2) of the *LAT Act* likewise does not apply. In the absence of statutory authority to make such an order, I find that the Tribunal lacks the power to disqualify an adjuster from handling a claim. If I am wrong about the scope of the Tribunal's authority, and the Tribunal does have the power to disqualify an adjuster under the *SPPA* and the *LAT Act*, I would decline to exercise that authority on substantive grounds, for reasons I explain below.

[23] The *Schedule* is not a complete code governing the relationship between insurers and insured persons. That relationship has also been governed by private law obligations and legislative schemes outside this Tribunal's jurisdiction. The applicants submit that the alleged misconduct of the adjuster in this case could amount to civil liability for intrusion upon seclusion, a common law tort established by the Ontario Court of Appeal in the 2012 case, *Jones v. Tsige*.^[1] They also submit that the respondent disclosed confidential information several weeks before obtaining authorization to do so under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*").

[24] If the applicants believe that the adjuster's conduct constitutes a civil wrong, the appropriate forum to pursue a remedy is the civil courts, not this Tribunal. If the applicants maintain that the respondent has breached its obligations under *PIPEDA*, the federal Office of the Privacy Commissioner has jurisdiction to hear such a complaint.

[25] The Tribunal routinely adjudicates questions of insurer conduct under s. 10 of Regulation 664. If the applicants wish to pursue a remedy from the Tribunal, it is open to them to claim an award for unreasonable withholding or delay of benefits in the underlying proceedings.

[26] To conclude, the applicants have satisfied me that the Tribunal can disqualify counsel if it determines that a conflict of interest exists. Whether characterized as a "finding" or a "declaration," I find that an order disqualifying counsel is a permissible exercise of the Tribunal's authority to decide accident benefits disputes and make procedural orders in accordance with the *Insurance Act*, the *LAT Act*, and the *SPPA*. I further conclude that the Tribunal lacks the authority to bar an adjuster from handling a disputed accident benefits claim, or, in the alternative, that the facts before me do not warrant such an order.

The basis of the applicants' request for a remedy

[27] The applicants submit that the respondent has engaged in "deep, entrenched, pervasive and intentional" sharing, commingling, and reconciling of evidence between their claims files to defend itself and assess exposure for payment of benefits. In so doing, the applicants submit the respondent has breached its duty to keep their information private and confidential, and that their counsel's involvement in this information sharing constitutes disqualifying conduct.

[28] The applicants concede that it is not necessarily a conflict for the same counsel to act for an insurer in related accident benefits claims. Rather, they submit that the unique facts of this case give rise to a finding of impropriety.

Investigator and adjuster conduct

[29] The essential facts are undisputed. The applicants reside in a shared three-bedroom apartment. They share common areas including a kitchen, living room, bathroom, and den.

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Each brother has claimed accident benefits from the respondent separately. Both Murtaza Mansuri and Javid Mansuri have received attendant care and housekeeping/home maintenance services from personal support workers sourced by Pro Choice Medical Ltd. ("Pro Choice"). They have claimed reimbursement for those services. In the underlying proceedings, the parties dispute whether those expenses are payable.

- [30] On October 8, 2021, the respondent's adjuster, Ms. Nikki Policelli, entered a log note in Javid Mansuri's file, which she was adjusting. The log note stated that she had spoken with the respondent's Investigator, Ms. Sandra McSweeney, and advised her that the details submitted by Murtaza and Javid Mansuri in support of their attendant care and housekeeping claims appeared to show a "potential overlap in HH [housekeeping/home maintenance] and ATC [attendant care]" that the documentation on file had not clarified.
- [31] On October 11, 2021, Ms. McSweeney sent two separate emails to the personal support workers at Pro Choice who had provided attendant care and housekeeping/home maintenance services to Murtaza and Javid Mansuri, respectively. The emails requested "additional information/clarification" on services provided to the brothers "at the same times on the same dates of service" including dusting, window cleaning, vacuuming, and disinfecting common areas.
- [32] Ms. Policelli began adjusting Murtaza's claim (in addition to Javid's) on October 27, 2021. On November 3, 2021, Ms. Policelli entered a log note requesting that Ms. McSweeney send the results of her recent investigation into the expenses Murtaza and Javid Mansuri had claimed for attendant care and housekeeping/home maintenance "so that I can review and consider if payment is reasonable at this time." She asked that the results be sent "separately, of course."
- [33] On December 8, 2021, the respondent submitted three Information Disclosure Request Forms seeking authorization to disclose claims information, investigation information, and personal information about the applicants in accordance with the PIPEDA. The forms set out the following rationale for the requests: "There is suspected duplication of proposed/submitted goods, services and benefits contrary to the applicable Statutory Accident Benefits Schedule (SABS)".
- [34] On December 23, 2021, Cyprian Kobbianyor, Director, Compliance and Chief Privacy Officer with Travelers Canada emailed Ms. Sandra McSweeney stating, "The requests are approved. Based on my conversations with you and Nikki, I have deduced that you and Nikki perceive an attempt at contravening a law."
- [35] The applicants submit that the respondent knew its inquiry into the "potential overlap" between Murtaza's and Javid Mansuri's attendant care and housekeeping/home maintenance claims was improper. They submit that Ms. McSweeney emailed Pro Choice separately on October 11, 2021 to "demonstrate to the claimants and ultimately paper its file in such a manner that the investigations were separate." They submit that Ms. Policelli's remark in the November 3, 2021 log note that the results of the investigation should be sent "separately, of course" demonstrates that she knew it was a breach of privacy and confidentiality to be reconciling the brothers' claim information, and did so surreptitiously. "She was tempted [to look at the contents of both files]," they submit, "and she actually did it." The applicants underscore that at the time Ms. Policelli began referring to both files in her log notes, she was only adjusting Javid Mansuri's claim, and not Murtaza's. They submit that when Ms. Policelli began jointly adjusting these two separate matters, she shared information between the files "without discretion."
- [36] The respondent submits that there is nothing improper about its handling of the applicants' claims. It submits that the applicants gave express consent for it to collect, share, and disclose their information when they signed OCF-1s to apply for accident benefits.

- [37] The respondent submits that its email correspondence with the personal support workers in October 2021 was an attempt to properly determine the amount of attendant care payable to Murtaza and Javid Mansuri. The respondent submits that there is nothing wrong with an adjuster entering log notes in a file they are not actively adjusting. It submits it is only obligated to notify a claimant when a new handling adjuster is assigned so the claimant knows who to correspond with.

The conduct of respondent's counsel

- [38] The applicants submit that the improper sharing of information by the respondent has "infiltrated" not only its investigation and adjusting of their claims, but its defence of the claims in this litigation. On December 9, 2021, the applicants' then-counsel, Mr. Jordan Dahan, had a telephone conversation with Ms. Kadey Schultz, who had been recently retained to defend the respondent in all three brothers' Tribunal matters. Mr. Dahan gave evidence that during their conversation, Ms. Schultz explained to him that "establishing liability for payment for attendant care and housekeeping services was more complex and thus delayed in these claims [...] because there were two personal support workers in the same residence, from the same attendant care company, providing similar attendant care and housekeeping services to Murtaza Mansuri and Javid Mansuri separately, but during the same times "
- [39] Then, in a December 22, 2021 email to applicants' counsel about the scheduling of an examination under oath, Ms. Schultz's legal assistant referred to Javid and Murtaza's matters as the "companion matter[s]".
- [40] On January 21, 2022, the respondent served productions on the applicants' counsel via email. The subject line of the letter was "Re: Dominion and Mansuri (Murtaza)(LAT)". Among the productions listed was the "Complete Surveillance file of Larrek Investigations". The surveillance file is not before me. However, the uncontested evidence of Mr. Dahan is that "[w]ithin the surveillance produced for Murtaza Mansuri, Schultz Frost LLP had served surveillance that was specifically attributable to Javid Mansuri, only. It was not that Javid Mansuri was merely captured in the surveillance. The surveillance was specifically for Javid Mansuri's separate matter."
- [41] On January 21, 2022, the respondent's counsel sent email correspondence with the subject line "Dominion and Mansuri (Murtaza)(LAT)" requesting production of an Assessment of Attendant Care Needs ("Form 1") dated April 29, 2019. However, the Form-1 of that date was conducted in relation to Mohammad Mansuri, not Murtaza.
- [42] The applicants submit that the disclosure of Javid Mansuri's surveillance within Murtaza Mansuri's matter and the request for Mohammad Mansuri's Form 1 in an email about Murtaza's matter demonstrate that Schultz Frost LLP had confused the evidence between the three separate matters due to their commingled handling.
- [43] The respondent submits that it disclosed the complete surveillance file of Larrek Investigations in Murtaza Mansuri's matter to comply with a production order of the Tribunal. It submits that if surveillance of Javid Mansuri had been obtained in error, the respondent still had an obligation to produce the entire contents of the file. If surveillance was captured of the wrong claimant, then it simply has no bearing on the matter.
- [44] The respondent submits that pooling information between claims is permissible to determine the proper amount of payment and to prevent, detect, and suppress fraud, through the consent obtained in the OCF-1. The applicants submit that there has been no allegation of fraud in this case and the respondent cannot now allege fraud with no evidence to support such an allegation. The respondent submits that its investigation is ongoing and the proper place to raise the issue of fraud is at a hearing on the merits.

- [45] I agree with the respondent that the applicants gave consent for the respondent to use their file information as it has done when they signed OCF-1s to apply for accident benefits.
- [46] The signature page of the respective OCF-1s signed by each of the three brothers as a condition of applying for accident benefits states:

"I UNDERSTAND that you, and persons acting for you, will collect personal information and personal health information about me that is related to my claims for accident benefits [...] and that all such information will be collected directly from me or from any other person with my consent

[...]

I ALSO UNDERSTAND that the information described above will be collected and used only as reasonably necessary for the purposes of:

- **Investigating my claims and processing my claims** as required by law, including the Ontario Automobile Policy.
- **Obtaining or verifying information relating to my claims in order to determine entitlement and the proper amount of payment.**

[...]

- **Preventing, detecting and suppressing fraud;**

[...]

I ALSO UNDERSTAND that you, and persons acting for you, **may disclose this information to the following persons or organizations**, who may collect and use this information only as reasonably necessary to enable you or them to carry out the purposes described above:

[...] insurance adjusters; [...] health care professionals; [...] solicitors; [...] databases or registers used by the insurance industry to analyze and check information provided against existing information; [...].

I ALSO UNDERSTAND that you, and persons acting for you, **may pool this information with information from other sources** and may analyze this information **for the limited purpose of preventing, detecting or suppressing fraud.**

[...]

I CONSENT [...] to you collecting, using and disclosing this information in the manner described above, but no more of such information than is reasonably necessary to meet the legitimate purposes of such collection, use or disclosure.

[...]

I AM ALSO AWARE that you, and persons acting for you, may be required or permitted by law **to disclose information to others without my knowledge or consent "**

[Emphasis added.]

- [47] I find that the emails of October 11, 2021 disclosed information to the applicants' personal support workers, who are health care professionals, for the purposes of investigating the applicants' claims and obtaining or verifying information to determine the proper amount of payment. The emails disclosed only as much information as was necessary for that purpose,

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including specific line items from the expense claims that appeared to overlap. The applicants expressly consented to this kind of disclosure in the OCF-1.

- [48] I see no impropriety in Schultz Frost LLP's disclosure of surveillance capturing Javid Mansuri in relation to Murtaza Mansuri's matter. First, the disclosure was to a solicitor, a person authorized to receive disclosure under the OCF-1. Second, surveillance is not confidential personal health information. A claimant does not have a privacy interest in surveillance images or footage obtained in public areas.
- [49] I accept the applicants' submission that Schultz Frost LLP's request for a Form-1 pertaining to one of the applicants in an email about another suggests that counsel may have confused the litigation files. However, no confidential information was disclosed in the January 21, 2022 email. In addition, I fail to see how references to the applicants' Tribunal matters as "related" or "companion matters" rises to the level of disqualifying conduct; even the applicants' submissions in support of this motion refer at paragraph 15 to the claims as "related."
- [50] I find that the respondent's pooling of claim information between the applicants' files falls within the authorized scope of information sharing set out in the OCF-1. I am not persuaded that an insurer must formally allege or establish fraud to pool information with information from other sources and analyze it as described in the OCF-1. An insurer can legitimately engage in fraud prevention and detection without fraud ever having occurred. The use of the phrase "limited purpose" in the OCF-1 implies that an insurer cannot pool information from separate claims files gratuitously or for some improper purpose. However, if there is a reasonable basis to infer that fraud may be occurring or about to occur, then in my assessment the consent in the OCF-1 permits an insurer to collect, use, and disclose information as may be reasonably necessary to prevent, detect, and suppress it. Indeed, such pooling of information may assist an insurer in concluding that no fraud has taken place, permitting it to properly adjust the claim.
- [51] In this case, Murlaza and Javid Mansuri submitted claims for expenses that, on their face, appeared to be potentially duplicative. Their invoices detailed similar services provided in common areas of their residence at the same times on the same days. In these circumstances, it was proper for the respondent to compare the documentation prepared by the service providers and to seek additional information from the applicants and their service providers to verify whether the amounts were payable. To be clear, I make no finding as to whether fraud has occurred in this matter. That is not a question I have been asked to decide, nor is it within my authority to make such a determination. However, the evidence before me is enough to satisfy me that the respondent has complied with its confidentiality obligations, and that the applicants consented to the information sharing that has taken place in this case.
- [52] The applicants submit that the consent they provided in the OCF-1s does not bar them from advancing a claim for disqualification due to a conflict of interest. They submit that the use of information in a manner that would constitute a conflict of interest cannot be considered authorized under the OCF-1's broad language. On this point, they rely on *Riley et al. v. Director of MVAC, et al.* ("*Riley*")^[12] and *Dervisholli et al. and Cervenak and State Farm* ("*Dervisholli*").^[13]
- [53] This case does not engage the same principles as *Dervisholli* and *Riley*. In both of those cases, the accident benefits claimant's consent to information sharing did not bar the disqualification of counsel because information and documentation was being shared for an unauthorized purpose: to defend the tortfeasor against the accident benefits claimant in the tort action.
- [54] This is a critical distinction. In both *Riley* and *Dervisholli*, the insurer (or the Motor Vehicle Accident Claims Fund acting as the "effective insurer" in the case of *Riley*) was in a conflict of interest because it was openly using documents and information obtained from the accident benefits claimant to defend a third-party tortfeasor in a separate tort action. The accident

benefits claimants were under a duty of mandatory disclosure with respect to their personal health information, and the insurer's duty of good faith toward them conflicted with its duty to defend the tortfeasor. No such adverse position exists when counsel acts for an insurer defending related accident benefits claims.

- [55] The applicants submit that the Divisional Court extended the principles from *Dervisholi* in *Jia*.^[14] In *Jia*, the court upheld a Tribunal decision to disqualify the insurer's counsel who tendered transcript evidence that had been compelled in a priority dispute on behalf of the insurer in an accident benefits dispute. The respondent submits that the conflict in *Jia* arose in a setting where counsel had a "dual role" (acting in the priority dispute and in the accident benefits matter). The respondent submits that the concern about an insurer having dual or conflicting roles is absent in this case.
- [56] Insofar as *Jia* extended the holding in *Dervisholi*, that extension was incremental and fact specific. The court declined to find, as a matter of law, that counsel acting for an insurer is necessarily in a conflict when acting for the same insurer in a priority dispute and an accident benefits matter arising from the same accident.
- [57] The applicants submit that *de Rosa* dispenses with the notion that the OCF-1 authorizes information sharing between accident benefits files. However, the *de Rosa* case is distinguishable from the present one because the insurer was seeking to tender a medical report detailing confidential health information about one accident benefits claimant in an arbitration about the claimant's spouse, who had been in the same accident and had claimed accident benefits from the same insurer. The arbitrator found that the insurer's use of confidential information did not fall under the legitimate purposes set out in the consent in the OCF-1.
- [58] In this case, the only disclosure of information was Ms. McSweeney's emails to the personal support workers in October 2021 itemizing the housekeeping services that appeared to be duplicative and naming one brother in correspondence regarding the other. Health practitioners are authorized recipients of disclosure in the OCF-1. I find that the disclosure was for the purpose of investigating and verifying the applicants' claims to determine the proper amount of payment and was therefore done with the consent of the applicants.
- [59] The applicants submit that the respondent's own Access to Personal Information Policy prohibits the use of information except with consent or as required by law. The policy does little to assist the applicants, as the respondent's use of their information occurred with their express consent and in accordance with the law.
- [60] The applicants submit that even if they gave consent in the OCF-1, consent is revocable. Mr. Dahan's affidavit evidence is that if the Tribunal finds that the applicants consented to the information sharing, they revoke that consent. While I accept that it is open to an accident benefits claimant to revoke his consent to information sharing, to do so would effectively constitute a withdrawal of a claim for accident benefits, as a completed and signed OCF-1 is a precondition for entitlement to statutory accident benefits under s. 32 of the *Schedule*.
- [61] The applicants submit that the respondent's Information Disclosure Request Forms were approved in December 2021, and that the information sharing began as early as October 2021. I note that the Chief Privacy Officer was aware that the request was for the "ongoing" release of information, as this language is present in the rationale for all three requests. The applicant has not directed me to any legislative provision that requires authorization in advance for the use of information consented to in the OCF-1. In my view, the signed OCF-1 provides sufficient authorization for the respondent's handling of the applicants' information, and I am not satisfied that the disclosure justifies an order disqualifying an employee or agent of the respondent.

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[62] The test for disqualifying conflict of interest is set out in *MacDonald Estate v. Martin* ("*MacDonald Estate*").^[5] The legal principles animating that test do not apply to the present case. *MacDonald Estate* addresses the conflict that may arise when a lawyer, acting against a former client, uses confidential information obtained in the context of the solicitor-client relationship to the detriment of the former client. Here, there is no solicitor-client relationship between the applicants and the respondent's counsel. Unlike in *Deryisholli*, where counsel for the insurer failed to separate the insurer's interests in the tort and accident benefits matters, the principles that the Supreme Court attempted balanced when it articulated the two-part test for a conflict of interest in *MacDonald Estate* are not engaged here.

[63] The issue before me is whether the conduct of the respondent constitutes a breach of its duties of privacy and confidentiality warranting the disqualification of its adjuster and counsel. The applicants have not established, on a balance of probabilities, a factual and legal basis for the relief they seek.

ORDER

[64] The applicants' motion is denied. The respondent's counsel may continue to act in the five underlying Tribunal matters. All adjudicative events that had been stayed pending the outcome of this motion may proceed as scheduled.

OTHER PROCEDURAL MATTERS

[65] If the parties resolve the issue(s) in dispute prior to the hearings in these matters, the applicants shall immediately advise the Tribunal in writing.

Released: September 28, 2022

Theresa McGee, Vice-Chair

[1] O. Reg. 37/10.

[2] 2019 ONCA 615.

[3] 2020 ONSC 5191.

[4] 2022 ONCA 584.

[5] 2017 ONFSCDRS 161 (CanLII).

[6] 2021 CanLII 40712 (ON LAT).

[7] 2020 CanLII 69525 (ON LAT).

[8] See *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para. 67.

[9] See also *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929.

[10] *Stegenga* at para. 53.

[11] 2012 ONCA 32 (CanLII).

[12] 2021 ONSC 2123.

[13] 2015 ONSC 2285.

[14] 2020 ONSC 6361.

[15] 1990 CanLII 32 (SCC), [1990] 3 SCR 1235.

Tab 14

3 ANNEX
1997

Barnett, Re, 1997 CanLII 851 (ON LST)

Date: 1997-10-09

Citation: Barnett, Re, 1997 CanLII 851 (ON LST), <<https://canlii.ca/1/1gr0j/>>, retrieved on 2024-04-03

Law Society of Upper Canada Ontario Discipline Committee

IN THE MATTER OF the Law Society of Ontario, AND IN THE MATTER OF James Douglas Manfred Leopold Schlosser Barnett of the City of Etobicoke, a Barrister and Solicitor

C.C. Ruby, L.A. Banack and R.D. Manes

Hearings: February 28, June 24 and 25, September 24 and December 1996
Decision of the Committee: February 26, 1997 Decision of Convocation: September 25, 1997 Reasons for Convocation: October 9, 1997

REPORT of the Discipline Committee

REASONS FOR DECISION

The solicitor James Douglas Manfred Leopold Schlosser Barnett stands charged with two complaints under the Law Society Act being numbers 0227/94 and 0355/95 alleging professional misconduct in the quality of service rendered to several clients, and professional misconduct in certain advertising or business relationships pursuant to which advertising ensued. The particulars of the alleged misconduct are as follows:

0227/94

1. ...

TO identify the professional misconduct alleged to have taken place the following particulars are provided:

- a) he failed to respond within a reasonable time to communications from his client, Premier Trust Company of Canada, which required a reply;
- b) he failed to respond within a reasonable time to communications from another solicitor, Fred Szasink, which required a reply;

- c) he failed to honour within a reasonable time his Undertaking to another solicitor, Fred Stasick, dated July 23, 1993;
- d) he failed to respond within a reasonable time to communications from his client, Scotiabank, which required a reply;
- e) he failed to provide within a reasonable time a report to his client, Scotiabank, upon the completion of a real estate transaction;
- f) he failed to respond within a reasonable time to communications from William Goodran, on behalf of the solicitor's client, which required a reply;
- g) he failed to respond within a reasonable time to communications from his client, Hansa Mortgage Investment Corporation, which required a reply;
- h) he failed to provide within a reasonable time a report to his client, Hansa Mortgage Investment Corporation, upon the completion of a real estate transaction;
- i) he failed to respond within a reasonable time to communications from Judy Pontes, on behalf of the Solicitor's client, which required a reply;
- j) he failed to respond within a reasonable time to communications from another solicitor, David Ruskin, which required a reply;
- k) he failed to provide within a reasonable time a report to his client, Bank of Montreal, upon the completion of a real estate transaction;
- l) he failed to honour in a timely manner his Undertaking to another solicitor, Stanley J. Arbus, dated October 29, 1993;
- m) he failed to represent his client, Pierre Julien, in a competent, diligent and efficient manner in a litigation matter, in that he:
 - i) claimed certain relief in the client's statement of claim which he had no authority to claim on the client's behalf;
 - ii) failed to review the statement of claim with his client before it was issued;
 - iii) failed to prepare in a timely fashion affidavits of service for service by mail on the defendants after completing such service by mail;
 - iv) failed to adequately and in a timely manner respond to a communication from counsel for one of the defendants;
 - v) made a settlement proposal on the client's behalf without the client's knowledge or consent; and
 - vi) failed to keep the client reasonably informed.
- n) he failed to serve his client, Royal Trust, in a conscientious, diligent and efficient manner in that he failed to register a Charge/mortgage of Land until approximately five months after funds had been advanced by the client.
- o) he failed to serve his client, Jeff McTavish, in a conscientious, diligent and efficient manner in representing him in the purchase of a condominium, in that he:
 - i) failed to deal in a timely fashion with the issue of a transfer of a parking space from the vendor to the client;
 - ii) failed to ensure that a change in ownership was communicated to the tax department of the municipality where the property was situated; and

Particular 2(d)(iii) does not refer to a specific rule but the Law Society argues that Rule 16 Commentary 3.(i) is of some assistance. That Commentary reads as follows:

A lawyer may not permit a non-lawyer to:

(1) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated;

During 1993, Mr. Barnett participated in the seminar programme with Douglas Hunter, a real estate sales representative for Century 21 Eldorado Real Estate Limited, to provide information to the public concerning aspects of purchasing a home.

Tab 15

Caruso v. The Law Society of Ontario, 2023 ONSC 6744 (CanLII)

Date: 2023-11-29
 File number: DC-23-096-JR
 Citation: Caruso v. The Law Society of Ontario, 2023 ONSC 6744 (CanLII),
<https://canlii.ca/1/dz0/>, retrieved on 2024-04-03

CITATION: Caruso v. The Law Society of Ontario, 2023 ONSC 6744
 DIVISIONAL COURT FILE NO.: DC-23-096-JR
 DATE: 20231129

ONTARIO

SUPERIOR COURT OF JUSTICE
 DIVISIONAL COURT

Backhouse, D.L. Corbett, Charney JJ.

BETWEEN:)

ANTONIO CARUSO)

Applicant)

) *Josh Long, for the Applicant*

- and -)

THE LAW SOCIETY OF ONTARIO)

Respondent)

) *Nader R. Hasan and Stephen Aylward, for
the Respondent*

and -)

COLLEGE OF IMMIGRATION
 AND
 CITIZENSHIP CONSULTANTS
 and
 ONTARIO PARALEGAL ASSOCIATION)

) *Ian W. Thompson, for the Intervenor,
College of Immigration and Citizenship
Consultants*

Proposed Intervenor:) *Wafa Khan*, for the Intervenor, O
ntario
) Paralegal Association
)
)
) **HEARD at Toronto (by Zoom):**
November
) 1, 2023

REASONS FOR JUDGMENT

CHARNEY J.:

Introduction

[1] The central issue raised in this application is whether the processing and filing of immigration applications on behalf of clients is within the Applicant's scope of practice as a paralegal licensed by the Law Society of Ontario (LSO).

[2] The Applicant takes the position that he is authorized to provide such legal services pursuant to s. 91(2) of the federal *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).

[3] The Applicant takes the position that, properly interpreted, there is no LSO by-law that limits the authorization set out in the *IRPA*. Accordingly, the LSO's policy that purports to limit his scope of practice in matters relating to immigration to providing legal services in connection with proceedings or intended proceedings before the Immigration and Refugee Board (IRB) is, therefore, not authorized by the LSO by-laws.

[4] In the alternative, the Applicant argues that, to the extent that the LSO by-law does limit his scope of practice in matters relating to immigration, the by-law conflicts with the *IRPA* and is rendered inoperative by virtue of the doctrine of federal paramountcy.

[5] In the final alternative, the Applicant argues that the LSO's restriction on his scope of practice violates *Charter* s. 7.

Facts

[6] The Applicant, Antonio Caruso, is a paralegal practicing in Niagara Falls, Ontario. He is licensed by, and a member in good standing of, the LSO.

[7] He describes himself as a "staunch advocate for paralegals to practice immigration [law]", and his affidavit focuses on his advocacy activities in this regard.

Relevant Statutory Provisions

[8] The issues raised in this case relate primarily to two statutes. The first is the *Law Society Act*, R.S.O. 1990, c. 129 and By-Law 4 passed thereunder.

[9] The second is the *IRPA*.

[10] Both statutory regimes have undergone significant legislative reform in recent years, and this history is directly relevant to the legal analysis.

Law Society Act

[11] Lawyers and paralegals in Ontario are governed by the LSO. The regulation of lawyers by the LSO (formerly the Law Society of Upper Canada) dates back to 1797: "*An Act for the better Regulating the Practice of the Law*" 1797 (U.C.) (2nd Sess.), c. 13.

7-3
[12] The regulation, licensing and discipline of paralegals by the LSO only began in 2007 pursuant to statutory amendments enacted in 2006 (*Access to Justice Act*, S.O. 2006, c. 21, Sched. C). Ontario was the first province or territory to licence paralegals and remains the only province or territory in which paralegals require a licence.

[13] Section 26.1(1) of the *Law Society Act* contains a broad prohibition that "no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario"

[14] Only lawyers are licensed to practice law. Paralegals are licensed to "provide legal services". The *Law Society Act* defines "the provision of legal services" in ss. 1(5)-(7):

Provision of legal services

(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Same

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.
2. Selects, drafts, completes or revises, on behalf of a person,
 - i. a document that affects a person's interests in or rights to or in real or personal property,
 - ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,
 - iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,
 - iv. a document that relates to a matter under the Bankruptcy and Insolvency Act (Canada),
 - v. a document that relates to the custody of or access to children,
 - vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or
 - vii. a document for use in a proceeding before an adjudicative body.
3. Represents a person in a proceeding before an adjudicative body.
4. Negotiates the legal interests, rights or responsibilities of a person

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.

2. Conducting an examination for discovery

3. Engaging in any other conduct necessary to the conduct of the proceeding.

[15] Also relevant is subs. 1(8), which exempts specified persons conducting specified activities from the definition of "practicing law or providing legal services". Of relevance to this case is subs. 1(81), which provides:

(8) For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services:

1. A person who is acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature, or an Act of Parliament, that regulates specifically the activities of persons engaged in that profession or occupation.

[16] Section 27(1) of the *Law Society Act* provides for classes of licences to be prescribed by the LSO in its by-laws:

Classes of licence

27 (1) The classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and any terms, conditions, limitations or restrictions imposed on each class of licence shall be as set out in the by-laws.

[17] Finally, s. 62(0.1) 4 of the *Law Society Act* gives the LSO broad authority to make by-laws governing the classes of licences that may be issued, including the scope of activities authorized under each class of licence:

62(0.1) Convocation may make by-laws,

4. prescribing the classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence;

[18] Pursuant to its authority under s. 62(0.1) 4 of the *Law Society Act*, the LSO enacted By-Law 4, in 2007. That provision is at the heart of this legal dispute

[19] Paralegals hold a Class P1 licence. Section 6(2) of By-Law 4 prescribes the scope of practice for paralegals:

Activities authorized

(2) Subject to any terms, conditions, limitations or restrictions imposed on the class of licence or on the licensee and subject to any order made under the Act, a licensee who holds a Class P1 licence is authorized to do any of the following:

1. Give a party advice on his, her or its legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.

2. Represent a party before,

i. in the case of a proceeding in the Small Claims Court, before the Small Claims Court,

ii. in the case of a proceeding under the Provincial Offences Act, before the Ontario Court of Justice,

iii. in the case of a proceeding under the Criminal Code, before a summary conviction court.

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iv. in the case of a proceeding before a tribunal established under an Act of the Legislature of Ontario or under an Act of Parliament, before the tribunal, and

v. in the case of a proceeding before a person dealing with a claim or a matter related to a claim, before the person.

3. Anything mentioned in subsection 1 (7) of the Act, provided the activity is required by the rules of procedure governing a proceeding.

4. Select, draft, complete or revise, or assist in the selection, drafting, completion or revision of, a document for use in a proceeding.

5. Negotiate a party's legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.

6. Select, draft, complete or revise, or assist in the selection, drafting, completion or revision of, a document that affects a party's legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.

[20] By-Law 4 defines "proceeding" as a "proceeding or intended proceeding" before certain bodies, including "a tribunal established under an Act of the Legislature of Ontario or under an Act of Parliament".

[21] If a legal service does not fall within a paralegal's scope of practice under By-Law 4, it is proscribed by s. 26.1(1) of the *Law Society Act*.

[22] While not raised in his factum or Notice of Application, the Applicant argued in oral argument that By-Law 4 was not authorized by the *Law Society Act*. Given the broad authority granted by s. 62(0.1) 4 of the *Law Society Act* to prescribe "the classes of licence that may be issued [and] the scope of activities authorized under each class of licence", this position is without merit.

Immigration and Refugee Protection Act

[23] Two sections of the *IRPA* are directly relevant to the legal issues raised in this case. The first is s. 167(1), which provides:

Right to counsel

167(1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

[24] The "Board" referred to in s. 167(1) is the IRB, which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division.

[25] Section 167(1) is very similar to the statutory provision – s. 69(1) of what was formerly the *Immigration Act*, R.S.C. 1985, c. 1-2 – considered by the Supreme Court of Canada in *Law Society of British Columbia v. Mangat*, 2001 S.C. 47. Statutory amendments to the legislation in 2011 made significant changes to the statutory regime, and I will return to the significance of those amendments when I consider the *Mangat* case and its impact on the present statutory regime.

[26] The second relevant section is s. 91(1) and (2) of the *IRPA*. It provides:

91 (1) Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration — or offer to do so — in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

Persons who may represent or advise

(2) A person does not contravene subsection (1) if they are

(200) (a) a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the *Chambre des notaires du Québec*;

(b) any other member in good standing of a law society of a province or the *Chambre des notaires du Québec*, including a paralegal; or

(c) a member in good standing of the College, as defined in section 2 of the *College of Immigration and Citizenship Consultants Act*.

[27] Sections 9(1) and (2) were first enacted by Parliament in 2011.

Issues

[28] This Application raises three issues:

- (1) Does LSO By-Law 4 permit paralegals to draft immigration documents or provide other immigration legal services that are not related to an IRB hearing?
- (2) Does By-Law 4 conflict with s. 4 (2) of the *IRPA*, such that it is constitutionally inoperative to paralegals licensed by the LSO?
- (3) Does the LSO's restriction on the Applicant's scope of practice infringe his rights under *Charter* s. 7?

Court's Jurisdiction

[29] In the ordinary course, this issue (the proper interpretation of By-Law 4) would come to the Divisional Court as an appeal under s. 49.38 (b) of the *Law Society Act* from a discipline proceeding against a paralegal who did not comply with the LSO's interpretation of By-Law 4.

[30] In the present case, the parties have agreed that the matter can proceed to the Divisional Court, even though Mr. Caruso was not subject to a discipline proceeding.

[31] The enactment of By-Law 4 by the LSO was clearly an "exercise...of a statutory power", within the meaning of s. 2(1) 7 of the *Judicial Review Procedure Act*, *LSO* (1990, c. 3) (*JRP*), and the remedy sought by the Applicant is a declaration in relation to that exercise of a statutory power, bringing the relief requested within the jurisdiction of the Divisional Court under ss. 2(1) and 6(1) of the *JRP*.

[32] While there may be some circumstances where it would be preferable to wait for an appeal from a Law Society Tribunal discipline hearing before the Divisional Court weighs in on the merits of the declarations sought, I am satisfied that this is not such a case. Firstly, the Law Society's interpretation of By-Law 4 has been made abundantly clear to its members. Second, that interpretation has already been accepted by the Law Society Tribunal in other discipline cases: *Law Society of Upper Canada v. Ghanehirazi*, 2017 ONI ST 20, at paras. 7 and 12; *Law Society of Ontario v. Belovari*, 2023 ONI ST 32, at paras. 41 and 43. In those circumstances, it is neither necessary nor appropriate to require Mr. Caruso to violate the clear direction of the Law Society and invite disciplinary proceedings before permitting him to seek the declarations sought in this case.

Issues

(1) Does LSO By-Law 4 permit paralegals to draft immigration documents or provide other immigration legal services that are not related to an IRB hearing?

[33] The LSO has formally taken the position that, pursuant to By-Law 4: "Drafting of documents or other legal services practices that are not related to an IRB hearing remain outside of a paralegal's scope of practice".

[34] This interpretation has been set out on the LSO's FAQ webpage, which currently states:

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As noted above, By-Law 4 authorizes paralegals to represent persons in certain "proceedings" and to engage in specific activities related to such "proceedings". A "proceeding" includes a proceeding before administrative tribunals established under an Act of the Legislature of Ontario or under an Act of Parliament. The only such tribunal that adjudicates proceedings in the immigration context is the Immigration and Refugee Board (IRB).

This means that in the immigration context, a paralegal licence only authorizes a licensee to provide legal services in connection with a proceeding before the IRB. A paralegal licence does not authorize paralegals to provide other legal services in the immigration context, such as preparing or providing legal advice in relation to applications to Immigration, Refugees and Citizenship Canada (IRCC). An application to IRCC is not a "proceeding" within the meaning of s. 6 of By-Law 4. As such, the only persons who are authorized to provide legal services in Ontario in connection with applications to IRCC are duly licensed lawyers and immigration consultants licensed by the College of Immigration and Citizenship Consultants (CICC). If a paralegal wishes to provide such services, they must separately seek to be licensed as an immigration consultant by the CICC.

