COURT OF APPEAL FOR ONTARIO

CITATION: Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518
DATE: 20190621
DOCKET: C65981 and C65995

Tulloch, Hourigan and Fairburn JJ.A.

C65981

BETWEEN

Mary Shuttleworth

Applicant (Respondent)

and

Safety, Licensing Appeals and Standards Tribunals Ontario and Licence Appeal Tribunal

Respondents (Respondents)

and

Peel Mutual Insurance Company

Respondent (Appellant)

C65995

AND BETWEEN

Mary Shuttleworth

Applicant (Respondent)

and

Safety, Licensing Appeals and Standards Tribunals Ontario and Licence Appeal Tribunal

Respondents (Appellants)

and

Peel Mutual Insurance Company

Respondent (Respondent)

Sunil Mathai and Domenico Polla, for Safety, Licensing Appeals and Standards Tribunals Ontario and Licence Appeal Tribunal

Cynthia Verconich, for Peel Mutual Insurance Company

Gary Mazin and Vasiola Bibolli, for Mary Shuttleworth

Heard: April 24, 2019

On appeal from the order of the Divisional Court (Justices Julie A. Thorburn, Michael K. McKelvey, and Frederick L. Myers), dated June 20, 2018, with reasons reported at 2018 ONSC 3790.

Hourigan J.A.:

Introduction

[1] Mary Shuttleworth was injured in a car accident on September 28, 2012. In December 2014, she applied to her insurer, Peel Mutual Insurance Company ("Peel"), for a determination that her accident injuries resulted in impairments that met the statutory threshold for a "catastrophic impairment" as defined in the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("the *SABS*"). When the parties were unable to agree whether the threshold was met, she sought a hearing before the Licence Appeal Tribunal ("the LAT"). At the time, the LAT was a part of a cluster of tribunals known as the Safety, Licensing Appeals and

Standards Tribunals Ontario ("SLASTO"). On April 21, 2017, LAT vice-chair Susan Sapin released a decision determining that the threshold was not met.

[2] Approximately two months later, Ms. Shuttleworth's counsel received an anonymous letter stating that, before the decision was released, it was reviewed and changed by Linda Lamoureux, the executive chair of SLASTO. The letter claimed that in Ms. Sapin's initial decision, Ms. Shuttleworth's injuries qualified as a catastrophic impairment, but when Ms. Lamoureux reviewed the decision, she altered it and determined that Ms. Shuttleworth did not meet the threshold. The letter also indicated that Ms. Sapin was reluctant to sign the decision.

[3] Ms. Shuttleworth attempted to obtain information about the process followed in her case. This was met by a broad claim of adjudicative privilege asserted by the LAT. However, the LAT did produce some emails without attachments, which it relied on in support of its position that there was no interference with Ms. Sapin's decision. Having obtained no meaningful information regarding the serious charges in the anonymous letter, Ms. Shuttleworth brought an application for judicial review.

[4] The Divisional Court granted Ms. Shuttleworth's application for judicial review and set aside the LAT's decision. While it made no finding of any actual impropriety, the court held that the LAT's decision-making process did not meet

the minimum standards required to ensure both the existence and appearance of adjudicative independence.

[5] The LAT and SLATSO appeal the order of the Divisional Court, as does Peel ("the appellants"). They assert that the court erred in law in finding that there was a reasonable apprehension of lack of independence in relation to Ms. Sapin. As I will explain below, I do not accept this submission and would dismiss the appeal.

Facts

[6] Ms. Shuttleworth suffered physical and psychological injuries as a result of her motor vehicle accident. A finding that she was catastrophically impaired would entitle her to enhanced benefits. Peel's assessments determined that Ms. Shuttleworth's impairment of the whole person ("WPI") fell below the 55% threshold for catastrophic impairment provided in the *SABS,* while an assessment that Ms. Shuttleworth commissioned confirmed that she met the threshold. She applied to the LAT under s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8, to resolve the dispute.

[7] To promote efficiency, the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5, s. 15 ("*ATAGAA*"), allows two or more adjudicative tribunals to be designated as a

"cluster" by regulation. Until January 1, 2019, the LAT was part of SLASTO.[1] Ms. Lamoureux was appointed as executive chair of SLASTO, pursuant to s. 16 of *ATAGAA*. The LAT acquired jurisdiction over disputes in respect of the *SABS* on April 1, 2016. Ms. Shuttleworth's case was the first catastrophic impairment decision that the LAT was to release.

