Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 13
Date: March 31, 2023
File Nos.: T1111/9205, T1112/9305 & T1113/9405

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Respondent

- and -

Sue Allardyce, Aubrey Brenton, Robert Churchill-Smith, Glen Coutts, Claudette Dupont, Pat Glover, Gary Goodwin, Valerie Graham (Estate of), Carol Ladouceur, Mayer Pawlow, Cindi Resnick, Sharon Smith and Don Woodward

Interested parties

Ruling

Member: Matthew D. Garfield

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I. Introduction

[1] Fifteen individuals (two Complainants and thirteen non-Complainants granted Interested Party status, collectively referred to as "the VRCM Group" or "the Group") who had filed a combined/consolidated motion for compensation in 2014 under the 2012 Memorandum of Agreement ("MOA") brought a motion on November 7, 2022 that I recuse myself as the presiding member (for reasons of alleged unfairness and apprehension of bias, and perceived conflict of interest) and grant them an adjournment of their upcoming Eligible Work hearing that month. Upon reading the parties' submissions including case law and upon much reflection, I dismissed the Group's motion for recusal and adjournment on November 24, 2022, with Reasons to follow. The following day the Group withdrew its Eligible Work motion and the upcoming hearing was adjourned and the file closed, pending the Tribunal's Reasons. These are those Reasons for Ruling.

II. Background To *Walden* Main Proceeding and MOA

[2] The Group is comprised of fifteen Vocational Rehabilitation Case Managers ("VRCMs") in the Canada Pension Plan Disability Benefits section of the renamed Employment and Social Development Canada ("ESDC"). (Two members of the Group, Karen Pick and Andrea Taylor, received *Walden* compensation as Complainants for their work as MAs, and hence already had standing before the Tribunal. Accordingly, they are included in "*Walden et al.*" in the style of cause/title of proceeding.) In 2014 the Group brought a motion before the Canadian Human Rights Tribunal ("Tribunal") for redetermination of compensation and other remedies by ESDC, specifically that their work as VRCMs met the definition of "Eligible Work" under the MOA, the 2012 settlement agreement.

[3] The MOA itself is the result of human rights complaints filed by Ruth Walden and 416 other Complainants between 2004 and 2007, challenging the classification of Medical Adjudicators ("MAs"), a group made up predominantly of female nurses involved in the assessment/adjudication of applications for *Canada Pension Plan* ("CPP") disability benefits, when compared to Medical Advisors, a group made up predominantly of male

doctors working alongside the MAs. The *Walden* Complainants alleged that, as a result of their classification, Medical Advisors received better compensation, benefits, training, professional recognition and opportunities for advancement than MAs despite the fact that both groups performed similar work in the assessment/adjudication of CPP disability claims. They successfully argued that this amounted to adverse differentiation on the ground of sex and violated both sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended ("*CHRA*"). This decision was upheld by the Federal Court on judicial review: *Canada (Attorney General) v. Walden*, 2010 FC 490. See also the Tribunal's Liability (2007 CHRT 56) and Remedy (2009 CHRT 16) Decisions, and judicial review of remedy (2010 FC 1135) and appeal (2011 FCA 202) Decisions.

[4] The MOA was concluded and signed on July 3, 2012. On July 31, 2012, the Tribunal issued a Consent Order implementing the terms of the MOA. The Tribunal retained jurisdiction to deal with any dispute or controversy surrounding the meaning or interpretation of the MOA upon the application of any party or individual who may have performed Eligible Work as defined in the MOA. The Tribunal initially retained this jurisdiction until June 30, 2014, but had since extended this date to March 31, 2015 to determine any outstanding motions (like the Eligible Work ones) filed by said date, and then on consent beyond that date with respect to the issue of gross–up payments only. By November 2019, the last remaining parts of the remedial implementation phase of the *Walden* proceeding were the VRCM Eligible Work motions of the Group and one other retired VRCM's motion, which had been adjourned subsequently for medical reasons.

[5] It is important to note that the Group's Eligible Work claim is not a new, stand-alone complaint of discrimination dealing with liability or remedy under the *CHRA*. Its motion is for compensation under a settlement agreement, the MOA, in the context of the remaining part of the implementation phase of the *Walden* proceeding.

III. VRCM Group's Motion for Redetermination of Eligible Work

[6] As noted earlier, the Group originally filed its motion on June 27, 2014. There were sixteen Case Management Conference Calls ("CMCC") held with the parties, dealing with

pre-hearing matters, including motions for disclosure, a motion to limit a party's witnesses' testimony, a motion about the scope of the hearing, etc. Tribunal Mediation was offered several times, but declined by the Respondent. The parties did have "without prejudice" and settlement communications over the course of this claim for compensation under the MOA. I made many rulings and orders/directions over the course of this matter, some reported (e.g., in the www.CanLII.org Internet database), and others orally or via Tribunal correspondence (e.g., CMCC summary letters), and of course all part of the Official Record.

[7] The Group went through different representational phases: at first represented by fellow Group members Gary Goodwin and Carol Ladouceur from 2014 to 2021 and 2022 respectively, with brief substitutions during that period by various counsel. On September 22, 2021 Mr. Goodwin resigned as lead representative and Ms. Ladouceur was removed by me as remaining representative for non-cooperation/lack of responsiveness on January 21, 2022. At that point each member of the Group was deemed self-represented. Upon writing the parties and convening a CMCC on March 11, 2022 fellow Group member Aubrey Brenton agreed to consider taking on the role of representative of the Group, with the assistance of Mr. Goodwin, Ms. Ladouceur and the other members. Mr. Brenton confirmed his willingness to represent the Group, and the Group's agreement that he do so, in April 2022. He remains as the sole representative of the Group.

[8] After lengthy pre-hearing case management including voluminous disclosure and production of the parties, hearing dates were set for Victoria, B.C. to commence in November 2017. Unfortunately, Mr. Goodwin had surgery scheduled during this time and understandably required post-surgery recovery time. On consent, I granted the adjournment with new hearing dates to be scheduled upon Mr. Goodwin being medically cleared. (The matter was not put into abeyance; case management would continue, as indicated in the Tribunal's reasons of November 10, 2017.)

[9] Fortunately, Mr. Goodwin was able to resume his duties as lead representative and the case was further case managed to a new set of hearing dates, with accommodations, scheduled to commence a year later in November of 2018. Unfortunately, again due to medical reasons, Mr. Goodwin sought an adjournment or abeyance until medically cleared. The Respondent opposed. I granted the adjournment. Neither co-representative Carol

Ladouceur nor another Group member was willing or able to take on the role as sole representative, which I understand. I note that I had advised the Group orally and in writing that it cannot expect perpetual, automatic adjournments. The Group should consider making alternate representational plans (e.g., represented by a lawyer, para-legal, other member(s) of the Group). I stressed the importance of achieving finality in this matter and the conclusion of the implementation phase of the *Walden* proceeding.

[10] I had also agreed to the Group's suggestion that I swap or switch the Eligible Work hearing queue by putting the Group's motion on hold and resume the hearing process for the only other remaining Eligible Work motion held in abeyance on consent. (Another former VRCM had withdrawn her Eligible Work motion on October 7, 2019.) The retired VRCM's motion resumed and was set for hearing. Unfortunately, for medical reasons, she was unable to continue, then was cleared with accommodations, and then medically uncleared again. Her matter remains to this day adjourned without a fixed resumption date pending her medical clearance.

[11] From October 17, 2018-January 21, 2022, the Group's motion was in abeyance. (Mr. Goodwin had written on July 9, 2020 that he remained unable "indefinitely due to the chronic nature of (my) conditions" to resume his duties and act as lead at a hearing. No current, updated medical documentation was provided and none was required by me.) But given the likelihood of the other retired VRCM's claim not proceeding to hearing soon, and upon the Respondent's request, I decided to hold a CMCC with the Group to discuss "next steps" including whether the abeyance should be lifted. It was at this point that the Group, or at least their co-representatives, became uncooperative. More than one attempt was made to get the available dates for Mr. Goodwin and Ms. Ladouceur, by correspondence and call/message from the Tribunal Registry Officer. No response from Ms. Ladouceur was received.

[12] Eventually, a memorable email was sent by Mr. Goodwin on September 22, 2021 resigning as lead representative, peppered with pejorative comments and a colourful baseball metaphor directed the Tribunal's way, as follows:

> It is true that I have delayed responding to the request for CMCC date availability well past deadline. Guilty as charged…I suppose I should not have

> been too surprised by this [the Tribunal wishing to hold a CMCC to discuss lifting the adjournment], however, as my perception over the seven years of our Motion at the CHRT is that when Ms. Marchildon says jump, the CHRT's response is often "how high".
>
> …
>
> Apologies for the oversimplified sports metaphor in advance, but it often felt like we were a beer league baseball team playing the New York Yankees of the 1950's and early 1960's, and the umpire was Mickey Mantle's cousin (although no one knew that). Although we occasionally got a hit, it was usually the result of an unforced error, and almost every close call at the plate went in the Yankees favour. We never stood a chance, really.