Prior to 2011, the Federal Immigration and Refugee Protection Act (IRPA) and its regulations prohibited paralegals from providing any legal services in the immigration context for a fee, including in connection with proceedings before the IRB, unless they were separately licensed as immigration consultants by the CICC. In 2010, Law Society representatives appeared before a Parliamentary committee during its study of Bill C-35, draft legislation which included amendments to the IRPA relating to the licensing of immigration consultants. The Law Society requested that paralegals be included in the list of persons authorized to provide legal services in certain immigration matters. In response, Parliament amended Bill C-35 to include what is now s. 91(2)(b) of the IRPA, which provides that legal services in immigration matters may be provided by a "member in good standing of a law society of a province [...], including a paralegal". The purpose of this amendment was to bring the IRPA in line with the permitted scope of practice in By-Law 4 by permitting paralegals to appear before the IRB. This amendment was not intended to broaden the scope of practice for paralegals in immigration matters beyond what is permitted in By-Law 4.

[35] This statement is the position of the LSO with respect to the proper interpretation of By-Law 4.

[36] The LSO argues that its position as stated on its FAQ webpage qualifies as a "policy" adopted pursuant to s. 4.1 of the *Law Society Act*, which provides:

4.1 It is a function of the Society to ensure that,

- (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

[37] The Applicant appears to accept that the LSO's interpretation of By-Law 4 is a policy but argues that the LSO is "acting *ultra vires* of its legislative authority by enforcing a scope of paralegal practice that has not been passed in a by-law".

[38] The Applicant's position in this regard misunderstands the term "*ultra vires*". The LSO's policy is simply its interpretation of By-Law 4. It does not purport to amend or expand By-Law 4, only to provide additional guidance to paralegals regarding the application of the By-Law to specific circumstances.

[39] The question for the court is whether the LSO's interpretation of By-Law 4, as set out on the LSO's FAQ webpage, is reasonable or correct, depending on the standard of review.

[40] That said, as noted above, the LSO's interpretation of By-Law 4 has been accepted as the correct interpretation by the Law Society Tribunal in discipline proceedings against paralegals: *Chaveshirazi*, at paras. 7 and 12; *Belovari*, at paras. 41 and 43. I note that in those cases there did not appear to be any dispute that the conduct of the paralegals was beyond the scope of their licence and in contravention of By-Law 4.

Standard of Review

[41] The Applicant did not directly address the standard of review in its factum, but indicated in oral argument that it takes the position that the standard of review is correctness.

[42] The LSO takes the position that the standard of review is reasonableness.

[43] In support of its position, the LSO relies on the Supreme Court of Canada's decision in *Green v Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 560, where the Supreme Court held, at paras. 20 to 25:

In my view, the standard applicable to the review of a law society rule is reasonableness. A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]"...

...
In the case at bar, the legislature specifically gave the Law Society a broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest. The Act empowers the benchers of the Law Society to make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity.

The Law Society acted pursuant to its home statute in making the impugned rules, and in such a case there is a presumption that the appropriate standard is reasonableness... The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute...

Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level" ... This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions... [Citations omitted.]

[44] The *Green* case dealt with the validity of a Rule of the Law Society of Manitoba. In the present case, the issue at hand is not the validity of By-Law 4 (I have already addressed that at para. 22, above), but the interpretation of the By-Law.

[45] This case arrived at this Court as a judicial review, rather than as an appeal from the Law Society Tribunal. We are not being asked to review the factual findings of any tribunal or consider any of the Applicant's past conduct. This case raises only a question of law.

[46] In *Canada (Minister of Citizenship and Immigration) v. Pavlou*, 2019 SCC 65, [2019] 4 SCR 653, the Court confirmed, at para. 58, that general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard.

[47] In my view, it matters not whether the standard of review in this case is correctness or reasonableness. The LSO's interpretation of By-Law 4 meets either standard.

Interpretation of By-Law 4

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[48] The Applicant argues that there is nothing in By-Law 4 that explicitly prohibits him from filing immigration applications, or that confines his scope of practice to matters before the IRB. He argues that the terms "proceeding" and "tribunal" in the By-Law are broad enough to include not only proceedings before the IRB, but also other legal services in the immigration context, such as preparing or providing legal advice in relation to applications to Immigration, Refugees and Citizenship Canada (IRCC).

[49] The Applicant argues that neither the *Law Society Act* nor the LSO By-Laws define the term "proceeding", other than to indicate that a proceeding also includes an "intended proceeding". As such, there is no reason why the term "proceeding" cannot be interpreted as "including a written application to an IRCC officer as a procedural means of seeking immigration privileges in Canada". He argues that any ambiguity in the By-Law should be interpreted against the LSO, which drafted the By-Law.

[50] The Applicant relies on the definitions of "tribunal" and "statutory power of decision" in s. 1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. 5, 22 (SPPA), which provide:

"tribunal" means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute;

"statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing:

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not;

[51] The Applicant argues that an immigration application is a document submitted to a person (such as the Minister of Citizenship and Immigration or an officer appointed by the Minister) upon whom a statutory power of decision has been conferred by the IRCA. That person has the authority to decide or prescribe legal rights and privileges, and therefore fits within the definitions of "tribunal". As such, it is the Applicant's position that immigration applications fit squarely into the definition of "proceeding before a tribunal" in By-Law 4.

[52] The LSO argues that an application to IRCC is not a "proceeding" within the meaning of s. 6 of By-Law 4. Some applications are made directly to the Minister, such as applications for relief on humanitarian and compassionate grounds (s. 25) and applications for exemption from certain statutory grounds of inadmissibility (s. 42.1). Other applications (such as applications for permanent residence and other visas) are made directly to an "officer" (s. 11). An "officer" is a person designated by the Minister under s. 6(1). The Minister may delegate the exercise of certain of the Minister's authorities to such officers under s. 6(2). For example, the officers designated to process applications for permanent residence and other visas are typically front-line case workers employed by the IRCC. Similarly, the Minister delegates authority to IRCC case workers to determine applications for relief on humanitarian and compassionate grounds. These decision makers are not "tribunals" in the sense of an adjudicative body, but rather government departments acting to implement authority delegated to the Minister.

[53] In my view, the LSO's interpretation of By-Law 4 is a reasonable and correct interpretation.

[54] I reach this conclusion for the following reasons:

[55] First, s. 1(5) – (7) of the *Law Society Act* (quoted above at para. 14) define "provides legal services" and sets out the scope of prohibitions against the unauthorized provision of legal services in s. 26.1 of the *Act*. The word "proceeding" appears in ss. 1(6) 2(viii) and 3:

1(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

2. Selects/drafts, completes or revises, on behalf of a person,

vii. a document for use in a proceeding before an adjudicative body.

3. Represents a person in a proceeding before an adjudicative body [Emphasis added.]

[56] Both references to "proceeding" in the *Act* relate to proceedings before an adjudicative body.

[57] The word "proceeding" in By-Law 4 should be given the same interpretation as the word "proceeding" in the enabling legislation. "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation": *R. v. Zeakowski*, 1989 CanLII 77 (S.C.C.), [1989] 1 S.C.R. 1378, at para. 9; Ruth Sullivan, *The Construction of Statutes*, 7th ed (Lexis Nexis Canada Inc., 2022) at § 8.04.

[58] I agree with the LSO that an application to the Minister or to IRCC officers or case workers is not a "proceeding" within the meaning of s. 6 of By-Law 4. Filing a written application to a government department does not begin the hearing process. While the Minister and officers under the *IRPA* may review applications and make initial decisions regarding a person's immigration or refugee status, they are not "adjudicative bodies" as that term is generally understood in the legal profession.

[59] In contrast, the various divisions of the IRB (the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division) clearly fall within the term "adjudicative bodies".

[60] This interpretation is supported by the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, which dealt with the content and duty of procedural fairness placed on immigration officers under the former *Immigration Act*, R.S.C., 1985, c. 1-2. The Court found that while a duty of procedural fairness applies to a decision of an immigration officer, the process was still an administrative process rather than an adjudicative process, and that no oral hearing was required.

[61] By-Law 4 must be interpreted in accordance with the modern rule of statutory interpretation, which requires that the words of an Act "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Mangat* at para. 6; *Mason v. Mason*, 2016 ONCA 775, 132 O.R. (3d) 641, at para. 29 and cases cited therein.

[62] In my view, the suggestion that an immigration officer who reviews written applications is a "tribunal" or an "adjudicative body" is not consistent with the ordinary sense in which those words are used, nor with the schemes of the *IRPA* or *Law Society Act*.

[63] Second, the meaning of a "tribunal established under an Act of Parliament" in s. 6(2) 1 (iv) of By-Law 4 is clarified by a consideration of the other bodies before which paralegals are authorized to appear under s. 6 of By-Law 4. Most of those bodies are courts (Small Claims Court, Provincial Offences Act court, and summary convictions court). This indicates that "tribunal" in this context is intended to refer to a quasi-judicial adjudicative body.

History of By-Law 4

[64] Finally, the LSO's interpretation is supported by the history and purpose of By-Law 4.

[65] In 2007, Ontario became the first province or territory to license paralegals. This new regulatory framework was enacted through amendments to the *Law Society Act* introduced in the *Access to Justice Act, 2006*, S.O. 2006, c. 1, Schedule C. Schedule C was entitled: *Amendments to the Law Society Act and Related Amendments to Other Acts*. This Act was the framework legislation that gave the LSO authority to regulate paralegals and determine their scope of practice.

[66] Prior to these amendments, paralegals were not licensed, and were prohibited from acting as barristers and solicitors under s. 50(1) (a) of the *Law Society Act* and its various predecessors.

[67] The content of this prohibition was developed through case law, which held that the prohibition applied, among other things, to providing legal advice, drafting documents intended to have legal effect, or generally to assisting clients on matters affecting their legal position. This included acting in real estate transactions, preparing forms for divorce proceedings, advising parties to a dispute, and the preparation of government forms, such as the incorporation of companies: *Law Society of Upper Canada v. Stoungi*, 2001 FC 755 (ON CA), at para. 9.

[68] At the time of the 2006 amendments, there were several contexts in which non-lawyers could appear as “agents” in lower courts and tribunals.

[69] The history and scope of non-lawyer agency work before tribunals and in provincial offences proceedings in lower courts was extensively reviewed by the Ontario Court of Appeal in *Regina v. Lawrie and Points Ltd.*, 1987 CanLII 4172 (ON CA). In that case, the Court of Appeal confirmed that a non-lawyer could represent persons charged with traffic offences under the *Highway Traffic Act*, R.S.O. 1980, c. 198 by virtue of s. 51(1) of the *Provincial Offences Act*, R.S.O. 1980, c. 400, which provided that a defendant charged with a provincial offence “may appear and act personally or by counsel or agent”.

[70] One of the “related amendments” in the *Access to Justice Act, 2006* was s. 131, which amended the *Provincial Offences Act* to align with the amendments to the *Law Society Act*. Section 82 of the *Provincial Offences Act* now provides: “A defendant may act by representative”, and s. 1 defines a “representative” as:

“Representative” means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding.

[71] Similarly, prior to 2006, s. 10 of the *SPPA* provided that “[a] party to a proceeding may be represented by counsel or an agent”. A “proceeding” under the *SPPA* meant (and still means) a proceeding before a tribunal where the tribunal is required to hold a hearing before making a decision (*SPPA* s. 3). This provision permitted non-lawyers to represent parties in hearings before administrative tribunals.

[72] Section 10 of the *SPPA* was amended by the *Access to Justice Act, 2006*, s. 134 (3) to align with the amendments to the *Law Society Act*. The amended provision provided that “[a] party to a proceeding may be represented by a representative” with the word “representative” defined as:

“representative” means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding.

[73] Pursuant to the *Access to Justice Act, 2006*, a number of similar amendments were made to repeal various statutory provisions that had previously permitted non-lawyer “agents” to appear in lower court and tribunal proceedings. In their place, “a person authorized under the *Law Society Act*” was permitted to represent a party in a “proceeding” before various adjudicative bodies, including Small Claims Court, Coroner’s Inquest, Health Services Appeal and Review Board, provincial judge or justice of the peace, Animal Care Review Board, Ontario Land Tribunal, Pay Equity Hearings Tribunal and the Ontario Rental Housing Tribunal: see sections 102(2), 103(3), 104(1), 105(1), 106(1), 109, 110, 112, 113, 118(1), 119, 121, 122(2), 124, 125(1) and (3), 126(2), 127(1), 129(1), 130(3), 131, 132, 133, 134(2), 136(1) and 137(1).

[74] What is significant about these various amendments is that the word “proceeding”, when used, always referred to a proceeding before a tribunal or lower court. Since this is what was meant by the word “proceeding” in the *Law Society Act* and the *Access to Justice Act, 2006*, this same interpretation should be applied to By-Law 4, which was enacted by the LSO in 2007 to operationalize the “*Amendments to the Law Society Act and Related Amendments to Other Acts*” found in Schedule C of the *Access to Justice Act, 2006*.

[75] Moreover, the Supreme Court of Canada’s 2001 decision in *Mangat* did not permit non-lawyers to prepare immigration application forms. The Court was clear that its decision permitted non-lawyers to only represent persons in hearings before the IRB (and to prepare documents for use at such hearings). The Court stated, at para. 74:

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As this case dealt with hearings before the Adjudication and Refugee Divisions only, I would hold that the *Legal Profession Act*'s prohibition on non-lawyers from collecting a fee to act as representatives and to provide services in that regard is imperative to that extent. The provision of services means document preparation and advice on matters relevant to the individual's case.

[76] In 2004, the LSO established the Task Force on Paralegal Regulation. Following extensive consultations, the Task Force reported to Convocation on September 23, 2004. The Task Force recommended that the paralegal scope of practice should be based on existing practice, i.e., it should be limited to advocacy work and exclude solicitors' work, stating, at paras. 73, 76 and 84:

The Task Force is of the view that existing areas of practice as defined in legislation and case law represent the appropriate scope of practice for paralegals and that only persons providing services in areas currently authorized should be regulated.

...

The Task Force is of the view that the case for expanding the scope of paralegal practice to include solicitors' work has not been made out, that to do so would not enhance access to justice, and would be contrary to the public interest.

...

While many submissions advocated changes in the law on the permissible scope of practice in both directions, the Task Force does not recommend any changes at this time. In the view of the Task Force such changes complicate the model and would significantly delay, and perhaps prevent, the implementation of any regulatory model.

[77] The Task Force recommended, at para. 85:

It is recommended that the scope of practice for paralegals be the currently permitted areas of practice, as set out in legislation and case law. This would include the following:

- a. Small Claims Court: all matters in Small Claims Court, including being recognized by the Court for the purposes of costs.
- b. The Ontario Court of Justice: all matters under the *Provincial Offences Act*.
- c. Tribunals: all matters before provincial boards, agencies and tribunals that allow for appearances by agents.
- d. Ontario Court of Justice: appeals under the *Provincial Offences Act*.

Currently, s. 109 of the *Provincial Offences Act* authorizes agents to appear on appeals.

[78] A draft of By-Law 4 was tabled before Convocation in March 2007. One of the drafters, who had been a member of the Task Force, specifically stated that the by-law was intended to implement the recommendations of the Final Report of the 2004 Task Force:

Mr. Dray: Now, let me just take you through the background here. In this licensing by-law that we've set out, it basically adheres to the draft report of 2004 and when Bill 14 was passed, it required the changing of several by-laws and this is one that had to be changed.

...

I think some of the main areas if we go through is what is included in what we are licensed to do and that I think is in keeping with the 2004 report to Convocation. But just to go through that particular area, it has not really changed from 2004. It will be Provincial

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Offences Court, Small Claims Court, all tribunals, appeals at Ontario Court of Justice and that will be from provincial offences and the one thing that is in here that I do want to point out is that the PI license will allow paralegals to appear on summary matters in criminal court.

Law Society of Upper Canada Convocation, *Transcript of Proceedings*, March 29, 2007, pp. 186, 188.

[79] Convocation adopted By-Law 4 with an effective dated of May 1, 2007.

Conclusion

[80] Based on the foregoing analysis, I conclude that the LSO's interpretation of By-Law 4, as summarized on the LSO FAQ webpage, is a reasonable and correct interpretation of the By-Law, and that By-Law 4 does not permit paralegals to draft immigration documents or provide other immigration legal services that are not related to an IRB hearing. As these activities are not within the scope of practice permitted to paralegals, they are proscribed by s. 26.1(1) of the *Law Society Act*.

(2) Does By-Law 4 conflict with s. 91(2) of the IRPA, such that it is constitutionally inoperative to paralegals licensed by the LSO?

[81] The Applicant argues that if By-Law 4 does not permit paralegals to draft immigration documents or provide other immigration legal services that are not related to an IRB hearing, it conflicts with s. 91(2) (b) of the *IRPA*, which expressly authorizes "any other member in good standing of a law society of a province.... including a paralegal" to provide such services, and By-Law 4 is therefore inoperative under the federal paramountcy doctrine.

[82] In order to consider this second issue, we must start with the decision of the Supreme Court of Canada in *Mangat*.

[83] *Mangat* dealt with ss. 30 and 69(1) of the former *Immigration Act*, which authorized non-lawyers to appear at hearings before the IRB. The Supreme Court held that s. 26 of the British Columbia *Legal Professions Act*, S.B.C. 1998, c. 9, s. 15, which prohibited non-lawyers from engaging in the practice of law, was constitutionally inoperative because compliance with the provincial legislation was impossible without frustrating Parliament's purpose.

[84] The Applicant argues that the decision in *Mangat* is determinative of the result in this case; that precisely the same conflict arises in this case, with the same result.

[85] Sections 30 and 69(1) of the former *Immigration Act* provided:

30. Every person with respect to whom an inquiry [by an adjudicator] is to be held shall be informed of the person's right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense.

69. (1) In any proceedings before the Refugee Division, the Minister may be represented at the proceedings by counsel or an agent and the person who is the subject of the proceedings may, at that person's own expense, be represented by a barrister or solicitor or other counsel.

[86] The central issues raised in *Mangat* were whether ss. 30 and 69(1) of the *Immigration Act* were *intra vires* the federal Parliament, and whether a provision of the provincial *Legal Profession Act*, which prohibits a person, other than a member of the Law Society in good standing or a person listed in the exceptions, to engage in the practice of law is constitutionally inoperative or inapplicable to persons acting under ss. 30 and 69(1) of the *Immigration Act* and its associated Rules and Regulations.

[87] The Supreme Court concluded, at para. 23, that the subject matter of the impugned provisions,

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[Falls within both the provincial jurisdiction over civil rights in the province under s. 92(13) of the *Constitution Act, 1867* and the federal jurisdiction over aliens and naturalization under s. 91(25) of the *Constitution Act, 1867*. Statutes of the two levels of government regulating this subject matter will therefore coexist insofar as they do not conflict. Where there is a conflict, the federal legislation will prevail according to the paramountcy doctrine. In this case, there is a conflict between both statutes. The Immigration Act authorizes non-lawyers to appear for a fee, whereas the Legal Profession Act prohibits them from doing so. Dual compliance to both statutes is impossible without frustrating Parliament's purpose. The Immigration Act must therefore prevail over the Legal Profession Act.

[38] It is not necessary to fully review the Court's federalism analysis in *Mangat*. The parties in the present case do not dispute the application of the double aspect doctrine to the federal and provincial statutes at play in this case, only the application of the paramountcy doctrine to those statutes. I note only the Court's conclusion at para. 47, which applies to the statutory provisions at issue in this case:

The subject matter of the representation of aliens by counsel before the IRB has federal and provincial aspects. Parliament and the provincial legislatures can both legislate pursuant to their respective jurisdiction and respective purpose. The federal and provincial statutes and rules or regulations in this regard will coexist insofar as there is no conflict.

[39] In considering the federal paramountcy doctrine, the Court in *Mangat* began by interpreting the term "other counsel" in ss. 30 and 69(1) of the *Immigration Act*. The Court held, at para. 55, that the term "other counsel" must mean non-lawyers".

[90] Significantly, the term "other counsel" did not mean "paralegals", since, at the time, paralegals were neither licensed nor regulated by any regulatory body. The Court stated, at para. 56: "[T]here is nothing in those provisions which requires other counsel, whether they act for a fee or not, to be licensed". As such, the provision did not incorporate a licensing requirement for "other counsel".

[91] The Court then moved to the question of whether there is an operational conflict between the federal and provincial legislation. The Court concluded, at para. 72, that there was such a conflict because the provincial law conflicted with the purpose of the federal law:

In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm and Bank of Montreal*, *supra*, dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the Immigration Act. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts.

[92] The Court therefore concluded, at para. 74, that the *Legal Profession Act* was inoperative to the extent that it prohibited non-lawyers from collecting a fee to act as representative and to provide services in hearings before the IRB.

[93] Also helpful in this analysis is the Supreme Court's discussion of the two branches of the federal paramountcy doctrine in the later case of *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2013 SCC 39, [2010] 2 S.C.R. 536, at para. 63:

Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, 1982 CanLJ 25 (SCC), [1982] 2 S.C.R. 161, at p. 191, per Dickson J. In *Bank of Montreal v. Hall*, 1990 CanLJ 157 (SCC), [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of British Columbia v. Mangat*, 2001 SCC 6, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada*, at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans*, at para. 14.

[94] The Court clearly states that *Mangat* falls into the second branch of paramountcy cases in which dual compliance is possible, but the provincial law is incompatible with the purpose of the federal legislation.

[95] In addressing the "incompatible purpose" branch of paramountcy cases, the Court stated, at para. 68, that "invocation of federal paramountcy on the basis of frustration of purpose, as opposed to operational conflict, requires clear proof of purpose; mere permissive federal legislation does not suffice".

[96] The Court explained this, with specific reference to its decision in *Mangat*, at paras. 69 and 70.

The distinction between a federal purpose sufficient to attract the doctrine of federal paramountcy on the one hand, and absence of specific purpose on the other, is illustrated by a comparison of this Court's decisions in *Spraytech* and *Mangat*. In *Spraytech*, the federal pesticide legislation was permissive, allowing the manufacture and use of the pesticides. In this sense, the federal scheme resembled the *Aeronautics Act*, which permits the construction of aerodromes wherever their construction is not expressly restricted. The impugned municipal by-law prevented the use of pesticides that would have been permitted under the federal scheme. L'Heureux-Dubé J. held that the second branch of the doctrine of federal paramountcy was not engaged:

Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". [para. 35]

In *Mangat*, by contrast, federal legislation provided for "other counsel", who were not members of a provincial bar, to appear before the *Immigration and Refugee Board* ("IRB") for a fee. However, the provincial statute required agents appearing before the IRB to be members of a provincial bar association or else refrain from charging a fee. Though it was possible to comply with both the federal and provincial enactments (non-lawyers could appear without charging a fee), Gonthier J. concluded that the provincial law undermined the purpose of the federal legislation (para. 72). Parliament had specifically provided that non-lawyers could appear before the IRB. This express purpose prevailed over the Province's conflicting legislation.

[97] The point here is that, in *Mangat*, the Court found that Parliament's purpose was to permit unregulated "other counsel" to represent persons before the IRB. Provincial regulation of "other counsel" was found to be inconsistent with that purpose. As the Court stated, at para. 72 of *Mangat*: "To require "other counsel" to be a member in good standing of the bar of the province ... would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*."

[98] In the present case we are no longer dealing with ss. 30 and 69(1) of the former *Immigration Act*.

[99] While the former s. 69(1) is very similar to the current s. 167(1) of the *IRPA*, s. 167(1) must be read in conjunction with s. 91(1) and (2), which was first enacted by Parliament in 2011 and requires that the provider of such services in Ontario be a member in good standing of the provincial law society or the College of Immigration and Citizenship Consultants: *Law Society of Ontario v. Leahy*, 2018 ONSC 4722, at para. 23.

[100] If it had previously been Parliament's intention to permit unregulated "other counsel" to represent persons before the IRB under the *Immigration Act*, that purpose was abandoned by the amendment to the *IRPA* in 2011, which restricted such representation to four categories of licensed persons: lawyers, notaries (in Quebec), immigration consultants and paralegals.

[101] Some legislative history will be helpful to put the 2011 amendment into context.

[102] Section 114(1)(v) of the version of the *Immigration Act* considered by the Supreme Court in *Mangat* gave the Governor in Council the authority to enact regulations:

(v) requiring any person, other than a person who is a member of the bar of any province, to make an application for and obtain a licence from such authority as is prescribed before the person may appear before an adjudicator, the Refugee Division or the Appeal Division as counsel for any fee, reward or other form of remuneration whatever;

[103] At the time *Mangat* was decided, no such regulations had been enacted. The Court held that this provision confirmed Parliament's intention that any such regulation would come, if at all, from the federal government. The Court stated, at para. 67:

As I mentioned above, there is no obligation for Parliament to regulate the "other counsel", even though it may be wise and advisable to do so. The enactment of ss. 30 and 69(1) and of s. 114(1)(v) illustrates Parliament's intention to address the subject of who may appear before the IRB. Aside from the situations where Parliament refers to provincial legislation (as it does for barristers and solicitors), the federal government has defined "other counsel" as being "a person", and the provinces cannot intervene in that sphere. Moreover, by the enactment of s. 114, Parliament has demonstrated its intent to regulate such counsel if and when needed. It has not yet done so, but that does not mean that the provinces can enact conflicting legislation in the meantime. However, to the extent that Parliament refers to the provincial statutes and regulations or leaves the matter unaddressed, the provinces can regulate that matter in accordance with their own powers.

[104] When the *IRPA* was enacted in 2004, s. 114(1)(v) of the former *Immigration Act* was replaced by s. 91 of the *IRPA*, which provided:

91. The regulations may govern who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.

[105] Pursuant to this regulation making authority, in 2004, the Governor in Council adopted Regulation SOR/2004-59 that prohibited any person other than an "authorized representative" to "for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, and officer or a Board."

[106] An "authorized representative" was defined as:

A member in good standing of a bar of a province, the *Chambre des notaires du Québec* or the Canadian Society of Immigration Consultants...

[107] The Canadian Society of Immigration Consultants is an independent body established by the federal government in 2003 to regulate non-lawyer immigration consultants.

[108] Thus, between 2004 and 2011, only licensed lawyers, Quebec notaries and immigration consultants could represent persons in proceedings before the IRB. (Recall that there was no such thing as a licensed paralegal anywhere in Canada prior to 2007).

[109] In 2011, s. 91 was amended to its present version. This amendment moved the prohibition against the unauthorized provision of immigration services from the regulation to the body of the IRPA.

[110] As the parties both point out, the original version of the draft legislation (Bill C-35) did not include paralegals, but the Bill was amended – at the request of the LSO – to include paralegals licensed by a provincial law society.

[111] In my view, the purpose of s. 91 can be discerned by comparing s. 91 to the statutory regime that existed when *Mangat* was decided by the Supreme Court.

[112] As indicated above, the Court in *Mangat* found that Parliament's purpose was to permit unregulated "other counsel" to represent persons before the IRB. Parliament reserved for itself the authority to regulate such other counsel "if and when needed". In the absence of such federal regulation, provincial regulation of "other counsel" was found to be inconsistent with that purpose. "To require 'other counsel' to be a member in good standing of the bar of the province ... would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*."

[113] Section 91 now demonstrates a decidedly different legislative purpose. The purpose of s. 91 is to restrict the provision of immigration services to only regulated "other counsel". These "other counsel" are regulated by three regulatory bodies identified in s. 91: the provincial law society, the *Chambre des notaires du Québec*, and the *College of Immigration and Citizenship Consultants*. Requiring "other counsel" to be members in good standing is no longer contrary to Parliament's purpose; it is Parliament's purpose.

[114] The text of s. 91(2) refers to a paralegal who is a "member in good standing of a law society of a province". By limiting s. 91(2) to paralegals "in good standing", Parliament demonstrated its intention that such paralegals would be regulated by the provincial law societies and comply with their regulatory requirements.

[115] This is made abundantly clear at para. 67 of *Mangat*, where the Court stated:

However, to the extent that Parliament refers to the provincial statutes and regulations ..., the provinces can regulate that matter in accordance with their own powers.

[116] Where Parliament's purpose is to restrict the provision of legal services to persons regulated by the provincial law society, regulation by the provincial law society is not incompatible with Parliament's purpose. Indeed, regulation by the provincial law society is exactly what Parliament intended. These regulations may include matters such as educational requirements, professional competence, codes of conduct and scope of practice restrictions.

Conclusion

[117] Based on the foregoing, I conclude that LSO By-Law 4 does not conflict with the purpose of s. 91(2) of the IRPA, and the doctrine of federal paramountcy has no application.

(3) Does the LSO's restriction on the Applicant's scope of practice infringe his rights under *Charter* s. 7?

[118] *Charter* s. 7 provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[119] The Applicant argues that the principles of fundamental justice require that paralegals be allowed to practice the full scope of immigration law. He argues that "vulnerable and marginalized people" are being

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denied access to justice because the LSO has eliminated "an affordable option for representation on the full gamut of immigration applications".

[120] The Applicant relies on no legal authority for his position, nor does he set out any facts in his affidavit to support his s. 7 claim.

[121] *Charter* s. 7 involves a two-step process. First, it must be determined whether there has been a deprivation of the right to life, liberty or security of the person. Secondly, the person seeking to establish the violation must establish that the deprivation of the right is not "in accordance with the principles of fundamental justice". The onus is on the applicant to prove both the deprivation and the breach of fundamental justice: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2001 SCC 4, [2004] 1 S.C.R. 76, at para. 5; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLJ 48655 (ON CA), at para. 45.

[122] The Applicant's submissions do not explain how he has been deprived of the right to life, liberty or security of the person. He appears to suggest that any limit on his scope of practice as a paralegal is a limit on his liberty.

[123] This suggestion is inconsistent with the Court of Appeal's decision in *Mussani*, at paras. 41 and 43, which held that the *Charter* does not protect the right to practice a profession.

[124] Nor has the Applicant established that By-Law 4 is inconsistent with any principle of fundamental justice.

[125] In *Canadian Foundation for Children*, the Supreme Court of Canada summarized the three criteria that must be met to qualify as a principle of fundamental justice, at para. 8.

Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria... First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters". Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice" ... The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws. [Citations omitted.]

[126] The Applicant's factum does not identify any principle of fundamental justice.

[127] In oral argument, the Applicant took the position that By-Law 4 was void for vagueness.

[128] Vagueness is a principle of fundamental justice. As the Court of Appeal stated in *Cochrane v. Ontario (Attorney General)*, 2008 ONCA 718, 92 O.R. (2d) 321, at para. 27:

Vagueness describes a lack of precision in legislation that leaves its meaning and application unacceptably uncertain. Legislation should provide fair notice to citizens as to what conduct is prohibited, appropriate limits on the discretion of law enforcement officials and a proper basis for coherent judicial interpretation. A law that implicates the s. 7 right to life, liberty and security of the person will be struck down as being inconsistent with the principles of fundamental justice if it is not sufficiently intelligible to meet these objectives.

[129] In *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLJ 72 (SCC), [1992] 2 S.C.R. 606, the Supreme Court of Canada held, at para. 42, "the threshold for finding a law vague is relatively high", and

recognized that vagueness requires unintelligibility, not simply uncertainty. A law should not be declared void simply because it requires judicial interpretation in order to determine its application to a particular situation.

[130] In *Ontario v. Canadian Pacific Ltd.*, 1992 CanLII 112 (SCC), [1993] 2 S.C.R. 1031, the Supreme Court stated, at para. 79.

Where a court is faced with a vagueness challenge under s. 7, the focus of the analysis is on the terms of the impugned law. The court must determine whether the law provides the basis for legal debate and coherent judicial interpretation. As I stated above, the first task of the court is to develop the full interpretive context surrounding the law, since vagueness should only be assessed after the court has exhausted its interpretive function. If judicial interpretation is possible, then an impugned law is not vague. A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible. In a situation, such as the instant case, where a court has interpreted a legislative provision, and then has determined that the challenging party's own fact situation falls squarely within the scope of the provision, then that provision is obviously not vague.

[131] In the present case, the legal debate revolved around the word "proceeding" in s. 6(2) of By-Law 4. Two possible interpretations were advanced by the parties, and this Court has found in favour of one. The By-Law clearly provides the basis for legal debate and coherent judicial interpretation. Having "embarked upon the interpretive process", and provided an interpretation of s. 6(2) of By-Law 4, and determined that the Applicant's proposed conduct is not permitted, "that provision is obviously not vague".

Conclusion

[132] The Applicant has failed to demonstrate that the impugned By-Law deprives him of life, liberty or security of the person, or that it is contrary to any principle of fundamental justice. Accordingly, By-Law 4 does not infringe the Applicant's rights under *Charter* s. 7.

Final Conclusion

[133] The Applicant and Intervenor, the Ontario Paralegal Association, advanced several policy arguments in support of the expansion of the scope of practice of paralegals in the immigration field. The Intervenor, the College of Immigration and Citizenship Consultants, made policy arguments in opposition to such expansion.

[134] It is not the role of this Court to determine whether, as a matter of policy, the scope of practice for paralegals should be expanded to include the processing and filing of immigration applications on behalf of clients. The policy issue has been delegated by the Ontario Legislature to the LSO, the body responsible for the regulation of paralegals. The Parliament of Canada has referentially incorporated the LSO's regulatory requirements by requiring paralegals to be "members in good standing" of the provincial law society.

[135] The Application is dismissed.

[136] As agreed by the parties, the LSO as the successful party is entitled to costs in the amount of \$20,000. The Intervenor is not entitled to costs and no costs are ordered against them.

Charney J.

I agree

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Backhouse J.

I agree

D.L. Corbett J.

Date: November 29, 2023

CITATION: Caruso v. The Law Society of Ontario, 2023 ONSC 6744

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Backhouse, Corbett, Charney JJ.

BETWEEN:

ANTONIO CARUSO

Applicant

and –

THE LAW SOCIETY OF ONTARIO

Respondent

- and -

**COLLEGE OF IMMIGRATION AND
CITIZENSHIP CONSULTANTS and
ONTARIO
PARALEGAL ASSOCIATION**

Proposed Intervenor

REASONS FOR JUDGMENT

Date of Release: November 29, 2023

Tab 16

Electronic Commerce Act, 2000, SO 2000, c 17

Current version: In force since May 15, 2020

Link to the latest version : <https://canlii.ca/t/2rx>

Stable link to this version : <https://canlii.ca/t/54bkh>

Citation to this version: Electronic Commerce Act, 2000, SO 2000, c 17, <<https://canlii.ca/t/54bkh>> retrieved on 2024-04-03

Currency: This statute is current to 2019-12-08 according to the [e-Laws](#) site

Electronic Commerce Act, 2000

S.O. 2000 CHAPTER 17

Consolidation Period: From May 15, 2020 to the [e-Laws currency date](#)

Last Amendment: 2019, c. 7, Sched. 48, S. 10

enacts,

Definitions

1 (1) In this Act,

"electronic" includes created, managed, transmitted or stored in digital form or in other intangible form by electronic means or by any other means that has capabilities for creation, recording, transmission or storage similar to those mentioned; "electronically" has a corresponding meaning; ("électronique", "par voie électronique")

"electronic agent" means a computer program or any other electronic means used to manage an act or to respond to electronic communications, in whole or in part, without review by an individual at a time of the response is sent; ("agent électronique")

"electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is so attached to or associated with the document; ("signature électronique")

"public body" means,

(a) any ministry, agency, board, commission or other body of the Government of Ontario,

(b) a municipality or local board, or

(c) an entity that is designated as a public body by a regulation made under [clause 32](#) (c); ("organisme public") 2000, c. 17, s. 1 (1)

Extended meaning of "legal requirement"

(2) In this Act, a reference to a legal requirement includes a reference to a provision of Law

to that requires, among other things, that a thing is not used and a form is not used, a document is not written or an original document is not provided or retained in

any way of which the making, the use or the use of a signature or the provision or retention of an original document leads to a specified punishment or other result; 2000, c. 17, s. 1 (2)

Use, etc., of electronic information or document: not mandatory

- (1) Nothing in this Act requires a person who uses, provides or receives information or a document to use, provide or accept it in electronic form without the person's consent. 2000, c. 17, s. 3(1).

