CITATION: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790
DIVISIONAL COURT FILE NO.: 334/17
DATE: 20180620

2018 ONSC 3790 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:	
MARY SHUTTLEWORTH Applicant	*Gary Mazin and Paulina Munroe*, for the Applicant, Mary Shuttleworth
– and –	
SAFETY, LICENSING APPEALS AND STANDARDS TRIBUNAL ONTARIO and LICENCE APPEAL TRIBUNAL	*Trevor Guy and Kathryn Chung*, for the Respondent Licence Appeal Tribunal
and	
PEEL MUTUAL INSURANCE COMPANY	*Cynthia Verconich*, for the Respondent Peel Mutual insurance Company
Respondents	
	HEARD at Toronto: April 4th, 2018

THORBURN J.

AMENDED REASONS FOR DECISION

OVERVIEW

[1] On September 28, 2012, the Applicant, Mary Shuttleworth, was sitting in the front passenger seat of a motor vehicle when it was hit head-on by another vehicle. She suffered physical and psychological injuries as a result of the accident.

[2] The Licence Appeal Tribunal ("LAT") adjudicator decided that the Applicant was not sufficiently badly injured to be entitled to benefits for catastrophic impairment under the applicable *Statutory Accident Benefits Schedule*.

[3] Several months after the adjudicator rendered her decision, the Applicant's legal counsel received an anonymous note. The author of the note said that after the adjudicator wrote her decision, the decision was reviewed by the executive chair of the umbrella organization, the Safety, Licensing Appeals and Standards Ontario ("SLASTO") who "changed the decision to make the applicant not catastrophically impaired." The note contains *indicia* including the file number and the name of counsel that would suggest the author was familiar with some of the circumstances of this case.

[4] The Applicant then sought further information from the LAT about how the adjudicator arrived at her decision. She discovered that, pursuant to an unwritten review process imposed by the executive chair, the legal department sent the adjudicator's draft decision to the executive chair for her review and comments. The executive chair provided comments to the adjudicator. The adjudicator thanked the executive chair for her helpful review of the decision and advised that she was working on revising it. Further revisions were made and the decision was released.

[5] The Applicant claims the process followed does not meet the requirements established by the Supreme Court of Canada to allow for consultation in the decision-making process while protecting the independence of the decision-maker. In particular, the Applicant says that the process followed by the LAT was deficient in the following ways:

a. Consultation was imposed on the adjudicator by the executive chair, a "superior level of authority within the administrative hierarchy"; and

b. There is reason to believe the executive chair changed the adjudicator's decision. The Respondents have refused to provide evidence to confirm the nature of the revisions made by the executive chair so there is no way of knowing whether the executive chair changed the decision as suggested in the anonymous note.

(*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 SCR 221.)

[6] The Applicant claims there is reason to believe the adjudicator's decision was influenced by the executive chair and does not represent the adjudicator's independent decision. She seeks to quash the decision and order a rehearing or reconsideration without input from the executive chair. Alternatively, she seeks an adjournment of this proceeding to allow her to examine the adjudicator and executive chair for discovery, and/or obtain further documentation and an extension of time to file such evidence.

[7] The Respondents submit that the anonymous letter is not admissible as it is double hearsay. In any event, decision-making is a consultative process. This was the first decision to determine whether someone suffered a catastrophic impairment under the recently implemented administrative structure at the LAT. Counsel for the LAT advised that where an LAT decision involves a novel, contentious, precedent-setting or high-profile issue, the executive chair reviews the decision as a second peer reviewer. The review is not intended to question the facts and

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evidence or to comment on the ultimate result. It is intended to offer suggestions to improve clarity, reasoning, readability, and ensure the correct legal test has been applied. Counsel for the LAT submits that adjudicators cannot be compelled to participate in the review process. The Respondents submit there is no credible evidence to challenge the adjudicator's independence and the Application for judicial review must therefore fail.

[8] For the reasons that follow, I allow the application and set aside the adjudicator's decision. As discussed below, I make no finding of any actual impropriety having occurred on the facts of this case. The applicant did not prove that the executive chair did anything to force the adjudicator to change her decision. Rather, the consultative decision-making process followed by the LAT in this case did not meet the minimum standards required to ensure both the existence and the appearance of adjudicative independence of the adjudicator's decision. 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. It must therefore be set aside.

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BACKGROUND

The Role of SLASTO and LAT

[9] Before 1990, compensation for those who were injured in a motor vehicle accident was left largely to the tort system.

