

CANADA / JUDGMENT

CK Auto Services Ltd. v. British Columbia (Attorney General)

2014 BCSC 2359

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Supreme Court of British Columbia

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2014 BCSC 2359 CK Auto Services Ltd. v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CK Auto Services Ltd. v. British Columbia (Attorney General),

2014 BCSC 2359

Date: 20141212

Docket: S139215

Registry: Vancouver

Between:

CK Auto Services Ltd. and

Tarshotam Singh Biran

Petitioners

And

The Attorney General of British Columbia and

The Director of Commercial Vehicle Safety

Respondents

Before: The Honourable Mr. Justice Williams

In Chambers

Reasons for Judgment

Counsel for Petitioners:

F.M. Rowan

Counsel for Respondents:

D.G. Cowie and

C. Drake

Place and Date of Hearing:

Vancouver, B.C.

March 21, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2014

- [1] In this proceeding, the petitioners seek judicial review of the decision of the respondent the Director of Commercial Vehicle Safety and Enforcement ("the Director").
- [2] The petitioners are a commercial company (CK Auto Services Ltd.) whose business is the inspection and repair of automobiles, and that company's owner, Tarshotam Singh Biran ("Mr. Biran").
- [3] The petitioners operated an automotive inspection and repair business in Surrey. Since 1999, Mr. Biran has been an authorized motor vehicle inspector, having passed the Commercial Vehicle Inspection Program Inspector's Course. That credential is granted by the Commercial Vehicle Safety and Enforcement branch (CVSE), pursuant to the relevant provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [4] As part of the regulatory structure, CVSE conducts annual facility audits. One such audit of the petitioner's operation took place in late February/early March 2013. Following that, a report was issued, finding the operation to be in order.
- [5] Subsequent to that inspection, CVSE inspectors re-inspected a number of vehicles that had been inspected and approved by the petitioners. Those re-inspections found deficiencies in some of the vehicles.
- [6] On October 23, 2013, CVSE served Mr. Biran with a Notice of Suspension of Vehicle Inspection Facility Designation and Authorized Inspector Certification and a Notice of Cancellation of Vehicle Inspection Facility Designation and Authorized Inspector Certification.

- [7] The Notices state that the cancellations were "... based on evidence that shows the actions of Mr. Biran, acting as both the designated facility operator and as the Authorized Inspector, have violated multiple Motor Vehicle Act Regulations (MVAR). Specifically, MVAR Section 25.12(1)(f)(ii) for failing to ensure that authorized persons at the facility conducts his or her inspections in accordance with the standards, and MVAR Section 25.13(2)(f) for improperly approving a motor vehicle."
- [8] The effect of the Notices was to immediately suspend Mr. Biran's authorization to conduct inspections, and to cancel his inspection authorization within 30 days.
- [9] Under the terms of the Notices, the cancellation would take effect unless the Notices were rescinded by order of the Director of CVSE, or his Designate, as a result of a Hearing to Show Cause as to why the cancellations should not take effect.
- [10] At the same time as serving the Notices, CVSE provided Mr. Biran with a "Cancellation Evidentiary Package" ("C.E.P.") setting out the evidence on which CVSE relied in support of the cancellation of the petitioners' inspection authorizations.
- [11] The petitioners delivered a Notice of Intention to Show Cause to CVSE on October 30, 2013. On November 25, 2013, the petitioners provided CVSE with written submissions as to why the inspection authorizations should not be cancelled.
- [12] The show cause hearing was conducted by Pamela McDermid, a CVSE manager (the "Adjudicator") based upon the written record, i.e., the C. E. P. and the petitioner's submissions.
- [13] On December 5, 2013, the Adjudicator issued her decision, finding that the petitioners had not shown cause as to why the cancellations should not be enforced.
- [14] On December 18, 2013, the Adjudicator issued her reasons for that decision.
- [15] The legislation provides for an unsuccessful party to have the Adjudicator's decision re-considered. On December 24, 2013, the petitioners served CVSE with a Notice of Application for Reconsideration, together with written submissions in support.
- [16] The reconsideration was conducted by Brian Murray, the Director.
- [17] On January 28, 2014, the Director denied the petitioners' application for reconsideration and issued his reasons for that decision.
- [18] It is the Director's decision on the application for reconsideration that the petitioners seek to have set aside on this judicial review ("Reconsideration decision").
- [19] The specific relief sought in the petition is:
 - 1. An order in the nature of certiorari setting aside the decision of the Director of Commercial Vehicle Safety dated January 28, 2014 which confirmed the written decision of the Director's Delegate dated December 18, 2013, which in turn confirmed the decision of Brian Kangas,

