Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 39
Date: December 23, 2020
File No.: T2495/5220

Between:

Graham Farmer

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Halifax Employers Association

Respondent

Ruling

Member: Kathryn A. Raymond, Q.C.

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I. Introduction

[1] This human rights complaint arose in Halifax, Nova Scotia. The complaint was referred to the Canadian Human Rights Tribunal (the "Tribunal") for inquiry pursuant to the *Canadian Human Rights Act* R.S.C., 1985, c. H-6 (the "*Act*"). The Chair of the Tribunal assigned the inquiry for case management and hearing to a part-time member of the Tribunal, Kathryn A. Raymond Q.C., ("Member Raymond", or as the context requires, the "Tribunal") who resides in Halifax. The Respondent, the Halifax Employers Association (the "HEA"), has brought a motion requesting that Member Raymond recuse herself based on a reasonable apprehension of bias. The Respondent asks that Member Raymond remit the matter back to the Chair for assignment to another member of the Tribunal.

[2] For the reasons that follow, the Respondent's motion for recusal is dismissed.

II. Statutory Background to Appointments

[3] As will become apparent, the statutory provisions in the *Act* respecting the appointment of members of the Tribunal provide relevant background. Pursuant to subsection 48.1(4) of the *Act,* members are appointed to the Tribunal by the Governor in Council "…having regard to the need for regional representation in the membership of the Tribunal." The Tribunal has both full-time and part-time members. Pursuant to section 48.5, all full-time members of the Tribunal are required to reside in the National Capital Region. As a result, the statutory requirement that the Tribunal membership include regional representation is addressed by the appointment of part-time members, such as Member Raymond, who resides in Nova Scotia.

[4] The *Act* requires that the Chair, the Vice-Chair and two other members of the Tribunal be current members in good standing of the bar of a province in subsection 48.1(3). In practice, part-time members of the Tribunal are members in good standing of the bar of their province and most of them practice law during their part-time adjudicative appointment. Member Raymond has been a member in good standing of the Nova Scotia bar since 1990 and prior to that was a member of the Law Society of Upper Canada.

[5] Persons eligible for appointment as adjudicators to the Tribunal are required to have acquired knowledge and experience in the area of human rights. Member Raymond's private legal practice includes employment law and other areas of law relevant to her eligibility. As well, Member Raymond holds other adjudicative appointments of relevance.

[6] In accepting an appointment as a fulltime or part-time member of the Tribunal, all members of the Tribunal are required to take an oath of office that they will execute their responsibilities impartially. Member Raymond was appointed a part-time member of the Tribunal in July 2019 and thereafter took the above-described oath of office.

III. Disclosure Upon Appointment by the Tribunal

[7] In July 2020, Member Raymond accepted the assignment to conduct the inquiry into this complaint from the Chair of the Tribunal in accordance with subsection 49(2) of the *Act*. Member Raymond conducted a conflict check before accepting the assignment. The conflict check confirmed that there was no association, client relationship or opposing client relationship between herself, in her role as counsel engaged in private practice, and the Complainant, Graham Farmer, the Respondent, HEA, or the Commission, in this case.

[8] Because Member Raymond practices law as a partner of a law firm, the conflict search was conducted to also identify any known associations between clients of the law firm or members of the firm and the parties to the human rights complaint. Several associations were identified.

[9] Member Raymond wrote the parties to this complaint to identify those associations on August 10, 2020. The letter stated the following:

> In addition to my responsibilities as a member of the Tribunal, I am engaged in the private practice of law in Nova Scotia with BOYNECLARKE LLP. It is my practice to check back over the past 10 years to determine whether there are any known connections between myself or other members of my firm and the parties to a complaint before the Tribunal, as a precaution. Disclosure of all of the following information is likely not required but is offered to the parties in the interests of transparency. I advise of the following:
>
> I have not been involved in matters related to either party to this complaint.

> Graham Farmer: The Complainant was a client of another lawyer with my firm on an unrelated, concluded matter ten years ago.
>
> Halifax Employers Association: The Respondent was an adverse party on an unrelated, concluded matter involving another lawyer in the firm over five years ago; one member of the Board of Directors of the Respondent is currently a client of another lawyer in the firm in their personal capacity on an unrelated matter; two other members of the Board have retained lawyers for unrelated personal matters, the most recent of which was closed four years ago.
>
> Members of the Halifax Employers Association: one of the Respondent's 37 corporate members is currently a client of another lawyer in my firm on an unrelated matter; one other member of the Respondent is a former client on unrelated, concluded matters, the most recent of which is several years old; a third member was an adverse party on an unrelated matter with another lawyer that closed six years ago.
>
> I ask that the parties please advise whether they have any concerns arising from this information forthwith.

[10] The parties did not express any concern as a result of this disclosure by the Tribunal.

IV. The Request for Pre-Emptive Recusal

[11] While the Respondent had no concern about Member Raymond's previous associations as stated in the letter, on September 4, 2020, counsel for the Respondent made an informal request by letter to the Tribunal. On notice to the other parties, counsel requested that Member Raymond pre-emptively recuse herself without the need for a motion to be filed, because of an alleged conflict in a matter separate and apart from those identified above.

[12] The request for pre-emptive recusal was based on the fact that, in her private legal practice, Member Raymond represents a client engaged in a dispute with a university located in the Atlantic region (the "University)". In this ruling, this proceeding will be referred to as "the University proceeding". This other matter was described by the Respondent as an internal, confidential proceeding within the University. Respondent counsel pointed out that his law firm, Stewart McKelvey, also represents a party to the University proceeding. Specifically, he advised that two partners of his law firm, one of whom is the firm's Regional

Managing Partner, represent the other party within the University proceeding. The University proceeding was described as adversarial, with multiple issues and hearings over six years. The proceeding is ongoing. Respondent counsel informed Member Raymond that he also represents the University in other matters, unrelated to the University proceeding or this complaint.

[13] Respondent counsel submitted that Member Raymond's retainer as legal counsel in the University proceeding gave rise to a reasonable apprehension of bias against his law firm in this proceeding. Respondent counsel clarified that the Respondent did not allege that Member Raymond was actually or subjectively biased. Respondent counsel submitted: "…We suggest there is an *objectively reasonable apprehension* of bias against Stewart McKelvey in this matter, because of your involvement with my colleagues in the University proceeding."

[14] Neither the Complainant, the Respondent, nor the Commission have any involvement in the dispute involving the University.