[8] On April 21, 2017, Ms. Sapin ruled that Ms. Shuttleworth's WPI was 51% and that Ms. Shuttleworth was, therefore, not catastrophically impaired. If Ms. Shuttleworth's WPI was assessed at 53%, it would have been rounded up to 55% and she would have been found catastrophically impaired. Ms. Shuttleworth did not request a reconsideration of the decision and did not appeal.

[9] Approximately two months after the decision was released, Ms. Shuttleworth's counsel received an anonymous letter advising that the decision was reviewed and changed by Ms. Lamoureux before its release. The letter stated:

> I have heard from reliable source that Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the ED Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.
>
> Thought you should know that the decision was not made by an independent decision maker who heard the evidence.
>
> I was also told that Sapin hesitated to sign this order.

[1] All the tribunals formerly in SLASTO now belong to a larger cluster entitled "Tribunals Ontario": *Adjudicative Tribunals and Clusters*, O. Reg. 126/10.

[10] After receiving the anonymous letter and being denied further information by the LAT, Ms. Shuttleworth's counsel made an access to information request. In response to that request, the LAT refused to produce the drafts of the decision, which could have resolved the issue. Instead, it made limited disclosure, including of internal emails. The respondent did not pursue further disclosure. In one email of particular note, dated April 11, 2017, Ms. Sapin wrote to Ms. Lamoureux as follows:

> I just wanted to thank you for your helpful review of this decision and to let you know that I have met with Liz and am working on revising it (for the umpteenth time, this was *not* a *first* draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.
>
> I also wanted to point out that this will take more time, and although I will do my best to meet Karen's recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.

[11] Ms. Lamoureux responded the same day, she wrote:

> Susan thank you for your note. This is a complex case. I had the benefit of reading it after a great deal of work on your part and after legal review. I recall stopping by your desk on a few occasions where you indicated you were struggling with a CAT case – no wonder given the issues at play. I do appreciate your understanding and willingness to work with legal and myself to ensure the best possible decision. You must be a fan of Justice Laskin's as he takes a similar approach. This is an important decision, one that will be referenced. I suspect it will receive a great deal of attention.

> Although I am concerned about the delay already experienced by the applicant and the further delay that will ensue because of my comments, I do appreciate your understanding of the importance of ensuring quality decision writing, and your willingness to accept constructive feedback. At the end of the day, the people we serve benefit.

[12] On June 21, 2017, Ms. Shuttleworth filed an application for judicial review. She argued that the LAT had failed to remain neutral in its decision-making process and sought an order reversing the decision or referring the matter back to the LAT for a rehearing.

[13] On the application for judicial review, Benson Cowan, Head of Legal Services for SLASTO, affirmed an affidavit explaining the LAT's decision review process. His uncontested evidence was that an adjudicator "is expected to send the decision for peer review" upon completing the draft. However, there was "no means to compel adjudicators to participate" and no means to prevent an adjudicator who declined to participate from releasing the decision. According to Mr. Cowan, in some situations, the review proceeds through a total of four phases: (1) peer review by the duty vice-chair; (2) legal review by the SLASTO Legal Services Unit; (3) a second peer review by the executive chair; and (4) a review by the file's case management officer. The Legal Services Unit would only send the decision to the executive chair in "rare instances" such as when a decision involved a "novel, contentious, precedent-setting, or high profile issue."

[14] Finally, Mr. Cowan provided some evidence about the operation of the peer review process in the case at bar. He stated that the adjudicator submitted her decision for peer review by the duty vice-chair and then to the Legal Services Unit for legal review. Mr. Cowan sent the decision to the executive chair for review because it was the first catastrophic impairment decision that the LAT was going to release.

Decision of the Divisional Court

[15] The Divisional Court accepted that an adjudicator's discussion of a draft decision with colleagues does not in and of itself breach the rules of natural justice. It relied on *Khan v. College of Physicians & Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), for the principle that some "outside" influence on reason writing is permissible and accepted. However, the court emphasized that the institutional consultation procedure must be designed to safeguard a decision-maker's ability to independently decide the facts and the law. It relied on *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 29, for the propositions that the consultation procedure cannot be imposed by a superior level of authority, consultation must be limited to questions of policy and law, and decision-makers must remain free to decide independently even on questions of policy and law.