Implied consent

- (2) Consent for the purpose of subsection (1) may be inferred from a person's conduct if there are reasonable grounds to believe that the consent is genuine and is relevant to the information or document. 2000, c. 17, s. 3(2).

Same

- (3) Subsection (2) is subject to section 14 (public bodies). 2000, c. 17, s. 3(3).

Payments

- (4) Notwithstanding subsection (1), it applies to all kinds of information and documents, including payments. 2000, c. 17, s. 3(4).

Prescription for own requirements

Legal recognition of electronic information and documents

- 4 Information or a document to which this Act applies is not invalid or unenforceable by reason only of being in electronic form. 2000, c. 17, s. 4.

Legal requirement that information or document be in writing

- 5 A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference. 2000, c. 17, s. 5.

Legal requirement to provide information or document in writing

- 6 (1) A legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form that is:

- (a) accessible by the other person so as to be usable for subsequent reference; and
- (b) capable of being retained by the other person. 2000, c. 17, s. 6(1).

Additional rules, public bodies

- (2) Subsection (1) is subject to section 16. 2000, c. 17, s. 6(2).

Legal requirement to provide information or document in specified non-electronic form

- 7 (1) A legal requirement that a person provide information or a document in a specified non-electronic form to another person is satisfied by the provision of the information or document in an electronic form that is:

- (a) provided in the same or substantially the same way as the specified non-electronic form;
- (b) accessible by the other person so as to be usable for subsequent reference; and
- (c) capable of being retained by the other person. 2000, c. 17, s. 7(1).

Additional rules, public bodies

- (2) Subsection (1) is subject to section 16. 2000, c. 17, s. 7(2).

Legal requirement for original documents

- 8 (1) A legal requirement that an original document be provided, retained or examined is satisfied by the provision, retention or examination of an electronic document if:

- (a) there exists a mechanism known as to the integrity of the information contained in the electronic document from the time the document is to be provided, retained or examined has first been created in its true form, whether as a written document or as an electronic document; and
- (b) in a case where the original document is to be provided to a person, the information or document that is provided is accessible by the person so as to be usable for subsequent reference and capable of being retained by the person. 2000, c. 17, s. 8(1).

Integrity and reliability

- (2) For the purposes of clause (1) (a),

- (a) the criterion for assessing integrity is whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display;
- (b) whether an assurance is reliable shall be determined in light of all the circumstances, including the purpose for which the document was created. 2000, c. 17, s. 8(2).

Additional rules, public bodies

(3) Subsection (1) is subject to section 16, 2000, c. 17, s. 8 (3).

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(4) Repealed: 2019, c. 7, Sched. 4, s. 10

Whether information or document is capable of being retained

9 For the purposes of sections 6, 7 and 8, electronic information or an electronic document is not capable of being retained if the person providing the information or document prevents or delays anything he, under his jurisdiction, storage by the recipient. 2000, c. 17, s. 9.

Whether information or document is provided

10 (1) For the purposes of sections 6, 7 and 8, electronic information or an electronic document is not provided to a person if it is merely made available for access by the person, for example, on a website. 2000, c. 17, s. 10 (1).

Same

(2) For greater certainty, the following are examples of actions that constitute providing electronic information or an electronic document to a person if section 6, 7 or 8 is otherwise complied with:

1. Sending the electronic information or electronic document to the person by electronic mail;
2. Displaying it to the person in the course of a transaction that is being conducted electronically. 2000, c. 17, s. 10 (2).

Legal requirement that document be signed

11 (1) Subject to subsections (3) and (4), a legal requirement that a document be signed is satisfied by an electronic signature. 2000, c. 17, s. 11 (1).

Endorsement

(2) For greater certainty, subsection (1) also applies to a legal requirement that a document be endorsed. 2000, c. 17, s. 11 (2).

Reliability requirements

(3) If the document is prescribed for the purposes of this subsection or belongs to a class prescribed for those purposes, the legal requirement is satisfied only if both of the following conditions, including any relevant agreement, are met: (a) the electronic signature meets the prescribed requirements, if any, as to its reliability; and (b) the association of the electronic signature with the relevant electronic document is reliable. 2000, c. 17, s. 11 (3).

Other requirements

(4) If the document is prescribed for the purposes of this subsection or belongs to a class prescribed for those purposes, the legal requirement is satisfied only if:

- (a) the electronic signature meets the prescribed requirements, if any, as to its reliability; and
- (b) the electronic signature meets the prescribed information technology standards, if any. 2000, c. 17, s. 11 (4).

Additional rules, public bodies

(5) Subsection (1) is subject to section 17, 2000, c. 17, s. 17 (5).

Seal

(6) The document itself has been sealed if:

- (a) a legal requirement that the document be signed is satisfied in accordance with subsection (1), (3) or (4), as the case may be; and
- (b) the electronic document and electronic signature meet the prescribed seal equivalency requirements. 2000, c. 17, s. 11 (6).

Legal requirement to retention of written documents

12 (1) A legal requirement to retain a document that is originally created, sent or received electronically is satisfied by the retention of an electronic document if:

- (a) the electronic document is retained in the same form as the one in which the written document was created, sent or received, or in a format that accurately represents the information contained in the written document; and
- (b) the information in the electronic document will be accessible so as to be usable for subsequent reference by any person who is entitled to have access to the written document in which is authorized to require its production. 2000, c. 17, s. 12 (1).

Same, electronic documents

(2) A legal requirement to retain a document that is originally created, sent or received electronically is satisfied by the retention of an electronic document if:

- (a) the electronic document is retained in the form in which it was created, sent or received, or in a format that accurately represents the information contained in the document that was originally created, sent or received;
- (b) the information in the electronic document that is retained will be accessible so as to be usable for subsequent reference by any person who is entitled to have access to the document that was originally created, sent or received, or who is authorized to require its production; and

Tab 17

Felton Brushes Limited v. Atlantis Properties Hamilton Inc., 2020 ONSC 2315
(CanLII)

Date: 2020-04-16
File number: 20-72534
Citation: Felton Brushes Limited v. Atlantis Properties Hamilton Inc., 2020 ONSC 2315 (CanLII), <<https://canlii.ca/t/j6g1q>>, retrieved on 2024-04-03

CITATION: Felton Brushes Limited v. Atlantis Properties Hamilton Inc., 2020 ONSC 2315

COURT FILE NO.: 20-72534

DATE: 20200416

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Felton Brushes Limited, Applicant

AND:

Atlantis Properties Hamilton Inc, Respondent

BEFORE: The Honourable Mr. Justice P. R. Sweeney

COUNSEL: Jameel Madhany, for the Applicant

Sam Gebrael, for the Respondent

HEARD: April 9, 2020

ENDORSEMENT

INTRODUCTION

[1] This application was heard by teleconference on an urgent basis during the COVID-19 Suspension of regular court operations.

[2] The Applicant/Tenant, Felton Brushes Limited, is an industrial brush manufacturer based in Hamilton. The Respondent/Landlord, Atlantis Properties Hamilton Inc., is the owner of the property known municipally as 26 Myler Street, Hamilton, unit F1 (the premises)

BACKGROUND

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amount due, costs and disbursements, therefor, the said goods and chattels shall be appraised by two appraisers, in accordance with the provisions of the Commercial Tenancy Act and shall thereafter be sold ... The notice also clarified that the Landlord changed the locks for the protection of the goods but the rights of the Tenants to the premises continue to be recognized.

[8] The Tenant brought this application before me on an emergency basis. On March 20, 2020, I ordered that the Tenant pay \$50,000 into a trust account of the applicant's counsel, in exchange for the ability to remove the equipment. A timetable was set out for delivery of materials, cross examinations, and the hearing date was set for April 9.

[9] The Tenant submits that the Landlord improperly distrained the Tenant's goods and chattels. The Tenant accepted the Landlord's offer to terminate the lease without penalty. There were no rent arrears at the time that the Landlord purported exercise the right of distraint. The Tenant submits that the Landlord seized the Tenant's assets as retribution for the Tenant exercising its right to terminate the lease as the Landlord refused to comply with its pre-occupancy obligations and after the Landlord made a clear offer to terminate the lease without penalty to the Tenant.

[10] The Landlord submits that the Tenant, having purchased alternate premises, wished to escape its lease obligations by raising issues of heat and lighting to assert a fundamental breach of the lease. In fact, the heat was the responsibility of the Tenant and not the Landlord. In exasperation, the Landlord's representative had written an email that he was prepared to let the Tenant out of the lease with no penalty immediately. This was not a legal surrender of lease which could be accepted by the Tenant. In any event, the Landlord did not re-enter the premises after the statement was made. The Landlord asserts that the distraint was legal.

ISSUES

- (1) Did the Landlord make a bona fide offer to terminate the lease without penalty which was accepted by the Tenant?
- (2) Did the Landlord's failure to provide additional heat and lighting constitute a fundamental breach of the lease?
- (3) Was the Landlord obligated to provide additional heat and lighting to the premises prior to occupancy?
- (4) Was the Landlord purported exercise of the right of distress unlawful?

ANALYSIS

(1) Did the Landlord make a bona fide offer to terminate the lease without penalty which was accepted by the tenant?

[11] The email communication between Mr. Ponikvar, the principal of the Tenant, and Mr. Khalifa, the principal of the Landlord, sets out the issues between the parties.

- [12] On February 17, 2020 Mr. Penikvar emailed Mr. Khalifa advising that "the HVAC guy is quoting \$50,000 to put heating in there." He acknowledged "this was big money." He asserted his interpretation of the lease agreement that the Tenant "will maintain HVAC but it has to be working on day one."
- [13] In his response, Mr. Khalifa described the emails as condescending. With respect to the heat, he wrote that the premises "was rented as is. Adding HVAC is your responsibility not mine." He indicated he would not spend anything other than on "the lights we have discussed." He then wrote: "If this warehouse space doesn't work for you I would be more than happy to let you immediately off the lease with no penalty and we can part ways."
- [14] In response, Mr. Penikvar did not accept the offer to be immediately let off the lease. Instead, he wrote: "email or text is not the best way to communicate." He asserted "heat to me was a given, like a door. I understand your perspective. But let me assess your thoughts, and our position. For sure we will come up with a solution. Whatever that is. Are you in town this week?"
- [15] In response, Mr. Khalifa reasserted his position that the heat is the Tenant's issue not his. There was enough heat.
- [16] There is divergence in the evidence over what happened over the next two weeks. The Landlord asserts that things seem to be moving forward. On March 3 or 4 there was a meeting. In that meeting, the Landlord offered to install additional heating but that would be at the cost of the Tenant- to be added to the lease. The Landlord denies there was any acceptance of his prior offer to terminate the lease with no penalty.
- [17] The Tenant asserts that in that meeting, the Landlord maintained it would not be responsible for ensuring the heat was in good working order nor would it provide more lighting. The Tenant says that it accepted the offer to terminate the lease with no penalty and part ways.
- [18] The Landlord agrees that there was little activity after March 4 on the premises. The Tenant acknowledges that and says that the Tenant was making arrangements to vacate the property. Although there was communication with the Landlord, it had to do with determining the appropriate rent. The Landlord says that the communications were consistent with an ongoing lease.
- [19] The Tenant made an offer to purchase another property. That offer was made February 14 and accepted on February 20. The offer contemplated this lease continuing.
- [20] The Tenant says it was vacating the property in accordance with the offer of the Landlord to terminate the lease. The Landlord noticed the removal of equipment. The Landlord immediately took steps to prevent the removal of equipment by blocking the doorways.
- [21] The Landlord's offer to terminate the lease was not a bona fide offer. It was an expression of exasperation on the part of the Landlord. I accept that it may have been an attempt to get the Tenant to accept his interpretation of the lease, that is, that the Landlord had no obligation to provide more heat. It is not a real offer to terminate. In any event, the Tenant did not immediately accept any offer. On the Tenant's evidence it was not until March 4 that the offer was accepted. This is not immediate. The Tenant's behavior in response to the initial offer is consistent with it not being interpreted as a real offer.
- [22] Further, the offer to surrender was not in writing. Article 1.17 of the Lease provides that termination of the lease must be "executed in writing by the party to be bound." In this case, the Landlord is the party to be bound. The email does not constitute execution in writing by Atlantis of the agreement to terminate the lease. There is no electronic signature on the email in accordance with

Tab 18

Dankha v Intact Insurance Company, 2023 CanLII 62892 (ON LAT)

Date: 2023-07-11
File number: 21-013046/AABS
Citation: Dankha v Intact Insurance Company, 2023 CanLII 62892 (ON LAT),
<<http://canlii.ca/t/25fns>>, retrieved on: 2024-04-03

Licence Appeal Tribunal File Number: 21-013046/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c. i.8.
in relation to statutory accident benefits.

Between:

Manweel Dankha

Applicant

and

Intact Insurance Company

Respondent

ORDER

Order made by Theresa McGee, Vice-Chair
y:

Date of Order: July 11, 2023

OVERVIEW

- [1] Manweel Dankha, the applicant, was involved in an automobile accident on **July 26, 2016**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”). The applicant was denied benefits by the respondent, Intact Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] On **March 8, 2022**, the Tribunal held a case conference, and the matter was ordered to proceed to a written preliminary issue hearing. The parties filed their submissions and evidence in 2022. In reviewing those submissions, the Tribunal identified a procedural concern as to whether the applicant’s representative is authorized to act in this matter. This order addresses that procedural matter.

ANALYSIS AND REASONS

- [3] Law Society of Ontario (LSO) By-Law 4 prohibits any Class P1 licence-holder (i.e., a paralegal) from acting in statutory accident benefits matters under the *Insurance Act*, RSO 1990 c18, where the claimant is, or appears to be catastrophically impaired. Rule 3.02(3) of the *Paralegal Rules of Conduct* prohibits a paralegal from undertaking or providing advice with respect to a matter that is outside their permissible scope of practice.
- [4] The LSO Directory lists the applicant's representative, Mr. Nilo Grabar, as a Class P1 licence-holder. The application presently before the Tribunal includes a dispute as to whether the applicant is catastrophically impaired. On October 21, 2022, Mr. Grabar filed written submissions on the preliminary issue.
- [5] On June 20, 2023, the Tribunal wrote to the parties in this matter asking the following questions:
- a. Is the applicant's representative acting within the permissible scope of practice for a Class P1 licence-holder as set out in the Law Society of Ontario's By-Law 4 and the *Paralegal Rules of Conduct*?
 - b. If the applicant's representative is unauthorized to act in this matter, how should the Tribunal proceed?
- [6] The respondent did not reply to the Tribunal's request. Ms. Crystal Watson of Centennial Law Group replied on behalf of the applicant that at the time Mr. Grabar filed the preliminary issue submissions, he was authorized to communicate and submit documents under the advisement of Mr. Gerry Falletta, former counsel of record in the matter. Ms. Watson advised that Mr. Falletta oversaw Mr. Grabar's handling of the file, and that the applicant had personally requested Mr. Grabar's direct involvement in his case. Ms. Watson advised that she recently took carriage of the file and asked that the preliminary issue hearing proceed as scheduled.
- [7] There is little evidence that Mr. Grabar was supervised by a lawyer in this proceeding. First, although Mr. Falletta attended the case conference in this matter along with Mr. Grabar on March 8, 2022 where the issue of catastrophic impairment was added, the Tribunal's records contain no Declaration of Representative from Mr. Falletta in association with this file. Nor has Ms. Watson filed a Declaration of Representative. Second, Mr. Grabar is listed as the applicant's representative in the application. Mr. Grabar is listed as the applicant's representative on the Case Conference Summary form, and Mr. Grabar's name appears on the cover to the "Schedule A" to the Case Conference Summary. Mr. Grabar's name alone is on the written submissions in the preliminary issue hearing. Third, neither Mr. Falletta nor Ms. Watson appear to be named anywhere in the evidentiary record. All correspondence in evidence sent on behalf of the applicant to the respondent was sent by Mr. Grabar or his legal assistant. Dr. Alyman's Psychological Consultation Report of December 31, 2020 also lists Mr. Grabar as the applicant's "lawyer".
- [8] Even if I were to accept the representations made by Centennial Law Group, the explanation offered by Ms. Watson does little to resolve the Tribunal's concern that Mr. Grabar is acting outside his scope of practice. The requirements for lawyers assigning tasks and functions to paralegals in relation to catastrophic impairment claims are found in Section 5.1 of LSO By-Law 7.1. The By-Law permits paralegals to participate in mediation of ancillary issues relating to the catastrophic impairment claims under a lawyer's supervision. The By-Law is explicit that ancillary issues do not include issues relating to catastrophic impairment determination.
- [9] The LSO's By-Laws and Rules are clear: lawyers cannot assign tasks and functions to a paralegal in a hearing before the Tribunal where catastrophic impairment is in dispute. Even if I were to accept Ms. Watson's representations to the Tribunal that Mr. Grabar was supervised at all relevant times by Mr. Falletta, Mr. Grabar would still be unauthorized to represent the

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applicant in this matter. The Tribunal cannot condone a violation of the LSO's Rules and By-Laws. Consequently, I am left with no option but to strike the written submissions prepared by Mr. Grabar from the record and to remove him as representative of record in this matter. I make these orders under s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 to protect the integrity of the Tribunal's process. As Centennial Law Group has highlighted in its response to the Tribunal in this matter, the applicant has significant vulnerabilities. It is precisely the vulnerability of the applicant, whose claim for catastrophic impairment determination hangs in the balance in the preliminary issue hearing, that warrants this pause in the proceedings. Because the preliminary issue could finally dispose of the applicant's claim, he should be given the opportunity to retain a representative who is authorized and competent to advise and represent him.

- [10] The applicant will have **30 days to retain a properly licenced representative** capable of acting in this matter (i.e. a lawyer with a Class L1 licence) and to re-file submissions on the preliminary issue by the deadline below. The applicant may choose to proceed without representation. The applicant may also wish to obtain independent legal advice.
- [11] The respondent may rely on the submissions it has already filed on the preliminary issue. If the respondent wishes to file reply submissions, it may do so according to the deadline in my order below.
- [12] If the applicant does not file submissions or request an extension by the filing deadline, the Tribunal will proceed to adjudicate the preliminary issue based solely on the respondent's submissions.

ORDER

- [13] The Tribunal hereby strikes the submissions submitted on behalf of the applicant by Mr. Grabar on October 21, 2022 from the record.
- [14] Mr. Grabar is ordered removed as the applicant's representative of record in this matter.
- [15] The applicant shall exchange and file **written submissions**, which shall be **no more than 10 pages** in length, **no later than August 10, 2023**. If the respondent intends to exchange and file **written reply submissions**, it may do so **no later than August 15, 2023**. The reply submissions shall be **no longer than 5 pages**.
- a. Submissions and/or documents/authority briefs, if any, shall be double spaced, 12 point, Arial or Times New Roman font and be indexed, bookmarked/tabbed and consecutively page numbered.
 - b. Submissions shall make specific reference to the evidence and law by tab and page number. Evidence not so referenced may not be reviewed.
- [16] **Except for the provisions contained in this Order, all previous orders made by the Tribunal remain in full force and effect.**
- [17] If the parties reach an agreement on the issues in dispute, the applicant shall immediately advise the Tribunal in writing.
- [18] I am not seized of this matter.

Released: July 13, 2023

Theresa McGee

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Tab 19

1990

1991

1992

1993

Mosa v BelairDirect Insurance Company, 2022 CanLII 11164 (ON LAT)

Date: 2022-01-11
File number: 21-011987/AABS
Citation: Mosa v BelairDirect Insurance Company, 2022 CanLII 11164 (ON LAT),
<<https://canlii.ca/2/jmjg/>>, retrieved on 2024-04-03

Citation: Mosa v. BelairDirect Insurance Company, 2022 ONLAT 21-011987/AABS-M

Licence Appeal Tribunal File Number: 21-011987/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 200(2) of the Insurance Act, RSO 1990, c. I.8., in relation to statutory accident benefits.

Between
n:

Mekonen Mosa

Applicant

and

BelairDirect Insurance Company

**Responde
nt**

DECISION

ADJUDICATOR: Ian Maedel, Vice Chair

APPEARANCES:

For the Applicant: Michael Bishop, Counsel

For the Respondent: Oliver Gorman-Asat, Counsel
Genevieve Madill, Articling Student

**Motion heard via
Teleconference on:**

November 17, 2021 and January 5, 2022

BACKGROUND

- 2321
- [1] The applicant was injured in an automobile accident on **December 4, 2020** and sought benefits pursuant to the **Statutory Accident Benefits Schedule Effective September 1, 2010**.
 - [2] The applicant was denied certain benefits and submitted an application to the **Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal")**.
 - [3] A case conference has been scheduled for **August 26, 2022**.

MOTION

- [4] On October 6, 2021, the applicant filed a Notice of Motion requesting that the Tribunal;
 - i. Compelling the respondent to provide particulars clarifying the statement made by Rebecca McPhee, Claims Representative, made in the email correspondence dated September 22, 2021
- [5] On November 15, 2021, the applicant filed a reply to the respondent's motion materials and requested the Tribunal grant the following relief:
 - ii Exclude Heather Morrow from the motion and disregarding the motion material purportedly served by the respondent on applicant and the Tribunal dated November 8, 2021.

Applicant's Position

- [6] The applicant submits further particulars are required regarding Ms. McPhee's comments and the Job Site Analysis Report dated August 30, 2021. The particulars are required because the rationale for denying the applicant's ongoing claim for income replacement benefits is unclear. These particulars are necessary not only to permit the applicant to know the case to meet, but for the Tribunal to have a full and satisfactory understanding of the issues in dispute.
- [7] The applicant further submits that Ms. Morrow should be excluded from making submissions at this motion hearing pursuant to s. 23(3) of the *Statutory Powers Procedure Act* ("SPPA")(1). The applicant submits Ms. Morrow is providing legal services, but is not licensed by the law society and not subject to sanction as a licensee. Similarly, Ms. Morrow is an employee of the insurance company, not a party pursuant to Rule 2.16 of the Tribunal's *Common Rules of Practice & Procedure* ("Rules").

Respondent's Position

- [8] The respondent submits it will consent to provide further particulars regarding Ms. McPhee's comments in the email correspondence dated August 30, 2021. However, the respondent will only provide this information if the particulars do not constitute an additional or subsequent denial. Regardless, this relief is improperly plead and should otherwise be by a request for reasons pursuant to s. 38(8) of the *Schedule*, relating to medical and other reasons. This issue goes to the heart of the denial at issue and is part of the factual inquiry undertaken by the hearing adjudicator, not on a preliminary procedural motion. In the alternative, the request for particulars should be argued at the case conference.
- [9] Ms. Morrow is the claims representative assigned to this file. Her appearance is akin to a self-represented litigant pursuant to Rule 6.7. She is not a witness and her exclusion from this motion hearing has no basis in law. To deny her ability to appear would result in an absurdity and would result in a negative precedent to set regarding self-represented litigants.

RESULT

Particulars

- [10] The applicant's motion for further particulars is denied at this stage.
- [11] As per Rule 2.15 particulars are specific facts that clarify an allegation or assertion or provide additional information about a person's statement.
- [12] The statement made by Ms. McPhee regarding the Job Site Analysis Report goes to the very heart of the denial of income replacement benefits at issue. Whether or not there is a contradiction in this statement versus the medical and other reasons provided in the denial of this benefit is a factual issue that shall be determined at the hearing.
- [13] Any evidence regarding this alleged contradictory statement shall be addressed during the potential hearing of this matter. The respondent has made a tactical decision at this stage to rely solely on the previous denial. For me to otherwise compel the respondent to provide this information at this stage may fetter the discretion of the hearing adjudicator. Only the hearing adjudicator may make a ruling regarding this issue, as only they will have the benefit of the full panoply of evidence tendered by both parties.

Exclusion of Ms. Morrow

- [14] This issue is largely moot, as respondent counsel has now been retained and Ms. Morrow did not appear at continuation of this motion hearing on January 5, 2021. However, the applicant was unwilling to withdraw this form of relief in order to obtain direction from the Tribunal.
- [15] I do not find that Ms. Morrow is a self-represented individual as the respondent submits. She appeared without counsel and as the ADR Alternative Dispute Resolution ("ADR") Representative for her employer BelairDirect Insurance Company.
- [16] In response to the Applicant's Notice of Motion, Ms. Morrow filed a Notice of Motion in response, or a Cross-Motion dated November 8, 2021. While this Notice of Motion did not contain legal argument, she did appear on this motion and would have been required to respond to the legal arguments posed by the applicant.
- [17] Ms. Morrow is not legal counsel, nor is she bound by membership in the Law Society of Ontario. My concern regarding her attendance at the previous Motion Hearing was that she would be expected to provide a response to the legal arguments and case law provided by the applicant. In my opinion, this strays into the realm of providing legal services on behalf of her employer. That is precisely why this matter was adjourned for her to provide further submissions on this very issue.
- [18] ADR representatives regularly appear without counsel at case conferences pursuant to Rule 14 of the Tribunal Rules. Case conferences often involve settlement discussions and case management. They are not procedural motions where points of law are argued. Ms. Morrow is not a 'representative' as defined in Rule 2.20, as she is not licensed under the Law Society Act(2), thus, pursuant to s. 23(3) of the SPPA, she could be excluded as not being competent to represent or advise the BelairDirect at this motion hearing.
- [19] Rule 26.1 of the Law Society Act states that no person other than a licensee shall practice law or provide legal services in Ontario. In my view, stretching the liberal interpretation of the Rules and the SPPA to permit Ms. Morrow and other ADR representatives to provide legal services is contrary to Rule 26.1. Permitting unlicensed parties to provide legal services could also result in procedural unfairness parties pursuant to Rule 3.1(a) of the Tribunal Rules.
- [20] Overall, it is my view that sophisticated parties like BelairDirect shall ensure that any person providing legal services before the Tribunal is licensed to do so. Otherwise, it runs the risk of

(1234) TAB 19
exclusion of representatives from Tribunal proceedings pursuant to Rule 2.20 of the *Rules* and s. 23(3) of the *SPPA*

- [21] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.**

OTHER PROCEDURAL MATTERS

- [22] This matter remains scheduled for a case conference on **August 25, 2022 at 9:00 am via teleconference.**
- [23] If the parties resolve the issue(s) in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

Released: January 11, 2022

Ian Maedel
Vice Chair

[1] R.S.O. 1990, CHAPTER S.22.

[2] R.S.O. 1990, c. 1.6.

Tab 20

Chandrarajah vs. Economical Insurance, 2024 CanLII 10566 (ON LAT)

Date: 2024-02-13
File number: 22-002287/AABS
Citation: Chandrarajah vs. Economical Insurance, 2024 CanLII 10566 (ON LAT),
<<https://canlii.ca/t/k2t2>>, retrieved on 2024-04-03

Citation: Chandrarajah vs. Economical Insurance, 2024 ONLAT 22-002287/AABS

Licence Appeal Tribunal File Number: 22-002287/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990 c I.8,
in relation to statutory accident benefits.

Between
n:

Dilipkanth Chandrarajah

Applicant

and

Economical Insurance

**Responde
nt**

DECISION

ADJUDICATOR: Ludmilla Jarda

APPEARANCES:

For the Applicant: Erin Neal, Counsel

For the Respondent: Ryland MacDonald, Counsel

HEARD: By Written Submissions

OVERVIEW

- [1] Dilipkanth Chandrarajah (the “applicant”) was involved in an automobile accident on August 24, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective*

(23)

September 1, 2010 (the "Schedule"). The applicant was denied benefits by Economical Insurance (the "respondent").

- [2] The applicant passed away on June 3, 2020 due to causes unrelated to the accident.
- [3] On February 25, 2022, the applicant's counsel applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute. There is no indication on the Application by an Injured Person for Auto Insurance Dispute Resolution under the Insurance Act that the applicant is deceased.
- [4] At the start of the case conference held on December 20, 2022, the applicant's counsel informed the respondent and the Tribunal that the applicant is deceased and that the applicant's spouse would be in attendance on behalf of the applicant. Neither the applicant's counsel nor the respondent had any documentation in their possession regarding the applicant's will, estate, or named beneficiary.
- [5] The applicant's counsel requested to adjourn the case conference to allow time to gather the necessary documentation. The Tribunal denied the adjournment request as the applicant passed away on June 3, 2020, and the application was submitted on February 25, 2022, which means that the applicant's counsel had had more than nine (9) months to request the documentation from the applicant's family.
- [6] The application was subsequently scheduled to proceed to a written hearing on September 8, 2023. Although no estate trustee was appointed to act on behalf of the deceased applicant, the applicant's counsel filed written submissions and evidence as well as reply submissions for the hearing. The respondent filed responding submissions and evidence.

ISSUES

- [7] The issues in dispute are:
1. Is the applicant entitled to physiotherapy services proposed by Gibson Wellness Centre, as follows:
 - i. \$7,041.67, in a treatment plan/OCF-18 ("treatment plan") submitted January 8, 2020 and denied February 26, 2020;
 - ii. \$6,141.80, in a treatment plan submitted January 15, 2020 and denied February 26, 2020; and
 - iii. \$6,702.67, in a treatment plan submitted May 7, 2020 and denied May 26, 2020?
 2. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
 3. Is the applicant entitled to interest on any overdue payment of benefits?
- [8] The respondent also introduced in its written hearing submissions a claim for costs against the applicant.

RESULT

- [9] For the reasons that follow, I find that:
1. The application was not properly constituted and is an irremediable nullity.
 2. It is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award as neither the applicant nor an estate trustee

(23)
acting on his behalf pursued this claim for accident benefits. To continue the application in the circumstances would be an abuse of process.

3. The respondent is not entitled to costs.

[10] The application is dismissed.

ANALYSIS

Procedural Issue

[11] In its written hearing submissions, the respondent raised a procedural issue. The respondent submits that since the applicant is deceased and that no estate trustee has been appointed, the application is not legally viable as there is no authority on which it can proceed. Further, the respondent argues that, in the circumstances, the application was not properly commenced. As such, the respondent requests that the application be dismissed on the basis that it is vexatious.

[12] The respondent relies on *Kanthasamy Karthigesu v. Wawanesa Mutual Insurance Company*, 2016 ONFSCDRS 269 (CanLII), *Jamil Toma v. State Farm Mutual Automobile Insurance Co.*, 2014 ONFSCDRS 171 (CanLII) [*Toma*], *The Estate of Delia Arnold v. Cumis General Insurance Company*, 2017 ONFSCDRS 336 (CanLII), and *Paeta Chechelashvili v. Jevco Insurance Company*, 2016 ONFSCDRS 189 (CanLII).

[13] In response, the applicant's counsel submits that this issue cannot be considered as it was not addressed at the case conference, and that raising this issue at this stage is indicative that the respondent is acting in bad faith. The applicant's counsel further submits that dismissing the application would be highly prejudicial to the deceased applicant and asserts that this is a very sensitive matter for the applicant's surviving spouse. The applicant's counsel also denies that the application was not properly commenced and submits that it was filed to protect the limitation period.

[14] In the circumstances, I am prepared to consider the procedural issue raised by the respondent. I find that it falls within my discretion to determine whether to consider the procedural issue raised by the respondent. It is well established that the Tribunal has the power to determine its own procedures and practices and may for that purpose make orders with respect to the procedures and practices in a particular proceeding. Further, the Tribunal may make such orders or give such direction in proceedings before it as it considers proper to prevent abuse of its processes [see: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"), ss. 23(1) and s. 25.0.1].

The application was not properly constituted, and it is an irremediable nullity

[15] I find that the respondent has demonstrated, on a balance of probabilities, that the application was not properly constituted, and that it is an irremediable nullity.

[16] In *Toma*, an application for arbitration was commenced by a deceased insured's counsel. While the insured's widow attended the pre-hearing discussion, it was agreed that the arbitration process could not go forward until an administrator or representative of the insured's estate was appointed. The insured's counsel later advised that the insured's family had not taken any steps to have an estate trustee appointed and that they had no plans to do so. The insurer sought to have the application dismissed.

[17] The arbitrator found that the insured's claims had become vexatious as there was no legally viable way of pursuing them, and he indicated as follows on page 2 of the decision:

Mr. Toma has been deceased for more than two years. A deceased person cannot pursue accident benefits. A legally appointed representative, either an executor or an estate

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trustee can "stand in the shoes" of the deceased and pursue a claim for accident benefits. No such person exists in this claim, nor, apparently, are there any plans to appoint a trustee. There is some question in my mind as to whether the dispute resolution process was properly commenced, given the lack of an executor or estate trustee.

- [18] Similarly, in *Michael Wentzel v. RBC General Insurance Company*, 2013 ONFSCDRS 33 (CanLII) [*Wentzel*], an application was commenced by the insured's representative after the insured passed away, without an estate trustee having been appointed. The insurer moved to dismiss the application as a nullity because of the insured's death and sought costs against the insured's representative for commencing an unauthorized proceeding. There was no evidence that anyone had undertaken to administer the insured's estate. The arbitrator concluded that the application had not properly been constituted and was an irremediable nullity and dismissed the application. The arbitrator also awarded costs against the insured's representative, which was upheld on appeal.
- [19] While I am not bound by decisions rendered by arbitrators of the Financial Services Commission of Ontario, I find the *Toma* and *Wentzel* decisions to be persuasive, and I subscribe to the same opinion.
- [20] In the present case, I find that the applicant's counsel commenced the application without the applicant's authority. It is well established that a deceased person has no authority to pursue a claim for accident benefits. Rather, a lawfully authorized representative must be appointed to act on behalf of the deceased person. While it is unclear who, if anyone has been instructing the applicant's counsel with respect to this application, given that the applicant passed away prior to the commencement of this application, in the absence of a lawfully authorized representative such as an estate trustee, there is no legally viable way for pursuing this application.
- [21] Although the applicant's counsel argues that she commenced the application to protect the limitation period, no explanation was provided as to why no estate trustee was appointed between June 3, 2020 (date of death) and February 25, 2022 (date of application). Further, there is no evidence that any steps were taken during this 632-day period to appoint an estate trustee to act on behalf of the applicant. Considering that the applicant passed away prior to the commencement of this application, in the absence of an estate trustee, the applicant's counsel has not demonstrated that she was authorized to commence the application.
- [22] I further find that the applicant's counsel has failed to demonstrate that any person is authorized to pursue this application and to act on behalf of the deceased applicant. As previously indicated, at the case conference, an issue was raised regarding whether the applicant's spouse was lawfully authorized to act on behalf of the deceased applicant. Despite discussions to that effect, no explanation has been provided regarding the steps taken, if any, to appoint an estate trustee to represent the applicant in this application between December 20, 2022 (date of case conference) and September 8, 2023 (date of written hearing). Further, there is no evidence to support that during this 262-day period that the applicant's spouse, or any person, has been appointed to be an estate trustee and to represent the applicant in this application.
- [23] I am also satisfied that the applicant's spouse opted not to pursue appointment as an estate trustee. While I appreciate the applicant's counsel's comment that this application is a very sensitive matter for the applicant's surviving spouse, I cannot ignore the fact that the applicant's spouse had 1192 days, specifically from June 3, 2020 to September 8, 2023, to take steps to seek appointment as an estate trustee. Despite having the opportunity to do so, there is no evidence that she took any steps to pursue the appointment.
- [24] Accordingly, I find that the application was not properly constituted and that it is an irremediable nullity.

