REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of Hearing: April 15, 2016

Panel: Aly N. Alibhai, Chair; Cezary Paluch, Dr. (Hedy) Anna Walsh, Members

IN THE MATTER OF CITY OF TORONTO MUNICIPAL CODE CHAPTER 545, LICENSING, as amended

Re: **2405490 ONTARIO LTD.**
o/a Minx Spa
Elliott Maurice Stone, President
Holder of Body Rub Parlour Owner's Licence No. B38-4418734

Moving Party

MUNICIPAL LICENSING AND STANDARDS, CITY OF TORONTO
Responding Party

Counsel for the Moving Party: Mr. Noel Gerry

Counsel for the Responding Party: Mr. David Tortell

INTRODUCTION

1. The Moving Party, 2405490 Ontario Ltd., brought a motion seeking the following orders:

   (i) An order that the panel members assigned to the hearing of Municipal Licensing and Standards (MLS) report No. 6344 recuse themselves;

   (ii) An order that report No. 6344 in its entirety be removed from the Toronto Licensing Tribunal offices;

   (iii) An order that the hearing scheduled to commence on March 31, 2016 be cancelled;

   (iv) In the alternative, an order that the hearing scheduled for March 31, 2016 be adjourned pending a new referral of the matter to the Toronto Licensing Tribunal (the Tribunal) by MLS and that such referred matter be heard by a newly constituted panel of the Tribunal.

2. The grounds for the motion included the following:

   (i) MLS acted in excess of its jurisdiction in providing report No. 6344 to the Tribunal;

(ii) The Tribunal acted in excess of its jurisdiction in receiving report No. 6344 and serving it on the moving party;

(iii) The members of the panel assigned to hear the matter are irretrievably biased by virtue of having received report No. 6344 prior to the commencement of the hearing;

(iv) Prior institutional access to MLS' evidence by a sitting Tribunal member violates principles of fairness, due process and natural justice;

(v) The practice of receiving reports from one party to the proceeding prior to the commencement of the hearing fetters the discretion of the Tribunal and creates a reasonable apprehension of institutional bias;

(vi) Proceeding with the scheduled hearing would result in a denial of natural justice to the moving party;

(vii) Chapter 545 of the *City of Toronto Municipal Code* (the *Code*);

(viii) Relationship Framework for the Tribunal;

(ix) Code of Conduct for the Tribunal; and

(x) Such further or other grounds as the Tribunal will permit.

3. While the moving party did not file any evidence in support of the motion and neither party called any witnesses at the hearing of the motion, the moving party asked that the Tribunal take notice of report No. 6344 and both parties made references, in their submissions, to this report during the hearing of the motion.

4. The Tribunal dismissed the motion on the grounds that the moving party failed to adduce the requisite evidence to satisfy the legal test of actual or apprehended bias or actual and apprehended institutional bias and further, that the Tribunal had not acted in excess of its jurisdiction in receiving report No. 6344 and serving the report on the moving party.

ARGUMENTS

5. Counsel for the moving party argued that the matter before the Tribunal had to start afresh and with a panel constituted of members of the Tribunal who had not had the benefit of receiving report No. 6344; that the Tribunal lacked jurisdiction to hear the matter because the By-Laws of the Tribunal do not make provision for the Tribunal to receive a report such as report No. 6344; and that in receiving report No. 6344 in advance of the hearing, an apprehension of institutional bias on the part of the Tribunal is created because the Tribunal receives evidence, statements of witnesses and other information all of which is contained in one comprehensive report. He argued that a "reasonable and right minded person"

would have a reasonable apprehension of bias, as a result of a report being provided to the Tribunal prior to a hearing.

6. Counsel for the moving party submitted that the motion was not intended to call into question the ability of individual members of the Tribunal to act in an impartial manner. Rather, the motion was intended to call into question the longstanding practice and procedure of the Tribunal to receive reports from MLS in advance of the Tribunal hearings. Counsel for the moving party argued that it is the process that has been in place at the Tribunal for many years and for all matters which come before it (i.e. the process of MLS staff preparing a report concerning the matter, providing the report to staff of the Tribunal who, in turn, provide the report to the members of the Tribunal in advance of the hearings) that is the subject of the motion because the process creates an apprehension of institutional bias in the Tribunal.