[15] The letter of September 4, 2020 requesting recusal was not accompanied by an affidavit. Respondent counsel took the position that the other proceeding within the University was confidential and that evidence from the other proceeding could not be shared with the parties in this case or with the Tribunal. Counsel advised that he had not shared the details of the University proceeding with his client, HEA.

[16] As indicated, the Respondent requested that Member Raymond recuse herself without the need for a motion. A member of a tribunal may exercise their discretion and recuse themselves based on a communication from one party, without having a hearing, as a recusal is a discretionary matter that does not affect the parties' substantive rights (*Human Rights Commission (NS) v. Town of Kentville*, 2004 NSCA 44 (CanLII). However, in this case, Member Raymond concluded that a motion was necessary and directed the Respondent to file a motion for recusal.

V. Introduction to the Respondent’s Motion for Recusal

[17] The Respondent filed its motion on October 13, 2020. The Complainant and the Commission subsequently indicated that they were not taking a position in relation to the Respondent’s motion.

[18] It is not specifically articulated as alternative requests in the motion, but it appears that Member Raymond is being asked to recuse herself based on the legal standard of reasonable apprehension of bias and is also being asked to recuse herself on a discretionary basis, upon request, as the latter is included in the conclusion of the motion.

[19] No affidavit was filed in support of the Respondent’s motion. The Respondent continued to take the position that the University proceeding was confidential and, that as a result, the Respondent was unable to provide evidence in support of its motion for recusal. The Respondent submitted that its motion should not be dismissed for lack of evidence because it was unable to provide evidence. Instead, Member Raymond should recuse herself.

[20] Before proceeding further with the factual history of this matter, it is appropriate to first explain the Respondent’s position respecting its own knowledge of the facts, given the alleged confidentiality of the University proceeding, and the obstacles that were presented to the Tribunal respecting the ability to provide a factual record for the motion.

VI. The Respondent’s Position respecting its Knowledge of the Facts

[21] As indicated, Respondent counsel advised that he had not shared information from the file respecting the University proceeding with his client, HEA. It is apparent from this statement, the Respondent’s letter of September 4, 2020 and the motion of October 13, 2020, that Respondent counsel has knowledge of the University file so as to advise his client in relation to the recusal motion. It is also clear that the Respondent, HEA, knew nothing of the matters raised by Respondent counsel.

[22] Given Respondent counsel’s position that the University proceeding is confidential, counsel addressed the matter of his knowledge of that file in the letter of September 4, 2020.

Counsel submitted that the Supreme Court of Canada in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC) at pp 1260-61 [*MacDonald Estate*] had established a rebuttable presumption that lawyers within the same firm would share confidences and acquire each other's confidential information. Respondent counsel wrote, "In this case, as counsel for HEA, I not only act as counsel for the University involved in the University proceeding, but there is a rebuttable presumption that the partners of my firm will have shared information about the University Proceeding with me." (While Respondent counsel advised that he represents the University, he has not been involved in the University proceeding.)

[23] The Tribunal agrees that there is a rebuttable presumption that the two partners within Respondent counsel's law firm handling the University case have shared information about the University proceeding with Respondent counsel. Counsel did not suggest in any way that his partners had not done so or that this presumption was rebutted on the facts of this case.

[24] It is apparent that counsel's acquisition of knowledge about the University proceeding provides the basis for the legal opinion provided to the Respondent, HEA, that a reasonable apprehension of bias exists in this case. As a result, the Tribunal understands that Respondent counsel is effectively asking the Tribunal to hear the Respondent's motion on the basis that the presumption in *MacDonald Estate* applies in this case and that, for purposes of this motion, it can be presumed that Respondent counsel is fully informed of the University proceeding.

[25] The Tribunal also notes that, as counsel has not shared information from the University file with his client, HEA has proceeded with this motion based on its counsel's advice, without requiring disclosure from its counsel of the information from the University proceeding relied upon for purposes of this motion, as would normally occur between a solicitor and client. Accordingly, the Tribunal understands that the Respondent is prepared to have this motion heard without having access to the relevant information that its counsel possesses.

VII. The Respondent's Position Respecting Evidence and Information in Support of its Motion

[26] Respondent counsel explained he could not provide evidence in support of the motion because he considers the internal University proceeding to be confidential. Counsel asserts that the confidentiality of the University proceeding was intended to protect all parties to that proceeding, including Ms. Raymond's client in her legal practice. Counsel further conveyed that his law firm's client, the University, had not waived solicitor-client privilege.

[27] Respondent counsel acknowledged that, in her legal practice, Member Raymond had filed several judicial review applications with the Nova Scotia Supreme Court on behalf of her client about the University proceeding, which are a matter of public record. Counsel advised, however, that there was nothing on the public record that the Respondent could rely upon to support its allegations of bias. The Tribunal infers from this statement that Respondent counsel has reviewed these applications.

[28] For the above reasons, the Respondent counsel asserted that no material from the University proceeding could be provided by affidavit for the motion. Counsel appeared to take the position that the position he found himself in was unresolvable.

[29] Further, the Respondent implied that it was in fact Member Raymond who had to disclose information she had in her possession. The Respondent referenced *Benedict v. Ontario*, 2000 CanLII 16884 (ON CA), [*Benedict*] at para 35. There the Ontario Court of Appeal found that there are situations "…where it is only the judge who knows the particulars that could give rise to an apparent bias should the judge hear the case." By the inclusion of *Benedict* and other similar cases in its submissions, the Respondent appears to take the position that Member Raymond is the only person who has knowledge of the information that could give rise to a reasonable apprehension of bias, and, therefore, either is required to recuse herself, or is required to make disclosure to the parties of all relevant facts. It is not clear in the submission whether this is intended to be an alternative argument or is included to indicate that Member Raymond has access to additional information not on the record of the University proceeding.

[30] Having raised *Benedict* and other cases, the Respondent, however, submitted that Member Raymond was limited in the disclosure that she could make to the parties about the University proceeding because of its confidentiality.

[31] From these submissions, it appeared that the Respondent was implicitly suggesting that Member Raymond was required to recuse herself because she was also in an unresolvable situation respecting the provision of information required for the motion, or a "catch-22".

VIII. Further Developments Respecting Evidence & Confidentiality

[32] After receipt of the motion, the Tribunal decided to write a letter to the parties on October 29, 2020 to offer general suggestions to facilitate the Respondent's ability to provide evidence in support of its motion. This action was taken based on Rule 3 of the Tribunal's *Rules of Procedure* which provide that, upon receipt of a Notice of Motion, the Tribunal may, among other things, direct the presentation of evidence by all parties.