[16] The Divisional Court was unable to find that the adjudicator lacked actual independence. It held that, as Ms. Shuttleworth elected not to cross-examine Mr. Cowan, there was no evidence to refute his evidence that the reviewers do not question the facts and evidence and do not comment on the policy choices or outcome, that there is no means to compel adjudicators to participate in peer review, or that the adjudicator has complete discretion to accept or reject any suggested revisions. This evidence, coupled with the presumption of regularity that applies to administrative proceedings, meant that Ms. Shuttleworth failed to prove a lack of actual independence.

[17] Notwithstanding the foregoing, the Divisional Court concluded that there was a reasonable apprehension of a lack of independence. The LAT breached the rule of consultation from *Ellis-Don* because the executive chair imposed a review that was not requested by the adjudicator. The court emphasized that peer review or other consultative processes must be accompanied by robust protections to safeguard adjudicative independence. It stressed that there was no formal or written policy protecting the adjudicator's right to decline to participate in a review by the executive chair or make changes proposed by the executive chair. The court found the absence of this policy "significant" because ss. 7-8 of *ATAGAA* required it and because its existence would safeguard the appearance of propriety. Accordingly, it concluded that the LAT subjected the decision to a

peer review process that lacked the required safeguards of adjudicative independence.

[18] It is important to note that, in reaching its conclusion, the Divisional Court made a number of factual findings about the review process, none of which are challenged on appeal:

(1) The SLASTO Legal Services Unit generally sent decisions to the executive chair without assent or input from the adjudicators;

(2) In this particular case, the adjudicator did not request the consultation with the executive chair and the executive chair only informed the adjudicator of her review after it had already taken place;

(3) There was no formal or written policy protecting the adjudicator's right to decline to participate in the review by the executive chair or to decline to make changes proposed by the executive chair;

(4) A manual describing the tribunal's procedure made no reference to the voluntariness of the peer review process; and,

(5) By virtue of reappointment powers granted to the executive chair under s. 14(4) of *ATAGAA*, she exercised a superior level of authority within the administrative hierarchy.

[19] In the result, the Divisional Court granted Ms. Shuttleworth's application, set aside the adjudicator's decision, and referred the matter back to the LAT for a new hearing.

Analysis

[20] The appellants submit that the Divisional Court erred by: (a) incorrectly articulating and applying the test for reasonable apprehension of bias; (b) wrongly applying the trilogy of Supreme Court of Canada cases involving the

preparation of reasons by administrative tribunals; (c) mistakenly finding that ss. 7 and 8 of the *ATAGAA* required SLATSO to have written consultation procedures; (d) failing to conduct a holistic analysis as mandated by *Khan*; and (e) conducting an incorrect analysis regarding reasonable apprehension of lack of adjudicative independence in relation to Ms. Sapin. These issues will be considered below.

(a) Test for a Reasonable Apprehension of Bias

[21] In the overview section of its reasons, the Divisional Court stated, “Justice must not only be done; it must be seen to be done. In the absence of a properly limited, voluntary consultative process, an informed, cautious observer would have a reasonable basis to believe that the decision did not reflect the independent decision of the adjudicator.”

[22] The appellants submit that the Divisional Court misapplied the test for reasonable apprehension of bias by introducing the concept of a “cautious observer.” This, they argue, is novel and inconsistent with the test for reasonable apprehension of bias articulated in *Valente v. The Queen*, [1985] 2 S.C.R. 673, which *Ellis-Don* confirms applies to the tribunal context.

[23] The test for a reasonable apprehension of bias or lack of independence in respect of an administrative tribunal is whether the apprehension is “a reasonable one, held by reasonable and right minded persons, applying

themselves to the question and obtaining thereon the required information": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at p. 334. The question is thus whether "an informed person, viewing the matter realistically and practically – and having thought the matter through" would think that it is more likely than not that the decision-maker would decide fairly: *Consolidated-Bathurst*, at p. 334. The Supreme Court recently confirmed this test in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282.

[24] I would not give effect to the appellants' submission that the Divisional Court applied the incorrect test. The appellants seize on the Divisional Court's passing reference to a "cautious observer". It is unfortunate that the term was used, as it may appear to introduce an unknown element to the test. However, on a review of the court's reasons as a whole, it is plain that it correctly articulated the test for a reasonable apprehension of a lack of independence at para. 50 of its reasons and cited the relevant authorities on the issue. At paras. 62 and 65, the court applied that test and found a reasonable apprehension of a lack of independence without making reference to a "cautious observer."

