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**

Tribunal File No.:18-000467/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:

Marcia MacDonald

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

(*Motion for Recusal of Hearing Adjudicator*)

PANEL: **Nidhi Punyarthi, Adjudicator**

APPEARANCES:

For the Applicant: Sylvia Guirguis, Counsel

For the Respondent: Laura Meschino, Counsel

HEARD: **In Writing**

OVERVIEW

[1] The parties appeared before the Tribunal on April 25, 2019 for a hearing of whether the respondent was to pay the applicant an award under Section 10 of R.R.O. 1990, Reg. 664: Automobile Insurance ("Regulation 664"). I presided over this hearing and rendered a decision dated August 7, 2019 (the "Decision"). In the Decision, I determined that an award was not payable.

[2] On August 26, 2019, the applicant brought a motion (the "Motion") containing submissions for the following relief:

a. That I recuse myself from further involvement in the file;

b. That an order be made to set aside the Decision; and

c. In the alternative, that I recuse myself voluntarily.

[3] The respondent filed its submissions in response to the Motion on September 18, 2019. It asked the Tribunal to dismiss the Motion. In these submissions, the respondent also made a claim for its costs of the Motion. The applicant served her reply submissions on September 23, 2019.

[4] For the reasons that follow, the applicant has not established a reasonable apprehension of bias. The Motion is denied. No order is made as to costs.

REASONABLE APPREHENSION OF BIAS

[5] The Supreme Court of Canada set out the test for a reasonable apprehension of bias in *Committee for Justice and Liberty v. Canada*[1], at p. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having through the matter though – conclude. Would he think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly."

[6] In *Wewaykum Indian Band v. Canada*[2], at para. 59, the Supreme Court of Canada confirmed the existence and importance of a strong presumption of judicial or quasi-judicial impartiality. In order to overcome this presumption, a party alleging a reasonable apprehension of bias must establish the presence of substantial grounds:

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[1] 1976 CanLII 2.
[2] 2003 S.C.R. 45.

> Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles of Judges* (1998), at p.30). It is the key to our judicial process and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.), supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.[3]

[7] The Court also noted, at para. 77, that this inquiry is highly fact-specific and contextual:

> […] this is an inquiry that remains highly fact-specific… As a result, it cannot be addressed through peremptory rules, and… there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.[4]

[8] In other words, the facts raised in support of a claim of reasonable apprehension of bias must be established and carefully understood in the overall context of the litigation, as well as the relationship between the parties and the decision-maker.

[9] It should also be noted that an adverse decision, in and of itself, does not rebut the presumption of impartiality.[5]

[10] In summary, the threshold for finding real or perceived bias is high. There must be more than a mere suspicion, but rather a real likelihood of bias.[6] Establishing an allegation of judicial or quasi-judicial bias requires cogent evidence.[7] Further, the cumulative effect of the adjudicator's conduct, comments and interventions must be assessed to rebut the strong presumption of impartiality.[8]

ANALYSIS

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[3] *Ibid.* at para. 59.
[4] *Ibid.* at para. 77.
[5] *Taucar v. Human Rights Tribunal of Ontario*, 2017 ONSC 2604, at paras. 84-85.
[6] *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856.
[7] *Marchand v. Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ONCA), leave to appeal to SCC refused, at para. 131.
[8] *Canadian College of Business and Computers Inc., supra*.

Parties' Positions

[11] In her Motion, the applicant submits that the adjudicator displayed a reasonable apprehension of bias for the following reasons:

a. The adjudicator "concocted" or "fabricated" evidence, specifically, in her finding that the respondent forwarded letters from the applicant's lawyers to its legal department, when the record of evidence did not support such a finding.

b. The adjudicator made findings with respect to a cognitive impairment of the applicant and to the tone of the applicant's lawyers' letters, when neither the testimony nor the parties' submissions dealt with these matters. In other words, the adjudicator made submissions on behalf of the respondent.

c. The adjudicator imposed a legal test "of her own creation" when she stated that the letters from the applicant's lawyers did not add value or make progress.

d. The adjudicator made findings about the respondent's notices of examination and the applicant's lawyers' letters that the evidence and submissions did not support.

[12] The respondent disagrees with the applicant and submits that the adjudicator made findings that she was entitled to make based on the evidence and the law.

Findings

[13] All four reasons submitted by the applicant describe what can be defined as alleged errors of fact and law. The Tribunal's *Common Rules of Practice & Procedure* (the "Rules") allow parties to ask that final decisions be reconsidered if there are errors of fact or law. Relief may also be sought from the Divisional Court.

[14] A reasonable and informed person, who views the entire matter in context, would note that an adjudicator may make factual, evidentiary, or legal errors, but that these errors are not, in and of themselves, evidence of bias. Rather, errors committed by an adjudicator are regularly corrected through the avenues described above. Therefore, even if an adjudicator's decision is overturned, it does not then follow that the adjudicator has demonstrated a reasonable apprehension of bias. Put another way, something more substantial than a possible factual and/or legal error is needed to displace the strong presumption of judicial and quasi-judicial impartiality.

[15] With these observations in mind, I find that the applicant did not put forward any cogent evidence in her submissions to suggest that there was a reasonable apprehension of bias on the part of the adjudicator who made the Decision.

Specifically, she did not provide cogent evidence to show how the four reasons summarized above, if accepted as true, could amount to a reasonable apprehension of bias.

[16] Accordingly, the test for a reasonable apprehension of bias has not been met. I will not recuse myself and will not set aside the Decision.

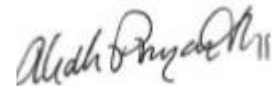
[17] In the alternative, the applicant also requested that I recuse myself voluntarily. Since the test for establishing a reasonable apprehension of bias has not been met, I see no reason to voluntarily recuse myself.

[18] I also decline to order costs as requested by the respondent. I do not find that the applicant acted frivolously, vexatiously, or in bad faith in bringing this Motion.

CONCLUSION

[19] The Motion is denied. There is no order for costs.

Released: November 25, 2019



Nidhi Punyarthi
Adjudicator