[13] In response to Mr. Goodwin's September 22, 2021 email, the Tribunal sent a letter to the parties on October 4, 2021 whereby I advised Mr. Goodwin and the Group that allegations of bias are a serious matter and the proper procedure is for the party to raise said issues at the earliest opportunity in the form of a recusal motion for the member to withdraw from the proceeding, supported by evidence and legal authorities. The Group did not do so until it filed its motion for recusal on November 7, 2022 (based on its November 1, 2022 "Appeal to the Chairperson" document) – thirteen months later.

[14] Having not received the available CMCC dates from the Group's representative(s), the Tribunal was left with no choice but to go ahead and schedule a CMCC with all the parties, who were technically at that point still represented by Ms. Ladouceur. That CMCC took place on January 21, 2022 attended by four members of the Group and the Respondent's counsel and client. Ms. Ladouceur, who did not attend the CMCC, was removed as the Group's representative. A subsequent CMCC was held on March 11, 2022 attended by four members of the Group and the Respondent's counsel and client. This was the first attendance by Mr. Brenton who indicated that he would advise if he would represent just himself or one or more members of the Group upon consulting with them. He advised on April 11, 2022 that he would take on the role as lead representative of the Group.

[15] The Tribunal allotted significant time and resources to assist Mr. Brenton in getting immersed in the file and to prepare for a hearing. We agreed to provide key documents of the file to Mr. Brenton and any other part of the file that he requested. I made it clear at the CMCC that the onus rests with Mr. Brenton to contact the Registry Officer, Judy Dubois,

regarding specific documents needed. The Registry Officer spent considerable time preparing and sending key and other documents and dealing with other requests from Mr. Brenton, providing them in the usual electronic format, but also in paper copy per Mr. Brenton's requests. (This was atypical: normally a new representative would receive the file from the party's previous representative.) I also directed that the file of the other retired VRCM's similar Eligible Work motion be made available to the Group, with that individual's consent. I thought this might be helpful, given the similar issues to the Group's motion, to see the list of witnesses, summaries of anticipated evidence ("will-says") and Table of Contents of proposed exhibits, including any requested copies of the actual documents.

[16] The Tribunal also set deadlines for the parties to provide any changes to previously filed witness lists and summaries of anticipated evidence from 2018, and provide any supplemental disclosure and production. We also discussed other issues during the renewed case management phase in 2022, including the proposed calling of retired *Walden* counsel Laurence Armstrong and the mode and location of hearing (i.e., in-person, by Zoom or hybrid).

[17] I had indicated that I believed that the parties might be able to come to an arrangement by way of agreed fact and/or joint submission that the Tribunal would not draw an adverse inference from the failure of parties to call Mr. Armstrong or Ms. Marchildon who negotiated the MOA to testify about the intent of the parties to the MOA. If there was no agreement and the Group still intended to call Mr. Armstrong, per my Ruling in 2018 CHRT 20, the Group would need to provide notice to *all* the *Walden* parties and Mr. Armstrong and allow them the opportunity to make submissions regarding the lifting of settlement privilege. I set tight timelines at the September 20, 2022 CMCC given the 3-week hearing was scheduled to commence November 28, 2022. The parties eventually negotiated an agreement and Mr. Armstrong was removed from the Group's witness list.

[18] The pre-hearing case management proceeded in preparation for the November 28, 2022 scheduled hearing. Updated witness lists/will-says and disclosure took place. The Respondent had agreed to take carriage of preparing a Joint Book of Documents (intended exhibits) with the assistance of Mr. Brenton. The Joint Book (of under 400 documents) was

never filed as the Group had removed itself from the pre-hearing process and brought a motion for recusal and adjournment on November 7, 2022 instead.

IV. VRCM Group's Instant Motion for Recusal and Adjournment

[19] On October 20, 2022 I denied the Group's request to change from a Zoom only hearing to a hybrid one (in-person, Zoom hearing). This precipitated the bringing of the motion for recusal and adjournment which the Group signalled twelve days later via its November 1, 2022 "Appeal to the Chairperson". This will be discussed in more detail later in these Reasons.

[20] The Tribunal scheduled a further CMCC to deal with final pre-hearing matters on October 24, 2022, but was cancelled at the last minute and rescheduled for November 3, 2022. However, on November 1, 2022 the Group wrote the Tribunal Chairperson with an "appeal" of my Zoom mode-of-hearing decision. The Group alleged that I was unfair and biased toward them and had a perceived conflict of interest. The Group wanted the Chairperson to override my decision, have me replaced as the presiding member and an adjournment granted. The Chairperson wrote back the following day indicating that she did not have such authority and that the proper procedure was for the Group to raise the issue before the presiding member. (The Tribunal had advised the Group, via its representatives, of the proper protocol/procedure for raising issues of unfairness/bias over a year earlier in the Tribunal's correspondence of October 4, 2021.)

[21] The Tribunal advised the parties that it wanted to hold a CMCC to prepare for the hearing, deal with some outstanding case management matters and address the Group's November 1, 2022 "Appeal to the Chairperson" and adjournment request. Also included on the Agenda was to set a time for a practice run-through session with everyone using Zoom, as had been agreed to earlier by the parties at the June 6, 2022 CMCC, and the matter of the settlement privileged "remedy chart" document that I had inadvertently seen.

[22] During the November 3, 2022 CMCC the Tribunal dealt only with the Group's "Appeal to the Chairperson" and adjournment request. The other Agenda items were deferred. The next CMCC would take place on November 7, 2022 during which "filing deadlines for the

recusal and adjournment motion will be determined, as well as setting a date for the next CMCC to discuss the remaining items in the agenda for the November 3, 2022 CMCC."

[23] At this point, no adjournment of the upcoming hearing had been granted and the preparation for the November 21, 2022 hearing was continuing in tandem with the motion for recusal and adjournment. Mr. Brenton agreed to attend the November 7, 2022 CMCC, but changed his mind, as I read his five emails (sent to the Tribunal since the close of business on Friday) sixteen minutes before the start of the Monday, November 7th CMCC. The Group's representative would not be participating. One of his emails asked the Tribunal to treat the Group's November 1, 2022 "Appeal to the Chairperson" document as the Group's Notice of Motion and primary submissions for its recusal and adjournment motion. The CMCC went ahead (with a written summary and audio recording provided to the Group).

[24] I set filing deadlines for a response and reply, ending November 16, 2022. (The Canadian Human Rights Commission was not participating in the Eligible Work hearing and did not file submissions in the recusal and adjournment motion.) The CMCC summary letter states that I said that I would make "best efforts" to render a ruling on the motion with reasons (or with written reasons to follow "in due course") by the Friday before the Monday, November 21st hearing was to commence. I also granted an extension for Ms. Marchildon to see if Mr. Brenton would finalize the parties' Joint Book of Documents (intended exhibits).

[25] What transpired thereafter was that there was a technical problem resulting in the Respondent's motion materials (submissions and authorities) having been sent, but not received by the Tribunal Registry (and I assumed the Group too) by the November 10th deadline. As a result, on November 15, 2022 the Tribunal extended the service/filing deadline for the Group's reply submissions to November 21, 2022. Accordingly, the hearing dates for the first scheduled week of November 21 to 25, 2022 were adjourned. The CMCC summary letter stated in underlined format: "<u>The parties are reminded that unless an adjournment is granted, the hearing will commence on November 28, 2022. The parties should continue to prepare their respective cases for the hearing accordingly.</u>"

[26] The Group took great umbrage with the above decision, correctly pointing out that I did not seek the parties' submissions. And the Group had filed its Reply by November 17,

2022. The Respondent had written on November 14, 2022 indicating that, "…ESDC is open to a short delay in starting the VRCM Group's Eligible Work hearing to give the Tribunal Member the time he needs to fully consider the Group's recusal motion." Mr. Brenton wrote further about the Group's opposition to this Order and the Tribunal replied on November 22, 2022. I note that at no time did the Group contact the Tribunal before my extending the Reply deadline and adjourning the first hearing week to advise that the Group had indeed received the Respondent's electronic materials by the original deadline.