[33] In its letter, the Tribunal advised that it was unaware of any grounds for recusal arising from the University proceeding, which is why it was not raised in its August 10, 2020 letter. The Tribunal acknowledged the Respondent's position that it was unable to provide evidence in support of its motion. The Tribunal explained that this placed the Tribunal in a difficult position, as the jurisprudence establishes that a party alleging bias generally bears the burden of proving the claim.

[34] The Tribunal stated its understanding that the Respondent's allegations were grounded in the adversarial nature of the University proceeding, which would presumably be manifest in the record of the proceeding. The Tribunal, therefore, suggested that Respondent counsel provide an affidavit identifying documents from the University proceeding that support the allegations. The documents themselves would be exhibited thereto, with all contents redacted save for the portions serving to illustrate the proceeding's adversarial tone. As well, the date and page number of any document attached as an Exhibit would be identified. The Tribunal indicated that, if an audio recording was relied upon, the

minutes marker on the recording could be provided, and the portion relied upon transcribed. All accompanying information would be redacted.

[35] In addition, the Tribunal noted that it possesses the statutory authority to make Orders and take measures to ensure the confidentiality of the proceeding, as provided by section 52 of the *Act*. The Tribunal advised that, where circumstances warrant, this provision can be used to seal the official record and prohibit publication of any decisions and rulings. The Tribunal invited the Respondent to propose a confidentiality Order that would meet its needs, having regard to the fact that significant details of the University proceeding (names of parties, background facts) are already publicly available in the judicial review filings.

[36] On November 16, 2020, the Respondent replied, stating that the Tribunal's suggestions were unworkable because the proposal did not address the Respondent's confidentiality concerns. The Respondent provided the following reasons for not proceeding as suggested by the Tribunal:

> Assume that, in accordance with the Member's proposal, HEA's counsel provided an affidavit that appended a document from the University Proceeding. The document included a statement that "illustrate[d] the proceeding's adversarial tone" and the remainder of the document was redacted. Assume the Member believed that counsel for HEA had taken the unredacted statement out of context, and that the unredacted statement could either be explained or justified by something else in the document that had been redacted, or by another document that was not included in the affidavit. It is not clear what would happen next, given that the Member is tasked with impartially determining the Motion before her. The Member's proposal risks unfairness to the Member because she cannot become a witness to the Motion and adduce evidence to rebut HEA's evidence (…). The parties in the Tribunal matter would be no further ahead in understanding the context of the University Proceeding, while the confidentiality of the University Proceeding still risks being breached despite best efforts to redact (…). Consequently, HEA maintains its original position in its Motion that it is not possible to append material from the University Proceeding without breaching confidentiality obligations.

[37] The Commission and the Complainant had been given an opportunity to respond to the Tribunal's suggestions by November 27, 2020. The Commission advised that, as the Respondent did not take a position respecting a confidentiality Order, the Commission took no further position. The Complainant did not respond.

IX. The Issues

[38] The primary issues in this motion are:

1. whether the Respondent is unable to provide evidence in support of its motion because of the confidentiality of the University proceeding and the risk that a confidentiality Order would be ineffective;
2. whether Member Raymond is required to make disclosure in relation to the University proceeding; and,
3. whether Member Raymond should recuse herself from hearing and deciding this human rights complaint.

X. The Burden of Proof

[39] It is well established law that the burden of proof in a recusal motion lies upon the party advancing the motion, upon the balance of probabilities.

XI. Presumption of Good Faith & Impartiality

[40] A strong presumption of good faith and impartiality attaches to adjudicators tasked with making judicial and quasi-judicial determinations. The presumption of good faith must be displaced by the party that bears the burden of proof. In *Carbone v. McMahon,* 2017 ABCA 384 (Can LII) at para 62, the Alberta Court of Appeal wrote that "Those who challenge this presumption must 'present cogent and substantial evidence to justify the conclusion on a balance of probabilities that the judge was, in fact, biased or that a reasonable, right-minded and properly informed person would conclude that the judge did not decide the case impartially,'" (See also *Bizon v. Bizon*, 2014 ABCA 174 (CanLII), at para 62; *The Queen v. S.*, 1997 CanLII 324 (SCC), and *Committee for Justice and Liberty v. National Energy Board,* 1976 CanLII 2 (SCC) [*Committee for Justice*]).

[41] Further, Members of the Canadian Human Rights Tribunal take an oath of office. This oath buttresses and reinforces the presumption of impartiality and good faith of Tribunal members: *Pacific Opera Victoria Association v. International Alliance of Theatrical Stage Employees, Local No. 168*, 2001 CanLII 33238 [*Pacific Opera*] at paras 19-20 and *Auer v. Auer*, 2018 ABQB 510 (CanLII) [*Auer*], at paras 102-103.

[42] This strong presumption of impartiality cannot be displaced by a simple request to recuse. Such a practice would create chaos in the administrative justice system. It would also permit “adjudicator shopping”. Parties are not permitted to select their judge or to displace an adjudicator because they do not wish to appear before them. (See in this regard *R v. Mitchell*, 2002 BCSC 3 (CanLII), at paras 39-40; *CET-53358-15-RO (Re)*, 2017 CanLII 93937 (Ont LTB) at para 22).

XII. Requirement that There Be Evidence

[43] Rebutting the presumption of impartiality requires cogent evidence as explained in *Pacific Opera*, *supra*, at para. 20. As noted in Emily Lawrence & Adam Stikuts, “Allegations of Bias in Administrative Law Proceedings: A Review of Recent Cases” (2017) 30 Can J Admin L & Prac 145, at p 15 [Lawrence & Stikuts]:

> Where the allegation of bias relates to earlier decisions or events during previous hearings, it is imperative to identify to the adjudicator which paragraphs or lines of the transcript are relevant, and yet litigants sometimes fail to do this. For example, in *Prince Edward County Field Naturalists v. Ontario (Environment and Climate Change)*, the party moving for recusal argued that past decisions written by the panel members demonstrated bias against its position, but failed completely to specify which comments or passages were problematic. They mentioned specific paragraph numbers only in their reply submissions. Unsurprisingly, the panel found the initial absence of specifics to be unpersuasive and did not recuse themselves.
>
> Similarly, in *Alla et Bombardier inc.*, …counsel did not give any specific examples of this [disrespectful] conduct. The adjudicator hearing the motion noted that he was “struck by the general, vague and imprecise character of the allegations” and denied the recusal motion.