[10] On June 1, 1990, Ontario enacted the *Insurance Statute Law Amendment Act, 1990*. S.O. 1990, c. 2. This new regime for motor vehicle accident compensation in Ontario is premised on an "exchange of rights" principle under that the legislature restricted the rights of innocent accident victims to maintain a tort actions against the wrongdoers in exchange for payment of enhanced no-fault accident benefits from their own insurers under the *Statutory Accident Benefits Schedule* (the "*SABS"*). (*Meyer v. Bright* (1993), 1993 CanLII 3389 (ONCA), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354 (C.A.) and *Sullivan Estate v. Bond* (2001), 2001 CanLII 8584 (ON CA), 55 O.R. (3d) 97, 202 D.L.R. (4th) 193 (C.A.)).

[11] Section 268(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 provides that,

> 268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[12] Pursuant to this system, every automobile insurance policy in Ontario provides its own insured with access to prescribed benefits in the event of a motor vehicle accident regardless of fault.

[13] Section 280 of the *Insurance Act* grants the LAT the jurisdiction to resolve disputes "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled."

[14] This is new jurisdiction for the LAT. Under the *Adjudicative Tribunals Accountability, Governance and Appointments Act,* 2009, SO 2009, c 33, Sch 5, (the "ATAGAA") the LAT has been designated as part of the SLASTO cluster of tribunals. The executive chair of SLASTO is a member of the LAT and has the powers and authority as its chair under s. 17 (1) of ATAGAA. Section 14 (4) of ATAGAA provides as follows:

> 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.

[15] In so doing, the executive chair of SLASTO exercises a "superior level of authority within the administrative hierarchy."

Accident Benefits and Catastrophic Impairment Regime

[16] The Applicant applied for and received statutory accident benefits from her insurer, the Respondent Peel, payable under the *SABS*.

[17] There is a $50,000 limit on the amount of medical and rehabilitation benefits, and a $36,000 limit on the amount of attendant care benefits an insured person is to be paid, under the *SABS Schedule*. These limits are increased to one million dollars if the insured is found to have suffered a "catastrophic impairment" as a result of a motor vehicle accident. (*Statutory Accident Benefits Schedule – Effective September 1, 2010*, Ont. Reg. 34/10 of the *Insurance Act,* RSO 1990, c I.8.)

[18] In December 2014, the Applicant submitted that her injuries resulted in "catastrophic impairment".

[19] As outlined in the *SABS*, "catastrophic impairment" is a 55% impairment of the whole person. There are several factors used to calculate whole person impairment. Physical and neurological impairments are rated under the appropriate chapter and are each assigned a percentage impairment rating. Individual percentages are then combined according to a formula in the *Guides to the Evaluation of Permanent Impairment*, arriving at a total whole person impairment ("WPI"). Psychological and mental impairments are assigned a class of impairment based on how seriously they affect a person's useful functioning in four domains of daily life, according to the *Guides*. To arrive at a total WPI, the psychological impairments must be converted to percentage values and then combined with the other ratings. (American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago: American Medical Association, 1993.).

[20] The *Guides* allow for the final estimated WPI to be rounded to the nearest values ending in 0 or 5, meaning a WPI of 53% will be rounded up to 55%.

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[21] The Applicant and the Respondent Peel both commissioned assessments to determine whether she met the catastrophic impairment threshold.

[22] The Applicant's assessors found her catastrophically impaired, as her physical and neurological impairments, when combined with her mental or psychological impairments met or exceeded the 55% WPI threshold. The Respondent Peel's assessors found the Applicant to have a 40% WPI, falling short of the 55% threshold. The following chart shows the respective positions of the parties and where the parties differed in their assessments:

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IMPAIRMENT	GUIDE CHAPTER	OMEGA's WPI	DIRECT IME's WPI
Cervico-thoracic	3	5%	5%
Medication side-effects	2	3%	3%
Sleep and arousal disorder	4	1-9%	0%
Mental status impairment	4	1-14%	7-8% (not included in the physical & neurological WPI subtotal)
Vertigo	4	1-9%	10%
Headaches		0%	0%
Lower back pain		0%	0%
WPI physical/neurological subtotal		**11-35%**	**17%**
WPI mental/behavioral (psychological) subtotal	14	27-34% (revised to at least **29%**)	**26%** (18% psychological impairment including sleep and + 7-8% mental status above)
TOTAL COMBINED WPI		35 - 57% (later revised to 54, round up to 55%)	39% (round up to 40%)

[23] The parties were unable to resolve their dispute and the matter was brought to a hearing before the LAT to resolve the issue.