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Disputed Treatment Plans, Interest, and Award

[25] I find that it is unnecessary for me to consider the disputed treatment plans, interest, and an award as the respondent has demonstrated, on a balance of probabilities, that there is no authority on which this application can proceed. I further find that to continue the application would be an abuse of process.

[26] Pursuant to s. 280 of the *Insurance Act*, R.S.O. 1990, c. I 8, an insured person may apply to the Tribunal to resolve a dispute in respect to their entitlement to statutory accident benefits.

[27] Further, in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 65 (CanLII), the Supreme Court of Canada relied on *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8874 (ONCA) approved by 2002 SCC 63, and held as follows at paragraph 37:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

[28] Here, neither the deceased applicant nor an estate trustee caused the application to be commenced, and no person has standing before the Tribunal to move the application forward. While I appreciate that the applicant's counsel filed written hearing submissions and evidence on the applicant's behalf, there is no evidence to support that the applicant's counsel had standing to do so.

[29] Accordingly, it is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award. As no estate trustee has been appointed, no person is authorized to pursue the deceased applicant's claim for accident benefits at the Tribunal. To continue the application in the circumstances would be an abuse of process.

Costs

[30] Pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules, 2023*, costs may be ordered where a party has acted unreasonably, frivolously, vexatiously, or in bad faith.

[31] In its written hearing submissions, the respondent sought costs against the deceased applicant in the amount of \$1,000.00. The respondent submits that the application is vexatious and should never have been commenced given that no estate trustee was appointed. The respondent argues that at the very least, the application should have been withdrawn. The respondent indicates that it has incurred legal costs to defend the application against a party that does not have any legal standing or existence.

[32] The applicant's counsel did not respond to the respondent's request for costs in the reply submissions, despite having the opportunity to do so. As such, the applicant's counsel's position is unknown.

[33] It is well established that the test to award costs represents a high bar. I find that the respondent has not demonstrated that the applicant's conduct attracts costs and I note that neither the deceased applicant nor an estate trustee acting on his behalf pursued this application. While I acknowledge that the respondent has been inconvenienced as a result of the applicant's counsel's actions, I have not been directed to any authority to support that the Tribunal has the power to make an order for costs against a legal representative.

[34] Accordingly, I decline to make an order for costs against the deceased applicant.

ORDER

[35] For the reasons outlined above, I find that:

2-10

1. The application was not properly constituted and is an irremediable nullity.
2. It is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award as neither the applicant nor an estate trustee acting on his behalf pursued this claim for accident benefits. To continue the application in the circumstances would be an abuse of process.
3. The respondent is not entitled to costs.

(36) The application is dismissed.

Released: February 13, 2024

Ludmilla Jarda
Adjudicator

Tab 21

Eskandari v. Raizman, 2023 ONSC 1674 (CanLII)

Date: 2023-03-13
File number: CV-20-647044
Citation: Eskandari v. Raizman, 2023 ONSC 1674 (CanLII),
<<https://canlii.ca/t/jw4xyv>>, retrieved on 2024-04-03

CITATION: Eskandari v. Raizman, 2023 ONSC 1674

COURT FILE NO.: CV-20-647044

DATE: 2023-03-13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PARSA ESKANDARI and JACOB ESKANDARI, minors by their Litigation Guardian
ABBAS ESKANDARI, MOJDEH RABIEL, and the said ABBAS ESKANDARI personally,
Plaintiffs

- and -

I. RAIZMAN, M. MAN YEE LEE, A. NATHANS, N. GARG, L. ROBERTS, N. LIPSMAN, A.
MOGHADDAMJOL, L. ELKAIM, J. KU, J. TAT, H. KREDER, N. LYNN MA, D. SCALES, H.
TIEN, S. ABDULLA, S. SYMONS, M. CHRISTAKIS, P. BERGER, A. MOHAMMED,
U. TARIQUE, E. HUGHES, L. DA COSTA, M. VYAS, J. AQUN, J. COTTRELL, L. SNEEL,
J. MUN YIU KOWK, J. LLOYD, J. GRENIER, R. RUSSELL, A. YU, SUNNYBROOK
HEALTH SCIENCE CENTRE, L. JACOVICH, E. SMITH, S. CHAO, T. TANG, V. MILLER,
L. MANEROV, S. BELL, F. KHAN, D. HUSSEIN and J. DOES 1-14, *Defendants*

BEFORE: Associate Justice Todd Robinson

APPEARING: J. O'Dell, *for the defendants*, Dr. Igal Raizman, Dr. Michelle Man Yee Lee, Dr. A. Nathans,
Dr. N. Garg, Dr. L. Roberts, Dr. N. Lipsman, Dr. A. Moghaddamjol, Dr. A. Yu, Dr. J. Ku, Dr. J.
Tat, Dr. H. Kredet, Dr. Noelle Lynn Ma, Dr. D. Scales, Dr. H. Tien, Dr. S. Abdulla, Dr. S. Symons,
Dr. M. Christakis, Dr. F. Berger, Dr. A. Mohammed, Dr. U. Tarique, Dr. Emily Hughes, Dr.
Leodante DaCosta, Dr. Manan Vyas, Dr. J. Aoun, Dr. Justin Cottrell, Dr. L. Snell, Dr. Jason Mun
Yiu Kwok, Dr. J. Lloyd, Dr. J. Grenier, and Dr. R. Russell (*moving parties*)

A. Eskandari, *in person*

H. Ngan, *for the defendants*, Sunnybrook Health Science Centre, L. Jacovich, E. Smith, S.
Chao, T. Tang, L. Manerov, S. Bell, F. Khan, D. Hussein

K. McDermott-Hermyman, *for the defendant*, Dr. L. Elkaim

A. Leung, *for the Office of the Children's Lawyer*

HEARD: December 16, 2022 (by videoconference)

REASONS FOR DECISION
(Motion to dismiss action by minor plaintiffs)

[1] The moving defendants seek an order dismissing this action by the minor plaintiffs for failure to appoint new counsel in accordance with the order that removed the plaintiffs' former lawyers from the record. Abbas Eskandari, the litigation guardian of the minor plaintiffs, who are his children, opposes the motion. The Office of the Children's Lawyer takes no position.

[2] The plaintiffs' former lawyers obtained an order removing them from the record on October 28, 2021. It appears that Mr. Eskandari was in attendance at that motion hearing, but it is undisputed that he was served with the order. The *Rules of Civil Procedure*, R20 (1990), Reg 194 (the "*Rules*") require that a person acting in a representative capacity must be represented by a lawyer. Mr. Eskandari seeks more time to find a lawyer and argues it would be unfair to dismiss the claims by his children in the circumstances of this case.

[3] There has already been significant delay in this proceeding since the removal order was granted in October 2021. This is a substantial medical malpractice claim seeking damages of \$20 million for Abbas Eskandari, \$2 million for his spouse, Mojdeh Rabiei, and \$1 million for each of the two minor plaintiffs. Pleadings are closed, but documentary and oral discoveries have still not yet occurred. Despite having nearly a year to comply with the removal order, neither Mr. Eskandari nor Ms. Rabiei complied with the order until after this motion was brought. Both have now served notices of intention to set in person. But for the minor plaintiffs, that would be an end to the matter and the action could proceed. However, in his capacity as litigation guardian, Mr. Eskandari must be represented by a lawyer. There is limited evidence on what steps have been taken to find a new lawyer since October 2021, other than brief affidavit evidence and Mr. Eskandari's unsubstantiated submissions made at the hearing.

[4] I have sympathy for Mr. Eskandari's position. However, the court must control its own processes. Despite over a year since the removal order and several adjournments of this motion leading to this hearing, Mr. Eskandari has put forward no cogent evidence of reasonable or sufficient efforts to find counsel. I am not satisfied that earnest efforts to find a lawyer are being made or that a lawyer is likely to be retained any time soon, if at all.

[5] In my view, the defendants are entitled to some certainty on which claims are proceeding against them. I am thereby granting the defendants' motion and dismissing the action by the minor plaintiffs.

ANALYSIS

[6] The moving defendants seek dismissal under subrule 15.04(9) and rule 60.12 of the *Rules*. Subrule 15.04(9) provides the court with authority to dismiss a proceeding for non-compliance with a removal order. Rule 60.12 provides the court with similar authority to dismiss a proceeding for non-compliance with an interlocutory order.

[7] My jurisdiction to hear this motion was not challenged. Subrule 37.02(2) provides me with jurisdiction to hear any motion in a proceeding, with the same jurisdiction as a judge, subject to certain enumerated exceptions. I have no jurisdiction to decide a motion where the power to grant the relief sought is conferred expressly on a judge by a statute or rule or a motion for judgment on consent in favour of or against a party under disability. Judgment is not sought against the minor plaintiffs. Rule 7 requires that noting in default and discontinuances against minors require leave of a judge and that approval of settlements with minors must be addressed by a judge. There is no similar provision dealing with a motion to dismiss a minor's claim for procedural non-compliance. I am satisfied that I have jurisdiction to hear and decide this motion.

[8] My decision on this motion is discretionary. Dismissing an action is a severe remedy, so I must consider the balance between having the minor plaintiffs' claims adjudicated on their merits and ensuring that the administration of justice is not undermined by non-compliance with the *Rules* and court orders. I agree with the moving defendants that guiding principles for exercising my discretion have been discussed in *Rana*

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v. Unifund Assurance Company, 2015 ONSC 2582, at para. 50. While not all of these principles are applicable here, the following are relevant in my disposition of this motion:

- (a) The court must be alive to the possibility that non-compliance with court orders is indicative of its process being abused. Failing to act may deprive the moving party of justice according to law and risks rendering the court "a paper tiger";
- (b) A litigant's right of access to the courts must be accompanied by the responsibility to abide by the *Rules* and comply with court orders; and
- (c) Self-represented litigants, while entitled to some accommodation and assistance to ensure a fair hearing, are not entitled to abuse the system or the party opposite. Failure to enforce orders once made against self-represented parties is unfair to the parties opposite and undermines respect for the court and the civil justice system.

[9] Case law supports that it is an appropriate exercise of the court's discretion under subrule 15.04(9) to dismiss a claim where a party does not show an active interest in prosecuting the action. *AGC v. Madeleine Rundle Club NEC Plus Ultra*, 2013 ONSC 2747 at para. 7; *Potluri v. Canac Kitchens*, 2015 ONSC 1064 at para. 17.

[10] Mr. Eskandari is currently representing himself in his personal capacity, as he is entitled to do. However, in his capacity a litigation guardian for the minor plaintiffs, he cannot act without a lawyer. Subrule 15.01(1) of the *Rules* provides that a party to a proceeding who acts in a representative capacity shall be represented by a lawyer. Mr. Eskandari thereby must be represented by a lawyer to advance the claims of his children.

[11] Representation by a lawyer in this case is a mandatory requirement. Unlike a corporation, for which leave to be represented by a non-lawyer may be granted under subrule 15.01(2), the *Rules* do not provide the court with any authority to grant leave to a non-lawyer to act for another person in a representative capacity. As set out in s. 26.1 of the *Law Society Act*, RSO 1990, c. 1.8, only licensees of the Law Society of Ontario are entitled to practise law or provide legal services in Ontario. Although no case law has been cited by either party, it is well-established that only a lawyer may appear to represent others in proceedings before the Superior Court of Justice and that the court has no discretion to permit a non-lawyer to represent another individual, including when acting in a representative capacity: *Radziewicz v. Workplace Safety and Insurance Appeals Tribunal*, 2019 ONSC 1678 (Div. Ct.), at para. 7; *Direk v. Attorney General of Ontario*, 2010 ONSC 3428 at para. 6.

[12] The order removing the plaintiffs' former lawyers from the record was issued on October 28, 2021, nearly 14 months before the hearing of this motion. Based on the handwritten amendment to the removal order, Mr. Eskandari appeared and made submissions on the motion. The time to find new counsel was amended to 60 days. The circumstances under which that amendment was made are not before me.

[13] The removal order does not refer to the requirement in subrule 15.01(1) of the *Rules* that Mr. Eskandari, as litigation guardian, must be represented by a lawyer. However, the order complies with subrule 15.04(4), which mandates certain contents for a removal order, including a requirement to insert the text of subrules 15.04(8) and (9) where the client is not a corporation. Subrule 15.04(8) provides as follows:

Clients Other Than Corporations

(8) A client who is not a corporation shall, within 30 days after being served with the order removing the lawyer from the record,

- (a) appoint a new lawyer of record by serving a notice under subrule 15.03 (2); or
- (b) serve a notice of intention to act in person under subrule 15.03 (3)

[14] There is a gap in the *Rules*. The direction in subrule 15.04(8)(b) is inaccurate for a party acting in a representative capacity. As discussed above, subrule 15.01(1) prohibits such a party from acting in person. A person acting in a representative capacity thereby cannot validly serve a notice of intention to act in person.

[15] I accept that Mr. Eskandari did not know he was required to have a lawyer to advance the claims by his children until receiving my endorsement dated August 9, 2022. I accept his evidence that he did not receive that endorsement, or the motion materials, until late September 2022. In my view, though, none of that matters.

[16] Mr. Eskandari's responding affidavit confirms that he understood the requirement to appoint a new lawyer or serve a notice of intention to act in person after the removal order was issued. Mr. Eskandari did neither in the 11 months before he says he received the materials for this motion. It follows that being unaware that he required a lawyer for his children does not explain ongoing non-compliance with the removal order.

[17] Mr. Eskandari's evidence and submissions support that it was not and is not his intention to proceed to trial without a lawyer, either in his own capacity or in his capacity as litigation guardian. In his responding affidavit, Mr. Eskandari states that all of his efforts since the removal order was issued have been directed at trying to first retain a medical expert, and then to try to retain a lawyer. According to Mr. Eskandari, he has been unable to find a lawyer.

[18] Evidence before me on Mr. Eskandari's search for a new lawyer is sparse. His responding affidavit was prepared with the assistance of a lawyer, who appeared as agent for Mr. Eskandari and Ms. Rabiei at the second return of this motion. That affidavit states that Mr. Eskandari has "consulted with several lawyers" between October 28, 2021 and the present, but identifies only three law firms. No dates are provided for when those lawyers were consulted. Although Mr. Eskandari submits that there have also been other lawyers, there is no evidence of that.

[19] Moreover, when the motion came back on before me on October 14, 2022, Mr. Eskandari sought an adjournment for 120 days to find a new lawyer. After hearing submissions, I granted a 60-day adjournment to this hearing. Instead of submitting supplementary evidence on his efforts to find a lawyer during that 60-day period, Mr. Eskandari appeared and argued for a further 120-day adjournment to find new counsel (which I denied for reasons given at the hearing). That request, combined with the extension I had already granted, amounted to a request for a total of 180 days to find new counsel beyond the second return of this motion: an even longer period than had been originally requested. No evidence was tendered supporting why a lawyer could not be found in the last 60 days or why another 120 days was reasonably needed.

[20] This action was commenced in September 2020. Documentary and oral discoveries have not yet occurred. Other than the fairly general evidence in Mr. Eskandari's affidavit on his efforts to contact three potential medical experts since October 2021, the plaintiffs have taken no substantive steps to advance this action since pleadings were closed shortly before the removal motion was heard.

[21] As set out in subrule 30(1) of the *Rules*, the *Rules* are to be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. There is a balance between having matters tried on their merits and ensuring procedural fairness to all parties. Parties are expected to comply with the *Rules* and court orders. When they fail to do so without a proper or complete explanation of the reasons for non-compliance, procedural fairness may trump.

[22] In this case, Mr. Eskandari had well over a year to retain counsel before this motion was argued. There is no cogent evidence of substantive efforts by Mr. Eskandari to find a new lawyer during that time. Only three lawyers have been identified in Mr. Eskandari's responding affidavit as being consulted, but the timing of when they were consulted is not disclosed. I afforded Mr. Eskandari a further 60 days to find a new lawyer before this motion was heard. There is a complete lack of evidence supporting that Mr. Eskandari took any steps to find counsel during the period of adjournment. Mr. Eskandari's oral submissions on efforts to find a lawyer before and after that adjournment are unsupported by any evidence before me.

[23] In these circumstances, I am left with the inescapable conclusion that providing Mr. Eskandari with more time will make no difference.

[24] Procedural-fairness dictates that the defendants are entitled to some certainty on what claims against them are proceeding. Serving notices of intention to act in person has preserved the claims by Mr. Eskandari and Ms. Rabiei in their personal capacities. However, the defendants cannot take meaningful steps to discover the minor plaintiffs' claims or take any steps affecting their interests until a lawyer is appointed. To hold otherwise would, in my view, run afoul of the requirement in subrule 15.01(1) of the *Rules* and the prohibition in s. 26.1(1) of the *Law Society Act* that procedurally preclude Mr. Eskandari from advancing the minor plaintiffs' claims without a lawyer. That is precisely what Mr. Eskandari would be doing if, for example, he were discovered on the minor plaintiffs' claims without a lawyer or he responded on the minor plaintiffs' behalf to any motions brought dealing with their interests.

[25] In my view, in circumstances such as these where there is no cogent evidence supporting reasonable efforts by Mr. Eskandari to find counsel in his capacity as litigation guardian, it is unfair to the defendants to permit the claims of the minor plaintiffs to proceed. Doing so will only continue to hold up this litigation for seemingly non-committal efforts to find a new lawyer to occur.

[26] For the above reasons, I am granting the defendants' motion and dismissing the claims of the minor plaintiffs by their litigation guardian, Mr. Eskandari.

COSTS

[27] The moving defendants submitted that, if successful, they would only seek their partial indemnity costs of attending this hearing. Mr. Eskandari's opposed adjournment request and the ultimate motion argument were spread over most of the day, such that the moving defendants' total partial indemnity costs claim is effectively for the 5 hours of court time (submissions and waiting time) before the motion was fully heard and reserved.

[28] Mr. Eskandari submits that, as a result of his paralysis and injuries from the stroke underlying this action, he has not worked for the past four years and has not earned any income. That is outlined in his responding affidavit. He submitted that, if unsuccessful, there should be no costs award and that the defendants should bear their own costs.

[29] Costs typically follow the event. I have no reason to doubt Mr. Eskandari's sworn statements that he is unable to work and has had no income for four years. However, parties to civil litigation are not insulated from adverse costs awards simply because they are not currently working or have no income. Typically, a party must establish impecuniosity to obtain relief from the court against a costs award. Having no income and being impecunious are not the same thing.

[30] Mr. Eskandari's affidavit includes only general statements about his financial circumstances. It does not include the level of robust particularity needed to establish impecuniosity. This is a substantial claim. The minor plaintiffs have each claimed \$1 million in damages. The moving defendants have been successful in their motion in respect of those claims. Both claims have been dismissed for non-compliance with the removal order and the *Rules*. Moreover, Mr. Eskandari and Ms. Rabiei only themselves complied with the removal order by serving notices of intention to act in person in response to this motion. Mr. Eskandari has not provided a sufficient explanation for ongoing breach of the removal order, particularly when I gave him a further 60 days to comply. In these circumstances, I do not find it fair or just to deny the moving defendants some costs.

[31] The moving defendants' costs claim is modest and more than reasonable in the circumstances. They could well have sought full costs of the motion, but have limited their costs claim to the final hearing. I am mindful, though, that the length of my list and when I called this matter was not the fault of either side. It is not clear to me that the moving defendants' lawyer dedicated all of her time to this matter while waiting before and between submissions on Mr. Eskandari's opposed adjournment request and the substantive motion.

[32] I am accordingly fixing the moving defendants' partial indemnity costs in the amount of \$475.00, including HST. I am also affording Mr. Eskandari a period of 60 days in which to pay the costs.

DISPOSITION

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[33] For the foregoing reasons, I accordingly order as follows:

- (a) The claims by Parsa Eskandari and Jacob Eskandari, minors by their litigation guardian Abbas Eskandari, are hereby dismissed.
- (b) Abbas Eskandari, in his capacity as litigation guardian for Parsa Eskandari and Jacob Eskandari, shall pay to the moving defendants their costs of this motion fixed in the amount of \$475.00, including HST, payable within sixty (60) days.
- (c) This order is effective without further formality.

[34] I have signed an amended copy of the revised draft order submitted by the moving defendants, as amended electronically prior to signing.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: March 13, 2023

Tab 22

Law Society of Ontario v. Collins, 2021 ONLSTH 177 (CanLII)

Date: 2021-12-17
File number: 20H-131
Citation: Law Society of Ontario v. Collins, 2021 ONLSTH 177 (CanLII),
<<https://canlii.org/llj/owp>>, retrieved on 2024-04-03

**LAW SOCIETY TRIBUNAL
HEARING DIVISION**

Citation: *Law Society of Ontario v. Collins*, 2021 ONLSTH 177
Date: December 17, 2021
Tribunal File No.: 20H-131

BETWEEN:

Law Society of Ontario

Applicant

- and -

Ian Jerrold Collins

Respondent

Before: Frederika M. Rotter (chair), Jorge Pineda, Michelle Richards

Heard: October 19, 2021, by videoconference

Appearances:

Benjamin Kates, for the applicant
Respondent, self-represented

Summary:

COLLINS – Working With or Employing a Suspended Lawyer – Failing to Prevent the Unauthorized Practice of Law – Joint Submission – The Lawyer acknowledged that he had allowed a suspended lawyer to assist him in relation to a judicial review of an arbitration decision – This included allowing the suspended lawyer to do research, clerical work, and drafting and filing court documents – The panel accepted the joint submission of a reprimand based on the parties' agreement and the Tribunal jurisprudence with respect to similar misconduct.

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REASONS FOR DECISION

- (1) **Frederika M. Rotter (for the panel):**— In an agreed statement of facts (ASF), Ian Jerrold Collins (the Lawyer) acknowledged that he had engaged in professional misconduct for about three years, between approximately April 12, 2017 and April 28, 2020. He had used the services of a suspended lawyer without the express approval of a panel of the Hearing Division of the Law Society Tribunal. By doing so, the Lawyer had also failed to prevent the unauthorized practice of law, contrary to Rules 7.6-1 and 7.6-1.1 of the *Rules of Professional Conduct*.
- (2) At the hearing, the parties jointly submitted that the penalty should be a reprimand. We accepted the joint submission based on the parties' agreement and Tribunal jurisprudence with respect to similar misconduct. These are our reasons for decision.

THE FACTS

The Lawyer

- (3) The Lawyer was called to the bar in 1975. He articulated for the Attorney General of Ontario. He is a sole practitioner who primarily practises criminal law in the Greater Toronto Area. He had no discipline history. He is now 72 years old.
- (4) The Lawyer had occasionally served by appointment as a special prosecutor for the Federal Department of Justice on drug importation cases arising from Pearson Airport, at a time when the minimum sentence for such offences was seven years in prison.
- (5) About 40 years ago, the Lawyer worked on a case in which he won a significant victory for First Nations clients. As a result, he gained a positive reputation in the Indigenous community. Subsequently, a lawyer, GB, who also dealt with Indigenous clients, became aware of the Lawyer's work.
- (6) In about 2015-2016, GB started to contact the Lawyer on a more or less frequent basis, to discuss Indigenous legal issues. At that time, GB was a practising lawyer, not yet suspended by the Law Society. He held himself out as a non-status person of Métis origin.
- (7) The Lawyer acknowledged that he had allowed GB to assist him in relation to a review of an arbitration while GB was suspended. The Lawyer had been retained by a former client of GB in an application for the judicial review of the arbitral decision (in substance an appeal).

The Factual Background

- (8) The arbitration in which GB had acted as counsel took place in the fall of 2016 and was successfully resolved for the client by an arbitral decision dated November 24, 2016.
- (9) The opposing party applied for judicial review in December 2016. The Lawyer contacted GB to assist with the application, as he had first-hand knowledge of the matter. At that point, GB was not yet suspended from legal practice. GB had knowledge and insight into the details of the case, and he assisted without pay. He did, however, have a financial interest in the outcome of the litigation.
- (10) GB worked with the Lawyer doing research, clerical work, filing, and providing information gained from before the Lawyer's involvement. He continued to perform this work after he was first suspended (on an interim interlocutory basis) in April 2017.
- (11) The Lawyer used GB's services for two years while GB was suspended (from April 2017-April 2019). During that period, GB was the subject of an ongoing capacity proceeding at the Law Society and was ultimately found to be incapacitated. The Lawyer had been advised by

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a Law Society investigator of her serious concerns that the Lawyer was violating Rule 7.6-1.1. of the *Rules of Professional Conduct* (the Rules) by using the services of a suspended lawyer.

- [12] GB assisted the Lawyer in drafting and filing court documents at the Belleville Courthouse and in liaising with the Belleville Courthouse Registrar and Trial Coordinator. He conducted factual and legal research, and occasionally corresponded with the court and opposing counsel.
- [13] On September 12, 2017, at the outset of the application hearing, the Lawyer advised Kershman J., the presiding judge, that GB had been suspended by the Law Society. He requested that GB be permitted to sit at the counsel table, ungowned, to assist. The opposing parties did not object and the Court granted the request. GB sat at the counsel table throughout the hearing.
- [14] The court dismissed the application on October 10, 2017 (i.e., the client was again successful). The parties subsequently became embroiled in costs and other negotiations. The unsuccessful party then appealed the judicial review decision.
- [15] On September 22, 2017, in advance of a proposed capacity hearing concerning GB, the Lawyer provided the Law Society with a letter of support for GB.
- [16] On November 9, 2017, the Hearing Division ordered GB to undergo a capacity assessment.
- [17] The Lawyer was out of the country between November 2-29, 2017. Between approximately November 20 and December 7, 2017, he was seriously ill. He was hospitalized in California and then transferred to the Toronto General Hospital on November 29, where he remained until December 7, 2017.
- [18] During this period of illness, GB assumed some responsibility for the appeal file, disregarding the Lawyer's instructions to adjourn the matter. Instead, he scheduled a case conference and took various other steps, including working on draft orders. GB subsequently performed significant work to prepare for the appeal hearing, including researching case law.
- [19] The lawyer acting for the other side of the file complained to the Law Society that GB was continuing to act although he had been suspended.
- [20] The Law Society authorized an investigation into the Lawyer's conduct in respect of GB on December 21, 2017. On January 3, 2018, the Law Society wrote to the Lawyer to notify him of its investigation and to request information, including a written response. The Law Society advised of its concern that in working with GB, the Lawyer may have failed to prevent, and/or may have facilitated the unauthorized practice of law and may have been working with a suspended lawyer contrary to Rule 7.6-1.1.
- [21] The Lawyer responded to the Law Society on February 12, 2018, detailing the nature of his working relationship with GB. He stated, "At all times I was aware of Section 7.6 of the Rules and was extremely careful – at all times – to make sure I was in compliance with and did not offend the rule."
- [22] The Law Society responded on March 1, 2018, advising that its concerns had not been alleviated, and that the Lawyer was not in compliance with at least Rule 7.6-1.1, as he was still using the services of a suspended lawyer in his ongoing legal work.
- [23] On September 18, 2018, the parties in the ongoing matter convened for cross-examinations on a motion for garnishment. The Lawyer attended the cross-examinations

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accompanied by GB. Counsel for the opposing parties objected to GB's presence. The parties adjourned the cross-examinations so that the Lawyer might move for directions on this issue.

- [24] Following an attendance on January 29, 2019, Kershman J. granted the Lawyer's motion and allowed GB to attend and assist at cross-examinations. The cross-examinations were completed with GB sitting beside the Lawyer.
- [25] GB's licence was suspended on an interlocutory basis on April 16, 2019.
- [26] GB attended at a psychiatric assessment regarding his capacity. On August 12, 2019, at the conclusion of a capacity hearing, the Hearing Division found GB was, and continued to be, incapacitated.
- [27] On February 10, 2020, a hearing panel suspended GB's licence on the grounds of incapacity, with the suspension to continue indefinitely until certain conditions were met.
- [28] GB continued to work for and with the Lawyer until about April 2019. In correspondence with the Law Society dated April 28, 2020, the Lawyer advised that his opinion of GB had changed since his September 22, 2017 letter of support, and that he wished to retract the letter.

THE RULES

- [29] The rules governing the Lawyer's admitted misconduct are straightforward. Rule 7.6-1 provides, "A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services." Rule 7.6-1.1 provides:

Without the express approval of a panel of the Hearing Division of the Law Society Tribunal, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their licence to practise law or to provide legal services revoked, has been suspended, has had their licence to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their licence to practise law or to provide legal services, and has not had their licence restored. (emphasis added)

PENALTY – ANALYSIS AND REASONS

The Misconduct

- [30] The Law Society says that the Lawyer worked with a suspended licensee without first obtaining the permission and approval of a hearing panel of the Tribunal, as required under Rule 7.6-1.1 of the Rules. By so doing, he failed to prevent the unauthorized practice of law or the unauthorized provision of legal services, contrary to Rule 7.6-1. In this case, it is clear that GB was providing unauthorized legal services, although it is not alleged that he was engaging in the unauthorized practice of law.
- [31] The Lawyer acknowledged in the ASF that his actions in working with GB constituted professional misconduct. We accordingly made a finding of misconduct at the hearing.
- [32] The rules prohibiting working with a suspended licensee have been enacted to protect the public and are restrictive. As the commentary to Rule 7.6-1.1 explains, even though an unauthorized or suspended person (such as GB) may have technical or personal legal skills

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and ability, it is not safe to work or engage with such a person. This is because a suspended licensee cannot be controlled, regulated, or disciplined by the Law Society.

- [33] In *Crawford v. Law Society of Upper Canada*,^[1] the hearing panel addressed the policy reasons for the rule.

Former licensees are uninsured, and immune from the regulatory and disciplinary control of the Law Society.... Former licensees do not contribute to the Compensation Fund, are not subject to trust accounting requirements, and are not subject to assessment of any fee taken. This presents an obvious and significant risk to the public, in that there is no recourse to the Law Society's regulatory structure and, generally, little to no recourse against the former licensee for negligent or fraudulent acts done in the course of unauthorized practice.

- [34] As also pointed out by the panel in *Crawford*, licensees are suspended on an interlocutory basis because a hearing panel of the Tribunal has determined that "there are reasonable grounds for believing that there is a significant risk of harm to members of the public, or to the public interest in the administration of justice, if the order is not made and that making the order is likely to reduce that risk"
- [35] In the present case, at least three hearing panels determined that GB should be suspended in order to protect the public from the risk of harm.
- [36] The Lawyer was aware of the prohibition against working with suspended lawyers. He was aware of GB's suspended status. He stated, however, that because he had requested permission from Kershman, J. in October 2017 to have GB assist him at the application hearing and to sit at counsel table, he assumed he had thereby been absolved or exempted from compliance with the Rules. He now understands that this assumption was incorrect.
- [37] The Lawyer did not dispute that he had worked with GB but asserted, in February 2018 correspondence with the Law Society, that he was "aware and sensitive" of GB's status under suspension. He stated he was also aware of s. 7.6 and was extremely careful to make he sure he complied with and did not offend the rule concerning the unauthorized practice of law.
- [38] He also submitted that he had been "transparent" with the Law Society and others. He never allowed GB to hold himself out as counsel or represent himself as a licensee. He made it clear, in his dealings with the court and other lawyers, that GB was a suspended lawyer. However, he admitted that he had not been sufficiently conscious of the rule about using the services of a suspended lawyer.
- [39] He acknowledges that he should not have used GB's services without having sought permission from the Hearing Division of this Tribunal. He acknowledges that although GB was not actually practising law, he was providing legal services, as defined under the *Law Society Act*, RSO 1990 c. L 6, and in violation of the Law Society's *Guidelines for Suspended Lawyers*.
- [40] The Lawyer stopped working with GB in April 2019. He has recognized that GB is incapacitated, as alleged.

Joint Submission on Penalty

- [41] The parties jointly submitted that the penalty in this case should be a reprimand.
- [42] The Divisional Court of Ontario, in *Bradley v. Ontario College of Teachers*,^[2] referring to the Supreme Court's decision in *R. v. Anthony-Cook*, 2016 SCC 43, enunciated a clear policy on joint submissions, saying at para. 11:

Tab 23

Law Society of Ontario v. Sherman, 2024 ONLSTH 26 (CanLII)

Date: 2024-03-11
File number: 22H-113
Citation: Law Society of Ontario v. Sherman, 2024 ONLSTH 26 (CanLII),
<https://canlii.org/can/condo/>, retrieved on 2024-04-03

**LAW SOCIETY TRIBUNAL
HEARING DIVISION**

Citation: *Law Society of Ontario v. Sherman*, 2024 ONLSTH 26
Date: March 11, 2024
Tribunal File No.: 22H-113

BETWEEN:

Law Society of Ontario

Applicant

- and -

Brian Allen Sherman

Respondent

Before: Lubomir Poliacik

Heard: September 29, 2023, by videoconference

Appearances:

Lisa Quan, for the applicant
Respondent, self-represented

Summary:

SHERMAN – CUPE Motion – The Law Society brought a motion for an order that findings from a conflict decision be admissible as proof of facts in a conduct application, and to bar the Lawyer from relitigating these findings – This arose from a situation where the Lawyer had continued to represent one client from a joint retainer after the relationship broke down – The former client obtained an order removing the Lawyer from the ongoing proceedings – Based on the doctrine of abuse of process by relitigation and the Lawyer's participation in the conflict proceedings, the panel ordered that findings from the conflict decision be admissible as proof of facts and that the licensee may not relitigate findings of fact from this hearing.

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REASONS FOR DECISION ON A MOTION

[1] Lubomir Poliacik:— This is a motion by the Law Society for orders that:

1. the reasons for decision by Master Muir of the Ontario Superior Court of Justice in *Moradi v. Baxi* 2018 ONSC 4645 (the Conflict Decision) and Master Muir's order, both dated August 2, 2018, are admissible evidence in this conduct application,
2. certain findings of fact made against Mr. Sherman contained in the Conflict Decision are admissible as proof of those facts in this conduct application; and
3. Mr. Sherman is barred from relitigating these findings of fact.

[2] Mr. Sherman does not oppose the admission of the Conflict Decision and Master Muir's order in evidence in this conduct application, but he wishes to dispute the findings of fact contained in the Conflict Decision. He therefore opposes the remainder of the relief sought by the Law Society on this motion.

[3] For the following reasons, I conclude that the findings in the Conflict Decision, with two exceptions, are admissible as proof of those facts in this conduct application and that Mr. Sherman is barred from relitigating these findings of fact.