Manager of Vehicle Inspections & Standards of the Commercial Vehicle Safety & Enforcement Branch to suspend Vehicle Inspection Facility Designation S5524 issued to CK Auto Services Ltd. and Authorized Inspector certification M08577 issued to Tarshotam Biran on October 23, 2013 (the "Decision");

2. an order remitting the matter back to the Director of Commercial Vehicle Safety for a hearing de novo before the Director of Commercial Vehicle Safety or a new delegate in accordance with the reasons of this Court; and
3. costs.

Legal considerations

[20] The petitioners rely upon the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, the relevant rules of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules") and the relevant jurisprudence.

[21] A threshold issue in matters of this type is to determine the appropriate standard of review.

[22] The respondent submits, and I do not understand the petitioners to contend otherwise, that the decision at issue can be fairly characterized as broadly discretionary, fact-based, and requiring the application of a specialized subject-matter expertise not shared by the Court. Accordingly, the applicable standard of review is that of reasonableness.

[23] A broadly accepted description of the standard of reasonableness was provided in *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] It is for this Court to review the Reconsideration decision with a reasonable measure of deference. The Court will not re-weigh the evidence which was before the decision-maker. The Court will find the decision reasonable and sustainable if there is some evidence upon which the finding could reasonably be made, and if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Essentially, the Court's function is to ensure that the Director's decision was within his jurisdiction and that procedural fairness was observed.

Discussion

[25] It is the Director's Reconsideration decision which is the subject of this Court's review.

However, because that decision was a review and reconsideration of the Adjudicator's decision and reasons, the analysis which follows will necessarily entail some reference to the decision and reasons of the Adjudicator.

[26] The issues arising from the Adjudicator's decision which the petitioners challenged in their submissions to the Director are these:

1. The Adjudicator "tampered" with the report.
2. The Adjudicator relied upon unreliable and unsworn evidence that was tendered in support of the cancellations, and preferred that over sworn evidence proffered by the petitioners.
3. The C.E.P. was overloaded.
4. There were deficiencies and errors contained in the C.E.P. The petitioners say the Adjudicator erred in failing to make comment about that.
5. The Adjudicator's decision was tainted by institutional bias in that both she as the decision maker and the investigators were all employees of the same organization.

[27] In this proceeding, the petitioners challenge the Director's decision that there was no error identified that would warrant disturbing the Adjudicator's conclusions.

[28] In addition, before this Court, the petitioners have raised two other matters that they say constitute a basis to have the decision set aside and to have the matter remitted for a new hearing:

1. The Adjudicator relied on irrelevant considerations, namely by commenting upon a matter that the applicable Guidelines indicated would not be considered.
2. The Director, in his reconsideration process, improperly had communication with one of the investigators/inspectors.

[29] Although it may seem somewhat cumbersome, I propose to examine the first five issues by setting out the submissions that were made by the petitioners to the Director and the Director's comments and conclusion respecting the issue advanced. Following that, I will deal with the issue.

[30] Because there is significant overlap among the issues which I have numbered as 2, 3 and 4, I will deal with those together.

[31] With respect to the last two issues, noted in paragraph 27, for reasons that I will explain, there were no submissions made to the Director, and so those will be dealt with on the basis of submissions that were made by counsel before me.

