LICENCE APPEAL TRIBUNAL **TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS**

Safety, Licensing Appeals and Standards Tribunals Ontario **Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario**

Citation: L.C. vs. Aviva Insurance Canada, 2020 ONLAT 18-008289/AABS

Tribunal File Number: 18-008289/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:

L. C.

Applicant

and

Aviva Insurance Canada

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Imtiaz Hosein
Gurpreet Singh
Peter Murray
Nathan Tischler

For the Respondent: Frank A. Benedetto
J. C. Rioux
Todd J. McCarthy
Bruce Porter

Heard in person and in writing

OVERVIEW

[1] The applicant was injured in an automobile accident on **July 13, 2016** and sought benefits from the respondent pursuant to *Statutory Accident Benefits Schedule - Effective September 1, 2010*, *O. Reg. 34/10* (the "*Schedule*"). Her injuries led her to submit an Application for Determination of Catastrophic Impairment. In response, the respondent had independent assessors examine the applicant pursuant to section 44 of the *Schedule*. The examinations were coordinated through an independent medical assessment company, CanAssess. The applicant attended the examinations but, following her participation in the physical examinations, revoked her consent for the participation of CanAssess, the third-party assessment company who was hired to arrange and conduct the assessments. To-date, the respondent has not received the examination reports, nor has it agreed with the applicant that she has suffered a catastrophic impairment. In response, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES

[2] The preliminary issue in this hearing is:

(i) Is the applicant barred from adjudicating entitlement to the disputed benefits, pursuant to section 55 of the *Schedule*?

RESULT

[3] The applicant has failed to comply with the insurer's examinations ("IEs") pursuant to section 44 of the *Schedule*. Despite this noncompliance, the application to the Tribunal is permitted pursuant to section 55(2) but the hearing is stayed until the applicant complies.

BACKGROUND

[4] The applicant was the driver of a vehicle which had a side to side collision with another vehicle. She claims to suffer from various injuries as a result of the accident, predominated by post-traumatic stress disorder and depression with psychotic symptoms. She claimed entitlement to income replacement benefits ("IRBs"), attendant care benefits ("ACBs"), and various medical and rehabilitation benefits, which the respondent denied at various times over the course of the claim. In response, the applicant submitted an Application to the Tribunal, which was received on August 31, 2018.

[5] A few days later, the applicant submitted an Application for Catastrophic Determination completed by Dr. M. C. Saini, family physician, and dated September 3, 2018 (“the CAT application”). The CAT application contemplated that the applicant was catastrophically impaired due to a combination of mental or behaviour impairment and physical impairment and/or a class 4 marked impairment in three or more areas of function that precludes useful functionality.

[6] The respondent denied the CAT application and requested the applicant participate in IEs. Transportation was arranged at the respondent’s expense and the applicant attended IEs on December 3rd and 6th, 2017. Following her attendance at the IEs, on January 18, 2019, she wrote to the respondent and expressly revoked her consent to allow CanAssess access to her personal information in any manner.

[7] A case conference occurred on February 7th and 20th, 2019. With the consent of the parties, the Tribunal ordered the issue of the applicant’s entitlement to a catastrophic determination, IRBs, ACBs, and medical and rehabilitation benefits to an in-person hearing on July 29, 2019.

[8] A few days prior to the start of the July 29, 2019 in-person hearing, the applicant successfully moved to have the respondent to produce the “remainder of the Accident Benefits file which has not been produced by the respondent to the applicant… subject to redactions for privilege and reserves…” As a result, the in-person hearing was rescheduled to start October 28, 2019.

[9] On October 24, 2018, a few days prior to the rescheduled hearing, the applicant sent notice to the respondent and Tribunal of a motion for “Further and better production of the complete adjuster log notes.” The Tribunal advised the parties that this motion would be heard at the start of the hearing on October 28, 2019.

