Dear Parties:

RE: Tribunal File No.: 20-001365/AABS
Mansuri vs. The Dominion of Canada General Insurance Company

Please see the attached document(s) related to your Automobile Accident Benefits Service dispute.

If you have questions regarding the scheduling of a future event, contact AABSScheduling@ontario.ca.

For any other concerns, please contact *Josh Grant, Case Management Officer,* or the Tribunal via phone 416-326-1356 or via email LATregistrar@ontario.ca.

Sincerely,

Teresa Augusto
Case Management Officer
Licence Appeal Tribunal
General Inquiries: 416-326-1356 | Toll Free: 1-888-444-0240
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Tribunal d'appel en matière de permis

Ontario

Licence Appeal Tribunal File Number: 21-011918/AABS
20-002907/AABS
21-012045/AABS
20-001365/AABS
21-006952/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Murtaza Mansuri

Applicant

and

The Dominion of Canada General Insurance Company

Respondent

MOTION DECISION

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Ryan Naimark, Counsel

For the Respondent: Kadey B. Schultz, Counsel

Motion heard in writing and via videoconference on: **August 24, 2022**

BACKGROUND

[1] Murtaza Mansuri, Javid Mansuri, and Mohammad Mansuri ("the applicants") are brothers. Murtaza Mansuri was involved in two separate accidents, one on April 28, 2016, and the other on January 6, 2018. Javid Mansuri and Mohammad Mansuri were involved in an accident on May 4, 2018. Each of the applicants sought benefits pursuant to the applicable version of the *Statutory Accident Benefits Schedule*, *Effective September 1, 2010.*[1]

[2] The applicants were denied certain benefits by the respondent, and they applied individually to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal"). The applicants currently have five applications before the Tribunal arising from the 2016 and 2018 accidents.

MOTION

[3] On March 1, 2022, the applicants filed a Notice of Motion concerning all five files. The Notice of Motion requested the following relief:

A. a declaration that the respondent and Schultz Frost LLP breached its duties of privacy and confidentiality owed to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri, respectively;

B. a declaration of a conflict of interest, or alternatively potential conflict of interest on the part of Schultz Frost LLP and Ms. Policelli in all three of the herein claimants' matters; and

C. an order that Schultz Frost LLP and Ms. Policelli are disqualified from handling the herein claimants' matters and that separate counsel and adjusters are required to handle each separate matter.

RESULT

[4] The applicants' motion is denied.

ANALYSIS AND REASONS

Request to amend Notice of Motion

[5] At the commencement of the oral motion hearing on August 24, 2022, the Tribunal invited supplementary submissions from the parties on the issue of whether the Tribunal has authority to grant declaratory relief. Oral argument was

[1] O. Reg. 34/10.

held down to give the parties time to address this issue.

[6] During the applicants' supplementary submissions, their counsel requested leave to amend their Notice of Motion, adding the following forms of relief to the existing request:

D. an order removing Schultz Frost LLP as counsel for Travelers / The Dominion General Insurance Company of Canada, as a result of a conflict of interest and or a breach of privacy and confidentiality; and

E. an order that Ms. Policelli be disqualified from adjusting and handling the accident benefits claims pertaining to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri as a result of a conflict of interest and/or a breach of privacy and confidentiality.

[7] The respondent opposed this request.

[8] After hearing from both parties, I denied the request to amend orally, with written reasons to follow. These are my reasons.

[9] First, the Tribunal has a duty to adjudicate matters justly, cost-effectively, and on their merits. The underlying applications range in case age from approximately 350 to 900 days. All adjudicative events pertaining to these matters have been stayed pending the result of this motion. Two oral hearings have been adjourned, and a third is scheduled to proceed within a month. Permitting the applicants to redefine the relief requested at this late stage in the motion proceedings would have necessitated further procedural accommodations to facilitate the respondent's full participation. This would have resulted in further and unacceptable delay to the underlying disputes.