THE CONDUCT APPLICATION

[4] In this application, Mr. Sherman is alleged to have engaged in conduct unbecoming and/or professional misconduct in respect of two complainants, AB and CD. The two complaints are unrelated and this motion relates only to the CD complaint. There the Law Society alleges at particulars 4 and 5 that:

4. Prior to acting for CD and EF on a joint retainer on a litigation matter (the "matter"), the respondent failed to advise CD, adequately or at all, in accordance with his obligations under Rule 3.4-5 of the *Rules of Professional Conduct*.
5. Between approximately November 2016 and August 2018, after a conflict arose between CD and EF in the matter, the respondent engaged in a conflict of interest by:
 - a) continuing to act for EF when he ought to have withdrawn from the matter completely; and
 - b) acting against CD following termination of the joint retainer, including using and disclosing confidential information provided to him by CD in the course of the joint retainer, and for the purpose of opposing CD's motion to have the respondent removed as solicitor of record for EF in the matter,

contrary to Rules 3.4-1, 3.4-2 and 3.4-10 of the *Rules of Professional Conduct*.

BACKGROUND TO THE CD COMPLAINT

[5] In November 2016, CD and EF executed a retainer agreement for Mr. Sherman to represent them as co-plaintiffs in litigation relating to the sale of a property that failed to close. Mr. Sherman commenced the main action on behalf of CD and EF and a third-party claim was subsequently commenced (collectively, the underlying actions).

[6] Shortly thereafter, the relationship between CD and EF began to deteriorate. Subsequently, the solicitor-client relationship between CD and Mr. Sherman also broke down. In June 2017, CD terminated her solicitor-client relationship with Mr. Sherman and hired new lawyers to act for her in the underlying actions.

[7] After CD terminated the solicitor-client relationship, Mr. Sherman, over CD's objections, continued to act for EF in the underlying actions.

- [8] CD brought motions in the underlying actions to remove Mr. Sherman as the lawyer for EF and to amend her pleadings. EF opposed the motions.
- [9] Both EF and Mr. Sherman swore affidavits in EF's opposition to CD's motions, in which they challenged CD's evidence and credibility. Mr. Sherman was cross-examined on his affidavits and the transcripts of the cross-examination were part of the record in the motions before Master Muir, heard in July 2018.
- [10] Fabian Otto, a lawyer in Mr. Sherman's firm, acted as counsel for EF on the motions.
- [11] Master Muir granted the relief sought by CD, including an order that Mr. Sherman be immediately removed as lawyer of record for EF in the underlying actions.
- [12] A notice of appeal by EF of Master Muir's order was entered in evidence at this motion hearing. Mr. Sherman stated in his interview with the Law Society investigator that "We had served and filed the Appeal ... and then it was withdrawn when [EF] took off to the United States and no longer cared".
- [13] It is unclear as to whether the appeal materials had been actually filed, as in 2023 the court staff at the civil intake office advised the Law Society's agent that no appeal has been filed. In any case, it is clear that the appeal did not proceed, and Master Muir's order is final.

THE LAW

Jurisprudence[1]

Admission of prior judicial findings as evidence

- [14] In *British Columbia (Attorney General) v. Malik*, 2017 SCC 18, the Supreme Court held at paras. 46-48 that:

Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions...

I agree, as well, with the Ontario Court of Appeal in *Del Core* that the prior proceedings may be admissible but the "weight and significance" to be given to them "will depend on the circumstances of each case".

...

Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (emphasis added)

- [15] In *Plate v. Atlas Copco Canada Inc.*, 2019 ONCA 196, Associate Chief Justice Hoy wrote for the Court of Appeal at paras. 54-55:

Although *Malik* considered the admissibility of a prior judgment in a subsequent interlocutory proceeding, its reasoning is not restricted to interlocutory proceedings [Citations omitted].

In Binnie J.'s view, a "prior judicial decision between the same or related parties or participants on the same or related issues" is not "merely another controversy over hearsay or opinion evidence": *Malik* at para. 52. Rather, the "court's earlier decision [is] a judicial pronouncement after the contending parties [have] been heard" having a "substantial effect on their legal rights": *Malik* at para. 52. In this vein, "the admissibility

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of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the context of the need to promote efficiency in litigation and reduce its overall costs to the parties": *Malik* at para. 37. The rule in *Hollington* gave rise to unnecessary inefficiencies, and any resulting unfairness in admitting prior judicial findings into evidence could be addressed on a case-by-case basis: *Malik* at para. 62.

The abuse of process doctrine

[16] In this motion, the Law Society relies on the abuse of process doctrine as set out by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 (CUPE).

[17] The Supreme Court applied the following principle at para. 37, citing *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.):

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. (emphasis and citations omitted)

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[18] The Supreme Court made the following observations about the doctrine's focus on the integrity of the adjudicative process at para 51

First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[19] At para. 53, the Supreme Court made the further observation:

...There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision....

[20] In *Law Society of Ontario v. Piersanti*, 2018 ONLSA 10 (affirmed by the Divisional Court, 2019 ONSC 1826), the Tribunal's Appeal Division noted that the Tribunal has applied the abuse of process doctrine established in *CUPE* to give effect to prior decisions on multiple occasions in many areas of the law. In *Piersanti*, the appeal panel elaborated on the circumstances referred to in para. 53 of *CUPE* where it would be unfair to treat a prior finding as being conclusive, stating that:

7.56
[66] Like issue estoppel, the abuse of process doctrine permits the second tribunal to exercise its discretion and hear evidence afresh where the circumstances require it in the interests of fairness and justice. That can arise in a number of circumstances. Again, the jurisprudence of this Tribunal and other adjudicative bodies elicits non-exhaustive list of situations in which it would be unfair to bind a party to the result in a prior proceeding:

- where the earlier proceeding was itself unfair; or it would be unfair to apply the findings outside the context of the party's role in that proceeding;
- where the financial or other stakes were relatively minor in the prior adjudication, for example where its purpose, downside risk or the upside benefit did not present a sufficient incentive for a party to vigorously litigate the point in dispute;
- where it is unclear (either at the outset of the Tribunal hearing, or at all) whether the issue in the prior hearing was precisely the same, so that there was a precise connection between the previous finding and the allegations in the instant application; or
- where an issue, or a particular aspect of an issue, was expressly left open by the first tribunal to be decided elsewhere; or
- where the applicable legislation contemplates parallel proceedings.

[citations omitted]

ANALYSIS

Admissibility of the conflict decision

[21] There is no dispute between the parties and Mr. Sherman concedes that, based on the principles set out in *Malik* and the subsequent jurisprudence, the conflict decision and the order are admissible at the hearing of this conduct application.

Findings made by Master Muir

[22] In its notice of motion, the Law Society seeks:

3. An order that the specific findings of fact contained in the Conflict Decision (including but not limited to paras. 1, 2-5, 6-7, 9, 12, 14-18, 20-23, 26, 34) and the Certified Order are admissible as proof of those facts in the within conduct proceeding against the respondent;
4. An order that the respondent is barred from relitigating the aforementioned specific findings of fact contained in the Conflict Decision and Certified Order....

[23] The Law Society submits that the following factual findings by Master Muir in the Conflict Decision should not be relitigated:

1. CD brought a motion seeking an order removing Mr. Sherman as lawyer of record for the co-plaintiff, EF, granting her leave to amend the statement of claim and to be added as a defendant. EF opposed the relief sought by CD (para. 1, Conflict Decision).
2. On November 9, 2016, CD and EF retained Mr. Sherman to act on their behalf relating to a civil dispute over an agreement of purchase and sale of a property in Toronto that did not close as scheduled (paras. 2-5, Conflict Decision).
3. Mr. Sherman drafted a statement of claim and commenced an action for CD and EF as co-plaintiffs on December 1, 2016 (paras. 6-7, Conflict Decision).

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4. Beginning in December 2016, just a few weeks after the action was commenced, the relationship between EF and CD began to deteriorate. Part of the conflict involved the underlying action and partnership (para. 9, Conflict Decision).
 5. On March 31, 2017, CD wrote to Mr. Sherman alleging that EF had been lying to her and was trying to cut her out of the partnership. CD then retained new counsel in June 2017 (para. 9, Conflict Decision).
 6. At the motion, EF took the position that no confidential information was obtained by Mr. Sherman during the course of Mr. Sherman's retainer by CD, and that there was no conflict between EF and CD in relation to the matters in issue in the underlying actions (para. 12, Conflict Decision).
 7. CD met the test in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), for disqualifying Mr. Sherman. In the within action, the previous retainer was not just related to said action, it was the same matter, and Mr. Sherman was continuing to act for EF in the same action in respect of which he acted for CD. This fact created a presumption that confidential information was imparted, and the evidence of EF and Mr. Sherman failed to rebut the strong inference that relevant confidential information had passed to Mr. Sherman from CD (paras. 14-15, Conflict Decision).
 8. It was absolutely clear from the evidence that confidential information was provided to Mr. Sherman. The record included dozens of pieces of correspondence between Mr. Sherman and CD concerning the matters in issue in the action and her conflict with EF. CD clearly confided in Mr. Sherman in terms of her position in this litigation, her conflict with EF and her motivation, concerns and objectives generally (para. 16, Conflict Decision).
 9. EF's argument that because this was a joint retainer between him and CD, none of her communications were confidential, was rejected. CD's communications with Mr. Sherman may not have been confidential with respect to EF but they were certainly confidential with respect to everyone else (para. 17, Conflict Decision).
 10. Mr. Sherman has no right to disclose confidential information given to him by CD to anyone other than EF and perhaps the third party. Nevertheless, this is exactly what Mr. Sherman has done in his opposition to CD's motion to amend. Mr. Sherman has sworn affidavits in opposition to CD's motion. In doing so, he alleges that his former client, CD, is making false allegations in her proposed amended pleadings. Mr. Sherman expressly states that he knows this based on information he received from CD. The information Mr. Sherman received from CD is confidential. It is clearly relevant to the matters in issue in this action and the motion to amend the statement of claim. It is obviously being used to the prejudice of CD in opposition of her motion to amend (para. 18, Conflict Decision).
 11. A reasonably informed member of the public would inevitably conclude that confidential information was provided to Mr. Sherman and there is a real risk it could be used to the prejudice of CD as this litigation proceeds. The preservation of the integrity of the justice system requires that Mr. Sherman be removed as lawyer of record for EF (para. 20, Conflict Decision).
 12. There was a second reason for an order removing Mr. Sherman, based on a lawyer's duty of loyalty to his or her former clients. The holding in the decision of the Court of Appeal in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2010 ONCA 788 [*Consulate Ventures Inc.*] was applicable to the facts before the court on this motion. Mr. Sherman was now acting against the interests of his former client, CD, and in connection with the very same matter. This was prohibited by the applicable rules of professional conduct. It undermines public confidence in the integrity of the legal profession and in the administration of justice. A lawyer's fiduciary and other duties to their client continue after discharge (paras. 21-22, Conflict Decision).

13. The fact that a lawyer's prior engagement was a joint retainer does not diminish these duties. The potential that a lawyer may have to withdraw if a conflict arises between clients is simply a risk associated with a joint retainer. A risk to the lawyer and a risk to the clients. That is why the Law Society of Ontario's Rules of Professional Conduct require a lawyer to inform clients of this possibility when entering into a joint retainer and to obtain their consent. Mr. Sherman clearly recognized this reality himself. On December 14, 2016 he advised CD in writing that if a conflict arose between her and EF, Mr. Sherman would have to withdraw from representing both of them (para. 23, Conflict Decision).

14. Mr. Sherman now acted for EF in opposition to his former client, CD. The holding of the Court of Appeal in *Consulate Ventures Inc.* required that an order be made in this action removing Mr. Sherman as lawyer of record for EF (para. 26, Conflict Decision).

15. It was ordered that Mr. Sherman be hereby removed as lawyer of record for EF in the underlying actions (para. 34, Conflict Decision).

[24] A number of the points listed in the above list are not "specific findings of fact".

[25] Point 15 above is not a finding by Master Muir, but is rather a recital of the order made by Master Muir removing Mr. Sherman as lawyer of record for EF. As stated above, the conflict decision and the order are admissible into evidence by the hearing panel in accordance with principles established in *Malik*. However, applying the abuse of process doctrine to a recital of the order unnecessary and superfluous.

[26] Points 7-14 contain findings of mixed fact and law, including Master Muir's finding that "CD met the test in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235 for disqualifying Mr. Sherman" (point 7) and that:

The holding in the decision of the Court of Appeal in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2010 ONCA 788 was applicable to the facts before the court on this motion. Mr. Sherman was now acting against the interests of his former client, CD, and in connection with the very same matter. This was prohibited by the applicable rules of professional conduct. It undermines public confidence in the integrity of the legal profession and in the administration of justice. A lawyer's fiduciary and other duties to their client continue after discharge. (point 12)

[27] There is nothing in the jurisprudence that prevents the application of the *CUPE* abuse of process doctrine to findings of mixed fact and law. Indeed, making a clear distinction between "specific findings of fact" and findings of mixed fact and law may not always be possible.

[28] The concern arises where, as in this case, applying the abuse of doctrine to Master Muir's finding that Mr. Sherman acted in a conflict of interest and that he acted in a manner "prohibited by the applicable rules of professional conduct", effectively forecloses Mr. Sherman defence to the very allegation raised against him in particular number 5 of the notice of application, and could pre-empt the panel hearing the conduct application on the very issue it is asked to decide: whether Mr. Sherman, in his dealings with CD and EF, engaged in professional misconduct.

[29] To address this concern, the definitions of conflict of interest in the court's jurisprudence and in the *Rules of Professional Conduct* must be reviewed.

DEFINING CONFLICT OF INTEREST IN COMMON LAW JURISPRUDENCE AND THE RULES

[30] Conflict of interest was defined by the SCC in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at para. 9 (*McKercher*):

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... As we held in *R. v. Neil*, 2002 SCC 70..., the general "bright line" rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated: para. 29. However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person": *Neil*, at para. 31.

[31] A number of Tribunal decisions have commented on the relationship between conflict of interest as defined by the Law Society's *Rules of Professional Conduct* and the common law definition of conflict of interest applied by the courts.

[32] In *Law Society of Upper Canada v. DeMerchant*, 2013 ONLSHP 153, the Hearing Panel commented:

[374] There may be considerable overlap in what the courts would consider as a conflict of interest and what the Law Society would consider a conflict of interest. But the result in one forum is not necessarily the result in the other forum.

...

[382] In our view, while the Supreme Court of Canada [in *McKercher* at paras. 15-16] differentiated between the court's role and the law society's role, it would not be practical for the decision of each to differ greatly. Accordingly we must be cognizant of the Supreme Court of Canada's ruling.

[33] The Appeal Panel in *DeMerchant*, 2015 ONLSIA 6, also addressed the issue in its reasons for decision:

[24] The obligation to avoid conflicts of interest is also a part of the lawyer's duties at common law, and may be applied by the courts to determine whether a lawyer may continue to act on a matter. This law informs our analysis, although at the end of the day we must apply the Rules, which may be different than the courts' approach. This was explained in *McKercher* at paras. 15-16:

The inherent power of courts to resolve issues of conflicts in cases that may come before them is not to be confused with the powers that the legislatures confer on law societies to establish regulations for their members, who form a self-governing profession: *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235, at p. 1244. The purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession.

Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10. In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although "an expression of a professional standard in a code of ethics ... should be considered an important statement of public policy": *Martin*, at p. 1246.

[34] In particular 5 of this conduct application, the Law Society alleges that Mr. Sherman acted contrary to Rules 3.4-1, 3.4-2 and 3.4-10.

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[35] Rule 3.4-1 prohibits acting in a conflict of interest: "3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section."

[36] Conflict of interest is defined in Rule 1.1-1 and its commentary:

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer;

Commentary

[1] In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur.

[37] Rule 3.4-2 permits acting in a conflict of interest in certain circumstances with the consent of the clients:

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

[38] Rule 3.4-10 deals with acting against former clients:

3.4-10 Unless the former client consents, a lawyer shall not act against a former client in

- (a) the same matter,
- (b) any related matter, or
- (c) save as provided by Rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

[39] The definition of conflict of interest in the Rule 1.1 and the commentary on that definition is clearly derived from *Neil and McKercher* and follows the wording of para. 8 of the SCC decision in *McKercher* almost verbatim.

[40] The commentary for the rules dealing with conflicts in section 3 specifically adopts the courts' framework for determining the existence of a conflict of interest, including expressly citing *McKercher* and the Bright Line Rule as well as the *Macdonald Estate* decision.

[41] Tribunal panels have repeatedly applied the courts' common law framework for determining whether a licensee's conduct constituted a conflict of interest: *DeMerchant*, 2015 ONLSTA 6 at paras. 26-28 (the appeal panel in *DeMerchant* specifically requested submissions on the *McKercher* decision, which was released by the SCC at the conclusion of the *DeMerchant* appeal hearing); *Law Society of Ontario v. Mader*, 2018 ONLSTH 74 at paras. 6-7 and 56-67; *Law Society of Upper Canada v. Callahan*, 2011 ONLSTH 174 at paras. 29-37; *Law Society of Upper Canada v. Hoskinson*, 2015 ONLSTH 216 at paras. 136-140; *Law Society of Upper Canada v. May*, 2016 ONLSTH 78 at para. 10; and *Law Society of Ontario v. Rapoport*, 2021 ONLSTH 100 at para. 124.

[42] Nevertheless, the conduct that is found not to constitute conflict of interest at common law may constitute a breach of one of the rules in section 3.

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[43] This issue was addressed in *Callahan*, where the former Rule 2.04(4), which is substantially same as current Rule 3.4-10, was considered:

[45] There is a difference between Rule 2.04(4) and the case law that is important here. *MacDonald Estate* permits a lawyer to show the absence of relevant confidential information where the prior and the new matter are related. In *MacDonald Estate*, a substantial relationship between the prior matter and the new matter gives rise to a rebuttable presumption that the lawyer possesses relevant confidential information. In contrast, subrule 2.04(4)(b) (now subrule 3.4-10 (b)) establishes a prohibition where matters are related. Unlike *MacDonald Estate*, the Rule does not allow for a lawyer to act if the lawyer can establish the absence of relevant confidential information.

[44] The other court decision relied upon by Master Muir was *Consulate Ventures*, above. In *Hoskinson*, the panel, without specifically determining whether the prohibition in the *Rules of Professional Conduct* against acting against a former client is more restrictive than the law elaborated in *Consulate Ventures*, adopted the *Consulate Ventures* framework in determining whether a breach of the Rules had occurred.

[45] Applying the abuse of process doctrine enunciated by the Supreme Court in *CUPE* to Master Muir's findings to preclude Mr. Sherman from relitigating these issues, including Master Muir's findings on the conflict of interest, is precisely the harm the doctrine is meant to prevent – avoiding the possibility of conflicting decisions, waste of judicial resources, unnecessary expense to the parties and potential hardship to witnesses.

[46] However, the *CUPE* abuse of process doctrine is not applicable to Master Muir's finding that Mr. Sherman acted in a manner that "was prohibited by the applicable rules of professional conduct".

[47] As stated by the Court in *McKercher*, "In exercising their respective powers, [the courts and the law societies] each may properly have regard for the other's views. Yet each must discharge its unique role."

[48] In *Groia v. The Law Society of Upper Canada*, 2013 ONCA 471, the court stated at para.

105:

... I agree that the views of the presiding trial judge regarding the propriety of an advocate's in-court conduct can and should attract considerable weight by a reviewing disciplinary body. However, they are not dispositive of whether the advocate has engaged in professional misconduct. Indeed, they may not even address this issue, which is a question for the regulator, not the courts.

[49] As the hearing panel stated at para. 49 of *Law Society of Upper Canada v. Ezer*, 2017 ONLSTH 206, where the lawyer's conduct has been considered by the courts, it is important to pay close attention to what the court has said about that conduct, while also recognizing the different roles of the courts and the regulator.

[50] It is for the Tribunal to determine whether Mr. Sherman engaged in professional misconduct, contrary to s. 33 of the *Law Society Act*, RSO 1990, c. 118, by contravening the *Rules of Professional Conduct*. Master Muir's finding that Mr. Sherman's conduct "was prohibited by the applicable rules of professional conduct" cannot be binding on the panel hearing this conduct application. It will be for that panel to determine whether Mr. Sherman engaged in professional misconduct by breaching the Rules.

Was Mr. Sherman a party to the conflict motion?

[51] Mr. Sherman submits that he was not a "party" to the underlying actions in which the conflict decision was made and that therefore the *CUPE* abuse of process doctrine is not

applicable. (262)

- [52] There are a number of cases where the lawyer or paralegal is not a party in the underlying proceeding but is nevertheless found bound by the findings (for example, of contempt⁽²⁾) made in that proceeding in subsequent litigation for the purposes of the application of the *CUPE* doctrine of abuse of process.
- [53] Similarly, in *Law Society of Upper Canada v. Borden*, 2012 ONLSP 1171, the lawyer was subject to four costs orders against him personally in proceedings to which he was not a party. The propriety of the lawyer's conduct was at issue in each of the costs decisions and the hearing panel found that the test of mutuality was satisfied for the purposes of issue estoppel: para. 68.
- [54] In *Law Society of Ontario v. Corcoran*, 2023 ONLSP 97, at para. 39 the panel applied the abuse of process doctrine where the court granted the Crown's application to remove the lawyer as counsel of record for the accused in a criminal proceeding:
- ... in circumstances where the lawyer was not a party to the proceedings, such as contempt proceedings or motions to have the lawyer pay costs personally, the abuse of process doctrine can apply if the lawyer had a fair opportunity to respond to the allegations that were made, and it would not have otherwise be unfair to preclude the lawyer from re-litigating the issues.
- [55] Mr. Sherman relies on the Appeal Panel's decision in *Law Society of Ontario v. Groia*, 2013 ONLSP 41, where the Panel found that the Hearing Panel erred in applying the former Rule 24.07(1) and the *CUPE* abuse of process doctrine to certain statements made by the judge in a proceeding because Mr. Groia was not a party to those proceedings.
- [56] The *Groia* decision is distinguishable from Mr. Sherman's case on a number of grounds.
- [57] Mr. Groia's conduct was the subject of numerous comments or "findings" by the judge, but he was not subject to any order. This had the result that there was no mechanism to appeal the "findings" made against him in the two decisions.
- [58] Furthermore, in *Groia*, the "findings" by the judge were not "specific findings of fact." Rather, the Appeal Panel found at para. 191 that these were merely comments which were not a necessary element of the court decisions:
- [I]n our view the decisions of Justice Campbell and of the Court of Appeal with respect to the OSC's judicial review application do not contain any findings about Mr. Groia's conduct that could fairly be said to be essential to those decisions for the purposes of the doctrine of abuse of process.
- [59] In Mr. Sherman's case, the findings in the conflict decision which are the subject of this motion are findings of fact and law which were essential to Master Muir's conflict decision.
- [60] The Appeal Panel in *Groia* also found that the legal issues in the court hearings which resulted in the "findings" or comments about Mr. Groia's conduct were not the same as those before the Hearing Panel, saying at para. 198,
- ... defending Mr. Groia's conduct was not the primary focus of Mr. Felderhof's legal team in the judicial review proceedings. In particular, Mr. Greenspan testified that the focus of the defence was on whether the trial judge had lost jurisdiction.
- [61] In this matter, the focus of the motion heard by Master Muir was, in fact, Mr. Sherman's conduct and the existence of a conflict of interest, which substantially overlaps with the issues before this Tribunal.

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[62] The Appeal Panel in *Groia* overturned the Hearing Panel's decision on the issue of abuse of process, stating at para. 201:

...the [hearing] panel effectively foreclosed [Mr. Groia's] defence on the basis of reasons for decision given in a proceeding to which he was neither a party nor witness, which he could not appeal, and which involved significantly different legal issues. In our view, the hearing panel should have refused to apply the abuse of process doctrine; instead, it should have given the reasons of the reviewing courts limited weight, in the unusual circumstances of this case.

[63] Mr. Sherman was a witness in the conflict motion proceeding, there was a right to appeal the conflict decision (see below), and the legal issues in the conflict motion before Master Muir were identical to those in this conduct application. The disqualification order bound Mr. Sherman as well as binding his client. The *Groia* decision therefore does not assist Mr. Sherman.

[64] In *Intact Insurance Co. v. Federated Insurance Company of Canada*, 2017 ONCA 73, the court stated:

[34] CUPE accepts that the abuse of process doctrine, unlike issue estoppel, can apply to preclude relitigation by a party who was not a party to the prosecution. However, the non-involvement of the party seeking to relitigate in the initial litigation is a significant factor in determining whether relitigation constitutes an abuse of process. Clearly, a party who had a full opportunity to litigate a fact at a prior proceeding stands on much weaker ground when seeking to relitigate that fact in a different context in a subsequent proceeding than does a party who has never had the opportunity to litigate the fact in issue.... (Citations omitted, emphasis added)

[65] Mr. Sherman was directly involved in the conflict motion before Master Muir, as he swore two affidavits in opposition to CD's motion seeking his removal as lawyer of record, was cross-examined, and the motion was argued by a lawyer from his firm. There is no unfairness in applying the abuse of process doctrine to preclude Mr. Sherman from relitigating Master Muir's findings.

The right to appeal the conflict decision

[66] Mr. Sherman submits that the *CUPE* abuse of process doctrine is not applicable in this case because, as he was not a party to the underlying actions, he did not have a right to appeal Master Muir's conflict decision.

[67] A very similar situation was addressed by the panel in *Law Society of Ontario v. Corcoran*, 2023 ON. STJ 97 at para. 43:

... it is not clear whether the Lawyer would have had a right to appeal, independent of his client's right to appeal. Assuming that the Lawyer had no right to appeal, does that make it otherwise unfair to preclude him from re-litigating Justice Braid's findings of fact? In my view, the lack of a right of appeal should not permit re-litigation in circumstances where the Lawyer has otherwise had a fair opportunity to contest the allegations... It would be corrosive of the principles that underlie the abuse of process doctrine—judicial economy, consistency, finality, and the integrity of the administration of justice—to permit re-litigation in the circumstances of this case. While there might be cases where the lack of an appeal could create unfairness, there is no unfairness here.

[68] No authority was submitted for the proposition that a lawyer, being directly affected by a disqualification order, could not appeal an order removing them as counsel

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[69] But even if Mr. Sherman did not have an independent right to appeal the conflict decision and order, his client EF clearly did. Indeed, a notice of appeal had been drafted by Mr. Sherman's office and was entered in evidence in this motion.

[70] There is no direct evidence as to why the appeal of Master Muir's order did not proceed. In his submissions, Mr. Sherman suggested that his client moved out of the country and lost interest in the case, or at least in the appeal, but no evidence was led on this issue.

[71] If a party wishes to oppose the application of the abuse of process doctrine on the ground that they were not able to appeal the previous court decision, especially where, as in this case, an appeal process was available (certainly to the client), there must be cogent evidence to support that position, setting out why they were not able to avail themselves of the available appeal process.

[72] In any case, the lack of availability of an appeal route of the original decision does not, in itself, make the CUPE abuse of doctrine inapplicable. As stated by the panel in *Corcoran* in the passage quoted above, there may be cases where the lack of an appeal process could create unfairness and make the abuse of process doctrine inapplicable. However, particularly in view of Mr. Sherman's active participation in the process that led to the conflict decision, there is no unfairness in applying the doctrine in this case.

Was the conflict decision wrongly decided?

[73] Mr. Sherman submits that the CUPE abuse of process doctrine should not be applied in these proceedings and that he should be permitted to lead evidence to challenge Master Muir's findings in the conflict decision because the conflict decision was wrongly decided. In particular, Mr. Sherman submits that Master Muir should not have accepted and preferred the evidence of CD over his own evidence, that Master Muir was wrong in finding that confidential information was used and finding that CD and EF's interests in the underlying litigation were in conflict.

Collateral attack

[74] The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, 1983 Can LII 35 (SCC) at p. 599, the rule against collateral attack:

...has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[75] As the Court stated in *CUPE* at para. 46:

A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum.

[76] Mr. Sherman's challenge of the correctness of Master Muir's decision in this proceeding is a collateral attack on the conflict decision. It constitutes an impermissible route of relitigation as set out by the Supreme Court in *CUPE* and in *Wilson*.

Was the conflict motion proceeding unfair?

[77] Mr. Sherman submits that the hearing was unfair because, as he alleges in his affidavit, "Master Muir had a reputation among many civil litigators for making up his mind before and apart from whatever counsel presented. He did that on this Motion..."

[78] This broad allegation is not supported by any evidence and is not given any weight.

Were the issues and scope of the motion the same?

[79] Mr. Sherman submits, "The issues and scope of the Motion before Master Muir and this motion are not the same and the relief sought is not the same".

[80] Clearly not all the issues before Master Muir are before this tribunal, including the order allowing CD to amend her pleadings. And of course the relief sought is not the same – the relief sought before Master Muir was the removal of Mr. Sherman as counsel and whereas in this application the Law Society is seeking a finding of professional misconduct

[81] But as already stated above, the issue of conflict of interest was squarely before Master Muir and is one of the issues before the tribunal in this misconduct application and this motion.

[82] It is not a necessary requirement for the application of the abuse of process doctrine that all the issues present in the original proceeding be also present in the subsequent proceeding, or that the relief sought be the same in both proceedings.

[83] This point is best illustrated by the fact situation in the *CUPE* decision itself. In *CUPE*, a City of Toronto employee was criminally convicted of sexually assaulting a minor. The City then fired the employee. The employee's union grieved his dismissal. At the arbitration hearing, the City entered into evidence the employee's criminal conviction. The arbitrator ruled that the conviction was admissible but ultimately held that the presumption of the criminal conviction had been rebutted and that the employee had been dismissed without just cause, but the court found that this was impermissible relitigation that resulted in an abuse of process.

[84] In *CUPE*, many of the issues before the criminal court leading to the conviction of the employee would have been different than the issues in the employment litigation resulting in the *CUPE* decision. And of course the relief sought in the criminal proceeding was different than the relief sought in the case eventually decided by the SCC as the *CUPE* decision. Nevertheless, the Supreme Court held that the arbitrator was bound by the criminal conviction and that the employee should not have been able to relitigate his conviction in the subsequent employment litigation.

ORDER

[85] The motion is granted for the reasons above and it is ordered that:

1. The reasons for decision by Master Muir of the Ontario Superior Court of Justice in *Moradi v. Baxi* (the Conflict Decision) and Master Muir's order, both dated August 2, 2018, are admissible evidence in this conduct application.
2. The following findings made in the Conflict Decision by Master Muir are admissible as proof of those facts in these proceedings:
 - a. CD brought a motion seeking an order removing Mr. Sherman as lawyer of record for the co-plaintiff, EF, granting her leave to amend the statement of claim and to be added as a defendant. EF opposed the relief sought by CD (para. 1, Conflict Decision).

- (26)
- b. On November 9, 2016, CD and EF retained Mr. Sherman to act on their behalf relating to a civil dispute over an agreement of purchase and sale of a property in Toronto that did not close as scheduled (paras. 2-5, Conflict Decision).
 - c. Mr. Sherman drafted a statement of claim and commenced an action for CD and EF as co-plaintiffs on December 1, 2016 (paras. 6-7, Conflict Decision).
 - d. Beginning in December 2016, just a few weeks after the action was commenced, the relationship between EF and CD began to deteriorate. Part of the conflict involved the underlying action and partnership (para. 9, Conflict Decision).
 - e. On March 31, 2017, CD wrote to Mr. Sherman alleging that EF had been lying to her and was trying to cut her out of the partnership. CD then retained new counsel in June 2017 (para. 9, Conflict Decision).
 - f. At the motion, EF took the position that no confidential information was obtained by Mr. Sherman during the course of Mr. Sherman's retainer by CD, and that there was no conflict between EF and CD in relation to the matters in issue in the underlying actions (para. 12, Conflict Decision).
 - g. CD met the test in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235 for disqualifying Mr. Sherman. In the within action, the previous retainer was not just related to said action, it was the same matter, and Mr. Sherman was continuing to act for EF in the same action in respect of which he acted for CD. This fact created a presumption that confidential information was imparted, and the evidence of EF and Mr. Sherman failed to rebut the strong inference that relevant confidential information had passed to Mr. Sherman from CD (paras. 14-15, Conflict Decision).
 - h. It was absolutely clear from the evidence that confidential information was provided to Mr. Sherman. The record included dozens of pieces of correspondence between Mr. Sherman and CD concerning the matters in issue in the action and her conflict with EF. CD clearly confided in Mr. Sherman in terms of her position in this litigation, her conflict with EF and her motivation, concerns and objectives generally (para. 16, Conflict Decision).
 - i. EF's argument that because this was a joint retainer between him and CD, none of her communications were confidential, was rejected. CD's communications with Mr. Sherman may not have been confidential with respect to EF but they were certainly confidential with respect to everyone else (para. 17, Conflict Decision).
 - j. Mr. Sherman has no right to disclose confidential information given to him by CD to anyone other than EF and perhaps the third party. Nevertheless, this is exactly what Mr. Sherman has done in his opposition to CD's motion to amend. Mr. Sherman has sworn affidavits in opposition to CD's motion. In doing so, he alleges that his former client, CD, is making false allegations in her proposed amended pleadings. Mr. Sherman expressly states that he knows this based on information he received from CD. The information Mr. Sherman received from CD is confidential. It is clearly relevant to the matters in issue in this action and the motion to amend the statement of claim. It is obviously being used to the prejudice of CD in opposition of her motion to amend (para. 18, Conflict Decision).
 - k. A reasonably informed member of the public would inevitably conclude that confidential information was provided to Mr. Sherman and there is a real risk it could be used to the prejudice of CD as this litigation proceeds. The preservation of the integrity of the justice system requires that Mr. Sherman be removed as lawyer of record for EF (para. 20, Conflict Decision).

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- l. There was a second reason for an order removing Mr. Sherman, based on a lawyer's duty of loyalty to his or her former clients. The holding in the decision of the Court of Appeal in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2010 ONCA 788 ["*Consulate Ventures Inc.*"] was applicable to the facts before the court on this motion. Mr. Sherman was now acting against the interests of his former client, CD, and in connection with the very same matter. It undermines public confidence in the integrity of the legal profession and in the administration of justice. (paras. 21-22, Conflict Decision).
 - m. The fact that a lawyer's prior engagement was a joint retainer does not diminish these duties. The potential that a lawyer may have to withdraw if a conflict arises between clients is simply a risk associated with a joint retainer. A risk to the lawyer and a risk to the clients. That is why the Law Society of Ontario's Rules of Professional Conduct require a lawyer to inform clients of this possibility when entering into a joint retainer and to obtain their consent. Mr. Sherman clearly recognized this reality himself. On December 14, 2016 he advised CD in writing that if a conflict arose between her and EF, Mr. Sherman would have to withdraw from representing both of them (para. 23, Conflict Decision).
 - n. Mr. Sherman now acted for EF in opposition to his former client, CD. The holding of the Court of Appeal in *Consulate Ventures Inc.* required that an order be made in this action removing Mr. Sherman as lawyer of record for EF (para. 26, Conflict Decision).
3. The respondent is precluded from re-litigating the facts listed in paragraph 2 of this order in these conduct proceedings.
 4. Costs of this motion shall be determined by the panel hearing the merits of the application 22H-113.

[1] This summary of the applicable law is adapted from *Law Society of Ontario v. Bush*, 2022 ONLSTH 133, paras. 33-51.

[2] *Bush*, above.