[32] I note that the petitioners structured their submissions to the Director on two separate bases: they alleged that the Adjudicator made legal errors, and they also alleged that she failed to properly observe the principles of procedural fairness in her considerations of the matter and decision. Because there was considerable overlap in the structure of those submissions, I will, for the most part, deal with the petitioner's case on an issue by issue basis, and without separating those two different approaches to the allegations of error by the Adjudicator.

Tampering -

[33] In their submissions to the Director, the petitioners said this:

CK and Biran submit that the Adjudicator made a legal error when she dealt with the issue of whether or not CVSE staff had tampered with the Structural Integrity Inspection Report that was prepared by Inspector Spanier. In the Decision, she said, "It appears that the front cover of the report was changed, likely to save paper and the entire second page and one paragraph near the end is missing due to printing errors and the failure by CVSE to properly collate the report." The Adjudicator either came to conclusions without supporting evidence or she received information from CVSE staff that was given to the Adjudicator but not to CK and Biran. In either circumstance, it was a legal error on the part of the adjudicator to base her decision that there was no tampering with the evidence on evidence that either did not exist or was evidence that was unknown to CK and Biran.

It is submitted that there is an appearance of bias in the way that the Adjudicator dealt with the allegedly tampered with report of Inspector Spanier. By excusing the defective document saying that changes had been made to save paper and further that there were printing errors and a failure to collate. There was no known evidence to support these findings. By making these findings, there is an appearance that the Adjudicator was biased in favour of the CVSE inspectors. The Spanier report as submitted by the investigators had a full page deleted and a very important paragraph deleted near to but not right at the end of the report. By making this unsupported finding in favour of the persons who put together the evidentiary package, the adjudicator made an unreasonable finding of fact and further displayed apparent bias towards the investigators.

[34] The Director found that there was neither legal error nor that the Adjudicator's handling of the issue constituted procedural unfairness, and addressed this complaint as follows:

Although the Structural Integrity Inspection Report was incomplete when delivered by Commercial Vehicle Safety and Enforcement (CVSE) as part of an evidence package to Mr. Biran on October 23, 2013, Officer Spanier had in fact delivered the complete report directly to Mr. Biran prior to October 23, 2013.

It was reasonable for the Adjudicator to conclude that the omission of parts of the report was an unintentional error by Officer Spanier, as he had previously provided the Applicants with the full report. As the Adjudicator had the benefit of reviewing the full report, the Applicants suffered no prejudice by the error in submitting the Report.

The Adjudicator did not commit an error of law by rejecting the Applicants' allegation that the omission was a function of "tampering" or for an otherwise improper purpose.

Analysis

- [35] The petitioners say this is a significant matter: it is especially important because the Adjudicator created an explanation without evidence, and that may indicate bias to support the inspector. The petitioners also contend that the inspector purposely altered the document to leave out sections that were of assistance to them, that is the petitioners.
- [36] As noted, the issue was raised with the Adjudicator. She did not accept that there had been tampering; she recognized that parts of the report were missing but concluded that was likely due to some innocent explanation.
- [37] The Director, based upon the fact that the entire report had been provided to the petitioners, and because the entire report was before the Adjudicator at the show cause hearing, found there had been no prejudice to the petitioners. Furthermore, because the entire file had been provided to the petitioners, the Director concluded there was no evidence of any deliberate tampering or misconduct, and so it was reasonable for the Adjudicator to find as she did.
- [38] I find that the Director's decision was reasoned and reasonable, taking into account the record that was before him.
- [39] The Adjudicator's comment, essentially speculating as to why the portions of the record were missing, was probably unnecessary and it would have been preferable if she had not made it. However, in all the circumstances, it is not of such significance as to have the effect the petitioners contend, and I see no basis to set aside the Director's disposition of the issue.