[10] Second, the substance of the proposed amendments to the Notice of Motion would have changed little in the Tribunal's analysis. In his own submissions on the request to amend, counsel for the applicants characterized the changes to the requested relief as "semantic." I agree. Paragraphs D. and E. in the proposed Amended Notice of Motion essentially re-state paragraph C. in the original Notice of Motion. The applicants' requests for disqualification and/or removal of counsel and the adjuster are, in essence, the same relief expressed in different terms.

[11] Third, if the Tribunal were to find that it lacked jurisdiction to issue the declaratory relief sought, the proposed amendments would do little to preserve the applicants' request for a remedy. Merely omitting the word "declaration" does not change the substance of the remedy. However, as I explain below, I am satisfied

that the Tribunal has the authority to disqualify counsel where a conflict of interest can be established. And although I am not satisfied that the Tribunal has the jurisdiction to disqualify the adjuster, it is not because the Tribunal cannot, in principle, make declarations related to an insurer's handling of an accident benefits claim. I explain my reasons for these findings below.

Jurisdiction to issue relief sought

[12] Relying on the Ontario Court of Appeal's decision in *Stegenga v. Economical Mutual Insurance Company* ("*Stegenga*")[2], the applicants submit that the Tribunal has broad jurisdiction under s. 280 of the *Insurance Act,* RSO 1990, c I.8. to adjudicate disputes in respect of entitlement to, or quantum of, statutory accident benefits.

[13] The applicants submit that the Tribunal's authority to grant the requested relief is implied in the Divisional Court case of *The Personal Insurance Company v. Jia* ("*Jia*").[3] In *Jia*, the court upheld a reconsideration decision in which the Tribunal disqualified the insurer's counsel whom it found to be in a conflict of interest.

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

[15] The respondent submits that there is no statutory or common law authority for the relief the applicants seek. The respondent submits that the *Schedule* is silent on any declaratory power or ability to make findings on conflicts of interest. Relying on *Dominion of Canada General Insurance Company v. Ridi* ("*Ridi*"),[4] the respondent submits that one cannot impute information into legislative provisions that is not expressed therein and cannot read findings into case law. The respondent submits that it is improper to infer from *Jia* that the Tribunal possesses disqualification powers.

[16] The respondent submits that the case of *Raffaella de Rosa v. Wawanesa Mutual Insurance Company* ("*de Rosa*"),[5] demonstrates that no implied power to remove

[2] 2019 ONCA 615.
[3] 2020 ONSC 6361.
[4] 2022 ONCA 564.
[5] 2017 ONFSCDRS 161 (CanLII).

counsel for a conflict of interest exists. In *de Rosa*, the arbitrator found that the insurer's counsel had misused information, but no conflict of interest existed, and no disqualification order was made. The respondent submits that *de Rosa* supports its position that the appropriate remedy for improper information sharing is not removal of counsel, but an order that the parties comply with the prescribed process for the exchange of documents.

[17] The respondent also relies on the Tribunal's reconsideration decision in *M.I. v. Coseco Insurance Company*,[6] in which the Tribunal held that it lacks the jurisdiction to award declaratory relief when entitlement and quantum of benefits are not in issue. The respondent submits that there are no benefits in dispute that are tied to this motion, and that the applicants' request for relief cannot be characterized as falling within the scope of the Tribunal's jurisdiction. The respondent submits that the applicants are asking the Tribunal to make declarations akin to the "hypothetical" and "academic" issues which the Tribunal determined in *B.E. v The Personal Insurance Company and Ministry of the Ontario General (Ontario)*[7] that it lacked the jurisdiction to decide.