PRELIMINARY MOTION FOR FURTHER PRODUCTIONS

[10] At the start of the in-person hearing on October 28, 2019, I heard the applicant’s motion for disclosure of the respondent’s complete adjuster log notes, unredacted for all claims of privilege. She claimed that the respondent’s withholding of all adjuster’s log notes after September 4, 2018, the date of this application, demonstrates that the respondent’s activities with respect to the applicant’s accident benefits claim, specifically insurer’s examinations, were done

for the dominant purpose of litigation, demonstrating a failure to adjust her claim in accordance with its duty of utmost good faith which entitled her to the records.[1]

[11] The respondent disagreed and submitted there is a *prima facie presumption of inadmissibility* because matters concerning IE reports would be an issue raised during the litigation and, once litigation was commenced, the adjuster's log notes became privileged.[2]

[12] I agreed with the respondent and found the redacting of the adjuster's log notes for litigation privilege following the date of the application is not evidence showing misconduct which would pierce the veil of litigation privilege. Thus, the adjuster's log notes following the date of this application were subject to litigation privilege. I denied this disclosure motion by the applicant.

DISCOVERY OF THE PRELIMINARY ISSUE FOR THIS HEARING

[13] The issue of the extent of the applicant's participation in the IEs became known during the preliminary motion. In the responding motion materials, the respondent expressly stated that the applicant's revocation of consent to allow the independent assessors to work with the independent assessment company was tantamount to failing to participate in the IEs.

[14] One consequence of failing to participate in an IE may be that the applicant is barred from applying to the Tribunal, pursuant to section 55 of the *Schedule*. According to the applicant, the dispute involves entitlements to sums that may exceed $2,000,000.00. With this in mind, and to maintain procedural fairness, I advised the parties that this issue ought to be addressed at the outset of the hearing and I sought their input on how to proceed.

[15] The respondent submitted it was prepared to make oral submissions on the issue that day and noted the preliminary issue was previously communicated to the applicant. In the alternative, it agreed to make submissions on the issue in writing. The applicant wished to proceed with the full hearing instead. She submits the preliminary issue should be heard together with the substantive issue of whether the applicant is catastrophically impaired, and the position can be used by the respondent as a defence. She further submitted she wished to call witnesses to speak to whether the IE notices were provided and how the IEs were conducted and, again, requested the respondent's unredacted log notes in order to mount a defence to the preliminary issue. Lastly, the applicant was

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[1] Pursuant to *Blank v. Canada (Minister of Justice)*, [2005] 2 S.C.R. 319

[2] Pursuant to *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52

unsure of my authority to seek such submissions and wanted a fulsome notice of motion and time to reply.

[16] After considering the parties' submissions, I ordered that the preliminary issue be addressed in writing. This provided the applicant with the requisite time to prepare her case on the preliminary issue. I determined it was unnecessary to call any witnesses for the preliminary issue as the issue is procedural and the IE notices are in writing. An analysis on the written notices does not require in-person testimony. Likewise, I found no reason why the unredacted adjuster's log notes were required to explain the applicant's position with respect to attendance at the IEs. Thus, the parties were given a written Order seeking initial submissions on the issue from the respondent, followed by response submissions from the applicant and reply submissions from the respondent. No evidence or page restrictions were given to the parties.

[17] My request for written submissions on the preliminary issue is made pursuant to the *Licence Appeal Tribunal Act, 1999* ("*LAT Act*"),[3] the *Statutory Powers Procedure Act (*"*SPPA*"),[4] and the *Common Rules of Practice & Procedure (*"the *Rules*").[5] Specifically, section 3(2) of the *LAT Act* grants me all powers necessary to carry out my duties and section 5(4) of the *LAT Act* provides me with the jurisdiction to determine all questions of fact or law that arise in matters before me. Section 23(1) of the *SPPA* permits the Tribunal to make Orders and give directions in proceedings before it as it considers proper to prevent abuse of its processes. Lastly, section 2 of the *SPPA* advises that the *SPPA*, and any rule made by a tribunal, shall be liberally construed to secure the just, most expeditious and cost-effective determination of each proceeding on its merits. Section 2 of the *SPPA* mirrors Rule 3.1c of the *Rules,* which permits me to liberally interpret, waive, vary, or apply on my own initiative these *Rules* to ensure consistency with governing legislation and regulations.

[18] Before proceeding further, I must note that the parties' written submissions on the preliminary issue were substantial in their volume and included many references to legislation including the *Personal Information Protection and Electronic Documents Act ("PIPEDA")* [6] and the *Canadian Charter of Rights and Freedoms* ("the *Charter*") [7] as well as numerous cases from various courts. I have considered the legislation and cases while making my decision. As my

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[3] *Licence Appeal Tribunal Act, 1999, S.O. 1999, c. 12, Sched. G*

[4] *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22*

[5] *Safety, Licensing Appeals & Standards Tribunals Ontario, Common Rules of Practice & Procedure (October 2, 2017)*

[6] *Personal Information Protection and Electronic Documents Act, S.C. 2001, c. 5.*

[7] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

preference is to write decisions in accessible, plain language, I have only cited the most relevant cases which, for the most part, specifically refer to the *Schedule.* The omission of any reference to a specific case in this decision does not mean that it was not considered during the process.