Tab 24

Law Society of Ontario v. Fuhgeh, 2020 ONLSTH 75 (CanLII)

Date: 2020-06-26
File number: 17H-102
Citation: **Law Society of Ontario v. Fuhgeh, 2020 ONLSTH 75 (CanLII)**,
<https://canlii.org/ott/STH/75/>, retrieved on 2024-04-03
Most recent unfavourable mention: *Simone v. Law Society of Ontario*, 2021 ONLSTH 114 (CanLII)

**LAW SOCIETY TRIBUNAL
HEARING DIVISION**

Citation: *Law Society of Ontario v. Fuhgeh*, 2020 ONLSTH 75

Date: June 26, 2020

Tribunal File No.: 17H-102

BETWEEN:

Law Society of Ontario

Applicant

- and -

William Ndze Fuhgeh

Respondent

Before: Raj Anand (chair), Barbara A. Laskin, Michelle Lomazzo

Heard: May 13-17, July 17, September 3-6, October 15-17 and 21-23, November 4-5, and 13, 2019, and January 21, 2020, in Ottawa, Ontario

Appearances:

Paul LeVay and Stephen Aylward for the applicant
Respondent, self-represented

Summary:

FUGHEH – Professional Misconduct – Conduct Unbecoming – Findings – Evidence – The Law Society brought two sets of allegations against the Lawyer – The first alleged improper conduct toward his client, other lawyers, the Federal Court and the administration of justice, in his representation of the client on an application for judicial review of an employment tribunal's decision

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– The second set alleged harassing conduct toward the complainant, his ex-partner, including the issuance of threatening and unfounded complaints for the purpose of influencing family law litigation between them concerning their son – The panel found that all of the allegations of professional misconduct or conduct unbecoming had been proven, except: 1) improperly alleging that the chair of the tribunal whose decision was under review was biased against the lawyer's client; and 2) filing unfounded professional discipline complaints against his ex-partner – In dismissing this latter allegation, the panel held that s. 36(3) of the Regulated Health Professions Act, 1991 (RHPA), which precludes any evidence of what takes place in an RHPA regulatory proceeding from being adduced in a civil proceeding, applied in these circumstances, where the other proceeding was before the independent adjudicative tribunal of another regulator.

REASONS FOR DECISION ON FINDINGS AND CERTAIN MOTIONS

INTRODUCTION

- [1] Raj Anand (for the panel) – Mr. Fuhgeh (the respondent or the Licensee) is a sole practitioner in Ottawa who practises in different areas including civil, administrative and matrimonial litigation. In this application, the Law Society brought two sets of allegations against him.
- [2] The first set alleges improper conduct by the respondent toward his client, other lawyers, the Federal Court and the administration of justice in his representation of a federal public servant, Dr. Bruno Makoundi, in an application for judicial review of an employment tribunal's decision. The second set alleges harassing conduct toward Complainant A, his ex-partner, including the issuance of threatening and unfounded complaints for the purpose of influencing family law litigation between them concerning their son.
- [3] To provide the context for this lengthy and procedurally complicated proceeding, we reproduce the text of the allegations in the amended notice of application:

DETAILS OF THE ALLEGATIONS:

1. In December, 2014, the Respondent, contrary to r. 5.1-2(e) of the *Rules of Professional Conduct*, knowingly attempted to deceive the Federal Court by filing a false and deceptive affidavit, in particular by filing a document purporting to be an affidavit sworn by the Respondent's client ("Client A") on December 22, 2014, in circumstances where the Respondent knew that
 - (i) the affidavit had not been read or reviewed by Client A; and further (or in the alternative),
 - (ii) the evidence contained in the affidavit was not the evidence of Client A; and further (or in the alternative),
 - (iii) the affidavit was not properly commissioned;
2. In August, November and December, 2014, the Respondent in oral and written submissions to the Federal Court, contrary to r. 7.2-1 of the *Rules of Professional Conduct*, failed to avoid making ill-considered or uninformed criticism about other lawyers, in particular by
 - (i) alleging in the course of representations to the Federal Court on behalf of Client A that three Department of Justice lawyers colluded with others against Client A to interfere with the processes of the Federal Court; and further (or in the alternative),
 - (ii) alleging that the Chair of a Tribunal whose decision was under review was biased against Client A,

in each case without an objective factual basis for the allegation:

request, the parties were given an opportunity to make post-hearing submissions in writing and to submit additional documents from the CTR to the application record.

[69] In a submission dated November 10, 2014, Mr. Fuhgeh provided a copy of an e-mail sent by Dr. Makoundi to the Executive Director of the PSST on July 15, 2013, in which he requested the recusal of the PSST Member for alleged bias towards the respondent and its witnesses as demonstrated during the first day of the PSST hearing. Dr. Makoundi was unrepresented at that time, but shortly thereafter retained counsel during a recess in the proceedings.

[70] Counsel for the respondent has drawn the Court's attention to correspondence from Dr. Makoundi's then lawyer (not Mr. Fuhgeh) dated July 29, 2013. The lawyer advised the tribunal that he had only recently been retained and requested a postponement to consider the matter, including the recusal request. On August 6, 2013, the lawyer informed the tribunal by letter that the recusal request was withdrawn and requested that the hearing resume.

[71] Therefore, it was misleading for Mr. Fuhgeh to have argued before the Court that the PSST Member failed to consider the recusal requested without further informing the Court that the request was expressly abandoned by Dr. Makoundi's counsel before the PSST hearings were completed.

[72] Among counsel's responsibilities to his client and to the Court was to thoroughly review the record of the PSST process prior to the hearing of this application. It was evident throughout the hearing that Mr. Fuhgeh had not done so. Mr. Fuhgeh should have been aware of the correspondence between his client's former counsel and the PSST regarding the recusal issue and brought it to the Court's attention in his written argument and oral submissions. It was improper for him to raise the issue without fully disclosing the circumstances to the Court. That error was compounded when Mr. Fuhgeh provided the July 15, 2013 e-mail without the subsequent correspondence from his client's former lawyer indicating that the recusal request had been abandoned.

[73] Rule 404(1) permits the Court to award costs personally against a solicitor where there has been "misconduct or default". However, an order cannot be made unless the solicitor has been given an opportunity to be heard.

[74] I consider this to be one of the rare instances where it may be appropriate to impose costs on counsel personally. I will reserve my decision on that question and will give Mr. Fuhgeh the opportunity to provide written submissions exclusively on the issue of costs within 15 days of the date of this judgment. These submissions cannot exceed 10 pages. Mr. Fuhgeh may request in his written submissions that he be given an opportunity to make oral submissions before a costs Order is made against him.

[75] If Mr. Fuhgeh does not file submissions by the deadline, I will proceed to order costs against him personally, assessed on the normal scale. It is also my intention to provide notice of such an order to Dr. Makoundi, pursuant to rule 404(3).

[91] The Licensee was placed in the difficult position of defending his client against a routine costs order in favour of the government, while at the same time defending himself against the extraordinary remedy of being required as counsel to pay those costs and to forego his own fees. Mr. Fuhgeh and his client were obviously in a conflict of interest. He told us he recognized this fact, but his conduct and all of the evidence indicate the contrary.

[92] The Licensee did not notify his professional services insurer, LawPRO, as he was obliged to do. LawPRO frequently retains counsel to advise and/or to represent the interests of a lawyer who is threatened with an order to pay costs at the conclusion of a proceeding. This is particularly important where liability for costs may depend on privileged information such as the instructions that the lawyer received from the client. A report to LawPRO would

Tab 25



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of Canada

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→ [The Personal Information Protection and Electronic Documents Act \(PIPEDA\)](#) → [PIPEDA compliance help](#)

→ [PIPEDA interpretation bulletins](#)

Interpretation Bulletin: Sensitive Information

May 2022

One of the Commissioner's primary roles is to investigate and try to resolve privacy complaints against organizations. Findings on a given issue may differ depending on the facts of each case and the position of the parties. Over time, findings on certain key issues may crystallize into general principles that can serve as helpful guidance for organizations.

In an effort to summarize the general principles that have emerged from court decisions and the Commissioner's findings to date, the OPC (Office of the Privacy Commissioner of Canada) issues Interpretations of certain key concepts in PIPEDA (Personal Information Protection and Electronic Documents Act). These Interpretations are not binding legal interpretations, but rather, are intended as a guide for compliance with PIPEDA (Personal Information Protection and Electronic Documents Act). As the Commissioner issues more findings, and the courts render more decisions, these Interpretations may evolve and be further refined.

The OPC (Office of the Privacy Commissioner of Canada) has also produced [Guidelines for obtaining meaningful consent](#) ([/en/privacy-topics/collecting-personal-information/consent/gl_priv_201805/](#)) and an [Interpretation Bulletin on formal consent](#)

([/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_07_consent/](#)) (currently under review) which also discuss the sensitivity of information.

Relevant Statutory Provisions

of the *Personal Information Protection and Electronic Documents Act*, S.C. (Statutes of Canada) 2000, c. (chapter) 5 (PIPEDA)

Principle 4.3.4: The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context. For example, the names and addresses of subscribers to a newsmagazine would generally not be considered sensitive information. However, the names and addresses of subscribers to some special-interest magazines might be considered sensitive.

Principle 4.7: Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

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Principle 4.7.2: The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.

Subsection 7.2(1)(a)(ii): In addition to the circumstances set out in subsections 7(2) and 7(3), for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, organizations that are parties to a prospective business transaction may use and disclose personal information without the knowledge or consent of the individual if the organizations have entered into an agreement that requires the organization that receives the personal information to protect that information by security safeguards appropriate to the sensitivity of the information.

Subsection 7.2(2)(a)(ii): In addition to the circumstances set out in subsections 7(2) and (3), for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, if the business transaction is completed, organizations that are parties to the transaction may use and disclose personal information, which was disclosed under subsection (1), without the knowledge or consent of the individual if the organizations have entered into an agreement that requires each of them to protect that information by security safeguards appropriate to the sensitivity of the information.

Subsection 10.1 (8): The factors that are relevant to determining whether a breach of security safeguards creates a real risk of significant harm to the individual include

- a. the sensitivity of the personal information involved in the breach;
- b. the probability that the personal information has been, is being or will be misused; and
- c. any other prescribed factor.

-Application by the Courts and the OPC (Office of the Privacy Commissioner of Canada) in Different Contexts

While under PIPEDA (Personal Information Protection and Electronic Documents Act) any personal information can be sensitive depending on the context, we have found that certain types of personal information will generally be considered sensitive because of the specific risks to individuals associated with the collection, use or disclosure of these categories of information.

Information that will generally be considered sensitive and require a higher degree of protection includes health and financial data, ethnic and racial origins, political opinions, genetic and biometric data, an individual's sex life or sexual orientation, and religious or philosophical beliefs.

Whether personal information is considered "sensitive" under PIPEDA (Personal Information Protection and Electronic Documents Act) will vary depending on the facts of each case. The following highlights cases where considerations around the sensitivity of information were relevant to the analysis.

Context is relevant to the assessment of sensitivity

- "Clause 4.3.4 sets up a standard of 'sensitivity of the information,' only to add that 'any information can be sensitive, depending on the context. Clause 4.3.5 then goes on to say that '[i]n obtaining consent, the reasonable expectations of the individual are also relevant' (...) All of this is to say that, even though Part 1 and Schedule 1 of the Act purport to protect the right of privacy, they also purport to facilitate the collection, use and disclosure of personal information by the private sector. In interpreting this legislation, the court must strike a balance between two competing interests." (Englander v. (versus) Telus Communications Inc., 2004 FCA (Federal Court of Appeal))

(https://decisions.fca-cfc.gc.ca/decisions/en/item/31309/index.do?c=Englander+v.+TELUS+Communications+Inc)

at paras. (paragraphs) 45 and 46)

- Although there may always be unique circumstances that heighten the sensitivity of otherwise non-sensitive personal information, the interpretation of PIPEDA (Personal Information Protection and Electronic Documents Act) calls for a reasonable, pragmatic approach. Furthermore, in keeping with the purpose of the Act, there is a need to balance the privacy rights of individuals with the need to facilitate the use of personal information for appropriate commercial purposes.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2012-002 – Facebook didn't get non-members' consent to use email addresses to suggest friends, investigation finds ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2012/pipeda-2012-002/](#))
- Email addresses could be considered sensitive in certain unique contexts.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2012-002 – Facebook didn't get non-members' consent to use email addresses to suggest friends, investigation finds ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2012/pipeda-2012-002/](#))
- Information that in isolation might be regarded as innocuous in a different context (such as names or email addresses) can take on a more sensitive nature when connected to services that may reveal the personal activities and preferences of its users.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2016-005 – Joint investigation of Ashley Madison by the Privacy Commissioner of Canada and the Australian Privacy Commissioner/Acting Australian Information Commissioner ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2016/pipeda-2016-005/](#))

Information can become sensitive when combined with other information

- That sensitive information is used to generate non-sensitive interest categories does not change the fact that the underlying information being used is sensitive. Where sensitive information is used to generate non-sensitive interest categories, both the underlying information and the resulting categories that are derived from such information must be assessed in determining the sensitivity of the information at issue.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2015-001 – Results of the Commissioner Initiated Investigation into Bell's Relevant Ads Program ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-001/](#))
- Profiles created by combining several data elements (i.e., (that is) customer names, contact details, interactions with an organization) can have a certain degree of sensitivity which can be further heightened by the known risk environment (in this case, the proliferation of targeted tech support scams) and the potential resulting harms from a breach.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2020-003 – Dell improves security and complaint handling practices following breaches and OPC (Office of the Privacy Commissioner of Canada) Investigation ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2020/pipeda-2020-003/](#))
- Data elements, when combined, can be exploited by malicious individuals to steal the identities of the persons concerned. The safeguards used to protect the information should therefore be commensurately high.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2020-005 – Investigation into Desjardins' compliance with PIPEDA (Personal Information Protection and Electronic Documents Act) following a breach of personal information between 2017 and 2019 ([/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2020/pipeda-2020-005/](#))

Health information as sensitive information

- The Federal Court accepted that medical information is of the utmost sensitivity and should receive the highest degree of protection. (Townsend v. (versus) Sun Life Financial, 2012 FC (Federal Court) 550 (<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/51045/index.do?q=Townsend+v.+Sun+Life+Financial%2C+2012+FC+550>) at para. (paragraph) 38)
- Information about how often an individual attends a fitness centre per week is on the low end of the scale of sensitivity and may, in most circumstances, be subject to implied consent. However, information about what an individual does at a fitness centre, how long they remain there, the nature of their training regime and their level of fitness, is more sensitive. (Randall v. (versus) Nobody's Fitness Centres, 2010 FC (Federal Court) 681 (<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/58234/index.do?q=nobody>) at para. (paragraph) 42)
- The delivery of online behavioural advertising requires meaningful and express consent when it relates to the collection and use of the sensitive health information of the user.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2014-001 - Use of sensitive health information for targeting of Google ads raises privacy concerns (<https://en.opc-actions-and-decisions/investigations/investigations-into-businesses/2014/pipeda-2014-001/>)
- Financial institutions must have adequate consent when disclosing a customer's sensitive personal health information to credit reporting agencies.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2015-017 - Financial institution discloses individual's sensitive health information to credit reporting agency (at paras. (paragraphs) 26-27) (<https://en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-017/>)
- Personal health information contained in an athlete anti-doping database, including a person's medical conditions, medications and prescriptions, analyses of bodily samples and specimens as well as genetic information is highly sensitive. Multiple potential harms could result from a breach of this kind of information.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2018-006 - Breach of World Anti-Doping Database (<https://en/opc-actions-and-decisions/investigations/investigations-into-businesses/2018/pipeda-2018-006/>)
- Biometric information is sensitive in almost all circumstances as it is intrinsically, and in most instances permanently, linked to the individual. It is distinctive, stable over time, difficult to change and largely unique to the individual.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2020-004 - Joint investigation of the Cadillac Fairview Corporation Limited by the Privacy Commissioner of Canada, the Information and Privacy Commissioner of Alberta, and the Information and Privacy Commissioner of British Columbia (<https://en/opc-actions-and-decisions/investigations/investigations-into-businesses/2020/pipeda-2020-004/>)
- Facial biometric information is particularly sensitive as it may allow for the identification of an individual through comparison against a vast array of images available on the internet or via surreptitious surveillance.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2021-001 - Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner of British Columbia, and the Information and Privacy Commissioner of Alberta (<https://en/opc-actions-and-decisions/investigations/investigations-into-businesses/2021/pipeda-2021-001/>)

Financial information as sensitive information

- "In terms of sensitivity, I agree with the Privacy Commissioner that financial information is generally extremely sensitive. As this Court observed in R. v. (versus) Cole, 2012 SCC (Supreme Court of Canada) 53, (2012) 3 S.C.R. (Canada Supreme Court Reports) 34, financial information is one of the types of private information that falls at the

heart of a person's "biographical core" (paras. (paragraphs) 47-48). However, the degree of sensitivity of specific financial information is a contextual determination. The sensitivity of financial information, here the current balance of a mortgage, must be assessed in the context of the related financial information already in the public domain, the purpose served by making the related information public, and the nature of the relationship between the mortgagor, mortgagee, and directly affected third parties." (*RBC v. (versus) Trang*, 2016 SCC (Supreme Court of Canada) 50 at para. (paragraph) 36 (<https://scc-csc.lexum.com/scc-csc/scc-us/en/item/16242/index.do>))

- A bank's disclosure of sensitive financial information to affiliates (in this case, social insurance numbers) was found to require opt-in consent.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Case Summary #2003-203 – Individual raises concerns about consent clauses on credit card application form
(<https://open/canada-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-203/>)
- Sensitive personal information, such as financial information and/or detailed identification information (e.g. (for example), SIN (Social Insurance Number), date of birth, and security question answers) risks being the target of phishing or identity theft attacks. As such, heightened safeguards should be in place by organizations to protect such sensitive information against unauthorized access.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2015-007 – Financial institution takes strong remedial measures after insufficient safeguards and unnecessary storage leaves sensitive data vulnerable to breach
(<https://open/canada-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-007/>)

Personal information affecting an individual's reputation

- Indexing of court and tribunal decisions by search engines can provoke significant reputational harm and embarrassment to individuals by needlessly exposing sensitive personal information to inadvertent discovery (i.e. (that is) human rights complaints, immigration hearings, bankruptcy proceedings).
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2015-002 – Website that generates revenue by republishing Canadian court decisions and allowing them to be indexed by search engines contravened PIPEDA (Personal Information Protection and Electronic Documents Act)
(<https://open/canada-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-002/>)
- It is crucial for organizations that hold personal information electronically to adopt clear and appropriate processes, procedures and systems to handle information security risks, supported by adequate expertise, especially where the personal information held includes information of a sensitive nature that, if compromised, could cause significant reputational or other harms to the individuals affected.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2016-005 – Joint investigation of Ashley Madison by the Privacy Commissioner of Canada and the Australian Privacy Commissioner/Acting Australian Information Commissioner
(<https://open/canada-actions-and-decisions/investigations/investigations-into-businesses/2016/pipeda-2016-005/>)
- Financial personal information is often reputationally sensitive, as it includes, in many cases, detailed information about individuals' credit worthiness.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2019-001 – Investigation into Equifax Inc. and Equifax Canada Co.'s compliance with PIPEDA (Personal Information Protection and Electronic Documents Act) in light of the 2017 breach of personal information
(<https://open/canada-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-001/>)

Security safeguards for sensitive information

- Where the unauthorized collection, use or disclosure of sensitive personal information (e.g. (for example), the fact that an individual has been diagnosed with a sexually transmitted disease) could lead to social stigmatization and long-term emotional and reputational harm for the individuals involved, the information must be protected by strong security safeguards.

- Personal information that involves the collection, use and disclosure of an individual's ethnicity is generally considered sensitive and would generally require express consent
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2019-004 Joint investigation of AggregateIQ Data Services Ltd. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia
(/en/opcc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-004/)
- Sharing an individual's email address (potentially with other contact information) with another service for the purpose of delivering political communications to them could reveal their political leanings or affiliations, which is sensitive personal information.
 - PIPEDA (Personal Information Protection and Electronic Documents Act) Report of Findings #2019-004 Joint investigation of AggregateIQ Data Services Ltd. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia
(/en/opcc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-004/)

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► Was this page helpful?

Date modified:

2022-05-16

Tab 26

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Made: May 1, 2007

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June 28, 2007

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LICENSING

PART I

CLASSES OF LICENCE

LICENCE TO PRACTISE LAW

Classes of licence

1. (1) Subject to subsection (6), there shall be the following classes of licence to practise law in Ontario as a barrister and solicitor:

1. Class L1.

2. Class L2.

Transition

Interpretation

(2) In subsections (3) and (4),

"member" means a member as defined in section 1 of the Act as it read immediately before May 1, 2007;

"temporary member" means a person admitted as a temporary member of the Society under section 28.1 of the Act as it read immediately before May 1, 2007.

Member other than temporary member

(3) Every person who is a member, other than a temporary member, immediately before May 1, 2007 is deemed, on May 1, 2007, to hold a Class L1 licence.

Temporary member

(4) Every person who is a temporary member immediately before May 1, 2007 is deemed, on May 1, 2007, to hold a Class L2 licence.

Class L3 licence: deemed surrender

(5) Every person who holds a Class L3 licence immediately before the day on which this subsection comes into force shall be deemed to have surrendered the licence on the day that is six months after the day on which this subsection comes into force.

Transition period: Class L3 licence

(6) Every person who holds a Class L3 licence immediately before the day on which this subsection comes into force shall continue to hold the licence until the earlier of,

(a) the day on which it is forfeited upon the issuance to the person of a Class L1 licence; and

(b) the day on which it is deemed to have been surrendered

Transition period: Class L3 licence scope of activities

(7) Subject to subsection (8), any terms, conditions, limitations or restrictions imposed on the person and any order made under the Act, a person who continues to hold a Class L3 licence pursuant to subsection (6) is authorized to do any of the following:

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1. Give a person advice with respect to the laws of Quebec, the laws of Canada and public international law.
2. Select, draft, complete or revise a document for use in a proceeding with respect to matters concerning the laws of Canada.
3. Represent a person in a proceeding before an adjudicative body with respect to matters concerning the laws of Canada. → Immig he?

Transition period: Class L3 licence terms, etc.

(8) A person who continues to hold a Class L3 licence pursuant to subsection (6) is subject to the following terms, conditions, limitations and restrictions:

1. The person is subject to any term, condition, limitation or restriction imposed on the person's authority to practise law in Quebec.
2. The person is prohibited from practising law in Ontario as a barrister and solicitor if the person is prohibited from practising law in Quebec.
3. The person is prohibited from practising law in Ontario as a barrister and solicitor if the person does not maintain the full mandatory professional liability insurance coverage required by the Barreau du Québec.

Scope of activities

Class L1

2. (1) Subject to any terms, conditions, limitations or restrictions imposed on the class of licence or on the licensee and subject to any order made under the Act, a licensee who holds a Class L1 licence is entitled to practise law in Ontario as a barrister and solicitor.

Class L2

GOUT LANTA

(2) Subject to any terms, conditions, limitations or restrictions imposed on the class of licence or on the licensee and subject to any order made under the Act, a licensee who holds a Class L2 licence is entitled to practise law in Ontario as a barrister and solicitor in the employ of the Attorney General for Ontario or, if appointed under the Crown Attorneys Act, as a Crown Attorney or as an assistant Crown Attorney.

Terms, etc.: Class L1 licence

Application of section

3. (1) This section applies to licensees who hold a Class L1 licence.

(2) A licensee who is exempted from payment of the annual fee under subsection 5 (1) of By-Law 5 is prohibited from practising law in Ontario as a barrister and solicitor.

Exempt from payment of insurance premium levies

(3) A licensee who is required to pay the annual fee, or who would be required to pay the annual fee but for being exempted from payment of the annual fee under subsection 5 (2) of By-Law 5, and who is exempted from payment of insurance premium levies is subject to the following terms, conditions, limitations and restrictions:

1. The licensee is prohibited from practising law in Ontario as a barrister and solicitor through a sole proprietorship, a partnership, a professional corporation or any arrangement that permits two or more licensees to share all or certain common expenses but to practise law as independent practitioners other than on a *pro bono* basis,

- i. for or on behalf of non-profit organizations, or
- ii. through a program registered with Pro Bono Law Ontario.

Authorized to practise law outside Ontario

(4) A licensee who is authorized to practise law in a province or territory of Canada outside Ontario is subject to any term, condition, limitation or restriction imposed on the licensee's authority to practise law in that province or territory.

Duration of terms, etc.

(5) A term, condition, limitation or restriction imposed on a licensee under this section remains in effect until it is cancelled under section 4.

Cancellation of terms, etc.

4. (1) A licensee who is subject to terms, conditions, limitations and restrictions under section 3 may apply to the Society to have the terms, conditions, limitations and restrictions cancelled and the Society may,

- (a) cancel the terms, conditions, limitations and restrictions;
- (b) require the licensee to complete education and obtain experience that the Society determines is necessary to ensure that the licensee has the skills necessary to practise law in Ontario as a barrister and solicitor without any terms, conditions, limitations and

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restrictions, and, if the licensee completes the education and obtains the experience,
cancel the terms, conditions, limitations and restrictions; or

(c) cancel the terms, conditions, limitations and restrictions subject to the following
terms, conditions, limitations and restrictions:

(i) the licensee must practise law only,

(A) as an employee of a person approved by the Society,

(B) as an employee or partner, and under the supervision, of a licensee who holds a Class
L1 licence who is approved by the Society, or

(C) under the supervision of a licensee who holds a Class L1 licence who is approved by
the Society,

(ii) the licensee must, within a time specified by the Society, complete education and
obtain experience that the Society determines is necessary to ensure that the licensee has
the skills necessary to practise law in Ontario as a barrister and solicitor without any terms,
conditions, limitations and restrictions.

Breach of terms, etc. imposed under subs. (1).

(2) If a licensee fails to comply with a term, condition, limitation or restriction imposed on
the licensee under clause (1) (c), the cancellation of terms, conditions, limitations and
restrictions under clause (1) (c) is deemed thereafter to be void.

Information to be provided by licensee

(3) A licensee shall provide to the Society all documents and information, as may be
required by the Society, relating to this section.

LICENCE TO PROVIDE LEGAL SERVICES

Classes of licence

5. There shall be the following classes of licence to provide legal services in Ontario:

1. Class P1.

3 years 6 months

Scope of activities

Class P1

Interpretation

6. (1) In this section, unless the context requires otherwise,

"amendment day" means the day sections 316 and 317.1 of An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts come into force;

"claim" means a claim for statutory accident benefits within the meaning of the *Insurance Act*, excluding a claim of an individual who has or appears to have a catastrophic impairment within the meaning of the Statutory Accident Benefits Schedule;

"party" means a party to a proceeding;

APPEARS → CAT
IMPAIRMENT → CAT
LAT → RESP → PARTY

"proceeding" means a proceeding or intended proceeding,

~~(a) in the Small Claims Court,~~

~~(b) in the Ontario Court of Justice under the *Provincial Offences Act*,~~

~~(c) in a summary conviction court under the Criminal Code (Canada),~~

~~(i) where under the Criminal Code (Canada) immediately before the amendment day an accused was permitted to appear or examine or cross-examine witnesses by agent, or~~

~~(ii) in respect of an offence under subsection 320.13 (1), subsection 320.16 (1), section 320.17 or subsection 320.18 (1) of the Criminal Code (Canada),~~

~~(d) before a tribunal established under an Act of the Legislature of Ontario or under an Act of Parliament, or~~ LAT

~~(e) before a person dealing with a claim or a matter related to a claim, including a mediator, a person performing an evaluation, an arbitrator or the Director acting under section 280, 280.1, 282 or 283 or 284, respectively, of the *Insurance Act*;~~

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"Statutory Accident Benefits Schedule" means the Statutory Accident Benefits Schedule within the meaning of the *Insurance Act*. **SRBS**

Activities authorized

P1 → **contributions**

(2) Subject to any terms, conditions, limitations or restrictions imposed on the class of licence or on the licensee and subject to any order made under the Act, a licensee who holds a Class P1 licence is authorized to do any of the following:

1. Give a party advice on his, her or its legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.
2. Represent a party before,

i. in the case of a proceeding in the Small Claims Court, before the Small Claims Court,

ii. in the case of a proceeding under the *Provincial Offences Act*, before the Ontario Court of Justice,

iii. in the case of a proceeding under the *Criminal Code*, before a summary conviction court,

iv. in the case of a proceeding before a tribunal established under an Act of the Legislature of Ontario or under an Act of Parliament, before the tribunal, and

v. in the case of a proceeding before a person dealing with a claim or a matter related to a claim, before the person.

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SRBS

3. Anything mentioned in subsection 1 (7) of the Act, provided the activity is required by the rules of procedure governing a proceeding.

4. Select, draft, complete or revise, or assist in the selection, drafting, completion or revision of, a document for use in a proceeding.

5. Negotiate a party's legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.

6. Select, draft, complete or revise, or assist in the selection, drafting, completion or revision of, a document that affects a party's legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding.

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PART IV

NOT PRACTISING LAW OR PROVIDING LEGAL SERVICES

Not practising law or providing legal services

28. For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services.

Aboriginal Courtwork Program

1. A person who delivers courtworker services to Aboriginal people through an Aboriginal delivery agency that has contracted with the Government of Ontario or the Government of Canada to deliver courtworker services as part of the Aboriginal Courtwork Program.

Other profession or occupation

2. A person whose profession or occupation is not the provision of legal services or the practice of law, who acts in the normal course of carrying on that profession or occupation excluding representing a person in a proceeding before an adjudicative body.

Committee of adjustment

3. A person whose profession or occupation is not the provision of legal services or the practice of law, who, on behalf of another person, participates in hearings before a committee of adjustment constituted under section 44 of the Planning Act.

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PART V

PROVIDING LEGAL SERVICES WITHOUT A LICENCE

Interpretation

29 In section 30,

"Canadian law student" means an individual who is enrolled in a degree program at a law school in Canada that is accredited by the Society,

"licensee firm" means a partnership or other association of licensees, a partnership or association mentioned in Part III of By-Law 7 [Business Entities] or a professional corporation.

"Ontario paralegal student" means an individual who is enrolled in a legal services program in Ontario approved by the Minister of Training, Colleges and Universities that is accredited by the Society.

Providing Class P1 legal services without a licence

NOT PREVIOUSLY ENROLLED

30. The following may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide:

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In-house legal services provider

EXEMPTION

NOT PRACTICE

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1 An individual, other than a Canadian law student or an Ontario paralegal student,

must be employed

who,

- is employed by a single employer that is not a licensee or a licensee firm,
- provides the legal services only for and on behalf of the employer, and
- does not provide any legal services to any person other than the employer.

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INSURE THE
COMPANIES

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PART VI

PRACTISING LAW WITHOUT A LICENCE

Practising law without a licence

35 The following may, without a licence, practise law in Ontario:

1. An individual who

- i. is authorized under Part VII of this By-Law to practise law in Ontario, and
- ii. practises law in Ontario in accordance and in compliance with Part VII of this By-Law.

2. An individual,

- ~~i. who is authorized to practise law in a jurisdiction outside Ontario, and~~
 - ~~ii. whose practice of law in Ontario is limited to practising law as counsel to a party to a commercial arbitration that is conducted in Ontario and that is "international" within the meaning prescribed by the *International Commercial Arbitration Act*.~~
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COMPARISON CHART OF OLD AND NEW LAY RULES



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Howie,
Sacks &
Henry

Attorneys at Law

Comparison Chart of Old and New LAT Rules

OLD RULES	NEW RULES
3.2 PRACTICE DIRECTIONS The Tribunal may issue public Practice Directions or similar types of documents to provide further information about the Tribunal's practices or procedures.	3.2 TRIBUNAL POWERS The Tribunal may vary or waive the application of any Rule or procedure on its own initiative or at the request of a party, except where to do so is prohibited by legislation. The Tribunal may make such orders or give such directions in proceedings before it to control its process or to prevent abuse of its process. The Tribunal may issue Practice Directions on a wide range of circumstances to provide further information about the Tribunal's practices or procedures.
This rule does not exist.	3.7 REQUIREMENT TO ATTEND IN-PERSON OR ELECTRONIC HEARING A party as defined under Rule 2.16 and/or the representative as defined in Rule 2.20 must attend the hearing in person or a electronic hearing before the Tribunal. If an unforeseen event prevents a party from attending in person or if the hearing, the party a representative for contacting the Tribunal before the scheduled start time on the hearing notice. The party must advise the Tribunal of the nature of the unforeseen event that prevents a party from attending.
This rule does not exist.	3.7.1 PARTY'S FAILURE TO ATTEND START OF HEARING If a party, who has been given notice of a hearing in accordance with the SRA, does not attend the in-person or electronic hearing within 30 minutes of the scheduled start time as stated in the hearing notice, the Tribunal may:

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		3. proceed with the hearing in the absence of that party, and/or 4. make any order it considers appropriate in the circumstances. In determining whether to proceed with the hearing in the absence of a non-attending party, the Tribunal will consider the reasons for the non-attendance, if any.

This rule does not exist

3.7.2 PARTY'S FAILURE TO ATTEND HEARING IN PROGRESS

If, after a hearing has commenced with the parties in attendance, a party is unable to attend part of the hearing, the party must advise the Tribunal of the reasons why they are unable to continue to attend. At the hearing, the Tribunal will consider the reasons for non-attendance, if any, and may

- proceed with the hearing in the absence of the party and/or
- make any order it considers appropriate in the circumstances.

This rule does not exist

3.7.3 REPRESENTATIVE'S FAILURE TO ATTEND HEARING

If a representative of a party does not attend any part of an oral session or electronic hearing, the Tribunal will consider the reasons for non-attendance, if any, and may

- proceed with the hearing without that representative, and/or
- make any order it considers appropriate in the circumstances.

This rule does not exist.

3.3 APPLICATION OF RULE 3

Despite Rule 1.4, this Rule applies to all appeals effective August 21, 2023.

4.2 NOTICE REGARDING INTERPRETER

Subject to Rule 20.0, if a party or a witness requires an interpreter in a language other than English or French in order to effectively participate in a proceeding, the party shall notify the Tribunal not less than 14 days before the hearing or case conference, and the Tribunal will either arrange for an interpreter at the expense of the party or approve the use of an interpreter at the party's choosing.

6.7 REPRESENTATION

A party may be self-represented or may have a representative.

8.1 ISSUANCE OF SUMMONS

The Tribunal may issue a summons on its own initiative or at the request of a party.

8.1 ISSUING A SUMMONS

The Tribunal may issue a summons on its own initiative or at the request of a party, requiring any person as defined in the SPPA, or a party:

- to give evidence at an electronic or in-person hearing and/or
- to produce documents and things specified by the Tribunal at an electronic or in-person hearing.

The Tribunal will only issue a summons for witnesses, documents or things that are relevant to the issues in dispute and admissible at a hearing.

8.2 FILING OF A REQUEST FOR SUMMONS

8.2 FILING FOR A REQUEST FOR SUMMONS

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A person requesting a summons must file a Request for Summons with the Tribunal. The Request shall provide a brief explanation of the information the witness is expected to give at the hearing.

A request for summons must be filed with the Tribunal using the form provided on the Tribunal's website. The requesting party must demonstrate the relevance of the request to the issues in dispute.

Unless otherwise ordered by the Tribunal, the approved summons must be served on the person summoned no later than 10 days before the hearing. The requesting party must file their request in a timely manner so that the Tribunal can adjudicate and issue the summons in advance of the dead line of 30 days.