Findings on the jurisdictional issue

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

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

[20] This motion calls into question the respondent's handling of the applicants' claim, and I find that its essential character relates to a claim for accident benefits. I am

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[6] 2021 CanLII 40712 (ON LAT).
[7] 2020 CanLII 69925 (ON LAT).
[8] See *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para. 67.
[9] See also *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929.
[10] *Stegenga* at para. 53.

unpersuaded by the respondent's submission that the Tribunal lacks the power to grant declaratory relief in this case because the motion itself does not involve determination of entitlement to or quantum of benefits. The underlying and ongoing disputes between the applicants and the respondent squarely engage questions of entitlement and quantum, and the outcome of this motion will impact the course of these underlying proceedings. The questions before me are neither hypothetical nor academic; they have direct bearing on the conduct of the litigation before this Tribunal.

[21] I find that no excess of jurisdiction would flow if I were to order the relief sought in this motion. The Divisional Court in *Jia* took no issue with the Tribunal's decision to remove counsel based on a conflict of interest. I am not persuaded by the respondent's submission that it is impermissible to "read in" findings to case law that are not explicitly expressed, or that the Court of Appeal's decision in *Ridi* stands for such a proposition. *Ridi* was a case about the principles of statutory interpretation and how ambiguity in legislative provisions should be resolved. The court's analysis in that case does not intersect with the jurisdictional issue before me. The inference the applicants ask me to draw from *Jia* is sound: If the Tribunal had exceeded its jurisdiction by declaring a conflict of interest and disqualifying counsel, the Divisional Court would have corrected that error when it directly addressed the matter on appeal.

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

[23] The *Schedule* is not a complete code governing the relationship between insurers and insured persons. That relationship his also governed by private law obligations and legislative schemes outside this Tribunal's jurisdiction. The applicants submit that the alleged misconduct of the adjuster in this case could

amount to civil liability for intrusion upon seclusion, a common law tort established by the Ontario Court of Appeal in the 2012 case, *Jones v. Tsige*.[11] They also submit that the respondent disclosed confidential information several weeks before obtaining authorization to do so under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*").

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

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

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

The basis of the applicants' request for a remedy

[27] The applicants submit that the respondent has engaged in "deep, entrenched, pervasive and intentional" sharing, commingling, and reconciling of evidence between their claims files to defend itself and assess exposure for payment of benefits. In so doing, the applicants submit the respondent has breached its duty to keep their information private and confidential, and that their counsel's involvement in this information sharing constitutes disqualifying conduct.

[28] The applicants concede that it is not necessarily a conflict for the same counsel to act for an insurer in related accident benefits claims. Rather, they submit that the unique facts of this case give rise to a finding of impropriety.

[11] 2012 ONCA 32 (CanLII).

Investigator and adjuster conduct

[29] The essential facts are undisputed. The applicants reside in a shared three-bedroom apartment. They share common areas including a kitchen, living room, bathroom, and den. Each brother has claimed accident benefits from the respondent separately. Both Murtaza Mansuri and Javid Mansuri have received attendant care and housekeeping/home maintenance services from personal support workers sourced by Pro Choice Medical Ltd. ("Pro Choice"). They have claimed reimbursement for those services. In the underlying proceedings, the parties dispute whether those expenses are payable.

[30] On October 8, 2021, the respondent's adjuster, Ms. Nikki Policelli, entered a log note in Javid Mansuri's file, which she was adjusting. The log note stated that she had spoken with the respondent's investigator, Ms. Sandra McSweeney, and advised her that the details submitted by Murtaza and Javid Mansuri in support of their attendant care and housekeeping claims appeared to show a "potential overlap in HH [housekeeping/home maintenance] and ATC [attendant care]" that the documentation on file had not clarified.

[31] On October 11, 2021, Ms. McSweeney sent two separate emails to the personal support workers at Pro Choice who had provided attendant care and housekeeping/home maintenance services to Murtaza and Javid Mansuri, respectively. The emails requested "additional information/clarification" on services provided to the brothers "at the same times on the same dates of service" including dusting, window cleaning, vacuuming, and disinfecting common areas.