RECUSAL REQUEST

[19] Following my decision to seek written submissions, the applicant asked that I recuse myself from the preliminary issue for which I sought submissions. She was concerned I could not decide matters fairly because I had denied the applicant access to the respondent's unredacted log notes, because I asked the parties to address the preliminary issue despite the respondent not raising same, because I adjourned the substantive hearing which had previously been adjourned, because I denied the applicant the opportunity to call witnesses for the preliminary issue hearing, and because the outcome of the preliminary issue hearing may bar her from adjudicating entitlement to the benefits claimed.

[20] The respondent submitted there was no reasonable perception of bias as a result of the decisions made during the in-person component of the hearing and that the outcome of the preliminary issue hearing may not bar the applicant's access to justice. In written submissions, it further noted the hearing record discloses no unfairness or prejudice.

[21] I considered the submissions and concluded there is no reasonable apprehension of bias. While the decisions made during the in-person component of this hearing may not have the outcome the applicant desired, they were made on a balance of probabilities and after considering the submissions and evidence and in accordance with the applicable rules and statutes. Unfavourable decisions, absent any other evidence of partiality, are not an indication of bias.[8]

PRELIMINARY ISSUE

[22] The preliminary issue hearing can be summarized as follows. The applicant discovered handwritten notes on a prior IE report produced by CanAssess, which was not part of the CAT IEs. These handwritten notes caused her to believe that CanAssess altered that report in favour of the respondent and made the applicant question the validity of CanAssess' participation in the CAT IEs. As a result, and despite attending the in-person portion of the assessments, the applicant revoked her consent to CanAssess' participation in the IE process, which has prevented CanAssess from providing the respondent with its IE

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[8] *Chavali v. Law Society of Upper Canada*, 2005 CanLII 2806 (Ont SCJ)

reports. At issue is whether the applicant is compliant with section 44 of the *Schedule*, considering she revoked her consent to CanAssess' participation in the IEs.

[23] Section 44 of the *Schedule* provides the respondent with the ability to have a regulated health professional examine an insured person for the purpose of determining if that person is or continues to be entitled to a benefit. The respondent's ability to request IEs pursuant to section 44 of the *Schedule* is not absolute. It must follow the notice requirements outlined in the section and must not exercise this right more than reasonably necessary.

NOTICE OF INSURER'S EXAMINATION

[24] On October 30, 2018, the respondent sent the applicant notice of four pending insurer's examinations ("the CAT IE notice"). The applicant's attendance was required for three of the four assessments. She attended the three in-person assessments on December 3rd and 6th, 2019.

[25] The respondent submits the applicant conceded the sufficiency of the CAT IE notice by her attendance at them. Further, in reply, it considered the CAT IE notice to be irrelevant to this hearing but nevertheless submits that arguments with respect to the sufficiency of the notice must be raised at the earliest practicable time. I disagree with the latter.

[26] The applicant is only obliged to attend a properly scheduled IE. Section 55(2)1 of the *Schedule*, which precludes the applicant from applying to the Tribunal for adjudication of her entitlement to certain benefits due to a failure to attend an IE, is conditional on the notice being in accordance with section 44 of the *Schedule.*[9] Put differently, the applicant has no obligation to attend the assessments if the notice is not in compliance with the *Schedule* and, therefore, would have no obligation to release her personal information, or to meet with, CanAssess. The issue before me is whether the applicant attended a properly scheduled IE, depending on her consent to CanAssess' participation in the IE process.

[27] The applicant submits the notice fails to demonstrate the respondent chose the regulated health professionals or arranged the IEs at its own expense. She further submits the notice fails to provide the information required for the applicant to allow her to provide the assessor with relevant documents pursuant to section 44(9)(2)(ii) of the *Schedule*, is not in accordance with section 45(3) of the *Schedule*, and is made for the dominant purpose of bolstering the

[9] For example: *16-003508 v Intact Insurance Company*, 2017 CanLII 77360 (ON LAT)

respondent's case in litigation. The respondent did not address the applicant's specific criticisms of the notice.