Unreliable evidence, overloaded C.E.P., failure to note and deal with errors in the C.E.P. -

- [40] The petitioners' submissions to the Director on these issues were as set out here:

CK and Biran submit that the Adjudicator made an error in law when she failed to place any weight on the evidence that showed that the CVSE inspectors placed allegations in the Evidentiary Package that they knew would be misleading in that they knew a number of the cars included in the Evidentiary Package had no problems with them whatsoever.

This is apparent in that in the Decision, the Adjudicator referred to them as "11 defective vehicles" when ultimately it was determined that only 4 of 11 had any defects whatsoever. The evidence package from the CVSE contains evidence relating to 14 cars in total. Three of the cars referred to were inspected by CK and Biran before 2013. Eleven of the cars were inspected in the Spring and Summer of 2013. Of those eleven, seven did not actually have defects that should have been included in the evidence package. Some contained no defects and others had defects that likely arose after CK and Biran inspected the cars. By referring to the cars as "11 defective vehicles", the adjudicator has shown that she failed to properly assess the evidence. The effect of

this is that the adjudicator placed too much weight on unreliable unsworn evidence from the adjudicators when contrasted to the sworn evidence of Mr. Biran and other witnesses for CK and Biran.

It is submitted that the Adjudicator made a legal error when she found that there was rust and wear in the area of the broken engine mount boss on the 2002 Volkswagen. It is submitted that there was no reliable evidence to support this and that it was specifically denied by Mr. Biran that the engine mount boss had been broken when he inspected the car.

The adjudicator found that there was rust and wear in the area of the broken engine mount boss. There was no evidence before the adjudicator to suggest that the rust could not have appeared in the one month between inspections. Furthermore, it appears that the adjudicator was relying upon her interpretation of the pictures alone. No witness makes reference to rust or wear. Given that the picture quality is poor, an Adjudicator must not rely upon her interpretation of a picture in the face of sworn evidence to the contrary, she must have evidence of equal weight to come to the conclusion that there was rust. There is, quite simply, no reliable evidence to support the adjudicator's finding that there was wear and rust present in the picture of the broken engine mount boss.

It was a legal error for the adjudicator to rely upon unsworn evidence when there was sworn evidence that directly contradicted unsworn evidence. Specifically, Biran said that the engine mount boss was not broken when he inspected the car. The picture, without more cannot be used to contradict Biran's sworn testimony.

Both the Adjudicator and all of the investigators are staff of the CVSE and so they presumptively enjoy a close relationship. In preparing the Evidentiary Package, the CVSE investigators placed a misleading Evidentiary Package before the Adjudicator in that they placed documents they knew to be deficient and/or tampered with before the Adjudicator and they knowingly included automobiles that they knew had no defects. If they did not know these automobiles had no defects, they were wilfully blind to the fact that a number of the automobiles had no defects.

By placing an Evidentiary Package containing a number of vehicles that did not have any defects it placed an unfair burden upon CK and Biran to rebut those allegations. It shows bias on the part of the investigators and it certainly made it difficult for the Adjudicator to overcome that bias which she clearly did not when she referred to 11 defective vehicles but later found that only 4 of them were defective.

This process has very strict rules and timelines. By overloading the evidentiary package with unfounded allegations, the investigators forced CK and Biran to respond to allegations that should never have been before the adjudicator. Because of the apparently close relationship between the adjudicator and the investigators, it is essential that the investigators do not provide any evidence that could tend to mislead the adjudicator.

It is submitted that there is an appearance of bias in the way that the Adjudicator dealt with the allegedly tampered with report of Inspector Spanier. By excusing the defective document saying that changes had been made to save paper and further that there were printing errors and a failure to collate. There was no known evidence to support these findings. By making these findings, there is an appearance that the Adjudicator was biased in favour of the CVSE inspectors. The Spanier report as submitted by the investigators had a full page deleted and a very important paragraph deleted near to but not right at the end of the report. By making this unsupported finding in favour of the person who put together the evidentiary package, the adjudicator made an unreasonable finding of fact and further displayed apparent bias towards the investigators.