[32] Ms. Policelli began adjusting Murtaza's claim (in addition to Javid's) on October 27, 2021. On November 3, 2021, Ms. Policelli entered a log note requesting that Ms. McSweeney send the results of her recent investigation into the expenses Murtaza and Javid Mansuri had claimed for attendant care and housekeeping/home maintenance "so that I can review and consider if payment is reasonable at this time." She asked that the results be sent "separately, of course."

[33] On December 8, 2021, the respondent submitted three Information Disclosure Request Forms seeking authorization to disclose claims information, investigation information, and personal information about the applicants in accordance with the *PIPEDA*. The forms set out the following rationale for the requests: "There is suspected duplication of proposed/submitted goods, services and benefits contrary to the applicable Statutory Accident Benefits Schedule (SABS)".

[34] On December 23, 2021, Cyprian Kebbianyor, Director, Compliance and Chief Privacy Officer with Travelers Canada emailed Ms. Sandra McSweeney stating, "The requests are approved. Based on my conversations with you and Nikki, I have deduced that you and Nikki perceive an attempt at contravening a law."

[35] The applicants submit that the respondent knew its inquiry into the "potential overlap" between Murtaza's and Javid Mansuri's attendant care and housekeeping/home maintenance claims was improper. They submit that Ms. McSweeney emailed Pro Choice separately on October 11, 2021 to "demonstrate to the claimants and ultimately paper its file in such a manner that the investigations were separate." They submit that Ms. Policelli's remark in the November 3, 2021 log note that the results of the investigation should be sent "separately, of course" demonstrates that she knew it was a breach of privacy and confidentiality to be reconciling the brothers' claim information, and did so surreptitiously. "She was tempted [to look at the contents of both files]," they submit, "and she actually did it." The applicants underscore that at the time Ms. Policelli began referring to both files in her log notes, she was only adjusting Javid Mansuri's claim, and not Murtaza's. They submit that when Ms. Policelli began jointly adjusting these two separate matters, she shared information between the files "without discretion."

[36] The respondent submits that there is nothing improper about its handling of the applicants' claims. It submits that the applicants gave express consent for it to collect, share, and disclose their information when they signed OCF-1s to apply for accident benefits.

[37] The respondent submits that its email correspondence with the personal support workers in October 2021 was an attempt to properly determine the amount of attendant care payable to Murtaza and Javid Mansuri. The respondent submits that there is nothing wrong with an adjuster entering log notes in a file they are not actively adjusting. It submits it is only obligated to notify a claimant when a new handling adjuster is assigned so the claimant knows who to correspond with.

The conduct of respondent's counsel

[38] The applicants submit that the improper sharing of information by the respondent has "infiltrated" not only its investigation and adjusting of their claims, but its defence of the claims in this litigation. On December 9, 2021, the applicants' then-counsel, Mr. Jordan Dahan, had a telephone conversation with Ms. Kadey Schultz, who had been recently retained to defend the respondent in all three brothers' Tribunal matters. Mr. Dahan gave evidence that during their conversation, Ms. Schultz explained to him that "establishing liability for payment

for attendant care and housekeeping services was more complex and thus delayed in these claims [...] because there were two personal support workers in the same residence, from the same attendant care company, providing similar attendant care and housekeeping services to Murtaza Mansuri and Javid Mansuri separately, but during the same times."

[39] Then, in a December 22, 2021 email to applicants' counsel about the scheduling of an examination under oath, Ms. Schultz's legal assistant referred to Javid and Murtaza's matters as the "companion matter[s]".

[40] On January 21, 2022, the respondent served productions on the applicants' counsel via email. The subject line of the letter was "Re: Dominion and Mansuri (Murtaza)(LAT)". Among the productions listed was the "Complete Surveillance file of Larrek Investigations". The surveillance file is not before me. However, the uncontested evidence of Mr. Dahan is that "[w]ithin the surveillance produced for Murtaza Mansuri, Schultz Frost LLP had served surveillance that was specifically attributable to Javid Mansuri, only. It was not that Javid Mansuri was merely captured in the surveillance. The surveillance was specifically for Javid Mansuri's separate matter."

