2013 S.C.BW. Number: 418395

SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: McWhirter v. Shankle, 2013 NSSM 28

BETWEEN:

JASON McWHIRTER

Appellant (Applicant)

- and -

ANDREW SHANKLE

Respondent

DECISION AND ORDER
PRELIMINARY MOTION TO RECUSE

Date of Hearing:	August 23rd, 2013
Place of Hearing:	Bridgewater, Nova Scotia
Heard Before:	Gavin Giles, Q.C., Chief Adjudicator
Counsel:	**For the Applicant:**
	The Applicant appeared personally
	For the Respondent:
	Jay Matheson, Articled Clerk
Date of Decision:	August 26th, 2013

Gavin Giles, Q.C., Chief Adjudicator

SUMMARY OF FINDINGS:

[1] For reasons which will be set out in detail below, the Applicant's Motion that I recuse myself from these proceedings is declined.

[2] First, the bases upon which such Motions are granted is objective and not subjective. In other words, the Moving Party's subjective assessment regarding the bias, likely bias or partiality of the decision-maker in issue is not relevant. What is instead relevant is how the objective observer, fully apprised of all of the circumstances of the subject proceedings, including the relevant high threshold test and the presumption at law regarding the decision-maker impartiality, would determine the Moving Party's allegations of bias, likely bias or partiality.

[3] Second, the high threshold test referred to above provides that it is incumbent upon the Moving Party to demonstrate the bias, likely bias of partiality alleged. The allegation itself is not sufficient.

[4] Third, the Applicant appears to be relying on some past experience that his allegation of bias, likely bias or partiality on the part of the decision-maker will be sufficient to cause that decision-maker to recuse. Be the Applicant's past experience as it may, a bare allegation, without more, is not a sufficient basis for whatever recusal is being sought.

[5] After having considered all of the Applicant's written and oral submissions, and having considered the applicable authorities, I have come to the conclusion that the Applicant has fallen short of establishing, on the required objective basis, that I lack the necessary objectivity and impartiality to fairly judge and determine the proceedings in which he is currently involved. It is on that basis that I have determined that should the Applicant maintain his pending Appeal from an Order of the Director of Residential Tenancies that he quit and deliver up the premises which he currently holds as a tenant of the Respondent, I will remain seized of the matter and will continue to preside over it.

INTRODUCTION:

[6] This matter was heard before the Small Claims Court of Nova Scotia, at Bridgewater, on the morning of Friday, August 23rd, 2013.

[7] Both the Appellant/Applicant ("the Applicant") and the Respondent/Respondent ("the Respondent") were present. The Applicant represented himself. The Respondent was represented by Jay Matheson, Articled Clerk.

[8] The matter involves a Residential Tenancies Appeal. The hearing had been scheduled to permit the Applicant to proceed with his Appeal from an Order of the Director of Residential Tenancies. The Applicant's Appeal had been taken pursuant to the provisions of Section 17C(1) of the *Residential Tenancies Act*. The Order of the Director of Residential Tenancies taken on appeal had directed the Applicant to quit and deliver up certain demised premises to the Respondent on or before August 12th, 2013.

[9] The Friday, August 23rd, 2013 hearing was the second time the matter had been before the Court. At the outset of the Applicant's original Appeal hearing, he brought a Motion for an adjournment. He submitted on the Motion that he had not had sufficient time to prepare for his Appeal. He submitted that he had been seeking legal counsel. He submitted that he had not been able to secure an appointment (appointments) with legal counsel until the following week. The Applicant's request for the adjournment was granted. The return hearing was scheduled for Friday, August 23rd, 2013.

[10] I presided over the Applicant's Motion for the adjournment. He said nothing at the time regarding my involvement with the matter. He gave no indication of any kind that he was (or would be) seeking my recusal.

[11] On the afternoon of Thursday, August 22nd, 2013, the Applicant filed a lengthy written submission in which he sought my recusal. The hearing convened on the morning of Friday, August 23rd, 2013 was to afford the Applicant the opportunity to make any additional submissions on my recusal and to permit the Respondent the opportunity to respond.

[12] Despite my invitation, the Applicant indicated that he had nothing more to submit in support of his Motion for my recusal. Through Mr. Matheson, the Respondent effectively took no position on the Motion but opposed any further delay. Again through Mr. Matheson, the

Respondent argued that their circumstances were dire, that the Applicant's continued tenancy in their premises was having a negative effect on their other tenants and that they were seeking to inquire into and to respond to the Applicant's Appeal in as timely a manner as possible.

BACKGROUND:

[13] At its simplest, the Applicant's submission in support of my recusal highlights three seminal points.

[14] First, the Applicant submits that I am biased against him.

[15] Second, the Applicant submits that he possesses a reasonable apprehension that I am biased against him.

[16] Third, the Applicant submits that in a prior Appeal which he took from a prior Order of the Director of Residential Tenancies which required him to quit and deliver up other demised premises to another landlord, I conducted myself in such a manner (or manners) that he was denied natural justice and fundamental fairness. Put at its simplest, the Applicant submitted that because of the past, he had no confidence that I could, or would, consider fairly the issues he wished to put before the Court in his current Appeal.