[27] The partial adjournment allowed the Group an extra eleven days to prepare *solely* for the hearing with their work on the recusal motion completed. This is something which I thought would be welcomed given Mr. Brenton had complained about the difficulty and time-requirements in preparing the recusal motion and the hearing at the same time. Finally, the filing extension and partial adjournment gave me the necessary extra time to read and contemplate the submissions and case law in a very serious motion. This enabled me to render a ruling on November 24, 2022 (with reasons to follow) on the motion for recusal and adjournment. (As indicated earlier, the Group chose to withdraw their Eligible Work motion on November 25, 2022 and I then adjourned the hearing scheduled to commence November 28, 2022.)

V. Issues

[28] The Tribunal deals with the following issues:

1. Has the Group waived its right to file a motion for recusal;
2. If not, has the Group demonstrated a reasonable apprehension of bias or perceived conflict of interest on my part such that I am required to recuse myself;
3. Is the November 4, 2022 email in question from Mr. Brenton privileged; and
4. Should the hearing dates scheduled to begin November 28, 2022 be adjourned?

VI. Legal Principles

[29] I have reviewed the submissions and case law provided by the parties. In particular, I rely on and apply the legal principles as canvassed in the well reasoned ruling on a recusal motion for bias from Member Gaudreault in *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3.

A. Waiver

[30] "Waiver" is a longstanding common law concept whereby if a party does not raise an objection of bias at the *earliest* opportunity, it voluntarily waives the right to raise it at a subsequent time. The idea is to discourage a party from "holding in reserve" or collecting objections/allegations as to a decision-maker's bias during the proceeding. It can be considered an abusive tactic. When bias is not raised at the earliest opportunity or immediately as to when the party was aware or objectively ought to have been aware, the genuineness of the apprehension of bias is thus called into question: *Constantinescu*, *supra*, at paras. 10 and 33; and *Eckervogt v. British Columbia*, 2004 BCCA 398, at para. 48. The lack of diligent action by a party may be deemed as acquiescence by same party to the continuation of the proceeding.

B. Apprehension of Bias

[31] Bias allegations are very serious and go to the heart of the public's confidence in not just the decision-maker or court/tribunal in question, but the broader administration of justice. Such allegations can have serious reputational implications for the court or tribunal (and the decision-maker) and thus should not be used as a litigation strategy or treated lightly by the party: *Hennessey v. Canada*, 2016 FCA 180. Thus, said allegations demand the party prove substantive and substantial grounds and raise them at the earliest opportunity.

[32] Judges/adjudicators must perform their duties without bias or prejudice and must also be perceived to do so: *Wewaykum v. Canada*, 2003 SCC 45, at paras. 57-58. "The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind.": *Ibid.*, at para. 58.

[33] A member of the Tribunal is presumed to be acting impartially in the exercise of his/her quasi-judicial function until proved otherwise: *Assoc. des employeurs maritimes v. Syndicat des debardeurs, section locale 375*, 2020 FCA 29, at para. 5.

[34] In addition, as stated in *Constantinescu*, *supra*, at para. 75: "[W]hen it comes to recusal, given the strong presumption of impartiality in favour of decision-makers, including those of administrative tribunals, an error, even reviewable, is not sufficient to support a reasonable apprehension of bias. More is needed to meet this heavy burden of proof; the error should not be confused with bias [cases cited]."

[35] The Supreme Court of Canada set out the test for establishing that a decision-maker recuse himself/herself due to a reasonable apprehension of bias as: what would an informed person, viewing the matter realistically and practically conclude? The grounds must be substantial: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-95. And a high onus rests on the party asserting it: *Cojocaru v. B.C. Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 22; and *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2.

VII. Parties' Positions

[36] The VRCM Group alleges that "over these many years, a number of issues/requests, etc. have resulted in what we feel are the ongoing and unfair treatment by Member Garfield since 2014…" toward the Group. Near the top of page 1 of the November 1, 2022 deemed initial/primary submissions on the recusal motion, the Group enumerates that it wishes to "appeal" the Tribunal's recent decision that "…unfairly denied our request for a hybrid hearing (part in person, part zoom)." Mr. Brenton at the bottom of page 1 of the Group's submissions writes: "I will begin by discussing our request for a hybrid hearing and the negative impact of Member Garfield's decision to my ability to conduct our case." The Group claims this was "only the most recent of a number of unfair decisions by the Member against our group going back to 2014 when we filed our Initial Motion at the CHRT."

[37] As will be analyzed later, my decision to hold the hearing via Zoom was the catalyst or fuse that brought about this recusal motion for bias and adjournment. It is also the first of

the eight clusters of bias allegations outlined in their submissions. This was highlighted by the following Group submission: "Only after his [Mr. Brenton's] own experiences regarding Member Garfield's unfair treatment since becoming lead, especially the Member's denial of our request for a hybrid hearing making it impossible for him to conduct the hearing to the best of his ability, did he, with the support of the group, reluctantly file a recusal motion."

[38] The Group also wrote: "…this history of unfairness is an indication of Member Garfield's long held bias in favour of the Government of Canada and its lead counsel in our case, Lynn Marchildon, and against our unrepresented group." And further: "…we only know that a number of Member Garfield's rulings and unsupportive behaviour over the years indicate to us that there is a pattern of unfairness that has led to such a conclusion." The Group further avers: "Lastly, I will discuss what seems to be, at the very least, an appearance of a conflict of interest in reference to Member Garfield's involvement in our case, or potentially any CHRT case, where the Government of Canada is a Respondent."

[39] The Respondent opposes the motion for recusal and adjournment. It argues that the allegations do not meet the high onus of the legal test for recusal based on reasonable apprehension of bias. Rather, ESDC states the Group's motion "attacks Tribunal decisions made years ago, the proper recourse for which was an application for judicial review challenging the decisions, not an allegation of bias." It also argues that the Tribunal's October 20, 2022 decision to hold the hearing via Zoom was a reasonable one and highlighted the assistive measures I ordered for Mr. Brenton in St. John's, Nfld. to address "his concerns about the technical challenges of a remote hearing."

[40] The Respondent further wrote:

> At best, the Group's bias allegations reflect a misunderstanding of the Tribunal's role in adjudicating their motion. At worst, the Group's allegations of the Tribunal's unfair treatment, bias and conflict of interest comes perilously close to an abuse of process. Over the course of their eight-year motion, and as set out in the Group's 18-page motion for adjournment and recusal, the Group has accused ESDC and its counsel of extortion, threats, professional misconduct and off-line communication with the Tribunal all in effort to force ESDC to abandon the hearing and pay the Group members pursuant to the settlement.

[41] The Respondent also submits that no real or perceived conflict exists from my consultant work for CIRNA. This was a contract from 2011-18 to my company, ADR Synergy Inc., for services rendered as an Adjudicator of claims of abuse brought by former Indian Residential School students. Counsel writes: "[Part-time] Tribunal members are often employed in other companies and workplaces and continue to carry out their duties as administrative decision-makers simultaneously." ESDC also avers that the Group became aware of this contract "in the early years of its motion [2016]" yet decided not to raise it until November 1, 2022, six years later. This again calls "into question the genuineness of its claims of an apprehension of bias on the part of the Tribunal Member."

VIII. Evidentiary Issue: November 4, 2022 Email

[42] On November 7, 2022, Mr. Brenton sent an email to Ms. Marchildon (and copied to the Tribunal and Commission) asking that an email inadvertently sent earlier by him (meant for a member of his Group) but accidentally sent to the Tribunal and the other parties, be deleted. He was alerted to this error by Ms. Marchildon. Upon becoming aware of this, he quickly responded.

[43] The dispute lies in the fact that Ms. Marchildon wished for the Tribunal to read the matter as she argues it was "highly relevant" to the present motion and in a damaging way to the Group's motives, showing that "the Group's objectives extend further than just an adjournment and include forcing ESDC into mediation to settle their claim." Respondent counsel submits this shows bad faith on the part of the Group:

> This strategy is consistent with a pattern of conduct by Mr. Goodwin whereby, rather than accepting that the only way to conclude the Group's motion is through a Tribunal hearing, the Group continues to look for ways to circumvent that requirement. Until now, the Group has focused most of their unfairness allegations against ESDC and its counsel. Now they are turning their focus to the Tribunal itself, with the hope that the infinite delay caused by the appointment of a new Tribunal Member will once again force ESDC into settling their claim.

The Respondent submits that the email in question is not litigation privileged.

[44] The Group strongly opposed the Tribunal admitting this email into evidence on the motion, arguing that it is protected by solicitor-client privilege, specifically legal advice privilege, notwithstanding that Mr. Brenton is neither a lawyer nor a licensed paralegal: *Chancey v. Dharmadi* (2007), 86 O.R. (3d) 612 (S.C.J.). The Group even submitted that I not even read it and that Respondent counsel's written submissions identifying the nature of the email itself is improperly before me.