[25] In my view, the Divisional Court did not apply a novel test for reasonable apprehension of a lack of independence. Accordingly, this ground of appeal should fail.

(b) Application of the Trilogy

[26] The Supreme Court's trilogy of cases on consultations in the course of preparing reasons for a decision – *Consolidated-Bathurst, Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, and *Ellis-Don* – sets out a framework of considerations for assessing whether there is a reasonable apprehension of bias or lack of independence.

[27] The guiding principle from the trilogy is that the decision-maker must be free to decide cases "in accordance with his own conscience and opinions": *Consolidated-Bathurst*, at p. 332. *Consolidated-Bathurst* establishes that discussions with colleagues are permissible even though they raise the possibility of "moral suasion," and that adjudicators are entitled to consider the opinion of their colleagues in the interest of adjudicative coherence: at pp. 331-33. The court also recognized that consultation could allow the adjudicator to benefit from the acquired experience of the entire board and foster coherence in the board's jurisprudence: at pp. 326-28. At the same time, the court concluded that any procedure or practice that unduly restricted independence would be contrary to the rules of natural justice: at p. 323. Accordingly, procedures that "effectively compel or induce" decision-makers to decide against their own conscience and opinions are impermissible: at p. 333.

[28] To reconcile the demands of decision-making by administrative tribunals with procedural fairness, the court held that full-board consultation was permissible if accompanied by appropriate safeguards. As Gonthier J. stated, the question is whether the "safeguards attached to this consultation process are…sufficient to allay any fear of violations of the rules of natural justice": *Consolidated-Bathurst*, at para. 53. *Consolidated-Bathurst* establishes that the fact that the board's chair or other board members lack any *de jure* power to impose their opinion on other board members is not a sufficient safeguard, as procedures may still "effectively compel or induce" members to decide against their conscience and opinions: at p. 333. Accordingly, the court must examine the "actual structure of the machinery created to promote collegiality" and "determine the *actual situation* prevailing in the body in question": *Tremblay*, at pp. 968 and 973 (emphasis in original).

[29] The Supreme Court also outlined specific rules that govern the practice of full-board consultation. In *Consolidated-Bathurst*, the court found it "obvious" that "no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision": at p. 332. Likewise, in *Tremblay*, the court found that the tribunal president's ability to refer a matter for plenary discussion without the permission of the adjudicator was a sufficient basis to find an appearance of a lack of independence: at p. 974. As a result, *Ellis-Don* held that it was a basic

principle that only the adjudicators could request consultation and that their superiors in the administrative hierarchy could not impose it on them: at para. 29. This conclusion is consistent with leading treatises. As Sara Blake states in *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017), at pp. 116-117:

> A process for compulsory consultation… is not acceptable. The decision to consult must be up to the decision makers. It should not be imposed on them. If they do not wish to consult, they must be truly free to choose not to do so. Compulsory consultation creates an appearance [of] constraint on their freedom to decide the case.

[30] The appellants attempt to distinguish the LAT's review process from the full-board meetings the trilogy considered on two bases. First, they submit that the review process was purely focused on the quality of the written decision, unlike the full-board meetings that involved reviewing policy choices and the ultimate result. Second, they submit that the same moral suasion concerns are not present in the review process because only a maximum of four reviewers are involved and it is a simple editorial exercise. I would reject these submissions for the following reasons.

[31] First, it is inaccurate to characterize the review process as a purely qualitative or editorial exercise. Mr. Cowan's evidence was that reviewers did comment on whether the correct legal test and jurisprudence has been identified and applied. *Ellis-Don* emphasized that the procedural safeguards were required

to protect a decision-maker's ability to decide questions of law independently from compulsion by other members of the tribunal: at para. 29.