[17] In addition to the three points noted above, the Applicant also took the position that it had been his past experience in both the Nova Scotia Provincial Court and the Supreme Court of Nova Scotia that upon suggesting a concern to the Judge or Justice before whom he was appearing that such Judge or Justice would not fairly consider the matters in which he was then involved, such Judge or Justice would recuse themselves. Referred to by the Applicant specifically were The Honourable Mr. Justice Hiram J. Carver and The Honourable Judge Anne E. Crawford, respectively retired from the Supreme Court of Nova Scotia and the Nova Scotia Provincial Court.

[18] It was on that basis that the Applicant appeared to be suggesting that he possessed a personal determination or power of sway over which decision-makers could or would preside over whichever matters in which he was or might become involved. It is my view that such a subjective approach on the part of the Applicant is simply incorrect and *if* acceded to by either the former Mr. Justice Carver or the former judge Crawford, would have amounted to an error in law.

[19] The Applicant also referred to legal advice he had received from Mr. David Hirtle. According to the Applicant, it was Mr. Hirtle's opinion, presumably based on the information provided to him by the Applicant, that I had no choice but to recuse myself from these proceedings.

[20] Noteworthy, at least to me, is that whatever information was provided by the Applicant to Mr. Hirtle has not been outlined to me and that there is, with great respect, no indication that Mr Hirtle knew, considered or applied the tests for recusal which are outlined in the applicable authorities. Moreover, and despite the fact that Mr. Hirtle was present in the Bridgewater Justice Centre during the course of the hearing into the Applicant's Motion for recusal, he, that is Mr. Hirtle, did not attend or submit on that Motion.

FACTS:

[21] The Appellant's written submissions in support of his Motion for my recusal were in eight (8) hand-written pages and have been summarized above. They commenced with the following submission:

> I, Jason McWhirter, being the Appellant in this matter have very serious and sincere concerns to proceed with this matter as long as Gavin Giles is the presiding adjudicator. I request that Gavin Giles recluse [sic] himself from any further legal dealing concerning myself and Cheryl Bristol.

[22] From there, the Applicant went on to detail his past appearance before the Court (which took place in the latter part of November of 2012). As indicated above, I was the presiding Adjudicator at that time of the Applicant's past appearance.

> I, as the Appellant at that time was treated very unfairly and felt Mr. Giles' conduct of how an adjudicator is suppose [sic] to be holding a court hearing was not done as it should.

[23] The Applicant's went on to detail his concern that in November of 2012 I effectively prevented him from seeking an Adjournment of his then-scheduled Appeal for the purposes of retaining and instructing legal counsel. According to the Applicant: "to deny someone [legal counsel], - no matter who it is, is very unfair and cannot be justified." I would ordinarily agree.

[24] To be clear, however, there was no attempt by me in November of 2012 to prevent the Applicant from retaining and instructing legal counsel. His difficulty, instead, was that he had not made any such attempt until just prior to the scheduled date for the hearing of his Appeal.

[25] At that time, the Court received correspondence Ms. Susan Mullins, a lawyer practicing in Liverpool, Nova Scotia. She indicated that she had been consulted by the Applicant and that he wished to secure an adjournment of his Appeal until such time as she might be available to meet with him and consider if she could represent him.

[26] In response to that request, I wrote to Ms. Mullins, on November 23rd, 2012 as follows:

> Dear Ms. Mullins:
>
> I refer to your correspondence to the Small Claims Court of Nova Scotia dated November 21st, 2012.
>
> The jurisprudence set out by the Supreme Court of Nova Scotia limits my ability to consider that correspondence for the purpose suggested.
>
> I refer, amongst other authorities, to *Cameron v. Morris* 2006 NSSC 9 which referred, *inter alia*, to *Earthcraft Landscape Limited v. Clayton*, 2002, 210 N.S.R. (2d) 101 (N.S.S.C.). Both authorities limit the ability of the Small Claims Court to receive and rely upon unsworn evidence not tested in any form of cross-examination.
>
> Additionally, *Earthcraft* suggests, in the strongest of terms, that a Small Claims Court Adjudicator has a duty to inform the party attempting to rely on the unsworn evidence that cannot be tested that it might not be accorded the same weight if adduced *viva voce* and then tested in cross-examination.
>
> In the circumstances, I expect that the Application for the adjournment to which you have adverted could be contested. In the circumstances, I could envisage an argument that you should be present before the Court with your schedule to explain why it is that you are not available to even see the Applicant (for the adjournment) for almost three (3) weeks and to be subject to cross-examination on that schedule.
>
> In the event that it is your plan to attend as one of the Applicant's witnesses, it is all well and good. In the event that it is not your plan, I feel, based solely on the jurisprudence referred to above, that I must advise that I may be compelled to give less weight, perhaps even no weight, to your correspondence.

> I assume that you will advise Mr. McWhirter.