[44] As the Respondent bears the onus of proof, it falls to the Respondent, as the party making this motion, to provide evidence in support of its motion. The Respondent has not provided any evidence in support of its motion for recusal.

[45] On this basis, the Respondent’s motion could be at risk of being dismissed for lack of evidence. However, the Respondent submitted that it was unable to present evidence because of the extent of the restrictions caused by the confidentiality of the University proceeding. The Respondent argued that its motion should not fail as a result. Accordingly,

the Tribunal considered whether the confidentiality issues the Respondent raised prevented the Respondent from providing evidence in support of the motion.

XIII. Whether Evidence for the Motion is Precluded Because of Confidentiality

[46] As indicated above, the Respondent counsel has all the information that he needs about the University proceeding. He relies upon the rebuttable presumption that his two partners, who are engaged in the University proceeding, have shared confidential information about the proceeding with him. He has not suggested in any way that the presumption should be rebutted. It is this information that has informed counsel's opinion that the facts give rise to a reasonable apprehension of bias, which has been adopted by the Respondent. Therefore, it is legally presumed that Respondent counsel has access to all information in respect of the University proceeding that he required to form his advice to his client and to present this motion. The alleged confidentiality of the other proceeding is not a bar to Respondent counsel's ability to be knowledgeable about the other file and to provide affidavit evidence in support of a motion for recusal, subject to considerations of confidentiality or privilege. Respondent counsel has not identified any information that he believes is relevant to the motion that he is unable to obtain so that he can address it on behalf of his client.

[47] Respondent counsel alleges, however, that he is unable to provide evidence on behalf of his client because the other proceeding is confidential. As noted above, the Respondent has provided no evidence or legal authority for the stated premise that the other proceeding is confidential.

[48] In relation to the extent to which this other matter may be confidential, Respondent counsel has acknowledged that applications for judicial review have been filed with the Supreme Court of Nova Scotia and that these are a matter of public record.

[49] Three applications for judicial review have been filed with the Supreme Court. No application was made by the University to seal these documents. Member Raymond recalls that one application received some media attention.

[50] Judicial review applications are subject to the *Nova Scotia Civil Procedure Rules* [*NS Rules*]. The *NS Rules* contain requirements respecting the content required to be contained in an application for judicial review. Because of these requirements, the three applications for judicial review contain a significant amount of information about the University proceeding. This includes identification of the parties, a description of what transpired that led to the proceeding, identification of many of the issues in the proceeding up to the date the last application was filed in November 2019 and the history of procedural disputes, hearings and rulings by the tribunal in that proceeding whose decisions will be reviewed by the Court. These applications for judicial review also contain a list of all the documents and transcripts that form the record of the internal proceeding, consisting of communications between the parties and the tribunal, of which there are many. Accordingly, a significant amount of information about this other proceeding lies within the public realm.

[51] Applications for judicial review are made to a court to try to correct tribunal decisions when a party disagrees with a decision. The applications for judicial review, therefore, provide information in a public record about disputes between the parties in the University proceeding. They are also relevant to the adversarial nature of the proceeding.

[52] In addition, the University did not take the position that the facts that led to this internal proceeding were confidential. The University informed two third-party organizations, one in Nova Scotia and another in a different province, of what the University had done that led to the proceeding. These third-party organizations provide information to the public and to similar organizations internationally. The information provided is part of the public record for this reason, as well. Further, Member Raymond does not recall that the confidentiality of the proceedings has ever been addressed in the University proceeding. It may be confidential, but no determination has been made by the tribunal in that proceeding in this regard.

[53] In summary, there can be no dispute on the facts that, 1) the existence of the University proceeding is not confidential, and, 2) a significant amount of information about the University proceeding is a matter of public record because of the three applications for judicial review that have been filed with the Court.

[54] Respondent counsel advises that it is not possible to discern the reasons why counsel alleges a reasonable apprehension of bias from a review of the information filed with the court in the three applications for judicial review.

[55] Respondent counsel has not identified any content in the University proceeding file, whether by date or by any other de-identifying information, that it would wish to append to an affidavit in support of its motion, even for the limited purpose of demonstrating that evidence exists or to be precise about where the evidence is in the file. Instead, Respondent counsel makes a vague reference to the highly adversarial nature of the University proceeding and asserts complete confidentiality over evidence he contends is relevant to this motion. Because the evidence upon which the Respondent counsel would wish to rely has not been identified, Member Raymond cannot assess whether she would agree that the specific evidence upon which the Respondent wishes to rely is confidential. In the Tribunal's view, Respondent counsel's position, that he is unable to provide any further information, is inconsistent with the obligation upon the Respondent, as the moving party, to provide the Tribunal with sufficient information to enable it to advance the issues and rule on the motion.

[56] It is also difficult to understand why Respondent counsel believes that he was unable to provide any evidence at all. The motion alleges that there is a reasonable apprehension that Member Raymond is biased against the law firm, Stewart McKelvey. Relevant evidence for the motion would provide information about what Member Raymond said or did that is relevant to a reasonable apprehension of bias against the law firm. The evidence should not be about the clients in the other proceeding but be about the law firm or its lawyers. Therefore, the disclosure of information relevant to the alleged perception of bias against the law firm should not breach any confidentiality of the clients. If evidence relevant to an apprehension of bias would breach confidentiality, that has not been satisfactorily explained or established by the Respondent.

[57] For these reasons, it appears that Respondent counsel should have been able to provide some indication of what Member Raymond said or did that was relevant to an apprehension of bias against the law firm, by describing the general nature of what occurred, by identifying a date, a document or by otherwise identifying where Member Raymond should look in the other file. In the Tribunal's view, the Respondent could have found a way

to identify some or all of this type of evidence without breaching confidentiality and without harming the interests of any litigant in the other proceeding.

[58] The Tribunal returns to the point that the burden of proof in a recusal motions lies upon the moving party, not the Tribunal, when the facts upon which the recusal motion rests are within the knowledge of the moving party. However, the Respondent's motion of October 13, 2020 and its reply of November 16, 2020 did not contain any alternate suggestion respecting how the Respondent could explain the alleged statements or conduct of Member Raymond while preserving confidentiality. The Respondent did not explain why it could not provide a description in a de-identified manner.

[59] The Respondent advanced several other arguments in support of its contention that its motion should not be dismissed for lack of evidence because it was unable to present evidence from the University proceeding. These will be briefly addressed.