[32] Second, the fact that fewer people were involved in the review than in the full-board consultations the trilogy considered does not assist the appellants. The fact remains that the executive chair occupies the most superior level of authority within the LAT and SLATSO. It should be recalled that the executive chair undertakes any reconsideration of the LAT adjudicators' decisions and holds power over the reappointment of individual adjudicators under s. 14(4) of *ATAGAA*. That subsection provides:

> **Chair to recommend appointments, reappointments**
>
> (4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

[33] The appellants submit that the moral suasion concern related to the executive chair's power over reappointment would be equally strong even if the adjudicator requested review by the executive chair. This submission should be rejected. As *Tremblay* and *Consolidated-Bathurst* recognize, adjudicators are more likely to feel free to decide according to their own conscience and opinions

if the consultation occurs at their own request: *Consolidated-Bathurst*, at pp. 334-335 and *Tremblay*, at p. 974.

[34] Third, it is also important to note that this court and other courts have found the principles from the trilogy on full-board consultation relevant to cases dealing with other review processes for draft decisions. In the context of review of draft reasons by counsel to a disciplinary committee, this court in *Khan* relied on *Tremblay* for the principle that compulsion to consult with others may cause the appearance of independence to be lost: *Khan*, at pp. 673-74. Similarly, in *Bovbel v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 563 (C.A.), the Federal Court of Appeal relied on *Consolidated-Bathurst* and *Tremblay* to evaluate whether the Immigration and Refugee Board's practice of encouraging board members to submit their reasons for review by staff lawyers gave rise to a reasonable apprehension of bias.

[35] I would therefore reject the submission that the Divisional Court erred in its application of the trilogy.

(c) Written Procedures

[36] The appellants submit that the Divisional Court erred in holding that the absence of a written peer-review policy was "significant" on the basis that ss. 7-8 of *ATAGAA* required such a policy. These sections provide as follows:

Member accountability framework

> 7 (1) Every adjudicative tribunal shall develop a member accountability framework.
>
> **Contents**
>
> (2) The member accountability framework must contain,
>
> (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
>
> (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
>
> (c) a code of conduct for the members of the tribunal; and
>
> (d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet
>
> **Approval**
>
> (3) The member accountability framework must be approved by the tribunal's responsible minister.
>
> PUBLICATION, AMENDMENT AND REVIEW OF PUBLIC ACCOUNTABILITY DOCUMENTS
>
> **Publication of public accountability documents**
>
> 8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[37] The appellants argue that the text of s. 7 of *ATAGAA* does not include a requirement for a written peer-review policy and that SLASTO has adopted all the required documents. Their position is that the documents codify the principle of adjudicative independence and address the roles of members and vice-chairs in the peer-review process. Nor, they argue, does the case law demand a written peer-review policy. They note that in *Consolidated-Bathurst* and *Ellis-Don*, the

Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultation even though the board lacked a written policy codifying the procedural safeguards in that process.

[38] I accept that ss. 7-8 of *ATAGAA* do not require SLATSO to publish a written peer review policy. Section 7(2) of *ATAGAA* only requires a tribunal to describe the functions of the members, the skills and qualifications required to be appointed a member, and a member code of conduct. SLATSO did publish a code of conduct, as well as descriptions of the vice-chair and member positions. The appellants are also correct that the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* despite the Board's lack of a written policy governing those consultations, and that the Supreme Court found a reasonable apprehension of bias in *Tremblay* even though there was a written policy that protected adjudicative independence.

[39] Despite the foregoing, the Divisional Court was still entitled to find the absence of such a policy significant when it considered the adequacy of LAT's procedural safeguards. The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and Mr. Cowan's own evidence was that adjudicators were expected to participate in the review process. While Mr. Cowan's evidence was

that there was no means to compel adjudicators to participate, he did not give evidence that SLATSO communicated to adjudicators that they were free not to have their drafts reviewed by the executive chair. The principal safeguard the appellants point to is the executive chair's inability to lawfully compel the adjudicator to change her mind. However, *Consolidated-Bathurst* establishes that this is not a sufficient safeguard: at p. 333.

[40] Further, the absence of a written policy on full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* and its presence of such a policy in *Tremblay* do not assist the appellants. The Ontario Labour Relations Board's practice of full-board consultations was well-known to board members and litigants before the board, as it was described in a 1971 government report and in legal treatises: *Consolidated-Bathurst*, Sopinka J., dissenting (but not on this point), at pp. 290-91. In particular, both board members and litigants knew that only the hearing panel could request a full-board meeting and it could not be centrally imposed: Gonthier J., writing for the majority, at pp. 316-17.