[45] I ordered the email sealed on November 7, 2022, and upon considering the submissions, when I dismissed the motion for recusal and adjournment on November 24, 2022, I also extended the sealing Order, making it permanent and ordered the Respondent and Commission to delete their copy. I also decided that it was not necessary for me to read the email's actual content, although it would have been open to me to do so: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 39. I relied on the submissions of the parties, including the description, characterization and nature of the email in dispute.

[46] Having reviewed the case law, I am satisfied that the email, while perhaps relevant, is nonetheless protected by the litigation privilege. Specifically, that the written communication between Mr. Brenton as the non-lawyer representative to one of the members of the Group falls within the class of privilege called litigation privilege. In addition, the leading case on litigation privilege makes it clear that Mr. Brenton not being a lawyer is irrelevant: *Blank v. Canada (Minister of Justice), 2006 SCC 39.* Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407.

[47] I find that the "litigation avoidance" focus of the email based on the Respondent's submissions may be considered as a type of litigation strategy. I also find that no exceptions to privilege are applicable here, nor does the inadvertent disclosure constitute a waiver or vitiate the protection of privilege.

IX. Analysis: The Eight Allegations

[48] The Group has enumerated a cluster of eight allegations. I will address and make findings regarding major allegations, but not address every argument and its minutiae. I adopt Member Gaudreault's approach in *Constantinescu*, *supra*, at para. 54: "For the sake of efficiency and brevity, and as several of the arguments submitted are not relevant and do not assist me in deciding this motion for recusal, I will only address the arguments of the parties that I consider necessary, essential and relevant to a decision": *Turner v. Canada (Attorney General)*, 2012 FCA 159, at para. 40. I note that the minutiae or details may be found in the many rulings (with reasons) and orders/directions, CMCC summary letters and correspondence from the Tribunal, and submissions from the parties over the course of this Eligible Work Motion. They all form part of the Tribunal Official Record.

[49] Further to the above, it is important to also note that a recusal motion for apprehension of bias is not the proper vehicle for a *de facto* challenge to the Tribunal's previous rulings and orders in the proceeding. "It is also not for me to restate the reasons for my decisions. If a party is not satisfied with a decision, it is always open to them to file an application for judicial review in the Federal Court": *Constantinescu*, *supra*, at para. 76.

[50] In addition, it is important to appreciate that even if there is a reviewable error, that is not enough necessarily to demonstrate bias. As is discussed in this Ruling, I find the principal arguments of the Group in this bias-recusal motion focus mainly on the outcomes of my numerous rulings, decisions, orders and directions over the course of their Eligible Work motion. I have considered the other grounds of complaint, including the alleged appearance of a conflict of interest.

[51] Please note that I will be making findings in each of the eight clusters of allegations involving the question of waiver and on the merits. Because of the seriousness of such recusal-for-bias motion, I deem it important to analyze and make alternative findings on the merits even in those instances where I have dismissed the allegation due to a primary finding of voluntary waiver. This was also the approach taken in *Constantinescu*, *supra*, at para. 30.

A. Allegation # 1: Hybrid Hearing Request

[52] After having discussed the various options for location and mode of hearing (in-person, Zoom or a hybrid of some participating in St. John's in-person and using Zoom, and the rest of the parties and witnesses via Zoom), the parties agreed to a Zoom-only hearing at the June 6, 2022 CMCC. However, prior to the September 20, 2022 CMCC, Mr. Brenton sent an email indicating that the Group now wished to change the mode of hearing to a hybrid (in-person/Zoom). During this CMCC we discussed this new request. Mr. Brenton stated, as reflected in the CMCC summary letter, that he felt a hybrid hearing was "the best way for him to present his case. He also indicated some technological concerns regarding his own computer and the use of the Zoom software program. He also made a request for additional equipment." I informed the parties that post-COVID (February 2020), "Tribunal hearings by Zoom have been the norm, rather than the exception." (Indeed, at the time of my denial of the Group's request to change from Zoom to a hybrid hearing on October 20, 2022, *all* post-COVID hearings to that date had been by Zoom only, without exception.) I note that a party, may *prefer*, but does not have the *right* to demand, one technological form of a hearing over another, even if it's on consent: *Cousins v. Silbourne*, 2022 ONSC 4000.

[53] The Respondent advised on October 11, 2022 that it consented to the Group's request. Thereafter I considered the oral and written reasons/rationale put forward by Mr. Brenton along with the factors listed in the September 2022 "Chairperson's message: In-person and virtual hearings" on the Tribunal's website and provided to the parties. On October 20, 2022 I provided my written decision with reasons. My decision letter stated that I was satisfied that a fair and accessible hearing could be held using Zoom and that the Group would not be prejudiced.

[54] This was to be a hearing with parties and witnesses spread over six time zones, from Victoria, BC to St. John's, NL. The mere fact of myself, the Tribunal Registry Officer, Respondent counsel and client representative, and Mr. Brenton (and one of his witnesses) being in the same room, while all other parties (14) and witnesses (13) participating remotely via Zoom vs. everyone participating remotely by Zoom, would not have made the hearing any more or less accessible or fair. Mr. Brenton's technological concerns/unfamiliarity with

Zoom were taken into consideration by me. But when those were balanced with the other considerations in my Decision, the outcome most favoured not changing from Zoom to a hybrid hearing.

[55] I also ordered accommodations to assist Mr. Brenton in addressing some of the issues that he raised (e.g., technological, home setup/environment not conducive, etc.), even though this was not a disability accommodation request under the *CHRA*. For example, I ordered: a suitable conference room in St. John's be provided for Mr. Brenton to attend with Wi-Fi/internet connection; and a laptop rented for him to use. (He also could have had a paper copy of the Joint Book of Documents (intended exhibits) for convenience, as I had requested for myself.) The Registry Officer would have been available to assist him (and any other parties or witnesses) before and during the hearing with any technological concerns.

[56] I do not intend to quote the entire decision here, which is of course part of the Official Record. However, I do wish to make the following points. First, I appreciate that Mr. Brenton is not a lawyer and this was his first time as a representative and party before the Tribunal. Representing parties at a hearing can be daunting and stressful. However, his reluctance to a Zoom hearing format seemed to be based, in large part, on an unfamiliarity with the Zoom program.

[57] In his September 28, 2022 email to the Tribunal, Mr. Brenton reiterated: "I outlined on the call, my key rationale for such a request. The fairness and accessibility of the form of hearing and the availability of technology and tools is one of the reasons why I put this request forward." The Group also submits in this recusal motion that the Tribunal's refusal to change to a hybrid hearing was so serious and "so damaged our ability to conduct a fair hearing that we had no choice but to file a Recusal Motion…" I disagree with that last sentence.

[58] Early on, at the June 6, 2022 CMCC, the parties had agreed to participate in a Zoom practice session together with the Tribunal. This would have addressed any concerns and answered questions through a real-time demonstration session, including using electronic documents. I take "judicial notice" that the Zoom program/app is very user-friendly and has

been used by millions of people worldwide, including by Canadian courts and tribunals. The Registry Officer, Ms. Dubois, would have acted as the Zoom "host" during the hearing, handling the technical aspects. All that Mr. Brenton and other participants would have had to do was to have access to a computer with an internet connection and sign-in to the Zoom conference. Unfortunately, by the time we were going to schedule the Zoom practice session, the Group was no longer participating in the pre-hearing process, instead focussing solely on its motion for recusal and adjournment.

[59] The Respondent submits that my October 20, 2022 decision (including assistive measures ordered) was a reasonable one and certainly did not demonstrate a reasonable apprehension of bias on my part. Based on my review of the October 20, 2022 decision and the submissions and case law filed on this instant motion, I find that the Tribunal's denial of the Group's request to change to a hybrid hearing format does not constitute a reasonable apprehension of bias. The Tribunal's October 20, 2022 decision was a reasonable one, balancing the various factors, with no indicia of an appearance of bias.

[60] At its highest, an allegation that the Tribunal erred in a decision might justify a judicial review, but it is not, in itself, proof of bias, real or perceived. Declining to have the Tribunal incur significant costs (such as travel) to accommodate a party's request to change the mode of hearing two months before the start of a motion-hearing for example, is not evidence of bias. This is especially true when the party requesting the change had declined to even engage with the supports the Tribunal had offered to support their participation in the Zoom hearing that both parties had earlier agreed to.

B. Allegation #2: Proposed Testimony of Mr. Armstrong

[61] The Group's bias allegation here centres on the process for calling Laurence Armstrong, counsel to most of the *Walden* Complainants, to testify about the intent of the parties, leading up to and including the settlement discussions that resulted in the finalization of the MOA. He and Ms. Marchildon negotiated the MOA. The Group argues that the process for calling Mr. Armstrong demonstrated a reasonable apprehension of bias on the Tribunal's part.