[28] I find no requirement for the respondent to demonstrate it chose the regulated health professionals or arranged the IEs at its own expense. While it is noted in the *Schedule* that the respondent shall arrange the examination at its own expense, it does not require this information to be included in the notice. The four notice requirements are listed in section 44(5) of the *Schedule*. Paraphrasing, the requirements are to provide the medical and other reasons for the examination, whether the applicant's attendance is required, the name of the person conducting the examination along with the regulated health profession they belong to and the titles and designations of the profession, and the day, time and location of the examination.

[29] I find the notice included the requisite information about the assessors and that, although the information about the assessors may not be expressly required by the *Schedule*, the applicant had sufficient information in order to provide the assessor with the relevant documents. The notice includes the name of each assessor and a contact person from CanAssess and the contact person's telephone number. It invites the applicant to send her relevant information to the assessment facility, which is identified as CanAssess, whom the respondent hired to conduct the assessments and produce a report of their results.

[30] I see no issue with the respondent hiring a third party such as CanAssess to carry out functions pursuant to section 44 of the *Schedule*. I agree with the reasoning in *J.P. v. Royal Sun Alliance Insurance*. In that case, the Tribunal found the only legal obligation is to have the assessment conducted by a regulated health professional.[10] Likewise, I see no reason why the applicant's disclosure of her personal information to CanAssess is unlawful, as the applicant submits.

[31] I find the notice required in section 45(3) of the *Schedule* is separate from the notice given pursuant to section 44. The notice the applicant refers to is the initial response to the CAT application, which is required within ten business days, and does not require a date or time for an assessment but simply must notify the applicant if any IEs are required and must provide the medical and other reasons why. The respondent's letter dated September 19, 2018 advised that there was insufficient medical documentation to make a determination in response to the CAT application and advised the determination was not reasonable and necessary considering the IE report dated June 6, 2017 which found the

[10] 2019 CanLII 34605 (ON LAT)

applicant had psychological injuries but concluded the injuries were not severe enough to result in an inability to perform activities of daily living and an inability to return to work.

[32] The notice discussed in section 44 is the notice of any scheduled IEs, including the date, times, and assessors. Considering the complex nature of the catastrophic impairment IE assessments, it would be unreasonable for the respondent to be required to complete the scheduling of the examinations within ten business days following receipt of the CAT application. I note the applicant attended the IEs despite the concerns she raised in her submissions.

[33] I find the respondent's request to conduct IEs to be reasonable and is not to bolster its case in litigation. As previously noted, the *Schedule* provides the respondent with the ability to have the applicant examined by a regulated health professional. To-date, the respondent has received no opinion from a regulated health professional on whether the applicant's impairment is a catastrophic impairment and the respondent is within its right to seek an opinion on this issue.

[34] The respondent provided proper notice of the CAT IEs and the applicant is obliged to attend them. I may now consider whether the applicant has satisfied her obligation to participate in the CAT IEs.

IS THE PRODUCTION OF A REPORT PART OF THE IE PROCESS?

[35] The respondent submits that the production of a report is inextricably linked to the IE process as was outlined in *18-002529 v Aviva*, which stated "… the right to an IE assessment under section 44 of the Schedule is designed to ensure that insurers are able to assess reports provided by a claimant and to adequately respond". It further submits that without the applicant's consent to CanAssess' participation, it is unable to produce a report of an examination as noted in section 45(5) of the *Schedule*. Section 45(5) provides the respondent with certain obligations within ten business days after receiving the report of an examination under section 44. The applicant did not address the connection between the production of a report and the IE process.

[36] I agree with the respondent and find that the production of a report of an examination under section 44 of the *Schedule* is part of the IE process and the applicant, by revoking her consent, has frustrated the assessors' ability to produce a final report of the examination. I find that reference in the *Schedule* to reports of an IE provide that a report of the examination is a necessary product of the IE process. Otherwise, provisions such as section 45(5) of the *Schedule*

would not be mandatory but, instead, include permissive language to anticipate that a report may not be produced as a result of the IE.

[37] Notably, the applicant was advised of the consequence for revoking her consent but chose to revoke it anyway. The CanAssess consent expressly notes that the implications of withholding or withdrawing consent in whole or in part may limit the ability of the assessment team to conduct the assessment and write a report on the findings. I recognize that CanAssess' notice with respect to the withholding or withdrawing consent does not advise the applicant of all the consequences as a result of revoking her consent, which – as is contemplated in her case – may include her application being barred from being adjudicated by the Tribunal. However, the notice is important in that it advised her that a revocation of consent may affect CanAssess' ability to conduct the assessment.