[60] Respondent counsel indicated that the fact that the University proceeding is confidential protects all the parties, including Member Raymond's client. The Respondent does not explain how this is so. If the point is that the identity of the clients and the existence of the dispute are confidential, that is incorrect. The existence of a public record about the existence of this other proceeding negates this position for all parties to the University proceeding. Further, if Member Raymond perceived any prejudice to her client in the University proceeding, she would not have accepted the assignment of this complaint.

[61] The Respondent briefly asserts that the information that it would adduce as evidence, if it were possible to do so, is subject to solicitor-client privilege. The basis for the assertion of this type of privilege is not explained. The Respondent's argument in this regard is not supported by any evidence or legal authority.

[62] The contents of the judicial review applications reference communications between two parties and a tribunal. Ms. Raymond's client is not affiliated with the University. Communications on the record in the University proceeding, therefore, include a party outside the University. It does not appear that there would be any solicitor-client privilege that would attach to the communications between the parties and the tribunal in these

circumstances. Accordingly, the Tribunal does not conclude that the Respondent is unable to provide evidence because the evidence in question is subject to solicitor-client privilege.

[63] For these reasons, the Tribunal is not persuaded that the Respondent is unable to provide any evidence in support of its motion because of the confidentiality of the University proceeding.

XIV. Whether Confidential Evidence Would Not be Protected by a Confidentiality Order

[64] In its letter of October 29, 2020, the Tribunal offered solutions to the Respondent to facilitate its ability to file an affidavit, after its initial motion was filed without one. For instance, the Tribunal suggested that Respondent counsel redact content from the documentary evidence or from the transcripts to be attached as exhibits to the affidavit. The Tribunal also offered the opportunity to the Respondent to request a customized confidentiality Order. The Respondent declined the Tribunal's suggestions.

[65] The Respondent asserted in response to these suggestions that the confidentiality of the University proceeding still risked being breached despite best efforts to redact. This assertion of risk was not explained or supported by evidence or legal authority.

[66] The Tribunal is well-equipped to protect the confidential nature of an inquiry pursuant to the *Act* by reason of section 52. In subsection 52(1), a member may "…take any measures and make any order that the member considers necessary to ensure the confidentiality of the inquiry…." where disclosure will cause undue hardship: see subsection 52(1)(c). "Take any measures" provides a broad range of powers. Similarly, subsection 52(2) gives the Tribunal a broad range of powers to ensure the confidentiality of a hearing held in respect of an application for a confidentiality Order.

[67] The Respondent made no attempt to avail itself of the protections in the *Act* to preserve confidentiality, asserting instead that these statutorily authorized confidentiality protections would not be effective. The Respondent bears the burden of demonstrating that these confidentiality protections would not be effective and did not provide evidence or submissions to meet that burden. Reference to an unexplained "risk of breach of confidentiality in spite of best efforts" does not discharge the Respondent's burden in this

regard. The Tribunal cannot conclude that it was reasonable for the Respondent to decline to request a confidentiality Order so that it could advance its motion with de-identified evidence or take advantage of other protections respecting confidentiality that can be ordered by the Tribunal. The Tribunal concludes that the Respondent was able to request a confidentiality Order to protect any confidential content in an affidavit in support of the recusal motion and, therefore, was able to file evidence in support of the motion without breaching confidentiality. Unfortunately, the Respondent declined to do so.

[68] The Respondent provided one other reason for not requesting a confidentiality Order, based on fairness to the Tribunal. The Respondent submits that it would be unfair for it to provide evidence through redacted documents authorized by a confidentiality Order because Member Raymond would not be able to provide any context in response to any specific allegations.

[69] This submission is inherently presumptive and speculative. The Respondent assumes that Member Raymond would need to respond to the affidavit. Member Raymond could have simply considered the evidence and decided whether to recuse herself. She would be in a position to issue a ruling based on the evidence provided by the Respondent.

[70] The Tribunal presumes that information provided on behalf of the Respondent by its counsel in an affidavit about a member of a tribunal would be accurate, and likewise, that Respondent counsel would not present statements out of context respecting a member of a tribunal in an affidavit. It is more likely than not that Member Raymond would have been able to issue a decision based on the Respondent’s evidence.

[71] Further, there would be no need for Member Raymond to respond to point out content in the record of this other proceeding so that counsel has notice of this information, as counsel is presumed in law and in fact to be in possession of all the facts about this other proceeding that are relevant to this motion. If necessary, Member Raymond could have referred to contextual content from the record of the other proceeding in a de-identified manner in her written decision.

[72] If, after considering the evidence presented by the Respondent, the Tribunal thought additional information was required, it would have addressed this issue in due course.

Instead, the Respondent pre-emptively determined that the issue would arise and could not be addressed. Again, it could have been possible for Member Raymond to provide information that was de-identified or to use other tools to ensure that no confidential information was being disclosed, such as through a confidentiality Order.

[73] In the view of the Tribunal, the assertion that Member Raymond would need to respond to the affidavit was not a sufficiently probable or compelling reason for the Respondent to pre-emptively decide that it was required to make a motion without providing any evidence. The lack of probable or sufficient reason for this position appears all the more likely given that the Respondent concluded that it should not request a confidentiality Order to provide confidentiality for this motion.

[74] Lastly, the information about the University proceeding in the judicial review applications is potentially available to provide background and context, if that were necessary and appropriate. The applications describe various procedural objections advanced by Member Raymond in the University proceeding. The Respondent did not address why this source of public information could not provide context. The Respondent also provided no example where context would be required to avoid unfairness to Member Raymond.

[75] If the Tribunal erred in its finding above that the Respondent was able to provide affidavit evidence to support its motion without breaching confidentiality in relation to the other proceeding, it finds that the Respondent could have filed an affidavit without breaching confidentiality by availing itself of a detailed confidentiality Order. However, the Respondent chose not to do so.

XV. Is Member Raymond Required to Make Disclosure?

[76] As explained above, in declining to request a confidentiality Order, the Respondent submitted that the Tribunal's proposal to grant such an Order risked unfairness to Member Raymond because she cannot become a witness to the Motion and adduce evidence to rebut HEA's evidence. The premise that Member Raymond would need to rebut the Respondent's evidence, rather than issue a decision, is addressed above. However, the

Respondent’s position raises a further issue respecting whether a tribunal member can be a witness. This, in the Tribunal’s view, is related to the question of whether, and in what circumstances, a tribunal member is required to make disclosure.