The failure of the Adjudicator to negatively comment on the inclusion of cars without defects appears to show a bias towards the investigators. CK and Biran argued it was improper to include cars that had no defects. The adjudicator failed to comment on that argument when it was a serious allegation that was ultimately supported in the adjudicator's findings of fact. The investigators knew that they were putting in cars that didn't have defects and by failing to comment on this, the Adjudicator appears to show a bias towards fellow CVSE staff when they do their job improperly.

In some cases, the investigators included cars or items that they originally judged to be defects, but it turned out they were not and so it could not be stated that CK and Biran made inspection errors. The adjudicator made negative comments about CK and Biran making mistakes, but failed to make similar comments in regard to the mistakes made by the inspectors. In doing this, the adjudicator appears to show a bias in favour of the inspectors.

[41] The Director dismissed these points as follows:

In a similar vein, the Applicants allege that "the Adjudicator made an error in law when she failed to place any weight on the evidence that showed that the CVSE inspectors placed allegations in the Evidentiary Package that they knew would be misleading in that they knew that a number of the cars included in the Evidentiary Package had no problems with them whatsoever".

The Applicants' allegations of intentional wrong-doing by the investigators, including the allegation repeated throughout the submission that the investigators submitted evidence for the purpose of misleading the Adjudicator are unfounded and unsupported by the evidence. A show cause hearing gives the licensees an opportunity to review and to refute any of the evidence on the file. The Adjudicator accepted the Applicants' evidence that a number of vehicle defects turned out to be unfounded based on updated inspection forms and other evidence provided by the Applicants. She did not find that a number of vehicles had no defects whatsoever.

The Adjudicator focused her decision to confirm the cancellation of the Applicants' designations on the strength of three particular vehicles that raised significant concern for public safety. These are: the 2008 Toyota Corolla, the 2003 Suzuki Grand Vitara, and the 2012 Toyota Prius. The Adjudicator also singled out the 2002 Volkswagen with the broken engine mount boss.

The Adjudicator noted that the remaining vehicles had defects, though she determined that a number of the alleged defects on some of the vehicles were unfounded. The adjudicator found that there was inconclusive evidence on only one vehicle, the 2012 Toyota Corolla. The Applicants' repeatedly assert throughout their submissions that only four vehicles had defects. This is incorrect. The Applicants misconstrue the Adjudicator's findings in the respect. The Adjudicator noted that some of the defects were unfounded but she did not determine that the vehicles in question had no defects whatsoever.

In any event, the Adjudicator focused her decision on the particularly egregious defects that formed the basis for her decision to confirm the cancellation of the licenses. This approach was not an error in law. Rather, this approach underlined and addressed the concern for the risks to public safety.

The Applicants' submission relating to a finding of rust and wear on the broken engine mount boss on the 2002 Volkswagen relates to a finding of fact. The adjudicator relied on declaration evidence provided by a CVSE Peace Officer who is also certified as a trade qualified mechanic. The adjudicator made a finding of fact based on a balance of probabilities that, in the span of 6 weeks and approximately 5000km travelled between inspections, it is unlikely that this level of rust would have formed on an exposed bolt on this vehicle in the summer months of July to mid-August 2013 in BC. I have reviewed the evidence and I have determined that the adjudicator was entitled to make this finding of fact on the evidence, and this finding is not unreasonable.

The Adjudicator focused her decision to confirm the cancellation of the Applicants' Designation and Authorization on the weight of the convincing evidence of defects on specific vehicles. Singling out these examples as the basis for her decision does not create an apprehension of bias, nor does it suggest that the other evidence was in any way submitted for an improper purpose.

Analysis

[42] The argument advanced by the petitioner is multi-faceted and somewhat complicated.

[43] To try and put the matter in a succinct and understandable fashion, the complaint as I apprehend it is that:

- (a) The Adjudicator made findings adverse to the petitioners, based upon unsworn evidence and her reference to photographs and evidence in the C.E.P. and in doing so, rejected sworn evidence adduced by the petitioners.
- (b) The C.E.P. contained evidence with respect to a number of vehicles, some 14 in all, and referred to a number of those as defective. The petitioners say most of those were not defective.