The Decision Review Process

[24] In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT. The stated reason was to maximize the quality of the tribunal's decisions. The peer review process has not been adopted formally. No written policy was provided but counsel swore that, "generally, the LAT decision review process for final decisions is, and at all material times in this case was" as follows:

> First, there is peer review: After drafting a decision, an adjudicator ***is expected to send the decision for peer review by the Duty Vice-Chair***. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.
>
> Second, there is legal review: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.
>
> Third, there is a second peer review by the executive chair: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – ***the Legal Services Unit will send the decision to the Executive chair for her review***. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."
>
> Fourth, there is a review by the file's case management officer: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct. [Emphasis added.]

[25] The absence of a written policy is significant. The ATAGAA contains a very formal process to ensure the accountability of tribunal members and officers both internally and to the public. Sections 7 and 8 of ATAGAA read 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. 2009, c. 33, Sched. 5, s. 7 (2).

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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.

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[26] No documents were provided to outline LAT’s review process nor were we advised that the process had been adopted and published in accordance with the statutory process designed to protect and enhance accountability as provided by the statute.

[27] According to counsel for the LAT,

> … those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. To the extent that a reviewer’s comments might relate to the facts or evidence, they are simply intended to clarify the author’s findings. The reviewer functions simply as an editor. Likewise, those who review a draft decision do not comment on the decision’s policy choice(s) or ultimate result. In this sense, the LAT’s decision review process recognizes that an adjudicator assigned to hear and determine a matter is completely independent to render whatever determination he or she sees fit. Again, the reviewer functions simply as an editor. The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it. If an adjudicator declined to participate in process, there is no means to prevent him or her from releasing the decisions without further comment or discussion.

[28] By contrast, the graphic presentation of the peer review algorithm disclosed to the court makes no reference to the voluntariness of the peer review process. Moreover, according to counsel, adjudicators “are expected” to subject their decisions for review and decisions get sent to the executive chair by the legal department without any assent or input from adjudicators. When comments come back to adjudicators from the executive chair, they are being made by a person with authority over the adjudicator’s reappointment.

The Tribunal Hearing

[29] The adjudicator heard the catastrophic impairment issue on September 7 and 8, 2016.

[30] The adjudicator submitted her decision for peer review by the Duty Vice-Chair, after which she sent her decision for legal review. After legal review was completed, the SLASTO's Head of Legal Services provided a copy of the decision to the executive chair as the decision was the first of its kind for the LAT and, as such, was viewed as highly significant. The executive chair then offered her comments to the adjudicator.

[31] On April 11, 2017, the adjudicator thanked the executive chair for her comments and indicated that she would further revise her draft. The adjudicator rendered her decision on April 21, 2017. She held that the Applicant had a WPI of 51% and that, accordingly, the Applicant was not catastrophically impaired.

[32] The Applicant did not request reconsideration of the decision nor did she appeal the decision. It is agreed that if she had received a WPI of 53% (rather than the 51% she received), this would have been rounded up to 55% and she would have been entitled to benefits for catastrophic injury. That is, a small change of any one finding on any single input into the WPI calculation would have changed the outcome of the decision.

The Anonymous Letter

[33] Almost two months after she received the Tribunal's decision, the Applicant's lawyer received an anonymous letter with no return address dated June 16, 2017. The note reads as follows:

> I have heard from [sic] reliable source that the [adjudicator] Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the [executive chair] 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 [the adjudicator] Sapin hesitated to sign this order.

The Results of the FOI request made by the Applicant

[34] After receiving the anonymous letter and being denied further information by the LAT, the Applicant's counsel made an access to information request to the LAT for "any/or all documents, notes and records relating to" the applicant and/or the adjudicator's decision, along with a second request for any "documents, emails, notes, letters, and all communications" between the executive chair and the adjudicator from September 7, 2016 to April 21, 2017.

[35] In response, the LAT disclosed, among other things, two emails. The first, dated April 11, 2017, was from the adjudicator to the executive chair. The email reads as follows:

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> I just wanted to thank you for your helpful review of this decision and to let you know that I have met with [legal counsel] 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 recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.
>
> I look forward to discussing this decision with you.

[36] The executive chair responded as follows:

> 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 [catastrophic injury] 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.