[41] On January 21, 2022, the respondent's counsel sent email correspondence with the subject line "Dominion and Mansuri (Murtaza)(LAT)" requesting production of an Assessment of Attendant Care Needs ("Form 1") dated April 29, 2019. However, the Form-1 of that date was conducted in relation to Mohammad Mansuri, not Murtaza.

[42] The applicants submit that the disclosure of Javid Mansuri's surveillance within Murtaza Mansuri's matter and the request for Mohammad Mansuri's Form 1 in an email about Murtaza's matter demonstrate that Schultz Frost LLP had confused the evidence between the three separate matters due to their commingled handling.

[43] The respondent submits that it disclosed the complete surveillance file of Larrek Investigations in Murtaza Mansuri's matter to comply with a production order of the Tribunal. It submits that if surveillance of Javid Mansuri had been obtained in error, the respondent still had an obligation to produce the entire contents of the file. If surveillance was captured of the wrong claimant, then it simply has no bearing on the matter.

[44] The respondent submits that pooling information between claims is permissible to determine the proper amount of payment and to prevent, detect, and suppress fraud, through the consent obtained in the OCF-1. The applicants submit that

there has been no allegation of fraud in this case and the respondent cannot now allege fraud with no evidence to support such an allegation. The respondent submits that its investigation is ongoing and the proper place to raise the issue of fraud is at a hearing on the merits.

Findings on the merits

[45] I agree with the respondent that the applicants gave consent for the respondent to use their file information as it has done when they signed OCF-1s to apply for accident benefits.

[46] The signature page of the respective OCF-1s signed by each of the three brothers as a condition of applying for accident benefits states:

> "I UNDERSTAND that you, and persons acting for you, will collect personal information and personal health information about me that is related to my claims for accident benefits […] and that all such information will be collected directly from me or from any other person with my consent.
>
> […]
>
> I ALSO UNDERSTAND that the information described above will be collected and used only as reasonably necessary for the purposes of:
>
> - **Investigating my claims and processing my claims** as required by law, including the Ontario Automobile Policy;
> - **Obtaining or verifying information relating to my claims in order to determine entitlement and the proper amount of payment**;
>
> […]
>
> - **Preventing, detecting and suppressing fraud**;
>
> […]
>
> I ALSO UNDERSTAND that you, and persons acting for you, **may disclose this information to the following persons** or organizations, who may collect and use this information only as reasonably necessary to enable you or them to carry out the purposes described above:
>
> […] **insurance adjusters**; […] **health care professionals**; […] **solicitors**; […] **databases or registers used by the insurance industry to analyze**

and check information provided against existing information; […].

I ALSO UNDERSTAND that you, and persons acting for you, **may pool this information with information from other sources** and may analyze this information **for the limited purpose of preventing, detecting or suppressing fraud**.

[…]

I CONSENT […] to you collecting, using and disclosing this information in the manner described above, but no more of such information than is reasonably necessary to meet the legitimate purposes of such collection, use or disclosure.

[…]

I AM ALSO AWARE that you, and persons acting for you, may be required or permitted by law **to disclose information to others without my knowledge or consent**."

[Emphasis added.]

[47] I find that the emails of October 11, 2021 disclosed information to the applicants' personal support workers, who are health care professionals, for the purposes of investigating the applicants' claims and obtaining or verifying information to determine the proper amount of payment. The emails disclosed only as much information as was necessary for that purpose, including specific line items from the expense claims that appeared to overlap. The applicants expressly consented to this kind of disclosure in the OCF-1.

[48] I see no impropriety in Schultz Frost LLP's disclosure of surveillance capturing Javid Mansuri in relation to Murtaza Mansuri's matter. First, the disclosure was to a solicitor, a person authorized to receive disclosure under the OCF-1. Second, surveillance is not confidential personal health information. A claimant does not have a privacy interest in surveillance images or footage obtained in public areas.