7. Counsel for the moving party took the position that the Tribunal should not receive any reports from MLS in advance of the hearings and that although Rule 9 of the *Toronto Licensing Tribunal By-Law No. 1 (as amended January 16, 2014), Rules of Procedure*[1] provides for the filing at least ten days before a hearing, by all parties to a hearing, all documents to be entered as evidence, Rule 9 does not specifically speak to a "report" being filed with the Tribunal. It was the position of counsel for the moving party therefore that Rule 9 of the Tribunal's *Rules of Procedure* does not contemplate the filing, by MLS, of a Report along the lines of report No. 6344 but rather, other types of "documents".

8. Counsel for the moving party asserted that report No. 6344 constituted something akin to a pleading in a civil process and therefore, that it acts to trigger the process before the Tribunal and serves like a notice of referral of a matter which comes before the Tribunal. Accordingly, counsel for the moving party argued that, as a notice of referral or trigger for the Tribunal process, the contents of report No. 6344 provides the Tribunal with content which is prejudicial to the moving party and therefore creates an apprehension of institutional bias in the Tribunal.

9. Counsel for the moving party suggested that the process used by the Tribunal (i.e. of having reports prepared by MLS provided to the Tribunal in advance of the hearings), is unlike that used for provincial Tribunals in Ontario such as the Alcohol and Gaming Commission of Ontario which, according to counsel for the moving party, uses a specific Notice of Referral to trigger the process before that Tribunal of the province of Ontario. He asserted that the Tribunal should use a similar Notice of Referral type of instrument as a means of triggering the process of matters that come before it because there is no established or set form for licensees to use when responding to proceedings before the Tribunal that are commenced by MLS.

[1] Rule 9 (1) of the Tribunal's *Rules of Procedure* provides: "All parties to a hearing shall, at least ten days before the hearing date, file with the Toronto Licensing Tribunal, copies of all documents, including photos and electronic materials, to be entered as evidence."

10. Counsel for the moving party acknowledged that the motion could in fact have been brought sooner, that there are no cases directly on point in support of the arguments that he advanced on the motion and that he had not submitted any affidavit evidence in support of the motion but that the Tribunal should take notice of Report No. 6344.

11. Counsel for the responding party submitted that report No. 6344 is not in fact the trigger for the process before the Tribunal and that the trigger for matters which come before the Tribunal is something called a Letter of Cause which, in this matter, could be found at page 422 of report No. 6344. Counsel for the responding party argued that it is the Letter of Cause sent to the licensee which triggers the process of a hearing before the Tribunal.

12. Counsel for the responding party asserted that the he was relying on the reasonable person test that a well-informed person would have a reasonable apprehension of bias. However, the moving party did not adduce the necessary "cogent evidence" required to meet the legal test for an actual or apprehension of institutional bias in the Tribunal and therefore, the motion must fail.

13. Counsel for the responding party argued that although Rule 9 of the Tribunal's *Rules of Procedure* does not specifically refer to a "report", it is clear that in referring to "documents", Rule 9 contemplates that any party can file with the Tribunal a report such as report No. 6344 at least ten days prior to the hearing. Counsel for the responding party argued that this is the same type of process which is employed by other provincial tribunals such as the Ontario Human Rights Commission and in fact, that this is not dissimilar from a civil process which is commenced by way of a Statement of Claim and can, where a Statement of Defense is not filed in a timely fashion by the defendant, result in default judgment for the plaintiff.

14. Counsel for the responding party asserted that the essence of the argument advanced on the motion by the moving party (i.e. an actual or apprehension of institutional bias is created in the Tribunal because the Tribunal first receives the materials being relied upon by MLS, including possibly evidence that may be entered at the hearing; and that the licensee can file materials with the Tribunal after MLS has filed its materials) is spurious because this process or practice is not inconsistent with the process or practice used by other administrative tribunals (e.g., Ontario Human Rights Commission) or the process that is used in civil matters as well as that used when seeking judicial review of administrative decisions.

15. Counsel for the responding party further argued that because report No. 6344 only concerns the matters set out in that report and report No. 6192, if anything at all, it might possibly be argued that there is an actual or actual or apprehension of institutional bias in the Tribunal in respect of these two reports but that this does not rise to the level of the legal requirement for cogent evidence of a "reasonable apprehension of bias in a substantial number of cases" [2] (emphasis added).

[2] See 2747-3174 *Quebec Inc. v. Quebec (Regie Des Permis D'Alcools)* [1996] 3 S.C.R. 919 at page 951.