[37] The Applicant filed her application for judicial review on June 21, 2017.

STANDARD OF REVIEW

[38] The Court is "required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly." (*London (City) v. Ayerswood Development Corp* (2005), 167 O.A.C. 120 at para 10.)

[39] This involves a review of the nature of the decision, the process followed; the statutory scheme pursuant to which the body operates; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and the choice of procedure selected by the agency. (See *Baker v Canada* [1992] 2 S.C.R. 817.)

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THE ISSUES

[40] The issues are as follows:

1. May the Applicant seek judicial review prior to reconsideration and/or appeal of the decision?
2. Should the anonymous letter be admitted and if so, for what purpose?
3. Is there a reasonable apprehension that the decision was not made by an independent decision-maker and if so, what is the appropriate remedy?

1. MAY THE APPLICANT SEEK JUDICIAL REVIEW PRIOR TO RECONSIDERATION OR APPEAL?

[41] The Applicant has not sought reconsideration nor has she appealed the Adjudicator's decision.

[42] Section 18.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure* permits reconsideration by the executive chair of the SLASTO within 21 days of the date of the decision. Section 11(1) of the *Licence Appeal Tribunal Act, 1999,* S.O. 1999, c. 12, Sch. G ("the Act") provides that the Divisional Court may hear appeals from decisions relating to matters under the *Insurance Act* on questions of law that are brought within 30 days of the order appealed from.

[43] Reconsideration is not an absolute prerequisite to judicial review. (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 SCR 221, 52 OR (3d) 160; 194 DLR (4th) 385.)

[44] The Applicant claims it would not have been appropriate to proceed by way of reconsideration or appeal because:

a. the deadline to apply for an internal review of the decision and appeal had passed by the time she received the anonymous letter which forms the basis for application for judicial review;

b. the whistleblower alleges that the executive chair changed the decision to deny her benefits for catastrophic injury; and

c. the executive chair is in charge of the reconsideration process.

[45] The Respondents do not object to the Applicant's filing outside the usual timeframe.

[46] This Application for judicial review may proceed notwithstanding that there has been no reconsideration or appeal of the decision because:

a. There is no prerequisite that a party must seek reconsideration before an application for judicial review;

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b. The Applicant did not receive the new information upon which this review is based until after the timeframe for reconsideration or appeal had expired; and

c. Reconsideration is effected by the executive chair who is also the person who edited the draft decision.

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2. SHOULD THE ANONYMOUS LETTER BE ADMITTED?

[47] The anonymous letter should be admitted into evidence.

[48] It is not admitted for the truth of its contents (that the executive chair changed the outcome) but for the purpose of narrative: to explain why the Applicant became concerned about the decision after the time for reconsideration and appeal had expired, and why she sought further information from the respondents regarding the decision and the process of decision-making.

3. WAS THERE A REASONABLE APPREHENSION THAT THE ADJUDICATOR DID NOT ARRIVE AT HER DECISION INDEPENDENTLY?

Is there a reasonable apprehension that the decision was not made independently by the adjudicator?

[49] The Applicant claims there is reason to believe the adjudicator's decision was not decided by an impartial decision-maker. The Applicant relies on the information obtained from the Tribunal.

[50] It is important to the administration of justice that 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 decided the case fairly. (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 and *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20.)

[51] An administrative decision-maker's discussion of a draft decision with colleagues does not, in and of itself, breach the rules of natural justice. (*IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 and *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.)

[52] "Contemporary reason-writing is very much a consultative process during which the writer of the reasons resorts to many sources" and "[t]o hold that any 'outside' influence vitiates the validity of … the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing." (*Khan v. College of Physicians & Surgeons of Ontario*, 1992 CanLII 2784 (ON CA))

[53] The implementation of an institutional consultation procedure does not create an apprehension of bias or lack of independence provided the system is designed to safeguard the ability of the decision-maker to decide the facts and the law to be applied, independently. The basic principles that must be followed to ensure compliance with the rules of natural justice are as follows:

> First, the consultation proceeding cannot be imposed by a superior level of authority within the administrative hierarchy, but can be requested only by the adjudicators themselves.
>
> Second, the consultation must be limited to questions of policy and law. Members of the organization who have not heard the evidence cannot be allowed to re-assess it. The consultation must proceed on the basis of the facts as stated by the members who heard the evidence.
>
> Finally, even on questions of law and policy, decision-makers must remain free to take whatever decision they deem right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal.