The requesting party must serve a copy of the approved summons on the other parties when it is served on the person summoned.

This rule does not exist

RULE 8.4 APPLICATION OF RULE 9

Despite Rule 1.4, this Rule applies to any request for summons filed on or after August 21, 2023.

Despite Rule 1.4, this Rule also applies to any summons issued by the Tribunal on its own initiative on or after August 21, 2023.

9.1 PRODUCTIONS OF DOCUMENTS - GENERAL

The Tribunal may at any stage in a proceeding, including prior to a case conference, order any party to provide such further particulars or disclosure as the Tribunal considers necessary for a full and satisfactory understanding of the issues in the proceeding.

9.1 DOCUMENT EXCHANGE, PRODUCTION ORDERS, WITNESS LISTS & HEARING BRIEFS - GENERAL

The parties shall exchange all documents, witness lists, and anything else they intend to rely on as evidence at the hearing.

The Tribunal may at any stage in a proceeding order any party to provide such further particulars, disclosure, and production of documents and things that the Tribunal considers relevant to the issues in dispute in the proceeding.

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9.2 DISCLOSURE OF DOCUMENTS

A party to a hearing shall, at least 10 days before the hearing, or at any other time ordered by the Tribunal or undertaker by the party:

- Disclose to the other parties the existence of every document and anything else the party intends to present as evidence at the hearing;
- Disclose a list of witnesses whom the party may call to give evidence at the hearing, and a brief description of each witness' anticipated testimony; and
- Serve a copy of the documents, numbered consecutively, on the other parties.

9.3 TRIBUNAL ORDER FOR DISCLOSURE

A party may seek an order from the Tribunal at any stage of the proceeding ordering a party to:

- Disclose the existence of every document and anything else the party intends to present as evidence at the hearing;
- Disclose a list of witnesses whom the party may call to give evidence at the hearing and a brief description of each witness' intended testimony;
- Serve any other party at least 10 days before the hearing or as otherwise ordered by the Tribunal, copies of all documents that the party will produce or present as evidence at the hearing;
- Make available for inspection anything, subject to conditions established by the Tribunal, that the party will present as evidence at the hearing; or
- Disclose any document or thing the Tribunal considers relevant to the issues in dispute.

This rule has been removed and Rule 9.2 is now 'Production Orders by the Tribunal.'

9.2 PRODUCTION ORDERS BY THE TRIBUNAL

Before requesting a production order from the Tribunal, a party must make reasonable efforts to obtain the document or thing without a production order.

9.2.1 Orders for Productions Between the Parties

A party may request an order from the Tribunal ordering another party to:

- Disclose the existence of a document or thing the other party intends to rely on at the hearing;
- Produce copies of all documents and things that a party intends to rely on at the hearing;
- Produce a list of witnesses the other party intends to call to give evidence at a hearing;
- Produce a summary of the evidence that each witness will give at the hearing;
- Make available for inspection any document or thing, subject to conditions established by the Tribunal, that a party intends to rely on at the hearing; and/or

1. Disclose or produce any document or thing the Tribunal considers relevant to the issues in dispute in the proceeding

The Tribunal will not make an order for the production of a document or thing that is not relevant to the issues in dispute in the proceeding, or that is unduly prejudicial.

9.2.2 Orders for Non-Party Productions

A party seeking production from a non-party may request an order from the Tribunal by filing a notice of motion and serving it on the other parties and the non-party. The notice of motion must provide detailed information for the non-party.

The Tribunal may order a non-party to disclose or produce any document or thing that the Tribunal considers relevant to the issues in dispute in the proceeding.

The requesting party must make reasonable efforts to obtain the document or thing without a production order.

Before an order is granted by the Tribunal, the non-party will have an opportunity to make submissions as set out in the notice of motion hearing.

9.4 FAILURE TO COMPLY WITH DISCLOSURE RULES

If a party fails to comply with any Rules, directions or orders with respect to disclosure or inspection of documents or things, or list of witnesses, that party may not rely on the document or thing as evidence, or call the witnesses to give evidence, without the consent of the Tribunal.

9.3 FAILURE TO COMPLY WITH THE RULES

If a party fails to comply with any Rule, direction or order with respect to disclosure, exchange, production, or inspection of documents or things, the party may not rely on the document or thing as evidence without the permission of the Tribunal.

If a party fails to comply with any Rule, direction or order with respect to the exchange or production of witnesses, the party may not call a witness who is not included on a witness list filed

Parties will have an opportunity to make submissions before the Tribunal determines

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Thus, these do not exist

9.4.1 Document Exchange Between the Parties (AABS)

Document Exchange Before the Case Conference

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The requirement for document exchange between the parties begins as soon as the application is filed with the Tribunal.

Rule 20.4 provides that at least 10 days before a scheduled case conference, each party must file a case conference summary in such form as required by the Tribunal. The parties are required to verify in the case conference summary that the documents and things in the party's possession, which the party intends to rely on at the hearing, have been provided to the other parties.

At the case conference, the Tribunal may make orders for production pursuant to Rule 16 and set deadlines for any document exchange that has not yet taken place between the parties.

9.4.2 Deadline for Document Exchange (AABSI)

If an order exchange date has not been ordered by the Tribunal, then no later than 45 calendar days before the hearing, the parties must exchange:

- all documents and things the parties intend to rely on as evidence at the hearing; and
- for electronic and in-person hearings, a list of witnesses each party intends to call to give evidence at the hearing, with a summary of the evidence each witness will give at the hearing.

9.4.3 Filing With The Tribunal – 21 Day Deadline For Electronic And In-Person Hearings (AABSI)

No later than 21 days before an electronic or in-person hearing, each party must file with the Tribunal and serve on the other party:

- a list of witnesses the party will call to give evidence at the hearing;

- b. a summary of the evidence each witness will give at the hearing, along with the anticipated amount of time needed for each witness to testify;
- c. a PDF copy of the evidence and authority cited containing only the evidence and authorities the party intends to rely on at the hearing which must be indexed, tabbed and consecutively page numbered and
- d. a completed form for electronic and in-person hearings, if any, that is provided on the Tribunal's website.

The parties should file a single, joint brief with the Tribunal where possible.

9.4.4 Failure To Comply With The 21 Day Deadline (AABS)

The Tribunal considers material that is received more than 21 days before an electronic or in-person hearing to be filed late.

The Tribunal will consider submitted materials as a preliminary issue at or before the hearing. The parties will have an opportunity to make submissions before the Tribunal commences:

- a. if the documents and things can be used at the hearing;
- b. if the witnesses may testify at the hearing and/or
- c. if the matter requires any other order.

In making this determination, the Tribunal may consider any relevant factors including the factors set out in Rule 9.3.

9.4.5 Filing With The Tribunal - Deadline For Written Hearings (AABS)

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10.3 EXPERT WITNESSES (DISCLOSURE TIMELINES) The disclosure required by Rule 10.2 shall be made: (a) By the party who filed the notice of appeal at least 30 days before the hearing; (b) By any other party at least 20 days before the hearing; or (c) As ordered by the Tribunal.	The deadline for filing and serving submissions and hearing briefs for written hearings will be set by order of the Tribunal. Written hearing briefs must be filed with the Tribunal as an indexed, tabbed and consecutively page numbered PDF, and only include the evidence and authorities a party intends to rely on at the hearing.
10.3 EXPERT WITNESSES (DISCLOSURE TIMELINES) The disclosure required by Rule 10.2 shall be made: (a) By the party who filed the notice of appeal at least 30 days before the hearing; (b) By any other party at least 20 days before the hearing; or (c) As ordered by the Tribunal.	10.3 DISCLOSURE AND FILING TIMELINES If not otherwise ordered by the Tribunal, the information required by Rule 10.2 must be: a. exchanged between the parties at least 45 days before the hearing; and b. filed with the Tribunal as part of the hearing brief pursuant to Rule 9.
10.4 EXPERT WITNESSES—CHALLENGES TO QUALIFICATIONS, REPORTS, STATEMENTS A party intending to challenge an expert's qualifications, report, or witness statement shall give notice with reasons to the challenge to the other parties as soon as possible and no later than 10 days before the hearing and must file a copy with the Tribunal.	10.4 CHALLENGES TO QUALIFICATIONS, REPORTS, STATEMENTS A party intending to challenge an expert witness' qualifications, report, or witness statement must: a. give notice to the Tribunal for the challenge, to the other parties no later than 10 days before the hearing; and b. file a copy of the notice with the Tribunal as part of the hearing brief filed by the party pursuant to Rule 9.
Rule 10.5 does not exist.	10.5 APPLICATION OF RULE 10 Despite Rule 1.4, this Rule applies to any appeal commenced on or after August 21, 2023, and to any appeal commenced

14.2 SCOPE OF CASE CONFERENCE SUBJECT MATTER

The Tribunal may on its own initiative, or in response to a party's written request, direct the parties to participate in a case conference to discuss:

- The settlement of any or all of the issues;
- Facts or evidence that may be agreed upon;
- The identification, clarification, simplification and narrowing of the issues and whether further particulars are required;
- The identification of parties and other interested persons adding parties, and the scope of each party's or person's participation at the hearing;
- Disclosure and the exchange of documents, including witness statements and expert reports;
- The dates by which any steps in the proceeding are to be taken or begun;
- The estimated length of the hearing, including setting hearing dates;
- Requirements for interpreters;
- French-language or bilingual proceedings;
- Human Rights Code or accessibility accommodations;
- Motions, provided parties have complied with the requirements of this Rule and Rule 15, or otherwise or consent of the parties or order of the Tribunal; or
- Any other matter that may assist in a fair and efficient resolution of the issues in the proceeding.

before August 21, 2025 for which the first notice of case conference is issued on or after August 21, 2023.

14.2 SCOPE OF THE CASE CONFERENCE SUBJECT MATTER

The Tribunal may on its own initiative, or in response to a party's written request, direct the parties to participate in a case conference to consider:

- The settlement of any or all of the issues;
- Facts or evidence that may be agreed upon;
- The identification, clarification, simplification and narrowing of the issues and whether further particulars are required;
- The identification of parties and other interested persons adding parties, and the scope of each party's or person's participation at the hearing;
- The disclosure and the exchange of documents, including witness statements and expert reports;
- Requests for production orders;
- The timing for steps the parties must take leading up to a hearing;
- The hearing format and, in the case of in-person and electronic hearings, the estimated length of the hearing;
- Requirements for interpreters;
- French-language or bilingual proceedings;
- Human Rights Code or accessibility accommodations;
- Motions, and
- Any other matter that may assist in a fair and efficient resolution of the issues in the proceeding.

14.6 ATTENDANCE AND AUTHORITY OF REPRESENTATIVES AT CASE CONFERENCE TO SETTLE ISSUES

Parties are required to attend the case conference. If a party is unable to attend a case conference, the party must at least 7 days before the scheduled case conference

- (a) Advise the Tribunal that it or her representative has instructions with respect to the issues and authority to make agreements including settlement of the case, and
- (b) Obtain permission from the Tribunal to attend that representative on the party's behalf.

14.8 PARTY ATTENDANCE AT CASE CONFERENCES

A party as defined under Rule 2.16 must attend their case conference.

If an unforeseen event prevents a party from attending the case conference, the party is responsible for contacting the Tribunal before the scheduled start time on the notice of case conference. The party must advise the Tribunal of the nature of the unforeseen event that prevents the party from attending.

If a party who has been given notice does not attend the case conference within 10 minutes of the scheduled start time, the Tribunal will consider the reasons for non-attendance and may

- a. proceed in the absence of that party; and/or
- b. make any other considerations appropriate in the circumstances.

15.1 CONTENTS OF MOTIONS

A party bringing a motion shall deliver a Notice of Motion setting out:

- (a) The decision or order that the party is requesting from the Tribunal;
- (b) The grounds to be argued, including a reference to any statutory or regulatory provision, rule or case law relied on;
- (c) The evidence in support of the motion; and (d) The proposed format of the motion.

15.2 SERVICE OF NOTICE OF MOTION

A party may have a motion heard at a case conference or hearing. If provided the party files the Notice of Motion and all supporting

15.1 FILING A MOTION

A party bringing a motion must file with the Tribunal:

- a. a notice of motion using the form provided on the Tribunal's website with the following information:
 - i. The decision or order that the party is requesting from the Tribunal;
 - ii. The authority being relied upon for the motion, including

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materials with the Tribunal at least 10 days in advance or in accordance with any other schedule as may be determined by the Tribunal, and serves the Notice and supporting materials on all other parties.

15.3 SERVICE OF RESPONDING PARTY'S MOTION MATERIALS

A responding party shall serve any materials it intends to rely on in response to the motion to all parties and file them, with a Certificate of Service, with the Tribunal at least 5 days before the motions to be considered

- any statutes, regulations, Rules and authorities:
- iii. The evidence in support of the motion; and
 - v. The proposed format of the motion hearing.
- b. all supporting submissions, which must not exceed 5 double-spaced pages in length, exclusive of evidence and authorities.

The moving party must serve the notice of motion and all supporting submissions on the other parties before filing with the Tribunal.

Motion hearings may be conducted electronically, in-person or in writing. The Tribunal will determine the format of the motion hearing.

15.2 MOTION HEARD AT A SCHEDULED EVENT

A party may request to have the motion heard at a scheduled adjudicative event.

The Tribunal may order a motion to be heard at a scheduled adjudicative event.

15.3 RESPONDING AND REPLY SUBMISSIONS

Before a motion is granted, the Tribunal may provide the responding parties with the opportunity to make submissions. The Tribunal may also provide the moving party with the opportunity to make reply submissions.

Parties must serve responding and reply submissions on the other parties before filing with the Tribunal.

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15.4 ATTENDANCE AT MOTION HEARINGS

A representative may attend a motion hearing on behalf of a party. If attending on behalf of a party, the representative must have instructions in all respects being heard at the motion hearing.

15.5 APPLICATION OF RULE 15

Despite Rule 14, this Rule applies to any motion filed with the Tribunal on or after August 21, 2023.

16.1 REQUESTS FOR ADJOURNMENTS

A request for an adjournment of a case conference or hearing must be in writing, be served on the other parties, and shall include:

- The reason for the request;
- Written agreement to the adjournment from the other parties or their representatives, if given; and
- At least three alternative dates, within 30 days of the case conference date or hearing date to be adjourned, that are agreeable to all parties.

16.1 REQUESTS FOR ADJOURNMENTS

A request for an adjournment of any adjudicative event at a Tribunal, including a case conference, motion hearing, settlement conference, or a written, in-person or written hearing must be made using the form for requesting an adjournment on the Tribunal's website.

The completed form must be served on the other parties prior to being filed with the Tribunal and must include all submissions and evidence in support of the request. Submissions must not exceed 5 double spaced pages in length and must include:

- Detailed written circumstances giving rise to the request;
- Other parties' position on the request, if known;
- The length of the adjournment being sought, and
- Whether a prior adjournment request has been served for this same adjudicative event.

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Failure to provide a completed form and supporting exhibits and evidence will result in the request not being considered by the Tribunal.

15.2 ORAL REQUESTS FOR ADJOURNMENTS

Despite Rule 15.1, a request for an adjournment may be made orally before a Member in exceptional circumstances with the consent of the Tribunal.

16.2 ORAL ADJOURNMENT REQUESTS

Despite Rule 16.1, a request for an adjournment may be made orally before a Member at the administrative event.

Oral requests will only be allowed in compelling circumstances where the party did not and could not have known of the circumstances giving rise to the adjournment request prior to the event.

The Tribunal may also direct that the request for an adjournment be heard at the event.

Rule 15.3 does not exist.

16.3 FACTORS TO CONSIDER

When considering whether to grant an adjournment request, the Tribunal may consider any of the following factors:

- The age of the child;
- Whether any previous adjournments have been granted and, if so, whether they were granted on a discretionary basis;
- Prejudice to the parties;
- Whether the request is an excuse;
- The type of event the adjournment is being requested for;
- The length of notice that the Tribunal has provided to the parties of the event;
- The timeliness of the request;
- Whether the parties were given the opportunity to canvass their availability;

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- 1. The specific reasons for being unable to proceed on the scheduled date;
- 2. Whether the parties can proceed on an earlier date;
- 3. Whether the reason for the adjournment was foreseeable and avoidable, and what efforts, if any, were made to avoid the reason for the adjournment;
- 4. The length of the requested adjournment and whether it would unduly delay the proceedings;
- 5. Broader institutional and public interests;
- 6. Legislative requirements;
- 7. The principles of natural justice and fairness;
- 8. Operational considerations; and
- 9. Any other factors considered relevant in deciding the request.

Rule 16.4 does not exist.

16.4 ADJOURNMENT REQUESTS FOLLOWING A DENIAL

Following the denial of an adjournment request, the Tribunal will not consider any further adjournment requests for the same event that are made for essentially the same reasons as the denial request. This prohibition applies to any party to the proceedings.

In an unusual and exceptional circumstance, a party can submit a new form for requesting an adjournment to support its submissions, as set out in Rule 16.1, for the same event.

When applying the "new and exceptional circumstances" standard, the Tribunal will consider "new" to mean that the information was not known, and could not have been known at the time of the first request, and "exceptional" to mean something exceptional to or beyond the parties' control.

16.4 (1) (a)

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Rule 16.5 does not exist

16.5 APPLICATION OF RULE 16

Despite Rule 16.4, this Rule applies to any request for adjudication made on or after 1 July 2023 with the Tribunal on or after August 21, 2023.

16.1 REQUEST FOR RECONSIDERATION

The Executive Chair of SLASCO may, upon request of a party or on his or her own initiative reconsider any decision of the Tribunal if the request is made within 21 days of the date of the decision. A request for reconsideration from a party must on served on all other parties and must include:

- Reasons for the request, specifying applicable criteria under Rule 16.2;
- Notification if the party is seeking judicial review or pursuing an appeal in relation to the decision; and
- Remedy or relief sought.

The determination of the request for reconsideration shall be heard by further submissions and may be heard by the same Member whose decision is the subject of the request.

16.1 REQUEST FOR RECONSIDERATION

The Tribunal may reconsider any decision of the Tribunal that finally disposes of an appeal if:

- The request is made within 21 days of the date of the decision;
- The request is served on all parties and filed with the Tribunal using the Tribunal's reconsideration request on the Tribunal's website; and
- The reconsideration request includes the following:

- All submissions in support of the request, which must specify the applicable criteria under Rule 16.2, 16.3, 16.4 and 16.5 and must not exceed 10 double-spaced pages in length exclusive of evidence and attachments;
- Notification if the party is seeking judicial review or pursuing an appeal in relation to the decision; and
- The remedy or relief sought.

The request for reconsideration will be heard by written submissions. It may be heard by the same member whose decision is the subject of the request, or by another member.

16.4 OUTCOME OF RECONSIDERATION

16.4 OUTCOME OF RECONSIDERATION

Howie,
Sarkis &
Henry

Upon reconsidering a decision of the Tribunal, the Tribunal may:

- Dismiss the request;
- After providing responding parties an opportunity to make submissions,
 - Confirm, vary, or cancel the decision or order; or
 - Order a rehearing in all or part of the matter.

If the Tribunal orders a rehearing of the matter, the Tribunal may make any order that it could make following a case conference.

This rule does not exist.

Upon reconsidering a decision of the Tribunal, the Tribunal may:

- Dismiss the request;
- After providing responding parties an opportunity to make submissions,
 - Confirm, vary, or cancel the decision or order; or
 - Order a rehearing in all or part of the matter.

If the Tribunal orders a rehearing of the matter, the Tribunal may issue a procedural and administrative directions and any other further orders as the Tribunal deems necessary.

18.5 REVIEW ON OWN INITIATIVE

At the discretion of the Chair or delegate, the Tribunal may, on its own initiative, review any decision of the Tribunal. The Tribunal's review shall take place within a reasonable time after the decision or order is made.

When considering a review on its own initiative, the Tribunal shall make an order under Rule 18.6 unless it is satisfied that one or more of the criteria in Rule 18.2 are met. Before making a review, the Tribunal will provide the parties with an opportunity to make submissions.

18.5 APPLICATION OF RULE 19

Despite Rule 14, this Rule applies to any request for reconsideration of a decision or order issued on or after February 7, 2019. Requests for reconsideration of decisions or orders issued before February 7, 2019 will be dealt with in accordance with the Rules existing at the time the decision or order was issued.

18.6 APPLICATION OF RULE 18

Despite Rule 14, this Rule applies to any request for reconsideration of a decision or order issued on or after August 21, 2023, and any review on the Tribunal's own initiative of a decision or order issued on or after August 21, 2023.

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20.4 AABS CASE CONFERENCE SUMMARY

Each party shall file an AABS Case Conference Summary in such form as may be required by the Tribunal at least 10 days before a scheduled Case Conference.

An AABS Case Conference Summary shall include:

- (a) A list of key documents in the party's possession which he or she intends to use in a hearing;
- (b) Verification that the documents listed in (a) have been disclosed and have been provided to the other parties;
- (c) A list of key documents that the party intends to seek from other parties pursuant to the disclosure Rules set out at Rule 9;
- (d) A list of any information the party is seeking from non-parties and requests for issuance of summonses;
- (e) The party's preference of hearing type with reasons for the preference;
- (f) A list of anticipated witnesses, including expert witnesses that the party intends to call at a hearing in electronic or in person format and a brief description of each witness' anticipated testimony;
- (g) An explanation of the necessity of calling more than two expert witnesses to provide opinion evidence, if a party seeks to call more than two such experts; and
- (h) Details of the most recent notification offer that is open for acceptance.

20.4 AABS CASE CONFERENCE SUMMARY

At least 10 days before a case conference each party must file a case conference summary in such form as required by the Tribunal. The case conference summary must also be served on the other parties.

The case conference summary shall include:

- a. Any one remedy issued if the party intends to raise;
- b. Any reasons the party is seeking to raise to the appeal and whether the opposing parties agree to add the issues;
- c. A list of documents and things in the party's possession which they intend to rely on at the hearing;
- d. Verification that the documents and things listed in (c) have been provided to, or made available for inspection by, the other parties;
- e. A list of documents and things that a party is seeking from other parties;
- f. Any requests for production orders;
- g. A list of documents and things the party is seeking from non parties;
- h. The party's preference of hearing format with reasons for the preference;
- i. A list of anticipated witnesses, including expert witnesses, that the party intends to call at an electronic or in-person hearing and a brief description of each witness' anticipated testimony; and
- j. An explanation of the necessity of calling more than two expert witnesses, if a party seeks to

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	call more than two such experts. If a party does not file a case conference summary in compliance with this Rule, the Tribunal will take into account the party's non-compliance when: a. making orders and directions under Rule 14.1; - and b. considering motions for productions under Rule 9 filed by the party after the case conference.
This rule does not extend to:	20.5 SETTLEMENT AT CASE CONFERENCES Parties should exchange settlement offers in advance of the case conference and be prepared to discuss settlement at the case conference. Written offers for settlement must not be filed with the Tribunal.
20.6 COMBINING AABS CLAIMS Where two or more AABS Claims have been made involving the same parties or the same accident, the Tribunal may: (a) Combine the claims on consent of the parties; (b) Schedule any case conferences to take place simultaneously; or (c) Combine any hearings on consent of the parties.	NOW UNDER RULE 20.6

Howie,
Sachin
Henry

20.6 INTERPRETER TO BE ARRANGED AT TRIBUNAL'S EXPENSE

Where a party gives notice pursuant to Rule 4.2 regarding the need for an interpreter, the Tribunal shall arrange for an interpreter at the Tribunal's expense despite Rule 4.2

This rule does not exist

NOW UNDER RULE 20.7

20.8 APPLICATION OF RULE 20

Despite Rule 1.4, this Rule applies to any appeal commenced on or after August 21, 2023 and to any appeal commenced before August 21, 2023 for which the first notice of case conference is issued on or after August 21, 2023.

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23.3 DISCLOSURE TIMELINES FOR (HTA) APPEALS

Disclosure in appeals respecting the suspension or cancellation of a driver's licence, as set out in 23.2(a), shall be made:

- By the appellant at least 10 days prior to the hearing; and
- By the Registrar of Motor Vehicles or Minister of Transportation at least 10 days prior to the hearing.

Disclosure in the HTA appeal types set out in 23.2 (b), (c) and (d), shall be made:

- By the appellant at least 10 days prior to the hearing; and
- By the Registrar of Motor Vehicles or Minister of Transportation at least 5 days prior to the hearing.

This rule does not exist.

23.3 DISCLOSURE TIMELINES FOR (HTA) APPEALS

Disclosure in appeals respecting the suspension or cancellation of a driver's licence, as set out in 23.2(a), shall be made:

- By the appellant at least 10 days prior to the hearing; and
- By the Registrar of Motor Vehicles or Minister of Transportation at least 10 days prior to the hearing.

Disclosure in the HTA appeal types set out in 23.2 (b), (c) and (d), shall be made:

- By the appellant at least 10 days prior to the hearing; and
- By the Registrar of Motor Vehicles or Minister of Transportation at least 5 days prior to the hearing.

For clarity, the timelines in Rule 10.3 and 10.4 do not apply to HTA appeals.

23.4 APPLICATION

Despite Rule 1.4, this Rule applies to all appeals effective August 21, 2023.

Rule 24 REPRESENTATION - GENERAL

This Rule applies to representatives as defined in Rule 2.20.

These rules of representation do not exist except in Ru's 6.7 - see Rule 6.7 above

24.1 PARTY'S ABILITY TO HAVE A REPRESENTATIVE

A party may be self-represented, or they may have a representative. In keeping with Rule 240, representatives are required to be authorized under the Law Society Act to represent a party in the proceeding and they must comply with the Law Society's applicable procedures, and rules of process and conduct.

24.2 DECLARATION OF REPRESENTATIVE REQUIRED

If a party wishes to have a representative, the representative must:

- file with the Tribunal the form for the declaration of a representative provided on the Tribunal's website, and
- serve a copy of the form on all other parties

The Tribunal will not recognize a representative unless a completion form has been filed and served.

If a party wants to change their representative, the new representative must file a form for the declaration of a representative with the Tribunal and serve a copy on all other parties.

24.3 PROCEEDING WITHOUT A REPRESENTATIVE

If, after having a representative, a party subsequently chooses to proceed without a representative, they must notify the Tribunal and the other parties in writing. No further steps are required.

24.4 REPRESENTATIVE WITHDRAWAL

A representative may remove themselves as a party's representative by filing a completed form for the removal of a representative with the Tribunal and serving a copy of the form on their client and any other parties. The withdrawing representative must confirm that:

- the party they were representing has been advised of their withdrawal as representative, and
- the representative has complied with the Law Society's and applicable guidelines and codes of conduct when withdrawing as the party's representative.

No further steps are required if:

- those requirements are completed 30 or more calendar days before the next adjudicative event, or
- another representative is taking over as the party's representative, and the new representative has filed and served a form for the declaration of a representative pursuant to Rule 24.2.

24.5 WITHDRAWAL LESS THAN 30 DAYS BEFORE NEXT ADJUDICATIVE EVENT

If a representative is seeking to remove themselves as a party's representative less than 30 calendar days before the next adjudicative event, the representative must serve an order from the Tribunal before being removed as the representative unless:

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a. the party is choosing to proceed without a representative and has advised the Tribunal pursuant to Rule 24.3, or b. another representative is taking over as the party's representative and the new representative has filed and served a form for the declaration of a representative pursuant to Rule 24.2	If the representative is seeking an order from the Tribunal, they must file with the Tribunal and serve on the client: a. a completed form for the removal of a representative; b. a notice of motion; and c. supporting material. The representative seeking to withdraw must also serve the form and notice of motion on the other parties. The representative is not required to serve the supporting material on the other parties. The Tribunal will set the format for hearing the motion. The Tribunal may hear the motion as a preliminary issue at the start of the next adjudicative event. If the Tribunal orders an in-person or electronic hearing of the motion, the representative must attend the hearing of the motion.
24.6 REQUIREMENTS RESPECTING PRIVILEGED, PREJUDICIAL INFORMATION A representative bringing a motion under Rule 24.5 who has materials with the Tribunal that are subject to privilege or that could, if disclosed to another person, be prejudicial to the client,	

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must notify the Tribunal that the materials contain privileged and/or prejudicial information.

The Tribunal may make a confidentiality order for any privileged and/or prejudicial information relating to the request for withdrawal. The order may be made at the request of a party, the withdrawing representative, or on the Tribunal's own initiative.

The representative must redact or omit the privileged and/or prejudicial information from the notice of motion and when the motion is served on a party other than the withdrawing party to Rule 24.5.

The Tribunal will use the information contained in the motion and supporting materials solely for the purpose of deciding the request for withdrawal.

A member who presides or otherwise takes part in a motion hearing for

- a. the confidentiality order; and/or
- b. the removal of representative

must not participate in the hearing of the appeal.

24.7 OUTCOME OF TRIBUNAL REVIEW

Upon review of a request for removal under Rule 24.5, the Tribunal may:

- a. allow the request for removal;
- b. refuse the request for removal; and/or
- c. make any other order the Tribunal considers appropriate in the circumstances.

The Tribunal may consider any relevant factor, including but not limited to:

- the reason for the request to withdraw;
- whether the representative confirms they have complied with the Law Society Act and applicable codes of conduct and guidelines;
- the conduct of the representative leading up to the request, such as whether the representative gave reasonable notice to allow the party to seek other means of representation, or if the representative filed a motion with the Tribunal to withdraw at the earliest possible time;
- the history of the proceeding, including whether the represented party has repeatedly changed representatives;
- the impact of the withdrawal on the representative's client;
- any resulting prejudice to the client, parties, and
- the impact of the withdrawal on the proceeding and the Tribunal's ability to fulfill its mandate.

24.8 REQUESTS FOR ADJOURNMENT DUE TO WITHDRAWAL OF REPRESENTATIVE

For clarity, Rule 15 and any related Practice Direction apply to requests for adjournment arising from the withdrawal of a representative.

Hon. Mr.
Justice
Gauthier

24.9 APPLICATION OF RULE 24

Under Rule 14, this Rule applies to all appeals effective
August 21, 2023

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[illegible]

A lawyer should be aware that a solicitor-client relationship and the resulting duty of care may arise prior to a formal retainer.³

Reference Materials

CBA Task Force Conflicts of Interest: Final Report, Recommendations and Toolkit -
2008 (pg. 183-265)

^(3/10)
InForum 2009-12-21 – Divorce matters in which one lawyer represents both parties may be rejected (see page 3: Notice from the Supreme Court Liaison Committee Family Division))

CLIA (Canadian Lawyers Insurance Association) – Issue 48 – Winter (2010) – Bulletin # 190 – Does a 7-Minute Call Create a Solicitor/Client Relationship?

CLIA (Canadian Lawyers Insurance Association) – Issue 42 – Winter (2008) – Bulletin # 173 Retainer Letters and Conflicts of Interest

CLIA (Canadian Lawyers Insurance Association) – Issue 22 – September (1998) – Bulletin # 83 Conflict of interest extends to legal support staff

Conflicts of Interest Checklist – LIANS

Checklist of essentials of conflict checking systems (see Appendix 5) from practicePRO.ca

Notes

1. Nova Scotia Barristers' Society, Code of Professional Conduct, Halifax: Nova Scotia Barristers' Society, 2012; Chapter 3: "Relationship to Clients"; section 3.4 "Conflicts"; and section 5.2 "Lawyer as Witness" FLSC, Code of Professional Conduct, Ottawa: Federation of Law Societies of Canada, 2014, section 3.4 "Conflicts". Limited exceptions to usual standard for conflict may apply for short term summary advice – see Nova Scotia Barristers' Society, Code of Professional Conduct, Halifax: Nova Scotia Barristers' Society, 2012 (January 23/15 amendments), rules 3.4-2B – 3.4-2D.

1. *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII) – Outlines duties to clients where there is subsequent retainer by another party adverse in interest to existing client. There cannot be a summary and unexpected dropping of a client to circumvent conflict rules and there is a duty of candour requiring lawyers to advise existing clients of all matters relevant to a new client retainer (para. 10). A new retainer "sufficiently related" to matters worked on for a different client raises a rebuttable presumption that a lawyer possesses confidential information that raises risk of prejudice to clients. Law societies can have stricter conflict rules than those the Court applies and while Court not bound by society rules they are considered important public policy statements. "Bright line rule" that a firm cannot act for a client with interests adverse to another existing client.

unless both clients' consent is not unlimited. It applies where clients' immediate legal interests are directly adverse. It does not apply to condone tactical abuses or where it is unreasonable to expect the lawyer will not concurrently represent adverse parties in unrelated legal matters (para. 32). Where situations fall outside the bright line rule "the question becomes whether concurrent representation creates a substantial risk that the lawyer's representation of client would be materially and adversely affected" and determination becomes "more contextual" (para. 38).

2. *Sun v. Shao*, 2013 BCSC 532 – Lawyer not removed. Staff evidence confirmed intake procedures to avoid taking confidential information.

3. *Descôteaux v. Miorzwiniski*, 1982 CanLII 22 (SCC) – Solicitor-client relationship arises from potential client's first dealings with lawyer or staff when seeking legal representation or advice and solicitor-client privilege can extend to initial conversations even if the retainer is not perfected.

Additional Commentary

"Related Matter"

Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., 2008 NSCA 22 (CanLII) – Lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk. A matter is "related" if the new retainer takes an adversarial position against former client with respect to legal work the lawyer performed for former client or a matter central to the earlier retainer.

Test for Conflict

Strother v. 3464920 Canada Inc., 2007 SCC 24 (CanLII), [2007] 2 S.C.R. 177 – Lawyers and their firms owe a fiduciary duty of loyalty to former and current clients which is an element of avoiding conflict. When a lawyer is retained the scope of the retainer is governed by contract but the solicitor-client relationship is overlaid with certain fiduciary responsibilities imposed as a matter of law. Fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. Binnie, J. (for the majority) held that the test to show that conflict creates a material and

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adverse impact on a client is the possibility rather than the probability of adverse impact, but that the impact must be "more than speculation" (paras. 60 - 61).

Wagner v. Wagner, 2014 NSSC 179 (NSSC) - Defendant represented Plaintiff in personal injury litigation. Defendant represented in unrelated matter by counsel for insurer in Plaintiff's case (Barnes). Plaintiff concerned Defendant's conduct and commitment to his case in negotiations with Barnes was influenced by this. Lawyer not disqualified, citing *Canadian National Railway Co. v. McKercher LLP*, 2013 SSC 39 (CanLII), para. 38 as applicable law for assessing conflict claims/fiduciary breaches falling outside "bright line rule."

MacDonald Estate v. Martin, 1990 CanLII 32. Standards for disqualifying conflict of interest (junior lawyer actively engaged with client joins another firm in litigation adverse to former client). Court concerned with "three competing values: (1) concern to maintain high standards of legal profession and integrity of justice system (2) countervailing value of not depriving litigant of choice of counsel without good reason and (3) permitting reasonable mobility of legal profession. Test is whether reasonably informed person would be satisfied. no use of confidential information would occur. This requires two questions to be answered: (1) Did the lawyer receive confidential information attributable to the solicitor-client relationship relevant to the matter at hand? (2) Is there a risk it will be used to the client's prejudice? (paras. 44-45). Once client shows existing previous relationship sufficiently related to new retainer Court should infer confidential information imparted unless lawyer can displace this difficult onus. Court unlikely to accept measures to protect confidential client information such as "Chinese Walls and cones of silence" as sufficient until governing bodies of legal profession approve and adopt rules re these methods. "A fortiori, undertakings and conclusory statement in affidavits without more [as to screening/walls] not sufficient for the Court nor is it likely to be sufficient to satisfy public (para. 50). HELD: Successor firm disqualified. Majority did not comment on test for transferring lawyer not personally involved in a file and minority left this issue "for another occasion."