[77] The Tribunal agrees with the Respondent that Member Raymond cannot become a witness in the full meaning of that term because members of adjudicative tribunals cannot be cross-examined, for example. The information provided by tribunal members is presumed to be reliable. However, tribunal members in certain circumstances become a witness in the sense that an obligation to disclose information to the parties can be triggered. Where there is information known only to a tribunal member that is relevant to a recusal motion, it is necessary to disclose that information. This is to provide an opportunity for the parties to challenge the information and to ensure that the information is available on the record to be reviewed by a court.

[78] An example of this is the decision of *De Cotiis v. De Cotiis et al.,* 2004 BCSC 117 (CanLII) [*De Cotiis*] which the Respondent referenced in its submissions. In that case, a judge had worked as an associate for a law firm for 15 months prior to his appointment to the Bench. The judge was going to hear a case involving a party represented by a partner from that firm. Opposing counsel brought a recusal motion. Opposing counsel was not in a position to have many details about the judge’s prior association with the partner’s firm, apart from knowing the association existed. For example, opposing counsel would not know to what extent the judge had worked for the partner while he was an associate. The court noted: “While I might not put it as bluntly as Mr. Hordo in saying the judge ‘effectively becomes a witness’, the fact remains that the judge must disclose the facts surrounding the previous association.” Because a tribunal may need to disclose information, in the Tribunal’s view, the Respondent to some extent overstates the limits applicable to response by a tribunal. It is not the case that Member Raymond cannot provide information to the parties if that is required by the circumstances.

[79] The Tribunal had difficulty reconciling the Respondent’s submissions on the subject of whether there was an obligation upon this Tribunal to make disclosure of information. The Respondent argued that the Tribunal could not become a witness and rebut any evidence offered by the Respondent. However, the Respondent also referenced *De Cotiis* and

Quattro Farms Ltd. v. County of Forty Mile No. 8, 2019 ABQB 135 (CanLII) [*Quattro*] in its submissions, both of which are cases involving an adjudicator who had a prior association with a law firm, where the adjudicator was expected to disclose information not in the possession of the moving party seeking recusal.

[80] In *Quattro*, counsel for the plaintiff notified the Board that its Chair should not hear the matter because the Chair had consulted with other lawyers in counsel's law firm. Counsel explained to the Board that he could not disclose more information about the Chair's consultation with his firm without breaching solicitor-client privilege. The other lawyers involved in *Quattro* also explained these professional constraints to the Board. Nonetheless, the Chair refused to recuse himself and the Board described the recusal motion as "based on an undated consultation with one or two members of [counsel for Quattro's] law firm, and no further evidence, facts or arguments on that." The Respondent points out that the court in *Quattro* was critical of the Chair, as he "declined to waive [solicitor-client] privilege to allow the parties an opportunity to evaluate the panel's denial that there was a reasonable apprehension of bias…. and continued to characterize counsel's limited sharing of information respecting the consultation as a 'choice' made by counsel." The court noted that the Chair:

> …failed to recognize the limitations on counsel to produce more detail regarding the issue. He also failed to recognize that he was the only participant in the dialogue that had the necessary information to overcome any concern. Ultimately he provided no insight into the basis for his or the panel's determination that there was no reasonable apprehension of bias and gave the parties no information on which to test the sufficiency of that determination (at para 63).

[81] Respondent counsel also referenced the *Benedict* case, *supra*, for the proposition that a judge should make disclosure where it is only the judge who knows the particulars that could give rise to apparent bias.

[82] The Respondent did not explain how *Benedict* or the related cases above are applicable to the facts of this case. In relying on these cases, the Respondent appeared to suggest that it was going to argue that there was an obligation upon Member Raymond to disclose information in this motion. The Tribunal expected that the Respondent would identify the general nature of what that information was. This was not identified. As noted at

the outset, Respondent counsel did not identify any information that he did not have access to and that he would have needed to advance his client's motion.

[83] As indicated, Respondent counsel relied on the presumption that he has knowledge of the University proceeding, and so did the Tribunal. The Respondent took its counsel's advice to proceed with this recusal motion without it having disclosure of documentary evidence from the University proceeding. Accordingly, the Tribunal is proceeding on the basis that it is not required to make disclosure to the Respondent and its counsel of matters relevant to this motion within the knowledge of the two partners of Stewart McKelvey who are involved in the University proceeding, before issuing this decision. The Tribunal considers that Respondent counsel is deemed to know this information and the Respondent itself has proceeded with this motion without having disclosure of particulars from its counsel.

[84] At the same time that Respondent counsel is relying upon the presumption that he has possession of knowledge to justify advancing this motion, counsel appears to suggest, by reason of the Respondent's inclusion of *De Cotes*, *Quattro* and *Benedict* in its submissions, that there is information that is only known by Member Raymond that would give rise to an objective and reasonable apprehension that she is biased against Stewart McKelvey, and that she should disclose that information. Concurrently, as well, it is also the position of the Respondent that Member Raymond cannot make disclosure, first, because she cannot be a witness in this proceeding and second, because of the confidentiality of the University proceeding. It is because of these arguments that the Respondent seems to suggest that Member Raymond is in a catch-22 whereby she is unable to provide information to address the recusal motion and, therefore, should recuse herself.

[85] The Respondent's position respecting disclosure by the Tribunal implies that the Respondent is not in possession of information that could give rise to a reasonable apprehension of bias against Stewart McKelvey. This contradicts the Respondent's motion and its position that the apprehension of bias is apparent on the record of the University proceeding. Further, if it is the intent of the Respondent to imply that Member Raymond has additional information that is not available to its counsel from the record of the University

proceeding but which is required to be disclosed to the parties in the interests of fairness, Member Raymond cannot guess what that information would be.

[86] Member Raymond advised the parties that she was not aware of what statement or conduct of hers would give rise to a reasonable apprehension of bias against Stewart McKelvey.

[87] Member Raymond disclosed to the parties what she believed was potentially relevant to the issue of bias in her letter of August 10, 2020. Member Raymond did not identify the issue raised by the Respondent. Member Raymond did not perceive that she was or would be perceived as having a potential bias against Stewart McKelvey by reason of engaging in highly adversarial proceedings with two of its partners.

[88] The Tribunal agrees that it would be required to make disclosure to the parties of facts not within the knowledge of the parties or, in this case, disclosure to counsel for the Respondent. However, the Tribunal is not persuaded that *De Cotiis*, *Quattro* or *Benedict* apply to the facts of this case. Respondent counsel has presumed knowledge of all of the same information in the record of the other proceeding that is available to Member Raymond. Respondent counsel has access to his two partners and to the file. In other words, to Member Raymond's knowledge, Respondent counsel has all the information required to draft an affidavit in support of his allegation that Member Raymond appears biased against the law firm.