(*Ellis-Don Ltd. (supra)* at para 29 per Lebel J. for the majority, citing *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 per Gonthier J.; and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles*), 1993 CanLII 106 (SCC) 2 S.C.R. 756. at p. 798.)

[54] As long as these rules are followed, decision-makers may change their minds as a result of discussions with colleagues or because they have further reflected on the matter. (*IWA v. Consolidated-Bathurst* (supra))

[55] The information provided by the Respondent Tribunal in this case must be considered to determine whether there is a reasonable apprehension that the adjudicator's decision was not made independently.

[56] We recognize that there is a presumption of regularity of the administrative process and that establishing some form of decision review process to ensure consistency in style and form is accepted practice. (*Ellis-Don* at para 55.)

[57] The legal department sent the draft decision to the executive chair because the decision was the first of its kind for the Tribunal and thus significant. The draft was reviewed by the executive chair, the executive chair offered her comments and further changes were made by the adjudicator. There is no evidence as to the nature of those changes.

[58] It would appear from the email exchange between the adjudicator and the executive chair that the adjudicator was informed of the review after it had taken place.

[59] The Applicant did not cross-examine the affiant for the Respondent Tribunal. There is therefore no evidence to refute the affiant's assertion that,

> … those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. … Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result.
>
> … The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete

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> discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it.

[60] Therefore, on the evidence before us and given the presumption of regularity of an administrative process, we are unable to conclude that the adjudicator did not make her decision independently.

[61] However, an important rule of consultation set out in *Ellis-Don* was contravened. Review was imposed by the executive chair; a person at a supervisory level of authority within the administrative hierarchy. Consultation was not requested by the Adjudicator. There was no formal or written policy protecting the adjudicator's right to decline to participate in review by the executive chair or to decline to make changes proposed by the executive chair. In their emails, the adjudicator and executive chair discussed the fact that the changes proposed would take time to draft but the executive chair indicated that the changes were important enough to justify further delay in the finalization of the decision.

[62] This failure to comply with the rules for consultation laid out in *Consolidated Bathurst* and applied in *Ellis-Don*, creates a reasonable apprehension of lack of independence.

CONCLUSION AND REMEDY

[63] The Applicant had a legitimate concern about the basis for the decision that she was not catastrophically injured. She therefore sought further information and was provided an affidavit from Board counsel that set out the process for editing decisions.

[64] The review was conducted by a person at a superior level of authority without a request from the adjudicator to do so. There is no evidence as to the nature of the changes made by the executive chair although counsel for the Tribunal swore that decision-makers are free to make whatever decision they wish.

[65] The executive chair's review is in breach of the first requirement set out in *Consolidated Bathurst* and applied in *Ellis-Don* that consultation cannot be imposed by a superior level of authority within the administrative hierarchy, but can only be requested by the adjudicator herself. This breach creates a reasonable apprehension of lack of independence.

[66] Deliberative privilege is meant to ensure that any peer review or consultative process has robust protections to safeguard adjudicative independence. Absent bad faith, the formality and express limits set out in a formal peer review process will usually be the last and best protection that the parties and the public have against improper interference and to safeguard the appearance of propriety of the decision-making process.

[67] There is no formal and voluntary process, despite the statutory accountability process that calls for one. As the decision in this case was subjected to a peer review process that did not contain the required safeguards of adjudicative independence, decision of the adjudicator is set aside and referred back to the LAT for a new hearing.

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[68] On the agreement of the parties as to the quantum, costs of this Application are awarded to the Applicant in the amount of $12,000 inclusive of HST and disbursements.

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Thorburn J.

McKelvey J.

Myers J.

Date of Release: June 20, 2018

CORRECTION NOTICE

Corrected decision: the text of the original judgment was corrected on June 25, 2018, and the description of the correction is appended.

In the style of proceedings counsel for the applicant has been corrected as Gary Mazin.

Corrected decision: the text of the original judgment was corrected on July 12, 2018, and the description of the correction is appended.

Paulina Munroe has been added as counsel for the applicant in the style of proceedings.

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SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:

MARY SHUTTLEWORTH

Applicant

– and –

SAFETY, LICENSING APPEALS AND STANDARDS TRIBUNAL ONTARIO and LICENCE APPEAL TRIBUNAL

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PEEL MUTUAL INSURANCE COMPANY

Respondents

REASONS FOR DECISION

THORBURN J.

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