*** Lawyer Claim Against Client for Unpaid Account**

Boyd v Boyd, 2008 CanLII 1417 (Ont. Sup. Ct.) - Lawyer sued client for outstanding bill while representing client in family matter. Judgment registered against

matrimonial home for unpaid fees before equalization; payment satisfied. Deemed conflict and judgment set aside. Court held lawyer could not continue to act. Situation distinguished from informing client who has not paid that lawyer unable to continue representation.

Acting Against Current Client on Unrelated Matter

R. v. Neil, 2002 SCC 70 (CanLII) "Bright Line Rule." A lawyer may not represent one client with interest directly adverse to immediate interests of another current client even if two mandates unrelated unless both clients consent after receiving full disclosure (and preferably independent legal advice), and lawyer reasonably believes s/he is able to represent each client without adversely affecting the other.

WHAT IS CONFIDENTIAL INFORMATION IN FAMILY LAW FILES?

The nature of family law litigation is emotionally charged and parties are particularly vulnerable. By its nature most information about family law cases will often be perceived as confidential from outset: *L.M.B. v. M.R.B.*, 2003 MBQB 146 (CanLII)

Marinangeli v. Marinangeli, [2004] OJ 3082 (Ont. Sup. Ct.). - Much of the relevant information received was confidential but would have had to be disclosed in any event to the opposing party and much became public record in a prior related family proceeding so lost the quality of confidentiality, but confidential information isn't limited to financial details. When previously represented by a lawyer now representing her Husband, Wife had disclosed other confidential matters such as concerns and feelings about her marriage and former husband and "the relationship between family lawyers and their clients goes well beyond technical, financial and impersonal information, disclosing whether by direct words or in the very nature of instructions to their counsel their strengths and weaknesses in the processes of settlement discussions, negotiation tactics and litigation strategies, perceptions of the other party's strengths and weaknesses including the opposite party's likely approach to various issues and which are likely to be important, and whether a client prefers to "play hardball" on particular issues. These are matters directly personal to a client and affect client directly in pursuit of an effective realization of a just conclusion on the issues. Firm disqualified.

FIRM DISQUALIFIED
IN MARINANGELI

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Bell v Nash, 1993 CanLII 845 (BCCA) - Lawyer inadvertently had initial phone interview with Wife of an existing client, booked a meeting and had second conversation. HELD: Lawyer must withdraw due to receiving confidential information (citing *Wolfe v. Wolfe*, 2003 SKQB 414, para. 46): "The substance of the exchange between these parties that is of significance is not so much the particulars of a concrete sort that were divulged as it is the information that went to the emotional heart of the petitioner's case."

DOES "PUBLIC DOMAIN" INFORMATION REMAIN CONFIDENTIAL?

Merrick v. Rubinoff, 2013 BCSC 2352 - Lawyer not required to withdraw for various reasons. Among these, the Court noted with respect to the conflict alleged in current proceedings that information given to lawyer during prior divorce proceedings was no longer confidential since the trial concluded in 2001 and was a reported case.

Lewis v. Lewis, 2006 SKQB 77 - Counsel unsuccessfully argued against being required to withdraw. He argued in family proceedings the obligation to disclose all relevant financial information means any information received from a client is obtainable in a new related proceeding. Argument rejected (see detailed discussion paras. 14-15).

PROOF OF EXCHANGE OF CONFIDENTIAL INFORMATION

Marinangeli v. Marinangeli, [2004] OJ 3082 (Ont. Sup. Ct.) - Lawyer formerly representing Wife moved to different firm which represented Husband in new but related proceedings. There is a strong inference lawyers who work together share confidences especially in a family law group even if internal "confidentiality screens" are in place. Where confidential information exchanged in prior related matter sufficiently related to current retainer lawyer must rebut inference confidential information was exchanged. High burden to rebut "not likely to be met where the solicitor whose removal is sought argues the motion himself or herself" Counsel should swear affidavits and not just give assurances as an officer of the Court in argument that no confidential information was exchanged within the family law group. Firm disqualified.

LAWYER MUST REBUT → AFFIDAVIT
COUNSEL

Hakzad v. Zernaryalai, 2010 ONCJ 24 (Ont. Ct. of Justice) - High profile Hague Convention case. Wife unable to keep former counsel (Lewis). On Lewis' recommendation Wife called Brodtkin but unable to pay retainer and later advised Brodtkin of that. Brodtkin later retained by Husband. Brodtkin did not file affidavit

but filed law clerk's affidavit deposing Brodtkin had no recollection of calls, not Brodtkin's practice to have detailed discussions with parties who can't afford retainers, Brodtkin receives many general phone calls and usually makes notes but had no notes of these calls, but affidavit still stated Wife's affidavit was "replete with misrepresentations, falsehoods and exaggerations and no confidential information was discussed." Clerk's affidavit did not take issue with content of Lewis' affidavit. Lewis said he called Brodtkin about the file, Brodtkin indicated she was aware of the file because Husband's counsel for Husband mentioned it at a family law conference and Brodtkin indicated willingness to assist with case including precedents for the appeal. HFLD: Brodtkin must withdraw. Lawyer did not meet "heavy burden" to rebut presumption confidential information exchanged especially where she had no notes of the call and Wife's evidence corroborated by Lewis.

Fisk v. Land, 2004 MBQB 192 – Wife testified she called lawyer (Stoffman), gave confidential information and left a message the next day requesting an appointment but her call was not returned. Husband retained Stoffman's firm. Stoffman testified he had no recollection of the wife's call and about firm's general practice with prospective clients (only information initially taken was that required to check conflicts and caller told no specific questions could be answered until conflict search done and a written retainer signed). Wife said Stoffman did not advise of this standard practice. Stoffman had no notes of discussion with Wife. HELD: Stoffman not required to withdraw. Wife had not met onus to establish confidential information divulged, and in particular (at para. 25):

- "...[E]vidence which merely alleges a discussion of the details of the issues and positions on the issues could be as little as saying, "we own this and that and he wants X and I want Y," which I would not find to be the imparting of confidential information. If there was more, such as the sharing of a litigation strategy or the sharing of fears or concerns so that the lawyer would have obtained confidential or insider information about the person he now proposed acting against, I would have expected that information to have been in evidence. Without it, I am left to guess."

WHEN DOES A CLIENT RELATIONSHIP BEGIN?

Initial phone calls/conversations

An initial call or conversation can create a client relationship even if no retainer ~~X~~

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perfected: *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC).

Law Society of Saskatchewan v. Shirkey, 2014 SKL 55 9 (CanLII): When a client commenced divorce proceedings in Alberta, he engaged the lawyer to serve the opposing party. When the lawyer served the wife, he met with her and discussed various issues with her. This was interpreted as legal advice by the wife. In proceeding by the law Society of Sask, the member agreed that this was a conflict of interest.

Telephone consultations potential client and lawyer

Shingoose v. Harripersad, 2004 SKQB 526. Despite lawyer's detailed evidence about "warning procedure" during first call from prospective clients to not disclose confidential information, lawyer not permitted to represent Husband in custody/access/child support proceedings because lawyer's evidence about content of call was "equivocal." Lawyer/firm had no standing in the appeal from disqualification: *Shingoose v. Harripersad*, 2005 SKCA 102.

Consultation between lawyers

Wolfe v. Wolfe, 2003 SKQB 474. Wife's Ontario divorce counsel contacted Saskatchewan lawyer (Merchant) to obtain advice on Saskatchewan law. Husband later retained Merchant. Merchant said he was not retained, did not recall conversation with Ontario counsel, his notes indicated he received no confidential information and purpose of call was to interview lawyers who might be asked to represent Wife. HELD: Rebuttable presumption confidential information was exchanged with "heavy onus." Merchant's notes did not reflect entire conversation and duty of confidentiality arose whether discussion with Wife or her Ontario counsel. Merchant forced to withdraw.

Calls from third parties

Forsyth v. Cross, 2009 SKQB 184. Husband's mother called Merchant Law Firm to obtain second opinion on custody/access or perhaps hire a lawyer at that firm. She gave particulars including terms of proposed settlement agreement. Husband and mother received letter confirming opinion given to mother by phone. No meetings with Husband or mother. Merchant Law firm not retained and subsequently retained by Wife. HELD: Lawyer must withdraw due to confidential information received from Mother, file opened and opinion letter being sent.

Free first consultation

Sauter v. Sauter, 2003 CanLII 349 (Sask QB) – A 30 minute free consultation can create a solicitor/client relationship. Client said he took notes at meeting. Lawyer's affidavit indicated he had client's name in his diary, but could not recall meeting, locate time records or meeting notes and did not open a file or send a bill. His practice at first free meetings was to only give general advice such as reference to the presumption of equal property division and applicability of the Federal Child Support Guidelines and that he would not get into "significant specifics" or paly strategy or do any detailed analysis in that short meeting time. HELD: Lawyer must withdraw.

First consultation no formal retainer

Popowich v. Saskatchewan, 1995 CanLII 5956, (Sask QB) – Initial client intake interview occurred. No formal retainer. Client recalled imparting confidential information. Lawyer disagreed. HELD: Context to determine relationship is if client believes s/he is dealing with a solicitor in a professional capacity. No need for formal retainer. Client's perception confidential information exchanged disqualified lawyer.

CLIENTS WITH COMPETING INTERESTS

NSBS v. Whitehead, 2014 NSBS 1 (CanLII) – A lawyer must not represent clients with competing interests in the same transaction and even if informed consent is obtained this does not obviate the lawyer's duty not to act. It is also a conflict to practice law with a lawyer who holds investment or other financial relationships with the firm's clients.

CORPORATE V. INDIVIDUAL CLIENT

Johnson v. Rudolph, 2013 NSSC 210 – Prior representation of companies linked to an individual did not make the individual a current client in his personal capacity.

Thoma-Lovell v. Lovell, 2011 ONCJ 384 (Ont. Ct. of Justice). – Motion by Husband for removal of Wife's lawyer from application to vary child support based on Husband's increased income. Husband claimed Wife's firm did work for his corporations from which he derived employment income. HELD: No conflict as it is clear any of Husband's relevant income information was not held in firm records.

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Racey v. Racey, 2007 CanLII 47156 (Ont. SC) – Firm previously did corporate work for Husband. Wife retained firm in family matter. HELD: Firm must withdraw. The value of the company on separation, its current value, circumstances of ... corporation, including its corporate structure and the conduct of both spouses as officers and shareholders, both before and after separation are or may well be matters of considerable dispute. There was both perception of conflict and real conflict and issues referred to also highlight that it is more than a mere possibility that prior corporate counsel might be a required witness.

Wall v Nicholls, 2011 QNSC 2814 (CanLII): Husband asserted that lawyer for wife in a conflict of interest because he had been a family friend for 20 years, had acted for his company and had been privy to information about the husband's income. Lawyer ordered removed as Solicitor of Record.

NEW SPOUSES/PARTNERS

Hermant v. Secord, 2010 QNSC 6444 – Wife applied to void separation agreement. At his prior firm, her lawyer represented Husband's second wife and also now employed an assistant who worked for the Husband's lawyer when the separation agreement was signed. HELD: Wife's lawyer not required to withdraw. Representation of Husband's second wife did not result in disclosure of relevant confidential information.

FORMER CLIENTS

Lappin v. Bauer, 2015 NSSC 108. Where situations fall outside the "bright line rule", there should be a contextual analysis and balancing of factors. In this case, court was satisfied the motion for removal was not brought for a tactical advantage, it was early in the process, and although it was inconvenient to seek new counsel "that inconvenience does not supercede the interests of the Applicant or the [original law firm's] duty of loyalty to the Applicant."

Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39 (CanLII) – See Footnote 1 Reference Materials.

Merrick v. Rubinoff, 2013 BCSC 2352 – Between 1999 and unspecified date after 2008, lawyer acted for Merrick in divorce, later had some (disputed) drafting involvement with Merrick's marriage contract with new wife, limited consultation on an intellectual property referred to other counsel and consultation about legal aspects of home renovation. The Court characterized the evidence about the ~~last~~

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consultation as "unattributed hearsay" and not relevant to Merrick's application to have lawyer removed as counsel for lienholder on Merrick's home. Court did not agree lawyer's involvement gave him so much insight into Merrick's character including his "risk tolerance" that lienholder had a litigation advantage, also noting information given to lawyer during divorce proceedings was no longer confidential since the 2001 trial was a reported case. Lawyer not required to withdraw.

Johnson v. Rudolph, 2013 NSSC 210 onus on former client to give clear and cogent evidence of how prior retainers would provide firm with confidential information that would result prejudice in a new unrelated matter.

Millhouse v. Millhouse, 2012 SKQB 499 - The Wife's first divorce was uncontentious. A settlement was negotiated while the Wife had counsel. Her first Husband's lawyer drafted the separation agreement. By then, the Wife was in a relationship with her second Husband and his lawyer gave her independent legal advice about the agreement. The Wife waived conflict but approximately five years into the protracted second divorce she asked to remove Husband's lawyer. HELD: Service to the Wife was confined to determining that she understood and agreed to terms of the agreement giving her sole custody of children from her first marriage. Any parenting attitudes or beliefs discussed in that context would lead an objective observer to conclude such discussions while confidential would have "tended toward the mundane." The current parenting issues were only as to the parties' child. The Wife's other children were now approaching adulthood. Risk that Wife might have disclosed any views prejudicial to the present custody suit would not be readily apparent to the reasonable observer and had she done so the information would be "obsolete," so the issue was not so much if the subject matter of the two retainers was the same, but whether confidential information learned during the first retainer would now be relevant. The two retainers were insufficiently related to disqualify Husband's counsel.

Lewis v. Lewis, 2006 SKQB 77 - Lawyer represented Wife in a child support variation in her first divorce. Several years later he represented her second Husband in their divorce. Lawyer unsuccessfully argued that since information gained in the first proceeding was information the Wife had been obliged to disclose it was not confidential (argument rejected, see paras. 14-15), that this information was irrelevant to the current divorce and he had limited recollection.

of it in any event. HELD: The Wife's prior solicitor-client relationship was sufficiently related to require withdrawal, her past earning capacity was relevant to present determination of spousal support and lawyer had not met the heavy onus required to rebut presumption of exchange of confidential information.

Montreal Trust Company of Canada v. Basinview Village Ltd., 1995 CanLII 4247 (NSCA) – It is unethical for a lawyer to represent a client on a foreclosure where the lawyer, his partner, or anyone with whom the lawyer was associated had represented the mortgagor and mortgagee in respect of the mortgage being foreclosed. The existence of conflict in this case does not depend on imputation of confidential information to the lawyer.

FORMER JOINT CLIENTS LATER OPPOSITE IN INTEREST

Card v. Card, 1997 NSCA 221 (CanLII) – Spouses jointly consulted a lawyer for estate planning advice and documents to implement joint plans for management and ultimate disposition of their assets. Parties later separated. The same lawyer sought to represent Husband in property sale and as to how Husband might best protect assets. Lawyer removed given he had previously represented Wife.

FORMER JOINT CLIENTS/NEW ASSOCIATES

Reagh v. Reagh, 2005 NSSC 365 (NSSC) – Lawyer Parker did various types of work for the Reaghs between 1980 and 2001, while a partner with Gillis. Gillis and Parker worked out of separate office locations and kept their files separate. The partnership dissolved in 2003. Wife started divorce proceedings in 2003. Schumacher joined Gillis in 2005 and was retained by Mr. Reagh for the divorce. While solicitor-client relationship with Parker was imputed to Gillis due to prior partnership, physical and organizational structure of partnership negated any real impact/consequences as between Gillis and the Reaghs. Schumacher did not and could not receive any confidential information Parker might have acquired that could be used to the detriment of the Wife. No conflict.

LAWYER AS A WITNESS

Brogan v. Bank of Montreal, 2013 NSSC 76 – If a lawyer may be a witness in a proceeding it is a conflict for the lawyer to represent a party to a proceeding. It may not be a conflict for another member of that lawyer's firm to act, depending on other relevant factors especially at an early stage in the proceedings there is uncertainty whether a lawyer giving discovery evidence will be a trial witness. Plaintiffs given right to bring a future motion as case proceeded to remove

Brogan's partners/associates and cautioned their counsel might "get heavily involved" and be removed before trial.

Nazinani v. Bindoo, 2013 QNSC 4744 (Ont. Sup. Ct.) – Detailed outline of factors to consider and applicable law to compel lawyer to withdraw if a potential witness.

Clarke v. Penney Estate, 2013 NLTD(F) 34 (Nfld. and Labrador SCTD) – Clarke sued late husband's estate for division of matrimonial property and support. Respondent daughter and Executrix represented by lawyer from a firm that included lawyer Stack. Trial issues included validity of cohabitation agreement. Respondent filed Stack's affidavit recounting conversations with deceased about Cohabitation Agreement and subsequent amendments. Respondent maintained Stack's Affidavit met all requirements for an acceptable and admissible "Solicitor's Affidavit" and did not support the conclusion he might be a witness cross-examined by his own firm and also argued proceedings were at a stage where too late to assert conflict. HELD: Proceedings not at a stage where prejudice from delay outweighed conflict concerns and there was likelihood Stack might be a witness. Firm could not represent estate.

PERSONAL INVOLVEMENT WITH CLIENTS

Zaldin v. Zaldin, 2014 QNSC 6504 (Ont. Superior Court of Justice): Custody dispute. Husband's lawyer was his uncle. Lawyer had close personal relationship with Husband, and close personal and business relationship with Husband's father. Lawyer must withdraw.

Windsor-Essex Children's Aid Society v. D.(B.), 2013 QNCJ 43 (CanLII) – Lawyer was Respondent's father and found to be personally and emotionally involved with both Respondent and her child. Respondent had cognitive limitations, relied on her father and was influenced by him. Father had conflict of interest with Respondent due to personal interest in outcome. Father had also expressed concerns about paternal grandmother and likely to be called as a witness. Father cannot represent.

Law Society of Upper Canada v. Stuart Martin Ghan, 2012 ONLSHP 98 (CanLII) – Lawyer acted for girlfriend in contentious dispute with girlfriend's ex-partner. Legal assistance was personal regarding access to child while girlfriend initially had (but later lost) counsel. Boyfriend subsequently arranged for his firm to represent her, assisting as junior counsel. He was eventually removed for conflict.

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although senior counsel from his firm continued with the trial. Evidence by girlfriend and senior counsel differed as to discussions of retainer especially whether involvement of her boyfriend as junior counsel was "considered and approved" by girlfriend. Findings at discipline proceeding included that there was insufficient disclosure to permit proper waiver of conflict by girlfriend and "even with full disclosure" the girlfriend was "in such a vulnerable position (in part due to issues around abuse, mental health problems and substance abuse) that she could not provide the consent required by Ontario's Professional Conduct Rule 2.04(e). Other circumstances of vulnerability arose from the personal relationship (see para. 78) and the boyfriend's personal dealing with girlfriend's ex-partner giving rise to potential he would be a witness either for or against her. Lawyer disciplined.

Kam v. Hermanstyne, 2011 ONCJ 101 (CanLII) – Respondent cohabited with his lawyer. She was removed as counsel citing Ontario Code referencing potential impaired judgment of counsel in such situations.

Burgess v. Burgess, 1997 CanLII 788 (BC S.C.) – The Wife sought to retain counsel in divorce who represented the Husband shortly before separation to prepare a will. The Husband also had a "loose" social relationship with the lawyer. The "loose social relationship" was not grounds for disqualification but the wills retainer was sufficient to trigger the lawyer's disqualification.

WAIVER OF CONFLICT

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch, Inc., 2014 NSSC 105 – Initial retainer by corporation where shareholder subsequently involved in divorce proceedings. Husband's conflict motion in receivership proceeding had "unmistakeable flavour" of tactic designed to delay receivership proceeding. Husband voluntarily provided information about divorce that might otherwise be confidential with awareness of potential conflict. No conflict previously asserted. Motion dismissed.

Francis v. Cook, 2004 SKQB 57 – Lawyer Graf represented Cook when he divorced his first Wife. Cook consented to Graf representing his second Wife on the understanding Graf believed the first divorce file had been destroyed. Without notice to Cook that Graf had been able to retrieve the file, Graf produced excerpts from the file that were favourable to the Wife in a conference brief. HELD: When Graf discovered he had the file he should have withdrawn or at least informed ^

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Cook he had the file. Finding the file changed the "factual foundation and basis" for Cook's waiver. Graf disqualified and ordered to pay solicitor-client costs to Wife for all steps in litigation from the date Graf knew he had the file and failed to withdraw and to Cook for all costs of the application to have him withdraw.

DELAY IN ASSERTING CONFLICT

Johnson v. Rudolph, 2013 NSSC 210 – Excessive delay in raising conflict may result in dismissal of motion to disqualify.

Merrick v. Rubinoff, 2013 BCSC 2352 – No conflict found with Court also noting removal of counsel is a "drastic remedy" that should not be imposed where pleadings closed, document discovery completed and cross-examination on affidavits scheduled, and where over a number of months applicant had implicitly accepted that his former lawyer was now acting against him, including responding twice to interlocutory steps.

Brett v. Superior Propane Inc., 2002 NSSC 78 (affirmed 2002 NSCA 111) – Delay does not always bar disqualification, especially if conflict previously raised before the motion.

Fisher v. Fisher, (1986), 73 NSR (2d) 181 (NSTD) Wife had lengthy consultation re: divorce with firm before commencing divorce but did not retain firm. Firm unable to represent Husband. Wife's delay in asserting conflict resulted in costs against her, costs reversed in *Fisher v. Fisher* 1986 CanLII 2000 (NSCA).

REASONABLE STEPS TO AVOID CONFLICT: LAWYERS TRANSFERRING BETWEEN FIRMS

Her Majesty the Queen v. Chartis Insurance Company of Canada, 2014 ONSC 4221 (Ont. Sup. Ct) – Lawyer representing plaintiff in three class action lawsuits moves to new firm with extensive knowledge of confidential information. Lawyer not working on plaintiff's file but working extensively on other files with counsel representing defendants. Ethical screening procedures suggested by Law Society Guidelines implemented before transfer in and supervised by senior partner. Application by defendants' firm for declaration that screening procedures sufficient to prevent conflict. HELD: No need for withdrawal. Small chance of "advertent disclosure" in professional interactions between counsel balanced against impact of disqualification on opposing parties' right to counsel of choice. with reference to "particular challenge" to avoid contact between lawyers in small firms (paras. 37, 40, 42).

Berg v. Bruton, 2005 SKQB 525 – Detailed outline of procedures put in place as written firm policy when lawyer transferring in including policies for assistants processing information. HELD: Firm took all reasonable steps required and not required to withdraw from custody/access file.

Howard v. Howard, 2015 ONSC 1499 (CanLII): Application to remove wife's lawyer, after husband's former counsel joined the firm of wife's lawyer. Not every transfer of lawyers from one firm to another will automatically raise a conflict of interest requiring a client to obtain new counsel. A contextual approach is required depending on the facts of the case. This is a family law matter, where parties are most vulnerable. The court was satisfied that a reasonably informed person, having considered all of the facts in this case, would have a concern, notwithstanding any institutional measures, when a client's lawyer, possessing confidential information, joins a law firm representing the client's former spouse.

STAFF

A non professional employee's change of firms can give rise to a disqualifying conflict of interest: *Hildinger v. Carrol* (2004), 2 R.F.L. (6th) 331 (Ont. C.A.); *Chern v. Chern* (2006), 55 Alta. L.R. (4th) 28 (C.A.) 18; *Ocelot Energy v. Jans*, (1998), 165 Sask.R. 222 (Q.B.)

MSK V. TLT, 2011 ONSC 5478 (Ont. Sup. Ct.) – Custody case. Legal assistant who had worked for Mother's former counsel now worked at firm that had represented Father throughout entire matter. Mother insisted she had met assistant and given personal information. Father's lawyer argued assistant's work was only clerical at both firms and assistant never had access to confidential information. HELD: Previous litigation related to current file. Clients frequently give assistants confidential information and Court had no doubt during work for Mother's firm assistant would have been apprised of file status, issues and various proceedings even if not part of lawyer-client meetings. Clients often tell assistants information to pass along when lawyers are unavailable and there is no doubt assistant received confidential information even if she cannot recall this. Lack of recollection also has no bearing on issue of solicitor/client confidentiality, lawyer failed to meet heavy onus to establish no confidential information exchanged, did not file affidavit and Father did not adduce evidence to establish prejudice caused by having to find new counsel. Firm required to withdraw.

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Hermant v. Secord, 2010 QNSC 6444 (Ont. Sup. Ct.) – Wife applied to void separation agreement. At his prior firm, her lawyer represented Husband's second wife. He also now employed an assistant who worked for Husband's lawyer when the agreement was signed. HELD: Lawyer not required to withdraw. Representation of Husband's second wife did not result in disclosure of relevant confidential information and adequate steps were taken before hiring the assistant to ensure compliance with conflict of interest rules of professional conduct. The Court noted Ontario Rules of Professional Conduct contained commentary to state that adoption of procedures to protect confidential information may be adequate in some cases and professional standards do not always have to be complied with to overcome disqualification and each case must be analyzed on the particular facts citing *Bank of Montreal v. Dressler*, (2002), 255 N.B.R. (2d) 37 (C.A.) and *Robertson v. Slater Vecchio*, (2008), 81 B.C.L.R. (4th) 46 (C.A.).

Krupp v. Krupp (2003), 27 C.P.C. (5th) 301, 2002 CarswellOnt 2799 (WC), [2002] O.J. No. 3299 (QL) (Ont. Sup. Ct.) NO LINK – Assistant transferred from a firm representing Husband in a divorce to firm representing Wife. HELD: No conflict. Assistant's ability to access a file did not establish she had in fact accessed it and new firm did not permit assistant to work on the file.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012:

Chapter 3: "Relationship to Client"

section 3.4 "Conflicts"

section 5.2 "Lawyer as Witness"

PODCASTS

ChA: *Protecting Your Client, Yourself and Your Firm: When and How to Use an Engagement Letter* Jan. 27, 2011.



ARTICLES AND BOOKS

Cotter, Brent / The Supreme Court of Canada speaks on lawyers' conflicts of interest (1991), in Nova Scotia Law News vol. 17 p. 125.

Devlin, Richard; Rees, Victoria / Conflicts of interest: where are we since R v. Neil? case comment (February 2006), in Nova Scotia Law News, vol. 30 no. 6, p. 113.

Gillis, Deborah E. / Effective Intake Procedures (Part 2) (October 2006) in Society Record, vol. 24, No. 5

Macnair, M. Deborah / Conflicts of interest: principles for the legal profession—Aurora, Ont. Canada Law Book, 2005. [KB 29 .L5 M169 2005]

Murray, Donald C / A conflict of interest refresher (2000), in Nova Scotia Law News, vol. 25, p. 29.

Irish, Alan V. / Conflict of interest: the continuing saga of Martin v. Gray (January 1994), in Bar refresher 1994. [KB 7.25 N935 1994]

Perell, Paul M. / Conflicts of interest in the legal profession—Toronto : Butterworths, 1995. [KB 265 P437 1995]

Pinnington, Dan / Conflict of Interest: The Third Most Common and second most costly Malpractice Error (March 2003) in LawPro Magazine

Approved by Council on March 25, 2011

Standards

- #1 – Conflict of Interest
- #2 – Client Competence
- #3 – Lawyers' Competence.
- #4 – Reconciliation

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- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts
- ▶ #9 - Affidavits
- ▶ #10 - Children
- ▶ #11 - Scope of Representation
- ▶ #12 - Independent Legal Advice
- ▶ #13 - Adoption
- ▶ #14 - Assisted Human Reproduction
- ▶ #15 - Electronic Information and Social Media
- ▶ General Resources

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April 20, 2023

KEVIN MCLEAN
775 KING ST W SUITE 410
TORONTO, ON M5V 2K3

Insured(s): Nicole Artopoulos and BMW Financial Services Canada A Division of BMW Canada INC
Claim No.: 035325790-3
Date of Loss: 2022-08-31
Claimant: Kevin Mclean

Dear Sir:

Thank you for submitting the Treatment and Assessment Plan (OCF-18) prepared by prepared by Ortho Neuro PhysioCare and dated April 6, 2023. We have reviewed the recommendations and are approving the following items:

- Physical rehabilitation in the amount of \$1995.00
- Assessment (examination), total body in the amount of \$85.57

We do not agree to pay for any of the following goods, services and/or assessments for medical reasons and all other reasons known as of the date of this notice as follows:

- Physical rehabilitation in the amount of \$598.50
- Assessment (examination), total body in the amount of \$129.43

To date we have received no further information, despite our s33 request for clinical notes and records, that the proposed goods and services are reasonable, necessary and/or essential to your recovery from your accident-related impairments. Currently, there is no medical evidence to support that the proposed goods and services are essential to your ongoing treatment / rehabilitation. In effort to obtain a holistic view of your impairments we require in-person assessments.

Your claim remains subject to the Medical and Rehabilitation limit of \$3,500. The amount of treatment, goods and services that has been approved to date is \$3,500.

In order to determine if you suffer from an impairment that comes within the above Guideline, the Treatment Plan (OCF-18) will be reviewed by an assessor(s) chosen by the insurer. A notice will follow under a separate cover with further information regarding the particulars of the examination including the date, time and location.

If you fail or refuse to participate in the examination, we will make a determination that you are not entitled to any of the goods, services and/or assessments described in the Treatment and Assessment Plan (OCF-18).

(see reverse)

YOUR RIGHT TO DISPUTE THE INSURANCE COMPANY'S DETERMINATION OF YOUR CLAIM FOR STATUTORY ACCIDENT BENEFITS

Under the *Insurance Act*, if your claim for statutory accident benefits has been reduced or denied by your insurance company, you have a right to dispute your insurance company's determination.

If you do not agree with the insurance company's decision you may file an application with the Licence Appeal Tribunal (LAT) - Automobile Accident Benefits Service (AABS) within 2 years of the date of reduction or denial.

WARNING: TWO YEAR TIME LIMIT

You have **TWO YEARS** from the date of your insurance company's refusal to pay, or reduction of a benefit, to file an application with the Licence Appeal Tribunal - Automobile Accident Benefits Service. If you do not apply within two years, you will lose the right to dispute the determination.

Your insurance company may have an internal complaint review system. While you are encouraged to work with your insurance company to settle your complaint, be warned that it does not extend the two-year time limit to make your claim.

HOW TO FILE AN APPLICATION TO THE LICENCE APPEAL TRIBUNAL - AUTOMOBILE ACCIDENT BENEFITS SERVICE

To file an application you must complete the following steps:

1. Complete an AABS Application by an Injured Person (the "application");
2. Send a copy of the application to the insurance company (this is called "serving" the other party);
3. Complete an AABS Certificate of Service to explain how you have sent the copy of the application to the other party; and
4. Submit the completed application and the Certificate of Service to AABS and pay the AABS application fee.

Forms

The forms can be downloaded and can be filled in on a computer or by hand. For more information on forms and serving documents please visit <http://www.slatso.gov.on.ca/en/AABS/Pages/Forms.aspx>

If you need a paper copy or if you have questions about the forms or process, please call AABS at 416-314-4260 from the Toronto calling area, or toll-free at 1-800-255-2214.

Fee

The fee to file an application with AABS is \$106.00. This payment can be made by cheque or credit card when you submit the forms. The \$106.00 fee is non-refundable once AABS has confirmed that it can proceed with your claim.

How to Submit Your Application

BY MAIL:

Automobile Accident Benefits Service
Licence Appeal Tribunal
77 Wellesley St. W.
Box 250
Toronto, ON, M7A1N3
Attention: Registrar

BY FAX: (416) 314-4270 or 1-800-720-5292 (toll free)

IN PERSON:

You may bring your completed application to the AABS office at 20 Dundas Street West, 5th floor, Suite 530, Toronto, ON M5G 2C2. It is located at the northwest corner of Yonge and Dundas Streets above the Dundas subway station.

Hours of Operation: AABS' hours of operation are Monday to Friday, 8:30 a.m. to 5:00 p.m.

348 557

Applicant Name: Molton, Mark	OCF-18	Policy Number: 00-11261505
Provider Name: Chelack, Manjinder		Claim Number: 016025796-3
Provider Ref:		Date of Accident: 2023-08-31

Part 11 Health Care Providers	Provider Reference	Provider Type	Provider		Registered (If Not Registered Mark "NR")	Uninsured (If Applicable, If Blank)	Hourly Rate (If Applicable)
			Last Name	First Name			
	A	PT	Chelack	Manjinder	11658		

Part 12 Proposed Goods or Services Requiring Insurer Approval	GSA Ref	Description	Code	Unit/Time	Provider Ref	Estimated			Projected	
						Quantity	Rate/Unit	Cost	Total Count	Total Cost
To the extent possible, this Treatment and Assessment Plan should include all goods and services (GSA) contemplated by the Regulated Health Professional referred to in Part 15 for the period of this Treatment and Assessment Plan. Rate of provider in the Treatment and Assessment Plan is \$120.00 per hour. Amounts in this plan used to determine the service codes and are described in the manual. Payments are made to the provider's account in available cash or by check.	1	Physical repositioning	9.22 PR		A	1.00	HR	\$9.76	26	\$253.36
	2	"Assessment (examination)", full body	2.12.02		A	1.00	HR	\$15.00	1	\$15.00
	Estimated duration of this Plan					12 weeks	Sub-total:		27	\$268.36
	How many visits have you already provided?					0 visits	Minus MCH			\$0.00
	Total of provider in the Treatment and Assessment Plan is \$120.00 per hour.					Minus Other Insurance P&C				\$0.00
						Tax (if applicable)			\$0.00	
						All-in Patient Total			\$268.36	
Applicant or Subordinate Decision Maker confirms consent to proposed goods and services: Please include any additional comments regarding proposed goods and services. Are there any attachments? ☐ Yes ☒ No If Yes, how many? _____ Send any attachments directly to the insurer.										

Part 13 Signature of Insurer	☒ I have the requirement of the Applicant's signature. I have reviewed the Treatment and Assessment Plan and based upon the information provided, I: ☐ Approve this Treatment and Assessment Plan ☒ Partially approve ☐ Do not approve The Statutory Accident Benefits Schedule states that the insurer shall, within 10 business days of receiving this Treatment and Assessment Plan, give the applicant a notice stating the goods and services contemplated by the Treatment and Assessment Plan for which the insurer will or will not pay.
Name of Adjuster (print): _____ Name: Althea-Pierre	Signature of Adjuster: Althea-Pierre Date (YYYY-MM-DD): 2023-04-20
To the Insurer: Please provide a copy of this page to the applicant, the Health Professional indicated in Part 4 and the Regulated Health Professional indicated in Part 11.	

Note: The fee for completing this form is not a fee in case of the Ontario Ministry of Health and Long-Term Care. This fee should be paid to the insurer directly. The Regulated Health Professional referred to in Part 5 will contact each of the health care providers listed in Part 11 and provide details of the services and other charges that have been approved and are payable under this Treatment and Assessment Plan.