[89] Member Raymond can only repeat that she cannot identify what statement or conduct of hers would give rise to a concern that there is a reasonable apprehension that she is biased against Stewart McKelvey based on her interactions with two of its partners.

[90] In summary, in these circumstances the Tribunal cannot conclude that it is under an obligation to make further disclosure to the parties.

XVI. The Merits of the Motion

[91] The Respondent submits that the test for bias was determined in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII) , [*Wewaykum*] at paras 60, 67-68 and 77:

> . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

The Tribunal agrees that this is the applicable test.

[92] The Respondent also correctly submits that the reasonable apprehension of bias test is "highly fact specific". As noted in *Wewaykum*, *supra,* at para 77:

> In *Man O'War Station Ltd. v. Auckland City Council (Judgement No. 1)*, [2002} 3 NZLR 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker, present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully, in light of the entire context. There are no short cuts.

[93] The Tribunal also agrees with the Respondent that the kind of relationships that can give rise to a reasonable apprehension of bias "can include a relationship with a lawyer representing one of the parties…" as noted in Lawrence & Stikuts*, supra,* at p 340.

[94] Respondent counsel relies upon the assertion that the University proceeding is adversarial and ongoing. Most litigation is adversarial, and much litigation is highly adversarial. That is not enough on its own to conclude that an opposing counsel is biased against the law firm of the other counsel. The issue was described at para 24 of *Pacific Opera, supra,* as whether the acrimonious professional relationship bears some relevance to the proceeding before the adjudicator. In our case, the alleged acrimonious professional relationship with the two partners involved in the University proceeding has no relevance to the proceeding before this Tribunal.

[95] Member Raymond wishes to make it clear that she agrees with Respondent counsel that the University proceeding is highly adversarial. There have been a number of contentious procedural issues. Member Raymond agrees that she has been critical of the

positions taken by opposing counsel. The filing of three judicial reviews with the Supreme Court of Nova Scotia within a year is evidence of that. Member Raymond has complained on the record to the tribunal in the University proceeding respecting the positions taken by the two partners in Respondent counsel's firm. There have been complaints made by counsel for both parties before the tribunal in the University proceeding respecting the conduct and positions taken by opposing counsel.

[96] Member Raymond agrees that the two partners involved in that proceeding could have concerns about appearing before Member Raymond because they have either been complained about by Member Raymond or have complained about Member Raymond to another tribunal. That is the situation that occurred in *Piatek v. Goodhoofd,* 2016 Can LII 95204 (On SCSM) [*Piatek*], where one of the lawyers argued that a deputy judge of the Small Claims Court should not hear the matter. Legal counsel and the deputy judge were acting against each other in ongoing and highly adversarial litigation. "Highly adversarial" included significant motion activity. Notably, the counsel seeking recusal filed an affidavit. In that case the deputy judge recused himself on a discretionary basis, so as to err on the side of caution, in what he described as a highly fact specific case. In *Piatek*, the lawyer involved in the highly adversarial case would have been appearing before opposing counsel who was acting in an adjudicative role. That is not the case here.

[97] This is not to suggest that recusal should be automatic when two counsel engaged in litigation are then involved in an adjudicative setting. Members of a provincial bar sometimes are appointed to part-time adjudicative roles, which one tends to encounter in a smaller city such as Halifax, where there is a limited number of counsel practicing in a particular area of law. Member Raymond has had counsel appear before her when she was acting in an adjudicative role at the same time that she and the same counsel were engaged in litigation, without objection or request for recusal. However, Member Raymond would understand if the partners at Stewart McKelvey engaged in the University proceeding were uncomfortable appearing before her in this matter. Each case is highly fact specific. As mentioned in *Beard Winter LLP v. Shekhdar*, 2016 ONCA 493 (CanLII), at para 10, a judge (or adjudicator) is best advised to remove herself if there is an air of reality to a bias claim.

However, "…judges do the administration of justice a disservice by simply yielding to entirely unreasonable and unsubstantiated recusal demands…".

[98] Neither of the two partners of the law firm in the University proceeding is appearing before Member Raymond in this case. It is Respondent counsel who would be appearing before Member Raymond. There is no history of difficulty or adversarial conduct between Respondent counsel and Member Raymond.

[99] There is an implicit assumption in the Respondent's motion that adversarial exchanges in the context of litigation between the lawyers involved in the University proceeding extend to all lawyers of the law firm, including Respondent counsel. The Tribunal cannot agree that this is a correct assumption.

[100] Further, the motion does not expressly allege that there is a reasonable apprehension that Member Raymond is biased against Respondent counsel. The motion is vague in this respect. If this is intended, no explanation is provided respecting how there is a reasonable apprehension that Member Raymond is biased against Respondent counsel.

[101] Member Raymond has some knowledge of Respondent counsel, having attended law school in the 1980's within a year or two of his attendance. They have had only very occasional professional interactions since Member Raymond returned to Nova Scotia in 1990. Member Raymond recalls having a case where Respondent counsel was involved and vaguely recalls that their clients had similar interests. However, this would have taken place over ten years ago and perhaps during the 1990's. The only recent occasion Member Raymond recalls of interaction with Respondent counsel occurred in the winter of 2019 at a Bench and Bar Dinner organized by the Canadian Bar Association, at which time they briefly discussed Member Raymond's involvement in the publication of a report for the federal government respecting modernizing labour standards.

[102] The law firm, Stewart McKelvey, is the largest private law firm in Atlantic Canada. Many lawyers practice in that firm. Member Raymond has had other files with members of the Employment and Labour Group at Stewart McKelvey over the years. There is no evidence that Member Raymond harbours general dislike of the firm.

[103] Respondent counsel considers it a relevant fact that one of the opposing counsels in the other proceeding is the Regional Managing Partner of the firm. However, no explanation is provided respecting how this fact translates to Member Raymond having a bias against the law firm as a whole or to a reasonable apprehension of bias against the firm as a whole. The Respondent has provided no legal authority for the proposition that having a contentious relationship with a counsel who is a Regional Manager of a law firm gives rise to a reasonable apprehension of bias against the law firm and each of its partners.

[104] Respondent counsel chose to inform Member Raymond in filing this motion that he does legal work for the University involved in this other proceeding. The significance of this information is unclear. Counsel has not explained how or whether this information is linked to an apprehension of bias by Member Raymond against him. Lawyers represent many clients. It is not reasonable for counsel to expect other counsel to hold their representation of clients against them. There is no evidence that this is the case here.