[49] I accept the applicants' submission that Schultz Frost LLP's request for a Form-1 pertaining to one of the applicants in an email about another suggests that counsel may have confused the litigation files. However, no confidential information was disclosed in the January 21, 2022 email. In addition, I fail to see how references to the applicants' Tribunal matters as "related" or "companion matters" rises to the level of disqualifying conduct; even the applicants'

submissions in support of this motion refer at paragraph 15 to the claims as "related."

[50] I find that the respondent's pooling of claim information between the applicants' files falls within the authorized scope of information sharing set out in the OCF-1. I am not persuaded that an insurer must formally allege or establish fraud to pool information with information from other sources and analyze it as described in the OCF-1. An insurer can legitimately engage in fraud prevention and detection without fraud ever having occurred. The use of the phrase "limited purpose" in the OCF-1 implies that an insurer cannot pool information from separate claims files gratuitously or for some improper purpose. However, if there is a reasonable basis to infer that fraud may be occurring or about to occur, then in my assessment the consent in the OCF-1 permits an insurer to collect, use, and disclose information as may be reasonably necessary to prevent, detect, and suppress it. Indeed, such pooling of information may assist an insurer in concluding that no fraud has taken place, permitting it to properly adjust the claim.

[51] In this case, Murtaza and Javid Mansuri submitted claims for expenses that, on their face, appeared to be potentially duplicative. Their invoices detailed similar services provided in common areas of their residence at the same times on the same days. In these circumstances, it was proper for the respondent to compare the documentation prepared by the service providers and to seek additional information from the applicants and their service providers to verify whether the amounts were payable. To be clear, I make no finding as to whether fraud has occurred in this matter. That is not a question I have been asked to decide, nor is it within my authority to make such a determination. However, the evidence before me is enough to satisfy me that the respondent has complied with its confidentiality obligations, and that the applicants consented to the information sharing that has taken place in this case.

[52] The applicants submit that the consent they provided in the OCF-1s does not bar them from advancing a claim for disqualification due to a conflict of interest. They submit that the use of information in a manner that would constitute a conflict of interest cannot be considered authorized under the OCF-1's broad language. On this point, they rely on *Riley et al. v. Director of MVAC, et al.* ("*Riley*")[12] and *Dervisholli et al. and Cervenak and State Farm* ("*Dervisholli*").[13]

[53] This case does not engage the same principles as *Dervisholli* and *Riley*. In both of those cases, the accident benefits claimant's consent to information sharing

[12] 2021 ONSC 2123.
[13] 2015 ONSC 2286.

did not bar the disqualification of counsel because information and documentation was being shared for an unauthorized purpose: to defend the tortfeasor against the accident benefits claimant in the tort action.

[54] This is a critical distinction. In both *Riley* and *Dervisholli*, the insurer (or the Motor Vehicle Accident Claims Fund acting as the "effective insurer" in the case of *Riley*) was in a conflict of interest because it was openly using documents and information obtained from the accident benefits claimant to defend a third-party tortfeasor in a separate tort action. The accident benefits claimants were under a duty of mandatory disclosure with respect to their personal health information, and the insurer's duty of good faith toward them conflicted with its duty to defend the tortfeasor. No such adverse position exists when counsel acts for an insurer defending related accident benefits claims.

[55] The applicants submit that the Divisional Court extended the principles from *Dervisholli* in *Jia*.[14] In *Jia*, the court upheld a Tribunal decision to disqualify the insurer's counsel who tendered transcript evidence that had been compelled in a priority dispute on behalf of the insurer in an accident benefits dispute. The respondent submits that the conflict in *Jia* arose in a setting where counsel had a "dual role" (acting in the priority dispute and in the accident benefits matter). The respondent submits that the concern about an insurer having dual or conflicting roles is absent in this case.