16. Counsel for the responding party also noted that it is imperative that the Tribunal recognize and safeguard the legal principle that starting point is that the Tribunal is presumed to be free of any bias and that the fact that the moving party was unable to put forward any cases on point in support of its motion makes the motion patently unmeritorious.

17. Counsel for the responding party relied on the decision in *Salem v. Metropolitan Toronto (Licensing Commission),* [1993] O.J. No. 895 to make the argument that the practice of reports being furnished by MLS to the Tribunal goes back some twenty-five years and in fact, is the very same process that was used by the predecessor of the Tribunal and, as such, the notion that was put forward by the moving party of MLS only referring matters (as opposed to reports) to the Tribunal is without merit.

18. Counsel for the responding party relied on the decision in *Law Society of Upper Canada v. Ontario Public Service Employees Union*, [2014] O.J. No. 1949 to argue that the words in Chapter 545 of the *Code* should be "interpreted harmoniously in a manner that avoids anomalous or absurd results"[3]. Counsel for the responding party submitted that Chapter 545 of the *Code* [4]gives the Tribunal broad powers and therefore, the argument of counsel for the moving party that the word "report" may not appear in the *Code*, the Tribunal's *Rules of Procedure* or elsewhere is irrelevant and that the position of counsel for the moving party (i.e., that MLS cannot refer a report to the Tribunal in advance of a hearing) would be tantamount to interpreting the words in the *Code* and the *Rules of Procedure* in a manner that produces anomalous or absurd results.

19. Counsel for the responding party argued therefore that the Tribunal was well within its jurisdiction to receive report No. 6344 and indeed, this report and any other report of MLS would only form part of the record at a hearing before the Tribunal when entered into the record as evidence being put forward for consideration by the Tribunal.

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CONCLUSION

20. On the basis of the arguments and submissions made by counsel for the moving and responding parties, the Tribunal held that the motion not be granted because the threshold for finding of an actual or apprehended institutional bias is high and the presumption is that the Tribunal will discharge its duties in an impartial manner.

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[3] See *Law Society of Upper Canada v. Ontario Public Service Employees Union*, [2014] O.J. No. 1949 at page 12, paragraph 48.

[4] See, for example, Chapter 545-3 B. (2) and L which provide as follows:
545-3 B. (2) City Council has delegated its decision-making powers to the Toronto Licensing Tribunal as a quasi-judicial adjudicative body to hear evidence and submissions and make independent decisions after a hearing respecting …….. (emphasis added);
545-3 L (1) The Toronto Licensing Tribunal shall provide brief written reasons setting out the salient evidence and the reasons for each of its decisions. (emphasis added)

21. Therefore, to successfully make out an allegation of institutional bias, a serious allegation to be sure, requires that the party alleging the institutional bias (in this case the moving party) adduce cogent and compelling evidence[5]. As the Courts have clearly stated, "suspicion is not enough" and the threshold to establish bias, the onus for which rests on the party alleging it is high because any finding of bias calls into question not just the personal integrity of the trier's of fact, but the indeed, the integrity of the entire administration of justice.

22. On the basis of the submissions and arguments made on the motion, the Tribunal was satisfied that the moving party did not adduce any evidence of actual or apprehended institutional bias in the Tribunal. Simply put, that the Tribunal receives reports from MLS like report No. 6344 does not mean that the presumption of impartiality and objectivity of the Tribunal has, in any way, been displaced.

23. The Tribunal, like any quasi-judicial administrative Tribunal, is not bound by the formal rules of evidence. Accordingly, where information is provided to the Tribunal in a report prior to a hearing, the weight that the Tribunal gives to any such information will depend on its assessment of that which is entered into evidence at the hearing including, but not limited to, any information that is included in any reports filed with the Tribunal prior to the hearing.

24. The Tribunal was also satisfied that in receiving report No. 6344 and serving this report on the moving party, the Tribunal did not exceed its jurisdiction.

25. The motion was not granted and, on consent of the moving and responding party, the matter will proceed to a hearing before the Tribunal on July 28, 2016.

Originally Signed

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Aly N. Alibhai, Chair
Panel Members, Cezary Paluch and Dr. (Hedy) Anna Walsh concurring

[Reference: Minute No.48/16]

Date Signed: May 5, 2016

[5] See, for example, *C.J.A. v. Lardale Construction* , [2002] O.L.R.B. Rep 680 at paragraphs 31 and 32.