[105] The Tribunal has carefully considered the legal authorities provided by the Respondent. No case has been presented to the Tribunal where a court has determined that there is a reasonable apprehension that a judge or adjudicator is biased against a law firm.

[106] The hypothetical informed person in the *Wewaykum*, *supra,* decision is presumed to have knowledge of professional expectations and the realities of practicing law where lawyers in private practice will represent different clients. A person informed about the professional expectations regarding interactions between members of the profession and the realities of the practice of law, viewing this case realistically and practically, would not, in my view, consider that the information offered by Respondent counsel, that he has or is doing other legal work for the University, would give rise to a reasonable and objective apprehension of bias by Member Raymond against him or an unrelated client. Likewise, that hypothetical informed person would not, in the Tribunal's view, find that there was a reasonable and objective apprehension of bias on the part of Member Raymond against the law firm, Stewart McKelvey, on these facts.

[107] Furthermore, unlike the *Benedict* case, Member Raymond has no interest in the outcome of this case. No matter if she finds discrimination or not against HEA, this would have no impact in the University proceedings.

[108] At the end of the day, Respondent counsel seeks recusal of Member Raymond based on facts that he is unwilling or unable to share with his client, the Tribunal, or any of the other parties to the proceeding before this Tribunal. In my view, this is not a suitable basis to rebut the presumption of impartiality. The law recognizes that tribunals such as the Canadian Human Rights Tribunal have jurisdiction to rule on their own impartiality (See *Warman v. Lemire*, 2008 CHRT 29 (CanLII), at para 3; see also s. 50(2) of the *Act*). Thus, it was incumbent upon Respondent counsel to advance his motion fully to this Tribunal and to make the case for his client.

[109] Further, it is difficult to understand how the Respondent can harbour a reasonable apprehension of bias when its own counsel has not disclosed to it the facts upon which this apprehension is grounded. The test is that of a reasonable person. The reasonable person must be "an informed person, viewing the matter realistically and practically"(*Committee for Justice, supra,* cited in *Yukon Francophone School Board,* 2015 SCC 25 (CanLII) , at para 20). The Respondent proceeded with this motion without being informed of the facts. As well, the realities of legal practice include that lawyers and adjudicators understand that there is a difference between a lawyer and the lawyer's clients and between lawyers and their firm in this context.

[110] In closing, it should be mentioned that, in assessing allegations of bias, it is appropriate to take into account the nature and functions of the Tribunal. In this case, members of the Tribunal are required to have experience and expertise in the field of human rights as required by subsection 48.1(2) of the *Act*, some are required to be currently members in good standing of a bar and part-time members usually are current members of a bar. Because of these statutory requirements and the history of appointments to the Tribunal, prior and current associations with parties and other counsel are bound to occur.

[111] The same is true in relation to the labour and employment bar and tribunals that determine matters of labour relations and labour standards. *Pacific Opera*, *supra*, is an

example of this. Employer counsel brought a recusal motion against a Vice-Chair of the British Columbia Labour Relations Board, Ms. O'Brien, alleging a reasonable apprehension of bias based on a lengthy and highly adversarial relationship between them. The Vice-Chair had been an officer with a union. The employer and that union had been engaged for a number of years in highly contentious disputes including grievances, arbitrations and work stoppages. The Labour Relations Board described the relationship between employer counsel and the former union official as follows at para 4:

> The relationship between Ms. O'Brien and Mr. Chafetz went beyond a normal adversarial relationship in which one would expect vigorous opposition in the hearing but cordial and civil relations otherwise. The relationship between Ms. O'Brien and Mr. Chafetz has been highly charged. It has been marked by an edge of animosity.

[112] The adversarial relationship between the two counsels was so charged that when the adjudicator was acting as a union representative against the employer's counsel, the latter required that he cross-examine Ms. O'Brien about her conduct. Further, the employer's counsel had her credibility challenged, and had a cost award made against her to his benefit, in relation to her conduct (see paras 26-27 of *Pacific Opera*). However, the Board found that this was insufficient to rebut the presumption of impartiality. None of this acrimony was found to be outside the norm of labour arbitration (see para 30). As noted at para 22, "If reasonable apprehension of bias in the labour relations context were to be based merely on the existence, or presumed existence, of acrimony between erstwhile combatants in the labour relations field, then the Board would be severely hamstrung in its operations." *Pacific Opera* involved a counsel who was required to appear before the Vice-Chair after having had a distinctly acrimonious relationship, unlike the circumstances here where a different counsel, albeit from the same firm, is appearing before the Tribunal.

[113] One of the key points in *Pacific Opera* is at para 24, where the issue is stated to be that "…one looks at whether the professional relationship bears some relevance to the proceeding before the adjudicator."

[114] In the Tribunal's view, while *Pacific Opera* is not binding upon this Tribunal, its logic respecting the relevance of the allegations to the proceeding before the adjudicator is appropriate in the context of an administrative justice system where part-time adjudicators

are usually chosen because they are practicing lawyers, and continue to acquire experience in the relevant field precisely because of their ongoing involvement in legal practice. This logic is similarly appropriate where regional representation on a tribunal is required, as is the case for the Canadian Human Rights Tribunal.

[115] In conclusion, the Tribunal finds that the Respondent's motion lacks particulars and that its allegation that there exists a reasonable apprehension of bias against the law firm, Stewart McKelvey, is not supported by substantiating evidence. The Tribunal cannot agree that an informed person, viewing the matter realistically and objectively, would reasonably conclude that Member Raymond is biased against Stewart McKelvey or Respondent counsel because of her involvement in another highly adversarial proceeding involving two partners of that law firm.

[116] I adopt the comment of Hillier, J. in *Al-Ghamdi v Alberta*, 2016 ABQB 424 (CanLII), at para 75, cited favourably, as well, in *Auer*, supra at para 103: "If there is no evidentiary basis for a reasonable apprehension of bias, recusal represents an abdication of responsibility."

XVII. The Order

[117] For these reasons, the Respondent's motion for the recusal of Member Raymond from this matter is dismissed.

Signed by

Kathryn A. Raymond, Q.C.
Tribunal Member

Ottawa, Ontario
December 23, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2495/5220

Style of Cause: Graham Farmer v. Halifax Employers Association

Ruling of the Tribunal Dated: December 23, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Brian G. Johnston, Q.C. for the Respondent