HAS THE APPLICANT SATISFIED HER OBLIGATION PURSUANT TO SECTION 44 OF THE SCHEDULE?

[38] The respondent submits that the applicant's revocation of her consent for the involvement of CanAssess has stymied the release of the reports and amounts to failing to participate in the IE process.

[39] The applicant submits she is unable to provide meaningful consent to the release of her personal information in accordance with *PIPEDA* and that the respondent must make reasonable efforts to ensure she is advised of the purpose for which the information will be used and disclosed. She further submits that the release of information permits the ghostwriting of IE reports to bolster the respondent's case at litigation. The applicant did not specifically address whether she satisfied her section 44 obligations, but the submissions above imply her position is that she is unable to satisfy her obligations because she is unable to provide meaningful consent to the IEs and CanAssess' involvement in the process. Thus, she is not required to attend at or consent to the IEs.

[40] I find the applicant's revocation of consent to the participation of CanAssess is tantamount to failure to participate in the IE process.

[41] There is nothing unlawful in having CanAssess involved in the IE process. As noted previously, the respondent is permitted to hire a third-party assessment company for the purpose of carrying out functions pursuant to section 44 of the *Schedule*. There is no duplicity in the respondent's involvement of CanAssess. The respondent's October 30, 2018 notice lists CanAssess as the assessment facility when it provided the contact information.

[42] The applicant has been advised of the purpose for which her information will be used and disclosed. The notice letter dated October 30, 2018 advised the applicant that the examinations have been scheduled to assist in determining whether she suffered a catastrophic impairment. It also requests the applicant to provide any additional relevant or necessary documents for the review of her medical condition to the assessment facility. The letter includes a contact person at CanAssess and their telephone number. This is a clear notice that the information is being used for the purpose of determining whether the applicant suffered a catastrophic impairment. If the applicant was or is unclear of how or where to send the information, she could contact CanAssess for clarity. Further, the respondent advised that it will forward all medical documentation on file to the assessment facility. Considering this, the applicant could also have forwarded any relevant information to the respondent to deliver to CanAssess or could have brought it with her to the assessment. The respondent went as far as to make reasonable efforts to clarify the role of CanAssess in the IE process: prior to the due date for submissions on the preliminary issue, the respondent provided the applicant with a statement by a representative of CanAssess explaining CanAssess' involvement in the IE process. Previously, the respondent wrote to the applicant on May 3, 2019 and July 11, 2019 and made attempts to address the applicant's concerns following the applicant's revocation of consent. They were unsatisfactory to the applicant.

[43] As contemplated and addressed in *Applicant and Royal & Sun Alliance Insurance Company* ("*Applicant v RSA*"), which the respondent submitted for consideration, the consent presented by CanAssess does not permit the ghostwriting of reports and the applicant, if necessary, can test this evidence through the cross-examination of the assessors.[11] The CanAssess consent seeks "express consent, rather than implied consent, for the purposes of the section 44 insurer examination." The consent authorizes "CanAssess and its examination team to conduct an examination and write a report that includes but is not limited to an opinion regarding the reasonableness and necessity of a specified/disputed benefit" which will be sent to the respondent. *Applicant v RSA* also refers to *Luther v. Economical Mutual Insurance Co.*, [2012] O.F.S.C.D. No. 82 at paragraph 13, whereby Adjudicator Maedel noted that

> …consent is required by most health professionals who could reasonably fear negative consequences if they perform medical-

[11] *18-007117/AABS v Royal & Sun Alliance Insurance Company (unreported, August 26, 2019, per Adjudicator I. Maedel)*

> legal examinations without having obtained consent in advance of the examination.

[44] I agree with this interpretation considering the sums at stake and the importance of making clear the relationship between CanAssess and the applicant. The concept is also addressed very clearly in *Coll v. Robertson* (“*Coll*”), which was released while I was drafting this preliminary decision[12]. In *Coll*, it was noted that

> …it is entirely appropriate to document the parameters of the relationship of persons involved in an “intrusive” examination - whether as examiner or patient. In fact, I would go further and say it is essential that same be reduced to writing. Doing so serves the parties. It serves the health practitioner. It assists in the litigation process and therefore promotes the administration of justice.