[56] Insofar as *Jia* extended the holding in *Dervisholl,* that extension was incremental and fact specific. The court declined to find, as a matter of law, that counsel acting for an insurer is necessarily in a conflict when acting for the same insurer in a priority dispute and an accident benefits matter arising from the same accident.

[57] The applicants submit that *de Rosa* dispenses with the notion that the OCF-1 authorizes information sharing between accident benefits files. However, the *de Rosa* case is distinguishable from the present one because the insurer was seeking to tender a medical report detailing confidential health information about one accident benefits claimant in an arbitration about the claimant's spouse, who had been in the same accident and had claimed accident benefits from the same insurer. The arbitrator found that the insurer's use of confidential information did not fall under the legitimate purposes set out in the consent in the OCF-1.

[58] In this case, the only disclosure of information was Ms. McSweeney's emails to the personal support workers in October 2021 itemizing the housekeeping

[14] 2020 ONSC 6361.

services that appeared to be duplicative and naming one brother in correspondence regarding the other. Health practitioners are authorized recipients of disclosure in the OCF-1. I find that the disclosure was for the purpose of investigating and verifying the applicants' claims to determine the proper amount of payment and was therefore done with the consent of the applicants.

[59] The applicants submit that the respondent's own Access to Personal Information Policy prohibits the use of information except with consent or as required by law. The policy does little to assist the applicants, as the respondent's use of their information occurred with their express consent and in accordance with the law.

[60] The applicants submit that even if they gave consent in the OCF-1, consent is revocable. Mr. Dahan's affidavit evidence is that if the Tribunal finds that the applicants consented to the information sharing, they revoke that consent. While I accept that it is open to an accident benefits claimant to revoke his consent to information sharing, to do so would effectively constitute a withdrawal of a claim for accident benefits, as a completed and signed OCF-1 is a precondition for entitlement to statutory accident benefits under s. 32 of the *Schedule*.

[61] The applicants submit that the respondent's Information Disclosure Request Forms were approved in December 2021, and that the information sharing began as early as October 2021. I note that the Chief Privacy Officer was aware that the request was for the "ongoing" release of information, as this language is present in the rationale for all three requests. The applicant has not directed me to any legislative provision that requires authorization in advance for the use of information consented to in the OCF-1. In my view, the signed OCF-1 provides sufficient authorization for the respondent's handling of the applicants' information, and I am not satisfied that the disclosure justifies an order disqualifying an employee or agent of the respondent.

[62] The test for disqualifying conflict of interest is set out in *MacDonald Estate v. Martin* ("*MacDonald Estate*").[15] The legal principles animating that test do not apply to the present case. *MacDonald Estate* addresses the conflict that may arise when a lawyer, acting against a former client, uses confidential information obtained in the context of the solicitor-client relationship to the detriment of the former client. Here, there is no solicitor-client relationship between the applicants and the respondent's counsel. Unlike in *Dervisholli*, where counsel for the insurer failed to separate the insurer's interests in the tort and accident benefits matters, the principles that the Supreme Court attempted balanced when it articulated the

[15] [1990] 3 SCR 1235.

two-part test for a conflict of interest in *MacDonald Estate* are not engaged here.

[63] The issue before me is whether the conduct of the respondent constitutes a breach of its duties of privacy and confidentiality warranting the disqualification of its adjuster and counsel. The applicants have not established, on a balance of probabilities, a factual and legal basis for the relief they seek.

ORDER

[64] The applicants' motion is denied. The respondent's counsel may continue to act in the five underlying Tribunal matters. All adjudicative events that had been stayed pending the outcome of this motion may proceed as scheduled.

OTHER PROCEDURAL MATTERS

[65] If the parties resolve the issue(s) in dispute prior to the hearings in these matters, the applicants shall immediately advise the Tribunal in writing.

Released: September 28, 2022

Theresa McGee, Vice-Chair