- (c) There was too much material in the package to be manageably dealt with. Even though the Adjudicator did not find many of the allegations of defect to be made out, the effect was to create an environment that was pervasively negative to the petitioners, so as to overwhelm the fairness of the process.
- (d) There was an objection as well to the fact that the Adjudicator did not make comment critical of the investigation and the information package with respect to those situations where no fault had been found on the part of the petitioners.
- [44] The Director observed, correctly in my view, that the Adjudicator was charged with making findings on the basis of her assessment of the evidence and concluded the findings she made were based on evidence before her and were not unreasonable.
- [45] I find no basis to conclude that to be an unreasonable conclusion by the Director.
- [46] As for the complaint of the overloaded and overwhelming nature of the evidentiary package, the Director noted that the Adjudicator had dealt with the material in its entirety and found that, in some instances, allegations of defects in certain vehicles were of a relatively minor nature. He was also satisfied that there were three vehicles where the Adjudicator found significant and serious defects which warranted the cancellation of the inspection designation.
- [47] In my view, the analysis that the Director made and the conclusions he reached were reasonable, and I can see no basis to set his decision aside.
- [48] The petitioners' submissions, both to the Director and to this Court, it seems to me, are very much rooted in a premise that the investigation and the show cause process were pervaded by bias - that the investigators were intent upon mounting a powerful campaign designed to cast so much doubt upon the petitioners' competence and quality of work that there could not realistically be any outcome other than cancellation of the inspection designations. That tone extends to the role played by the Adjudicator: she is portrayed as operating in concert with the inspectors to the same end.
- [49] The spectre of bias permeates the petitioners' submissions.
- [50] If one is prepared to accept and proceed from the proposition that there likely is bias, then the sinister conclusions urged by the petitioners seem plausible.
- [51] However, the allegation of bias in this case is without any actual evidence to support it. It is an accusation that is founded upon suspicion alone.
- [52] The matter of alleging bias was the subject of comment by Justice Gibbs in *Johnson v. British Columbia (Superintendent of Motor of Vehicles)*, 2002 BCSC 89 at para. 28:

This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is practice which,

in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

[53] In my view, that observation is apt in the present circumstances. The position of the petitioners is quite staunchly based in accusations of bias which, when examined with care, are suspicions without an evidentiary basis.

[54] As for the complaint that the Adjudicator should have made remarks critical of the investigation or the materials that were filed, I know of no authority for that proposition. Her responsibility was to deal fairly with the evidence and the submissions and to render her decision accordingly.

Bias because of same institutional structure-

[55] The petitioners said this in their submissions to the Director:

Both the Adjudicator and all of the investigators are staff of the CVSE and so they presumptively enjoy a close relationship. In preparing the Evidentiary Package, the CVSE investigators placed a misleading Evidentiary Package before the Adjudicator in that they placed documents they knew to be deficient and/or tampered with before the Adjudicator and they knowingly included automobiles that they knew had no defects. If they did not know these automobiles had no defects, they were wilfully blind to the fact that a number of the automobiles had no defects.

By placing an Evidentiary Package containing a number of vehicles that did not have any defects it placed an unfair burden upon CK and Biran to rebut those allegations. It shows bias on the part of the investigators and it certainly made it difficult for the adjudicator to overcome that bias which she clearly did not when she referred to 11 defective vehicles but later found that only 4 of them were defective.

There is an apparent lack of independence. The adjudicator is employed by the CVSE, the same governmental organization that employs the inspectors/investigators. CK and Biran do not challenge the delegation to this adjudicator, however, it is submitted that to overcome the presumptive appearance of bias, the adjudicator must, at a minimum, explain how it is that she can render an unbiased decision in light of the appearance of a very close relationship with the inspectors/ investigators.