[45] Considering the findings in *Applicant v RSA*, which, to me, are similar to those reiterated in *Coll*, I fail to see how the release permits the nefarious actions suspected by the applicant, such as the ghostwriting of IE reports. Furthermore, I fail to see how the evidence of alleged ghostwriting submitted by the applicant – copies of draft reports of prior IEs with CanAssess which include comments and edits from a quality assurance team member – are anything more than an internal copy editing and peer review process to ensure clarity and consistency. The editing of draft reports appears to be a reasonable step in the report production process. IEs are conducted by healthcare professionals who are trained to conduct examinations and make medical findings but may not necessarily be proficient in independently drafting, editing, and publishing a report. It is reasonable to have another person in the company, who is also subject to the applicable privacy rules, to assist with these tasks. Healthcare professionals are responsible for the final content of their reports and any writing that is inconsistent with their findings would, I presume, be addressed before the final report is endorsed and published.

THE CONSEQUENCES FOR REVOKING CONSENT TO THE ASSESSMENT

[46] The applicant’s revocation of consent to CanAssess’ involvement in the IE process has prevented the assessors from sharing the applicant’s personal medical information with the respondent. As a result, CanAssess is unable to complete and deliver their reports to the respondent. As noted above, the production of a report is part of the IE process and, thus, the IE process is not complete without the report.

[12] *Coll v Robertson*, 2020 ONSC 383 (CanLII)

[47] While the applicant could negotiate the language contained in the consent form provided by CanAssess, such a negotiation does not exempt the applicant from the consequences outlined in section 55 of the *Schedule*. The language in section 55 of the *Schedule* is clear. It prohibits the applicant from applying to the Tribunal if she has not complied with section 44 unless permitted to apply by the Tribunal.

[48] The lack of the CAT IE reports deprives the Tribunal from conducting a fair process and from making an informed decision on the applicant's CAT determination. Currently, there are medical professionals who have examined the applicant and are prepared to produce a report on their opinion, subject to the applicant's consent to their involvement in the IE process. It would be unfair to proceed to a substantive hearing without these relevant opinions. In other words, fairness provides that the respondent be permitted to conduct and produce reports of regulated heath professionals pursuant to section 44 of the *Schedule*.

[49] The conclusion of the IE reports may render the hearing to be moot. The respondent has denied the applicant's claim for CAT pending the opinion of the IE assessors which may find the applicant is indeed catastrophically impaired as a result of the accident. A hearing on the issue of catastrophic impairment would not be necessary if this were the IE findings. If the IEs find the applicant is not catastrophically impaired, the applicant may test the evidence in the reports through cross-examination. This includes issues pertaining to the possible ghostwriting of reports, which the applicant noted throughout her submissions.

[50] Section 55(2) of the *Schedule* allows the Tribunal to permit the applicant to apply despite her non-compliance with section 44. Further, section 55(3) permits the Tribunal to impose terms and conditions on such permission. With this in mind, I will now turn my attention to whether the applicant should be permitted to proceed and, if so, why.

THE APPLICATION IS STAYED UNTIL THE APPLICANT COMPLIES WITH SECTION 44 OF THE *SCHEDULE*

[51] The respondent submits that the applicant cannot apply to the Tribunal because she has not complied with section 44 of the *Schedule*. It requests a stay of proceedings on the CAT determination until the CAT IE process is completed and the reports are delivered. The applicant submits that, if section 55(1) applies, that she be permitted to apply to the Tribunal. If the applicant must participate in the section 44 process, she requests an Order for the respondent to provide a comprehensive statement that lists all of the purposes for which it has engaged

CanAssess in the IE process so that she may provide informed consent to CanAssess' participation.

[52] Pursuant to the authority provided by sections 55(2) and 55(3) of the *Schedule*, I permit the applicant to proceed with her application but stay the substantive hearing until the applicant complies with section 44 of the *Schedule.*

[53] The applicant is in a potentially vulnerable psychological state and ought not be subject to avoidable delays. The applicant's entitlement to certain benefits hinges on a determination that she is catastrophically impaired, and fairness provides that, should she be entitled to the benefits, she has access to them as soon as possible. A dismissal of her application, at this stage, could cause unnecessary delay by forcing her to reapply. A stay of proceeding allows the parties to contact the Tribunal to schedule a substantive hearing without unnecessary delay, if a substantive hearing remains necessary.