[41] In contrast, in this case, the Divisional Court found there was no evidence that adjudicators were aware that they had the right to refuse a review by the executive chair and that the process gave them no opportunity to refuse: at para. 28. The absence of a written policy was thus significant because it confirmed that the LAT had not communicated to adjudicators that they had the right to refuse. As for *Tremblay*, all it establishes is that a formal policy that protects adjudicative

independence will not be an adequate safeguard if it is disregarded in practice: at pp. 972-73. The presence of the formal policy likely would have been a relevant consideration in *Tremblay* but for the evidence that the tribunal was disregarding it in practice.

[42] The SLASTO code of conduct and the position descriptions for the member and vice-chair positions undermine the appellants' position. The appellants point to the guarantee of adjudicative independence in these documents. However, the code of conduct simply states that "[m]embers should be independent in decision-making" and makes no mention of a member's right to refuse a review by the executive chair. This provides no evidence to undermine the Divisional Court's finding that members were not advised of their right to refuse. Moreover, the member position description confirms the Divisional Court's finding that members were expected to submit their decisions for peer review and were not advised of their right to refuse. Under the heading "Key Duties," the description states "A Member, where appropriate… submits draft decisions for, and participates in, peer and other decision reviews before they are issued in accordance with SLASTO policy".

(d) Holistic Analysis

[43] The appellants' submission that the Divisional Court failed to apply the holistic approach from *Khan* is unfounded. It is important to recognize that the

court in *Khan* did not purport to undermine the holding in *Tremblay* that imposed consultation is generally inappropriate and did not suggest that it is merely one factor among others. To the contrary, Doherty J.A. found *Tremblay* "an appropriate starting place," quoted from it, and relied on it for the proposition that the result of compulsory consultation is that "the appearance of independence may be lost": *Khan*, at pp. 673-74.

[44] In *Khan* the court considered all of the factual circumstances of the case. Similarly, the Divisional Court recognized the need to look at all the circumstances. At paras. 38-39, it stated it was necessary to assess the "specific circumstances" and review the five factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, to determine the level of procedural fairness required.

[45] In addition, the review process in this case lacked the guarantees that led Doherty J.A. to find in *Khan* that the discipline committee's use of counsel in the drafting process did not give rise to a reasonable apprehension of lack of independence. Doherty J.A. stressed that counsel's involvement "could not have had any coercive effect" because counsel was the "servant of the Committee" and his involvement "was not mandatory, and was entirely under the control of the Committee": *Khan*, at p. 674. In contrast, the executive chair was the superior of the adjudicator with power over her reappointment, not the adjudicator's servant.

[46] In summary, I would reject this ground of appeal on the basis that the Divisional Court conducted an analysis of all of the circumstances of the case. I will consider in the next section of my reasons the adequacy of that analysis.

(e) Overall Analysis

[47] The appellants' position is that the case before the LAT was an important, precedent-setting matter, and that it was thus an appropriate case for the executive chair's limited decision review role, which is consistent with her statutory responsibility in s. 20(1) of *ATAGAA* to ensure the LAT performs its duties and functions. The appellants submit that the Divisional Court's finding that there was no evidence that the adjudicator did not make her decision independently should have led the court to conclude that the executive chair's review of the draft decision did not raise a reasonable apprehension of a lack of independence. They argue that the uncontested evidence was that peer reviewers do not question the facts, evidence, policy choices, or result in a decision, and that adjudicators have complete discretion to accept or reject any suggested revisions. As a result there is no danger of moral suasion of the kind discussed in *Ellis-Don*. Had the Divisional Court properly examined the facts of this case, the appellants submit, it would have found that a reasonable observer would conclude that the peer review adequately safeguards adjudicative independence.

[48] I am not persuaded that the Divisional Court erred in its conclusion that there was a reasonable apprehension of a lack of independence on the facts of this case. I reach this conclusion for the following reasons.

[49] First, the Divisional Court correctly found that the executive chair's imposition of the review on the adjudicator breached the rules set out in the trilogy. The Divisional Court found as a fact that the adjudicator was expected to send the decision for peer review: at para. 28. It also found that, as was the general practice, the legal department sent the decision to the executive chair without the adjudicator's prior knowledge or assent. The adjudicator was only informed of the review after it had taken place: at paras. 28, 57-58. The Divisional Court thus correctly concluded that the Tribunal violated the rule from the trilogy because a superior level of authority imposed consultation on the adjudicator.