[62] The Respondent counters that the Group should be barred by waiver from bringing this allegation in its recusal motion in 2022, "[g]iven the Group raised these issues as early as 2016 and the Tribunal ruled on them in 2018..."

[63] Disclosure issues and the intention to call Mr. Armstrong were indeed raised in 2016 by the Group. As reflected too in its submissions in the present recusal motion, the Group was concerned and clearly disagreed with my interpretation and application of the "Eligible Work" definition in the MOA in *Walden et al. v. Attorney General*, 2015 CHRT 15 ("*McIlroy*" Eligible Work Decision). The topic of calling Mr. Armstrong was mentioned in the Tribunal's Ruling on the scope of the hearing and related issues, cited as 2016 CHRT 19, at para. 29.

[64] I indicated in 2016 and thereafter that I questioned the need for calling Mr. Armstrong (or for that matter, Ms. Marchildon as the other negotiator of the MOA). I invited the parties to attempt to arrive at a solution such as an agreed fact, or joint submission that no adverse inference would be drawn, etc. The parties eventually came to an agreement in 2022 and Mr. Armstrong was taken off the witness list by the Group.

[65] In 2018 the Group still wished to have Mr. Armstrong testify. The Commission (then participating in CMCCs) and Respondent both took the position that Mr. Armstrong's testimony would include settlement privileged communication requiring that *all Walden* parties (not just those represented by Mr. Armstrong) be given notice and an opportunity to make submissions on the motion, including whether they waive privilege and the settlement privilege should be lifted. (The Commission and Respondent indicated that they were not waiving privilege.)

[66] In my Ruling, 2018 CHRT 20, at paras. 35-36, I required the Group to serve all parties and Mr. Armstrong with their Notice of Motion requesting that I lift the settlement privilege and allow Mr. Armstrong to testify on such matters at their Eligible Work hearing. My Ruling, including the Order, is quite clear. At para. 37, the Tribunal wrote: "If the Goodwin Group wishes to proceed, the Tribunal will issue a Direction regarding the "next steps" to be followed and addressing the logistical considerations involving such a large group."

[67] The Group failed to meet the July 13, 2018 deadline in the Order to advise the Tribunal if it still sought the issuance of a Summons to Appear to compel the testimony of

Mr. Armstrong and pursue its motion for production of one of the letters in dispute. The Tribunal wrote the parties on July 20, 2018 in part:

> It is trite to say that any requests to vary an order by way of extension or otherwise should be made *before* any deadline.
>
> …
>
> My Order did not stipulate any conditions (i.e., that the Respondent advise whether it wishes to participate in a Tribunal mediation before the Goodwin Group indicates if it wishes to pursue its production and summons motion).
>
> …
>
> As a result, I would like to convene a CMCC next week if possible to deal with the issues raised in para. 37 of my June 29th Ruling (i.e., admission, agreed fact and/or joint submission, and the "next steps" protocol should the production and summons motion proceed).

[68] The Group confirmed in writing on July 25, 2018 that it still intended to call Mr. Armstrong as a witness. The Tribunal's letter to the parties the following day notes this passage from the Group's letter: "…the Goodwin Group will not agree to attend a CMCC until the Respondent has provided a response to the CHRT's offer of Mediation Services…" Ms. Marchildon advised on September 4, 2018 that, "ESDC has instructed that it does not wish to make use of the Tribunal's mediation services. I have advised Mr. Goodwin and Ms. Ladouceur of this fact and the reason for it in a separate email to them."

[69] While the Group indicated on July 25, 2018 that it still wished to call Mr. Armstrong, they continued thereafter to refuse to provide their availability dates for a CMCC. As a result, no CMCC was scheduled, and no "next steps" Direction was issued as the Eligible Work hearing scheduled to commence November 5, 2018 was adjourned *sine die* (with no fixed resumption date) for medical reasons on October 17, 2018 (full reasons issued February 18, 2019).

[70] It is clear from the above that while the Group may not have known of the exact composition of the "next steps" in the process for compelling Mr. Armstrong's testimony from Ruling 2018 CHRT 20, it was aware or reasonably ought to have been that it would involve serving all 417 *Walden* Complainants, the Commission, the Respondent, and

Mr. Armstrong. And there was no indication that anyone other than the Group would be responsible for expending the time and cost of doing so.

[71] However, in fairness to the Group, and consistent with its submissions herein, its major contention centres around the *process* for calling Mr. Armstrong and the exact, detailed requirements, including setting out the steps and deadlines, and the resources it would have to expend (time and cost). And the "next steps" protocol was not set out in detail until the September 20, 2022 CMCC. Most of the time spent on the Agenda items focussed on item #2 "Proposed testimony of Mr. Armstrong; will-say" and #3 "Logistical issues/next steps/timelines in notice of motion." I made it clear again that the Group would be responsible for the time and cost for providing notice and the carriage of the motion. I also indicated that it was not the appropriate role of the Tribunal to serve a party's notice of motion and other related documents. I also encouraged the parties to speak and see if they could come up with an alternative not requiring Mr. Armstrong's testimony, to which the parties eventually came to an agreement. Additionally, I went over the requirements of the Ruling, 2018 CHRT 20.

[72] The timelines set were tight given the upcoming hearing was scheduled to begin two months later, on November 21, 2022 (later adjourned to November 28, 2020). While tight, they were doable in my opinion, the first deadline being September 30, 2022 and the last one November 7, 2022, with the Tribunal's Ruling on whether the settlement privilege would be lifted, to be rendered before the hearing commenced. (On October 7, 2022 the Tribunal granted the Group's two extension requests. The new Reply submissions deadline would be November 14, 2022.) While the Group stated that it was unfair, it never accused the Tribunal of bias or an apprehension of bias over this, until the "Appeal to the Chairperson" document was sent on November 1, 2022.

[73] Based on the foregoing, I find that waiver is not applicable here. On a generous, liberal interpretation, I find that the Group did not know the exact, specific logistical requirements, particularly the timelines, until the September 20, 2022 CMCC, although the Group was aware early on who it would need to serve. The Group took just over a month to raise the bias spectre in this matter on November 1, 2022, then in its official November 6, 2022 email bringing its recusal motion before me. Of note, the Group did not bring its recusal

motion until *after* the Tribunal's October 20, 2022 hybrid hearing denial decision, the catalyst/trigger for the recusal motion.

[74] Turning to the issue of the process for receiving Mr. Armstrong's testimony and whether it demonstrates an apprehension of bias on the merits, I find that it does not. The Ruling was a reasonable one and the "next steps" protocol too. The issue of Mr. Armstrong's testimony had been raised in 2016, adjudicated in 2018 and resumed in 2022. The timelines imposed for calling Mr. Armstrong were appropriate in the circumstances given that the Group confirmed in September 2022 that it still wished to call Mr. Armstrong at the scheduled November 2022 hearing. That the dates were compressed and complying with them involved significant work for Mr. Brenton is only a reflection of the September-November time window, rather than any unfairness or bias on the part of the Tribunal. Indeed, the Tribunal attempted to facilitate this process by providing contact information and suggested wording to the Group. That the Tribunal did not assume the Group's responsibility to serve appropriate notice cannot form the basis for a successful bias motion. I find that the Group has failed to meet the high threshold test of establishing an apprehension of bias in this allegation.

C. Allegation #3: The VRCM Settlement Privileged document/Lack of Response to Allegations Against the Respondent

[75] The Group combines two historically related allegations here.

[76] In my November 22, 2016 Ruling, 2016 CHRT 19, I had ordered the Group to file: "A Chart of specific remedies sought (compensation and reclassification/conversion) and dollar amount (if available) and time-period claimed, for each of the sixteen members of the Goodwin Group, including which of the three categories of Eligible Work s/he is claiming under the MOA." The Group's counsel at the time, Jean-Rodrigue Yoboua, filed a remedy chart on February 6, 2017. Mr. Goodwin subsequently filed a revised, more detailed one per my request, being the September 2017 Remedy Chart ("September Chart"), in spreadsheet format on September 8, 2017. The September Chart was helpful.