[56] The Director dismissed that objection, stating as follows:

The Applicants' repeated allegation of bias based on a "presumptively close relationship" between the Adjudicator and the investigators is unfounded. The Adjudicator reviewed the evidence and based her decision to confirm the cancellations of the designations on evidence of serious

defects that compromise public safety. This evidence included the defects noted by Mr. Biran during his inspection but passed the vehicles anyway. The Applicants have not established that the Adjudicator was biased nor have the Applicants established any grounds for bias based on a "presumptively close relationship" between the Adjudicator and the investigators who produced and submitted the evidence of vehicle defects.

Analysis

- [57] This allegation also concerns the issue of bias or partiality.
- [58] The matter at bar arises from a legislatively created process whereby the investigation, the adjudication and the reconsideration are conducted by one organization.
- [59] While the petitioners do not contend that a structure of this nature is impermissible, they maintain that the Adjudicator must, in circumstances such as this, provide a positive explanation as to how it is that she can render an unbiased decision.
- [60] The Director's decision, that there was no evidence of bias, is, in my view reasonable and answers the concern. Indeed, where an investigative/adjudicative structure of this type is at issue, it seems to me that to accept the petitioners' position would be to implicitly legitimize proceeding from the premise that there is an assumed bias, an impropriety, and so a decision maker is obliged to overcome that in order for the decision to be credible.
- [61] That is simply not a viable proposition.
- [62] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [Ocean Port], the Supreme Court of Canada had occasion to discuss at length legislatively created processes of this nature. The Court observed that it is for the legislature or parliament to determine the degree of independence that tribunal structures will have, and that courts engaged in judicial review of administrative decisions must defer to the legislature's intention in assessing what degree of independence will be required. That reflects a fundamental distinction between administrative tribunals and courts.
- [63] With respect to the concerns raised by the present case, the Court in *Ocean Port* has made clear that the legislature is entitled to create a model whereby investigative, prosecutorial and adjudicative functions overlap in a single agency, such as in the matter at bar. There is of course a concern that those engaged in the prosecution not participate in the adjudication process. There is no basis to find that principle is offended by the model at issue or that the process in the show cause or reconsideration hearings in this case breached that rule.
- [64] In the result, I find no basis to take issue with the Director's conclusion respecting this issue.

Reliance on irrelevant factor - the Guideline issue-

[65] Before this Court, the petitioners raised as a ground of objection that the Adjudicator had, in her reasons, made mention that:

Over the last two years when the improperly inspected rebuilt vehicles were brought to Mr. Biran's attention, it appears that he failed to acknowledge that there may be issues with the quality of his inspections. His submission was an opportunity to demonstrate that changes had been made to his operating practices that would ensure that only vehicles that met the standards would be passing inspections at his facility.

[66] The petitioners also make reference to a document issued by CVSE entitled "Show Cause Hearing Guidelines". That document purports to provide an overview of the show cause hearing process and is intended to assist and guide persons who are preparing submission for such a hearing.

[67] One specific entry on that document is as follows:

PLEASE NOTE: A proposal or action plan explaining how you intend to comply with regulatory requirements will not be considered by the Director when deciding whether the cancellation should take effect.

[68] The petitioners say that there has been a serious unfairness in this case arising from this guideline instruction and the comment made by the Adjudicator. Specifically, the petitioners say that, in the course of preparing for the show cause hearing, they reasonably understood from the guideline that their submission should not include any explanation of any action plan or proposal for future conduct and so no such content was included. They say that a fair reading of the Adjudicator's reasons supports a conclusion that she effectively faulted the petitioners for not having offered an explanation.

[69] I note that this issue was not raised in submissions made to the Director on the reconsideration hearing. Accordingly, it was not dealt with by the Director.

[70] In the circumstances, because this issue does not form any part of the Director's decision, the decision which is subject of this judicial review, is not a matter that this Court can decide. There are sound policy grounds for limiting this review to consideration of the decision of the tribunal below, and not to permit issues to be raised here for the first time.