[50] I do not agree with the appellants' arguments that the Divisional Court erred in fact by finding that consultation was imposed. The appellants submit that the executive chair did not impose the review on the adjudicator because it was staff counsel that forwarded the decision to the executive chair. The fact remains that, by deciding to provide comments on the decision without seeking the adjudicator's permission, the executive chair imposed the review on the adjudicator. I likewise disagree with the argument that Mr. Cowan's evidence that the LAT lacked the legal power to force an adjudicator to participate in the peer

review process meant that consultation was not imposed. Mr. Cowan forwarded the decision to the executive chair and the executive chair provided comments without seeking the adjudicator's consent. As Ms. Shuttleworth submits, the adjudicator's freedom to decline the review does not assist her because she was never given the opportunity to decline and was instead presented with the executive chair's review as a *fait accompli*.

[51] Second, the Divisional Court found that the breach was significant because of the power of the SLATSO executive chair. *Consolidated-Bathurst* recognized the possibility that a tribunal chair could exert moral suasion over tribunal members: at p. 333. Similarly, *Tremblay* stressed the control the tribunal president exercised over the consultation process in finding a reasonable apprehension of bias: at p. 973-74; see also David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 344.

[52] The Lieutenant Governor in Council could not reappoint the adjudicator without the executive chair's recommendation: *ATAGAA*, s. 14(4). This power over reappointment is significant, as the Divisional Court found: at paras. 14-15, 28. The New Brunswick Court of Appeal has twice held that Ministers or Members of the Legislative Assembly should not be permitted to represent a claimant before a tribunal because the tribunal's members owe their re-appointment to the provincial cabinet: *Chipman Wood Products (1973) Ltd. v. Thompson* (1996), 181 N.B.R. (2d) 386 (C.A.); *Fundy Linen Service Inc. v. New*

Brunswick (Workplace Health, Safety & Compensation Commission), 2009 NBCA 13, 341 N.B.R. (2d) 286. Legal commentators have also recognized the power of the executive chair and the potential danger the chair's control over reappointments poses to the independence of individual adjudicators: Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials*, 7th ed. (Toronto: Emond, 2015), at p. 529; Mullan, at pp. 343-344.

[53] Third, the Divisional Court correctly concluded that the review process lacked the appropriate procedural safeguards. The court stated that peer review processes must be accompanied by "robust protections to safeguard adjudicative independence": at para. 66. This is consistent with the trilogy: see *Consolidated-Bathurst*, at p. 341. One of the factors the court considered in this regard was the lack of a written policy protecting the adjudicator's right to decline a review. However, the Divisional Court considered other relevant factors in drawing its conclusion. At para. 28, it stressed that the procedure manual made no reference to the voluntariness of the peer review process and that there was an expectation that adjudicators subject their decisions to review. There was thus no evidence that the Tribunal had ever communicated to adjudicators that they were free to decline to participate in a review by the executive chair and considerable evidence tending to show that adjudicators were expected to participate in such a review.

[54] The Divisional Court's finding of a reasonable apprehension of a lack of independence was supported by the facts of this case. The Divisional Court found, based on the emails, that the adjudicator did make changes following the executive chair's comments: at para. 57. The Divisional Court further found that those changes were significant, as the executive chair believed they were important enough to justify further delay: at para. 61.

[55] In addition, the executive chair became involved without the adjudicator's consent. The Divisional Court appropriately gave weight to the fact that the executive chair imposed the review and the adjudicator was only informed of it after it took place. It considered this evidence cumulatively with the lack of a formal written policy to protect the adjudicator's right to decline to participate and the lack of evidence as to the nature of the changes stemming from the review.

[56] In summary, there is no basis for appellate interference with the Divisional Court's analysis of the issue of a reasonable apprehension of a lack of independence. In my view, that analysis is correct.

Disposition

[57] For the foregoing reasons, I would dismiss the appeal. On a new hearing before the LAT, Ms. Shuttleworth and Peel have agreed to rely only on evidence available at the time of the original hearing so no party would be in a better position.

[58] The parties have agreed on costs in the event Ms. Shuttleworth is successful. Those costs are fixed in the all-inclusive total sums of $2,500 against the LAT and SLASTO, and $6,250 against Peel.

Released: “C.W.H.” June 21, 2019

“C.W. Hourigan J.A.”
“I agree. M. Tulloch J.A.”
“I agree. Fairburn J.A.”