[77] The allegation is that I improperly viewed a similar document, the October 2017 "without prejudice" Settlement document remedy chart ("October Chart"), a spreadsheet setting out the amount for each type of compensation claimed for each of the members of the Group for settlement discussion purposes. The October Chart along with other privileged communications between the parties (part of earlier settlement discussions/negotiations between the Group and Respondent) were intentionally sent to the Tribunal by the Group in May 2018, outlining the Group's claims that the Respondent and its lead counsel had engaged in "sharp practice", "unethical conduct", "bad faith" settlement negotiations over the Group's Eligible Work claim, and an alleged "extortion attempt by ESDC" as against one of the members by threatening to withhold *Walden* settlement monies. The Group provided documents (settlement proposals and emails with the Respondent, including the allegedly threatening email to Ms. Ladouceur, and the Group's correspondence with the Ministers of Justice and ESDC and the Law Society of Ontario). The Group requested my intervention "to protect" its members from the Respondent's and its counsel's actions and to investigate their actions.

[78] Respondent counsel opposed my viewing these privileged documents. After reviewing both of the parties' submissions, I decided to not view said documents, including the October Chart and conveyed this to the parties by Registry letter dated June 29, 2018. My reasons were that the Tribunal does not supervise, nor is a party to, settlement discussions between parties and that my remaining jurisdiction was further limited under the Consent Order to the interpretation and implementation of the MOA, and after the March 31, 2015 deadline, to the remaining matters and motions. If this were a separate complaint of retaliation, for example, under the *CHRA*, then the aggrieved party would need to file a new complaint with the Commission. (A claim of seven incidents of alleged retaliation (predating the May 2018 ones) by ESDC against the Group for its bringing the Eligible Work motion before the Tribunal was first raised by Mr. Goodwin in a February 2016 CMCC. I advised the parties that the Group would need to file a notice of motion, including addressing the jurisdictional issue. Mr. Goodwin advised on April 26, 2016 that the Group would file a retaliation complaint with the Commission instead.) I did offer the parties the mediation services of a Tribunal member to assist the parties in arriving at a settlement and could

address the above issues/conduct too. The Group, including Ms. Ladouceur, pursued other avenues/remedies (e.g., to the two Ministers of the Crown and the Law Society of Ontario).

[79] At this point I had not looked at any of the above documents, including the October Chart. Go forward to the March 11, 2022 CMCC. (At the previous January 21, 2022 CMCC the abeyance was lifted.) To assist the to-be-confirmed new representative, Mr. Brenton, "getting up to speed" on this voluminous file, the Tribunal offered to make available the entire file as well as the file of the other retired VRCM's similar Eligible Work motion. The onus, of course, was on Mr. Brenton to go over the contents of the file with the Group and contact the Registry Officer with specific documents requested. (Normally, the former representative is expected to transfer the file to the party's new representative.) To also assist, the Tribunal undertook to put together a "Key Documents" PDF for the parties. This was not to be exhaustive, but assistive to the parties. The Registry Officer spent considerable time creating this PDF document, with consultation with me as to its contents.

[80] Unfortunately, the Registry Officer had in good faith included the October Chart by mistake in the Key Documents PDF, instead of the September Chart, and I did not notice the error when I viewed section/box 9 (Ms. Ladouceur's claim) of that document in June 2022 in preparation for the June 6, 2022 CMCC dealing with the Agenda issue of the Group to confirm or revise if needed, its remedies. (I had assumed that I was looking at the "with prejudice" September Chart.) That said, I had only looked at section/box 9 in the October Chart because I planned to (and indeed did on the CMCC) direct Mr. Brenton to contact Ms. Ladouceur regarding her separate, original Eligible Work motion and whether she wished to transfer any claims from it to her claim as part of the Group.

[81] The Tribunal and the parties did not notice the inadvertent error. It was not until the Group wrote to the Tribunal on September 27, 2022 inquiring if I had indeed viewed the October Chart and was concerned about the effect, if any, that the Tribunal first learned of the error. (The error was subsequently corrected when the October Chart was removed and replaced with the September Chart in the "Key Documents" PDF by the Registry Officer on my instructions.) The Group's request/concern was a fair one. To this day, it remained unanswered. This Ruling is my first response to the inquiry. In retrospect, I should have responded much earlier. My thought-process on September 27, 2022 was that I would put

it on the Agenda for the very next CMCC, on October 24, 2022. Indeed, it was placed as item #6 ("Remedy chart; settlement privilege issue"). That CMCC was rescheduled to November 3, 2022. Unfortunately, at that CMCC Mr. Brenton sought an adjournment of the call. He agreed to discuss the Group's recent "Appeal to the Chairperson" and pending motion for recusal and adjournment of the hearing. I set filing deadlines for the motion and then granted his request to adjourn the remainder of the Agenda items (including #6 above) to a subsequent CMCC on November 7, 2022. All parties agreed to attend. However, on Sunday night before the CMCC was to resume the next morning, Mr. Brenton had sent an email to the Tribunal indicating that he would not be participating in the CMCC. So, alas I never got to explain what had occurred regarding the October Chart until now.

[82] Had that discussion about my seeing the October Chart (specifically, section/box 9 only) taken place at the CMCC, I would have indicated that there was no prejudice suffered by the parties. Tribunal Members, including myself in the Group's Eligible Work motion, are entitled to view privileged material, for example, to determine if privilege exists. I did so without objection, for example, in the disclosure motion Ruling 2018 CHRT 20. I note the October Chart is the same one (as part of a package of without prejudice/privileged documents) that the Group had filed with the Tribunal in May 2018 for me to read, to the objection of the Respondent.

[83] Regarding these two components of Allegation #3, I find that waiver is not applicable with regards to my inadvertently reading section/box 9 of the October Chart, as the Group did not have the full picture and was not aware of the Tribunal's explanation until now. On the merits, I find that this inadvertence on my part does not demonstrate a reasonable apprehension of bias.

[84] With regards to the factually related allegation of the Tribunal's lack of response to the request to investigate the settlement conduct of the Respondent and its counsel, I find that the voluntary waiver is applicable. The Group was aware of my response in writing with reasons on June 29, 2018. If the Group thought then that my response was so lacking that it constituted real or perceived bias, the Group was obligated by the longstanding common law principles to bring a motion for recusal based on bias as soon as reasonably possible or at the earliest opportunity, but certainly a lot sooner than November 2022, over four years

later. At the very latest, the Group should have raised the bias allegation very soon after it was put on notice of the proper procedure for raising such matters in the Tribunal's October 4, 2021 letter responding to Mr. Goodwin's "resignation" letter.

[85] In the alternative, I find that, on the merits, the Group's assertion on how I handled its complaint against the Respondent and its counsel does not establish a reasonable apprehension of bias. The reasons that I gave at the time summarized above and found in Tribunal correspondence dated June 29, 2018 were reasonable and free of any bias toward the Group. There is nothing to suggest any bias other than the Group's disagreement with the Tribunal's decision.

D. Allegation #4: Management of Recent Respondent Deadlines for witness list/will-says

[86] This Allegation by the Group centres around my cancelling the October 24, 2022 "at the last minute" causing "great inconvenience" to the members of the Group who planned to attend the CMCC. They contrast my response to an event in July 2018. The October 24, 2022 CMCC was to deal with pre-hearing, case management matters leading up to the November 21, 2022 hearing. Two of the items were the parties' witness lists and will-says and any changes. The Tribunal had the Group's final list and will-says; however, the Respondent missed its deadline. I checked my Tribunal email account on Sunday night and Monday morning (October 24th). Not wanting to bifurcate the CMCC, I decided to adjourn the CMCC Sunday night and reschedule once the Respondent had provided its outstanding documents, if by Monday morning the documents still had not arrived.

[87] I appreciate the inconvenience it caused. However, I wanted the Group and me to have those documents and deal with them and the other Agenda items, on one CMCC, especially given the closeness in time to the upcoming hearing. I acknowledge that I did not seek the position of the parties. It was on short notice (a few hours). Ms. Marchildon wrote in apologizing for missing the deadline and providing an explanation on October 24, 2022. The Tribunal rescheduled the CMCC, but a week later the Group had sent its "Appeal to the Chairperson" and then the Group's focus changed to having me recuse myself and adjourn

the November 21, 2022 hearing. I believe that this was the only time in the history of this matter where a CMCC had been cancelled on such short notice.

[88] In its recusal motion submissions, the Group goes so far as to state: "In reviewing the sequence of events and e-mails, it seems possible to us that there was off-line communication between the member and the Respondent." The Tribunal wrote back indicating that there was no *ex parte* "off-line communication between the Respondent and me." And the Group writes further: "…it is difficult for us not to conclude that this cancellation had more to do with sparing the Respondent embarrassment regarding her lack of communication around the witness information delays." That was an odd (and incorrect) conclusion for the Group to draw.

[89] I note that the only *ex parte* communication has been on the part of the Group over the course of the proceeding. This has resulted in the Registry Officer having to forward Group correspondence to the other parties on several occasions. The Respondent on more than one occasion has asked me to remind the Group to forward communications with the Tribunal to the other parties, and I have reiterated this, save for minor administrative questions to the Tribunal. (See for example, page 2 of the CMCC summary letter dated March 24, 2016.)