[71] I note in passing that this issue was raised and commented upon in the course of the oral hearing. The respondent took the position that this was not a matter for this Court to address, but did observe that the guideline appears to refer to a plan for changes going forward, whereas the comment of the Adjudicator was with respect to changes that had been made.

[72] Notwithstanding whatever merits there may be, I take the position that this is not an issue properly before this Court and so I decline to deal with it.

Allegation of Director's Improper Communication

[73] The final point to address concerns an allegation of irregularity in the reconsideration process. While it is not part of the Director's decision per se, I consider it to be a matter that this Court should address.

[74] The chambers record includes an affidavit sworn by Brian Kangas, a manager of CVSE. He was responsible for coordinating the file in the current matter. In his affidavit, he exhibits a number of the documents and materials which constitute the file.

[75] At para. 14 of his affidavit, Mr. Kangas says the following:

Prior to rendering his decision, Mr. Murray verbally asked me to provide him with the back of the Vehicle Inspection Report/Notice and Order, the first page of which were part of the Cancellation Evidentiary Package. The back of the Report/Notice provides instructions and information to the registered owner who receives the Report/Notice. As well, if an offence violation ticket is issued to the registered owner along with the Report/Notice, information regarding the disposition of that offence ticket will be set out in the disposition section. Confirmation of the repairs the registered owner is required to make because of the Notice and Order are tracked separately and would not appear in the disposition section. Mr. Murray also asked me to provide him with a blank Structural Integrity Declaration Report that had been updated on April 29, 2013, and a blank Body Integrity Inspection Report current to May 27, 2013. Attached as Exhibit "L" to my affidavit is a copy of these materials.

[76] The petitioners say that this appears to be a significant irregularity. In essence, the Director who has the responsibility of conducting the reconsideration hearing should do so on the basis of the record of the proceedings before the Adjudicator and nothing else. He should not be embarking upon his own investigation nor should he be having contact with the original investigator. However, the affidavit suggests he did just that.

[77] I have examined the affidavit of Mr. Kangas and the documents that he testifies he provided to the Director. I have also examined the documents contained within the C.E.P. that is, the evidentiary package that was in the hands of the petitioners and which was before the Adjudicator.

[78] It is apparent to me that the documents which were sought by the Director and provided by Mr. Kangas were both the front page and the back page of a pre-printed form entitled Vehicle Inspection Report/Notice Order. The first or front page of that document has information contained on it, specific information that has been filled in. Those front pages were part of the C.E.P. and were in the possession of both the petitioners and the Adjudicator at all material times. As best I can discern, the reverse side of those documents was not contained within the C.E.P. It is those reverse sides that Mr. Kangas provided to the Director. Upon examination of those reverse pages, I observe that they represent a printed form only. The page contains some general information, together with a notice and a warning and provides for disposition information to be entered. In fact, there appears to be

no substantive information other than the document as printed - nothing of meaning has been added. The other document, the Body Integrity Inspection Report is a pre-printed form used by the CVSE. There is no information contained on that - it is blank.

[79] I infer from the affidavit of Mr. Kangas that his interaction with the Director in this regard was confined to the activities that are noted and described in the affidavit.

[80] In the circumstances, I can see no reasonable basis to conclude that the Director was privy to any new information with respect to this case when he conducted his reconsideration hearing nor do I see any basis in the evidence to conclude that he had any improper communication with Mr. Kangas in his capacity as the investigator of the matter. There was nothing of substance to the dealing between these two persons.

[81] Accordingly, while the matter of the Director obtaining the material as he did is unusual, I see no basis to conclude that it constitutes an impropriety of any material significance.

Conclusion

[82] I find that the petitioners have not established that the decision of the Director was unreasonable, or that there was any other basis upon which to set aside his decision. Accordingly, this application stands dismissed.

[83] There will be no award of costs.

"The Honourable Mr. Justice Williams"

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