[54] It would be unfair to allow a hearing to proceed without the relevant evidence. As noted above, the applicant's revocation of her consent to CanAssess' participation in the IE process has prevented CanAssess from releasing the reports to the respondent. This has a chilling effect on the respondent's case in that it cannot present relevant evidence to support its position, leaving the hearing adjudicator to decide the applicant's status base solely on the reports she commissioned.

[55] I dismiss the applicant's request for an Order for the respondent to provide a comprehensive statement that lists all the purposes for which it has engaged CanAssess in the IE process because the respondent has already done so. As noted previously, the respondent has advised the applicant that CanAssess has been hired for the purpose of carrying out functions pursuant to section 44 of the *Schedule*. The respondent wrote to the applicant on May 3, 2019 and July 11, 2019 to clarify CanAssess' role in the IE process and, prior to the deadline for submissions for this preliminary issue hearing, provided the applicant with a written statement from CanAssess, which provides further explanation of its role in the IE process.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

[56] The applicant made substantial submissions on how the IE may affect her rights under the *Charter*. The submissions are in addition to those concerning her privacy and queries as to the possible privacy breaches that may occur as a result of consenting to the assessment. The respondent submits that there is no

constitutional issue engaged and the impugned provisions of the *Schedule* do not contravene the *Charter*.

[57] I have reviewed the applicant's submissions on the infringement of her *Charter* rights and decline to consider the argument because she has failed to comply with Rule 11 of the *Rules* and section 109 of the *Courts of Justice Act.*[13]

[58] Pursuant to Rule 11 and section 109 of the *Courts of Justice Act*, the applicant must service notice of constitutional question to the Attorney General of Canada, the Attorney General of Ontario, and all other parties as soon as the circumstances requiring the notice become known and, in any event, at least 15 days before the question is to be argued.

[59] The applicant's notice of constitutional question was delivered after her submissions were made and delivered to the Respondent and the Tribunal. Therefore, she failed to provide notice as soon as the circumstances became known to her and not with at least 15 days' advance notice, as required by section 109(2.2) of the *Courts of Justice Act*. Section 109(2) expressly prohibits the Tribunal from adjudicating the constitutional question. Consequently, I must decline to consider the arguments.

CONCLUSION

[60] Fairness provides that the respondent be afforded an opportunity to assess the applicant by a regulated health professional pursuant to section 44 of the *Schedule*.

[61] The applicant's substantial submissions on the issue indicate that she is passionately concerned with the collection of and disclosure of her personal information. However, there is no evidence showing that the involvement of a third-party assessment company will permit the unlawful disclosure of said information nor does it permit nefarious behaviour such as the ghostwriting of reports. In the event such behaviour occurs, the applicant is permitted to address it in cross-examination during a hearing, if necessary. The applicant's privacy concerns, as submitted, do not override the respondent's legislated ability to have a regulated healthcare provider assess the applicant.

[62] By revoking her consent to CanAssess' participation in the CAT IEs, the applicant has prevented the release of the IE reports to the respondent and, as a result, prevented the respondent from assessing her claim for a determination of

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[13] *Courts of Justice Act*, R.S.O. 1990, c. C.43

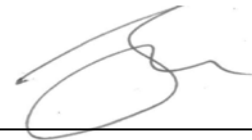
catastrophic impairment pursuant to section 44 of the *Schedule*. I have found that the production of an IE report is a component of the section 44 IE process. Considering this, I also find that the applicant's revocation of consent, preventing the release of the IE reports, is tantamount to failing to participate in the IE process. As a result, she is not compliant with section 44 of the *Schedule* and, pursuant to section 55(1), shall not commence an Application with respect to the Catastrophic Impairment Determination.

[63] In light of the applicant's vulnerable psychological state, I exercise my discretion under section 55(2) of the *Schedule* to allow the Application to proceed, subject to the applicant's consent to the participation of CanAssess in the IE process. With this in mind, pursuant to the authority provided by section 55(3) of the *Schedule*, the substantive hearing is stayed until the applicant is compliant with section 44 of the *Schedule*.

[64] Either of the parties, once the CAT IEs are completed and a determination is made by the respondent, may contact the Tribunal to schedule the resumption of the substantive hearing, if required.

[65] Considering my involvement in this preliminary issue hearing, the substantive hearing will be heard be a different adjudicator, should it occur.

Released: May 29, 2020



Brian Norris
Adjudicator