[90] The Tribunal wrote the parties on October 26, 2022 in part: "The Tribunal notes that her [Ms. Marchildon's] extension request came *after* having missed the October 21, 2022 deadline." [original italics]. The Group contrasts this to when "…the Member chose to admonish Mr. Goodwin in his letter to all the parties." This was referencing the Tribunal's July 20, 2018 letter addressing the Group's non-compliance with Order #3 of the Ruling, 2018 CHRT 20. The letter read in part: "The Goodwin [VRCM] Group has failed to comply with the July 13, 2018 deadline set in the Ruling and Order of June 29, 2018. It is trite to say that any requests to vary an order by way of extension or otherwise should be made before any deadline." The Tribunal's 2018 response did not include any italicizing or emphasis as it did in the 2022 letter to the parties regarding the Respondent's missed deadline. I do not agree with the Group's submission that: "It's clear by Member Garfield's actions in the above 2 examples that there are strict, inflexible rules for [sic] that demand immediate public response to the Complainant even though there is no impact to the parties

at all, and different, more flexible rules for the Respondent requiring little or no public response despite a negative impact to the parties."

[91] The Tribunal accepted the Respondent's "late request" for an extension to file her witness information. The Group now submits, "By accepting a 'late' request for extension, Member Garfield shows favouritism towards one party versus another and without even asking us for our position." There was no favouritism shown here. I note that over the course of the proceeding that I granted more extension/deadline requests to the Group than to the Respondent. But that does not suggest anything negative, as one judges each request, motion, objection, etc. on its individual merits. If a party makes ten valid requests/motions, then it should have all ten granted. It's not a numbers' game. A judge/adjudicator evaluates each one on its merits, on a case-by-case basis.

[92] I find that waiver is not applicable here as the main event (October 24, 2022 CMCC cancellation) occurred in late October 2022, so the Group's raising it in its November 1st "Appeal to the Chairperson"/primary submissions for the recusal motion document was reasonable in time. On the merits, I find based on the above, that Allegation #4 does not reach the high level of apprehension of bias.

E. Allegation #5: Disclosure Requests

[93] The Group alleges that I denied the "great majority" of their disclosure requests/motions over the period of 2014-18, showing a pattern of bias against them. One of the highlighted examples was the "CHRT Walden Decision, Overview of Medical Adjudicators CHRT Decisions and Guidelines for Processing Settlement" dated May 2013 ("Guidelines"). The Group had received the Guidelines, redacted and with no Annexes, through an Access to Information and Privacy ("ATIP") request, and not from the Respondent during the disclosure/production phase of the proceeding. The Group moved for the complete, unredacted document. I allowed their request in part: see Ruling, 2018 CHRT 20. (The issue of the Guidelines, including why it had not been disclosed by the Respondent, was discussed at a 2017 CMCC as outlined in the CMCC summary letter dated October 20, 2017.)

[94] The Group claims this is an illustration of my bias during the disclosure aspect of the proceeding. The Respondent had opposed this request. At para. 12 of Ruling 2018 CHRT 20, the Tribunal wrote:

> The Respondent argues lack-of-arguable-relevance for some redactions or non-production of a document in its entirety, and privilege for others. Indeed, Ms. Marchildon questions whether the Guidelines are even arguably relevant, but that it is a moot point in terms of what has been provided to the Respondent already via the ATIP response. The Commission takes the position that certain documents and parts thereof are privileged and that privilege should be "jealously guarded" by the Tribunal. The Goodwin Group argues that the Guidelines with Annexes are arguably relevant and that any claim of privilege has been waived by ESDC when the ATIP request was met.

[95] In said Ruling I found that the Guidelines were arguably relevant ("or at least parts thereof") and having determined the issue of privilege, ordered the Respondent to provide the Group the following forthwith: the two emails unredacted to the extent stipulated in this Ruling; and Annex B in its unredacted form. I also ordered one of the letters in question be unsealed and a copy of it and the cover letter provided by the Tribunal Registry to the Group.

[96] I have reviewed the CMCC summary letters and other Tribunal correspondence, and rulings with reasons provided, regarding the many disclosure requests made by the Group during 2014-18. It is true that the majority of their requests/motions for disclosure were denied. Each one was determined on its own merits and reasons (oral or written) were provided in all cases. The Group goes even further: "It is our contention that this Motion could have been resolved years ago had more of our disclosure requests been supported by the Member." This is of course highly speculative, but misses the point. The Group was successful and not successful in its disclosure (and other) requests based on the merit of each request.

[97] On the issue of waiver here, I find that it is applicable. In its reply submissions, the Group writes: "As noted above [regarding disclosure requests denied from 2014-18], soon after raising these concerns with the Tribunal, PSAC assigned us counsel, and counsel did not want to pursue these concerns, preferring to focus on moving to hearing." The Group does not indicate the date(s) they discussed these issues/concerns of bias with their

counsel, but the Tribunal record indicates Mr. Yoboua represented the Group from September 2016 to May 2017.

[98] Also, in the above quote the Group states, "soon after raising these concerns with the Tribunal…" I do not know what they mean. My review of the record and my notes do not indicate the Group raised any issues of the Tribunal's alleged bias before me prior to Mr. Goodwin's "resignation" email of September 22, 2021. A computer search of the words "bias" and "conflict of interest" reveals that they first appeared as against the Respondent's client representative and witness as raised by Mr. Goodwin at a 2016 CMCC as reflected in the CMCC summary letter dated March 24, 2016. The first search-result of "bias" as against the Tribunal is found in the Tribunal's October 4, 2021 letter responding to Mr. Goodwin's *de facto* bias-raising "resignation" email of September 22, 2021. A computer file search of the words "bias" and "conflict of interest" reveals the words were first explicitly used by the Group as against the Tribunal in its November 1, 2022 "Appeal to the Chairperson".

[99] I agree with the Respondent's submission that waiver applies here. The Group had discussed their "concerns" with their counsel sometime in 2016-17. The Group, through its counsel, should have raised the bias matter to the Tribunal then and brought a recusal motion forward. In the alternative, on the merits as discussed above, the Group has not reached the high threshold for establishing apprehension of bias.

F. Allegation #6: Respondent Not Held Accountable for Withholding Relevant Documents; Incomplete Relevant Documents Provided by the Tribunal

[100] This Allegation appears to centre on the Tribunal not holding the Respondent accountable for withholding relevant documents in the disclosure phase, and the Tribunal not providing complete documents. The Group focuses on the Guidelines referred to in Allegation #5 above, and the Agreed Statement of Facts in the other retired VRCM's Eligible Work motion file.

[101] With respect to the Guidelines issue, I dealt with this in Allegation #5. I did enquire of the Respondent at the CMCC why it was not disclosed. And I adjudicated the matter in 2018 CHRT 20 and made a finding that it was arguably relevant (parts thereof), and made

an order for production in part. As for “accountability”, it was open to the Group to cross-examine relevant ESDC witnesses on the point at the hearing, and make legal argument during final submissions, including asking the Tribunal to draw adverse inferences/findings against the Respondent.

[102] As for the two Agreed Statements of Facts (“ASF”), there had been correspondence among the Registry Officer, Mr. Brenton and Ms. Marchildon regarding one or more ASFs in the other retired VRCM’s matter and attempting to clarify and resolve the issue. I understand that the Tribunal had only received one, unsigned, draft ASF on June 4, 2021. As to why that ASF was not in the Key Documents PDF, the answer is that only the Table of Contents to the Joint Book of Documents (intended exhibits) in the other retired VRCM’s Eligible Work motion file was included. However, my notes indicate that it was on the list to confirm that it was resolved at the October 24, 2022 CMCC, which was cancelled and re-scheduled. As indicated, that and other final case management matters in advance of the November 21, 2022 hearing were never discussed as the Group had by November 1, 2022 gone down the other route of seeking a recusal and adjournment.

[103] As indicated earlier, the usual practice was for outgoing representatives to pass on the complete file to the successor. (And Mr. Goodwin and Ms. Ladouceur were, along with the other members of the Group, assisting Mr. Brenton.) However, to assist Mr. Brenton we created a Key Documents PDF file given to all the parties. However, Mr. Brenton was told that the onus was on him to contact the Registry Officer regarding any documents he needed (from the Group’s or the other retired VRCM’s files) or to make arrangements to go over the contents of the files. The Registry Officer was very helpful and was in contact with Mr. Brenton by phone and electronically throughout his time as representative. Mr. Brenton had made several requests for documents and received them. That these significant - even extraordinary - efforts might not have been perfect is hardly an argument that the Tribunal was biased.

[104] As to the question of waiver, I make the same finding of its applicability regarding the Guidelines, as stated in Allegation #5 above. And on the merits, none of the instances enumerated by the Group in Allegation #6, regarding the Guidelines, the ASFs, the Key

Documents PDF, etc. come anywhere close to constituting a reasonable apprehension of bias.

G. Allegation #7: Refusing to Hold a Written Hearing

[105] The allegation here is that my denial of the Group's request to have its motion heard in writing as opposed to an oral hearing constitutes a reasonable apprehension of bias.

[106] The issue was first raised and determined by me at the December 15, 2014 CMCC where the Group was represented by counsel. I heard submissions from the parties. The Respondent opposed the request, not willing to surrender its right to cross-examination. The Commission made no submission on the hearing format. Upon hearing the submissions, I ruled in favour of an oral Eligible Work motion-hearing with reasons orally delivered, and put in written form in the CMCC summary letter. I needed to make findings of fact and law, including regarding controverted facts. Reliability of the evidence also militated in favour of an oral hearing.

[107] I note that this issue was revisited during the proceeding and I indicated consistently that I was not prepared to take away a party's right to cross-examination, regarding testimony on the facts and vis-à-vis the many likely exhibits. (By November 2022, the draft Joint Book of Documents was under 300 intended exhibits.)

[108] While the Group was always in agreement to a written hearing, the Respondent was not. I did canvass with the parties on several occasions my openness to exploring ways to simplify and speed up the hearing process, including allowing for statements in lieu of direct examination. Having held an oral hearing in the only Eligible Work hearing to have taken place to date, the *McIlroy* hearing (2015 CHRT 15), I saw the benefit of an oral hearing with cross-examination, and that hearing had fewer witnesses and documents than the Group's hearing was going to have. That said, had the Respondent, and therefore all the parties waived their right to cross-examination and agreed to a written hearing, I would have done so.

[109] I find that voluntary waiver applies here. If the Group felt my denial of its request for a written hearing raised issues of bias, it had counsel at that December 2014 CMCC when

the ruling was given, and had PSAC counsel later in 2016-17. After that December 2014 CMCC, at the earliest, and when represented by counsel in 2016-17 at the latest, a motion for recusal based on reasonable apprehension of bias could have been brought. In the alternative, on the merits, based on my comments above, I find there is no indicia of apprehension of bias to warrant my recusal.

H. Allegation #8: Appearance of a Conflict of Interest

[110] The Group submits that there was a perceived or apparent (not a real or actual) conflict of interest regarding my Tribunal work, including my adjudication of the Group's Eligible Work motion, and my company's contract with the federal Government, both involving adjudication as an independent, third-party neutral.

[111] The Group states that it became aware of this apparent conflict "in the early years" of its motion, in 2016. It did not raise the issue with the Tribunal "for fear of retaliation were it not taken seriously." The Group did raise the matter with its then-counsel: "Later in 2016, PSAC [Public Service Alliance of Canada] decided to represent us in our Motion at the CHRT. We provided our PSAC counsel with a copy of Member Garfield's company federal government contract information from the PWGSC [Public Works and Government Services Canada] website. Counsel did not want to move forward with it."

[112] The Respondent counters that there was no conflict of interest, real or apparent, in my adjudicative work:

> In assessing whether a potential conflict of interest exists and raises a reasonable apprehension of bias, the courts have considered the particular context of the nature of the work an individual may be involved in and the role he/she may have as a decision-maker. [two cases cited] Tribunal members are often employed in other companies and workplaces and continue to carry out their duties as administrative decision-makers simultaneously.
>
> …
>
> The Eligible Work motion before the Tribunal seeks compensation from ESDC, a completely separate entity from the department identified by the Group…The Tribunal Member's duties as an adjudicator in human rights complaints are sufficiently removed from any work he may be doing as part of his private sector employment.

The Respondent also argues that waiver applies here.

[113] The contract referred to above was between my Alternative Dispute Resolution Services company and the then-federal Department of Aboriginal Affairs and Northern Development Canada ("AANDC")(Chief Adjudicator's Office) as one of the many individuals privileged to have been selected to be an Independent Assessment Process ("IAP") Adjudicator of claims of physical, sexual and psychological abuse by former First Nations students of Indian Residential Schools.

[114] The IAP system was headed by an independent Chief Adjudicator with Deputy Chief Adjudicators and over 100 Adjudicators across Canada. The IAP system had an administrative/operational arm, the Indian Residential Schools Adjudication Secretariat. In essence, the IAP model was akin to an *ad hoc*, administrative tribunal, like the Canadian Human Rights Tribunal, except that the latter is permanent and based on the common law adversarial system, while the IAP was more claimant-centred and inquisitorial. Each is composed of adjudicators and an administrative/operational agency, and is independent of parties before it, including the Government of Canada.

[115] I find that waiver applies here. The Group learned of my company's government contract and told their counsel in 2016. He advised not to proceed and the Group accepted their counsel's advice. They could have instructed him to proceed to raise the issue and if not satisfied with the Tribunal's response, bring a motion for recusal. Instead, the Group waited six years to do so. At the very latest, the Group should have brought a motion for recusal after the Tribunal's October 4, 2021 letter addressing Mr. Goodwin's *de facto* accusations of bias and putting the Group on notice of the appropriate procedure and time constraints when making such allegations.

[116] In the alternative, on the merits, I find that my work from 2011-18 as an independent IAP Adjudicator, through my company's contract with a *separate* Government department, and my work as a Tribunal part-time member, including with regards to the Group's Eligible Work motion, did not constitute a perceived conflict of interest or demonstrate a reasonable apprehension of bias. A reasonably informed person would conclude that my IAP work was independent from my Tribunal work, and vice versa. Most part-time members on this and

other tribunals, like me, have other employment and work, including the practice of law. The Government of Canada is a huge entity, composed of many departments and agencies. I was not an employee of AANDC and I did not represent it or the government in my role as an IAP Adjudicator. Similarly, as a part-time member of the Tribunal, I am an independent Governor-in-Council appointee, appointed on the recommendation of the Minister of Justice and Attorney General of Canada.

[117] Both roles are as independent, third-party neutral adjudicators. Both adjudicative roles demand impartiality, fairness and an absence of bias, real or perceived. Indeed, the rigorous selection process for IAP Adjudicators required, among other things, that each Adjudicator-candidate be approved unanimously by the selection panels involving all parties/stakeholders in the landmark, historic Indian Residential Schools Settlement Agreement.

[118] In one of its submissions, the Group states that my conduct has demonstrated a predilection in favour of Government departments and managers. Ironically, approximately ninety percent of my IAP Decisions upheld the claims of the former Residential Schools students *against* Canada. (This was consistent with the other adjudicators as “90% of all claims that went to a hearing or a Negotiated Settlement Process interview resulted in some level of compensation”: 2021 IAP Summary of the Final Report, IAP Oversight Committee, p. 22). Now of course that does not demonstrate an apprehension of bias in favour of the former students and against Canada, as each IAP case, as with Tribunal cases such as the present one, is judged on a case-by-case basis, after considering the evidence and legal arguments.

[119] I also find that my company’s IAP contract and my work as an IAP Adjudicator were publicly disclosed. They were no secret. The actual PWGSC contract was posted online (that is how the Group became aware of my IAP work) as was my biography identifying my IAP role in the Tribunal’s Annual Reports (tabled in Parliament) and on the Tribunal website under the Members’ section.

X. Conclusion

[120] For the foregoing reasons, I denied the Group's motion for recusal and adjournment on November 24, 2022. On the following day, the Group withdrew its Eligible Work motion, and I then adjourned the hearing scheduled to begin the following Monday, November 28, 2022. I want to acknowledge the work that the Group and its various representatives had put in over the course of the Eligible Work proceeding; a great deal of time, effort and stress, no doubt. Likewise, for the Respondent counsel and team.

[121] As I indicated in this Ruling, "but for" my decision on October 20, 2022 denying the Group's request to switch to a hybrid (in-person, Zoom) hearing in St. John's, more likely than not, the process would have unfolded very differently. Instead of the route of the motion for recusal and adjournment, we would have held the hearing in St. John's and a Decision rendered on the Group's Eligible Work motion on the merits ("yea" or "nay"). This would have been preferable, but unfortunately, it was not to be.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
March 31, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1111/9205, T1112/9305 & T1113/9405

Style of Cause: Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Ruling of the Tribunal Dated: March 31, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Lynn Marchildon and Samar Musallam, for the Respondent

Aubrey Brenton, for the Interested Parties