[27] In response to that correspondence, Ms. Mullins replied, on November 24th, 2012, as follows:

> Dear Mr. Gavin [sic]:
>
> I have not been retained by Mr. McWhirter yet, nor even had a chance to meet with him and find out any information about his appeal. He contacted me last week regarding the matter and I told him that I was much too busy to even meet with him until the 10th of December and that the best I could suggest was that he try to have the matter adjourned to a later date in order for him to obtain legal counsel. I have several trials scheduled in the next few weeks as well as many smaller matters to attend to for clients by whom I have already been retained and I am not in a position to take on a new client right now.
>
> Mr. McWhirter asked me if I could write a letter to the court confirming my unavailability and I did so.
>
> I will have my staff notify Mr. McWhirter of your correspondence on Monday morning.

[28] Against this backdrop, and against the backdrop of the Applicant's failure to attempt to retain and instruct any other legal counsel, I indicated to him at the outset of the scheduled hearing of his Appeal that I was not inclined to grant his request for an adjournment. I explained to him that Motions for adjournment must be considered judicially and that the task involved the balancing of the rights not only of the Applicant but of those other parties who would also be affected by the adjournment. The Applicant had no response to my observations.

[29] The Applicant's Motion for the adjournment of the hearing of his past Appeal was aggressively opposed. Submitted of behalf of the Respondent in that matter was that the Applicant had remained in the demised premises (the ones at issue in the past Appeal) well beyond the "eviction date" ordered by the Director of Residential Tenancies. Submitted by the Respondent was that certain actions by the Applicant (and by his co-tenant) which had been found by the Residential Tenancy Officer to have been in breach of the subject lease had remained on-going. Submitted by the Respondent was that the Applicant continuously pushed the applicable procedural boundaries so as to remain as long as possible in possession of

premises which he had been ordered by the Director of residential Tenancies to quit and deliver up.

[30] Considering the matter judicially and attempting to balance the interests of both the Applicant and his then landlord, I concluded that the uncertainties surrounding the then-impugned tenancy had been outstanding long enough and that the form of certainty which might inhere in my determination of the matter on its merits was very likely overdue. It was on that basis, and only on that basis, that I rejected the Applicant's Motion for adjournment.

[31] It was then that the Applicant asked if he could attempt to try to work something out with the Respondent and I replied that he could. I also told the Applicant that anything he could work out with the Respondent himself would probably be better and more palatable (to all parties) than would be any resolution which I imposed.

[32] Arriving at a consensual arrangement with respect to the outcome of the past Appeal was what the rest of that hearing entailed. It was not an adversarial proceeding. No evidence was called. No legal or other submissions were made (other than as they had related to the Applicant's Motion for the adjournment). I was not called upon to assess credibility or arrive at a set of conclusions with respect to one contending view or another.

[33] In the circumstances, the only outcome to the Applicant's past Appeal was an Order pursuant to the provisions of Section 17D(1) of the *Residential Tenancies Act*. The Order was in the form of a memorial of the agreement at which the Applicant and the Respondent in that Appeal had arrived. It provided as follows:

> ***RECITALS***:
>
> (1) On November 16th, 2012, the Appellant filed and served a broadly-based appeal from the Decision and Order of Residential Tenancy Officer, Susan Evans, dated November 7th, 2012;
>
> (2) The Appellant's appeal was scheduled to be heard before This Court on November 26, 2012 at 2:00 o'clock in the afternoon at the Bridgewater Justice Centre;
>
> (3) One of the parties to the Decision and Order of Residential Tenancy Officer, Susan Evans, dated November 7th, 2012, is ***Cheryl Bristol***, a tenant of the subject premises;

(4) Cheryl Bristol has not appealed from the Decision and Order of Residential Tenancy Officer, Susan Evans, dated November 7th, 2012 and the time for the filing and service of any such appeal has expired;

(5) The decision and Order of Residential Tenancy Officer, Susan Evans, dated November 7th, 2012, as it pertains to Cheryl Bristol, is therefore confirmed and the said Cheryl Bristol shall quit and deliver up the subject premises to the Respondent herein immediately or as otherwise provided for in this Order;

(6) At the hearing of the Appellant's appeal on November 26th, 2012, the Respondent were represented by Thomas Fiendel. The Appellant, though late, eventually appeared and represented himself;

(7) At the outset of the hearing of the Appellant's appeal on November 26th, 2012, the Appellant applied for an adjournment on the basis of his stated requirement for legal counsel and his inability to retain and instruct such legal counsel;

(8) Through counsel, the Respondent opposed the Appellant's application for an adjournment;

(9) Upon consideration of the submissions both for and against the application for the adjournment, the application was declined;

(10) Upon the decline of the Appellant's application for the adjournment, the Appellant sought to negotiate, with the Respondent, his vacant surrender of the subject premises;

(11) Upon the conclusion of those negotiations, the Appellant represented to the Court that he:

(a) Was withdrawing his Appeal herein;

(b) Would quit and deliver up vacant possession of the subject premises not later than 3:00 o'clock in the afternoon of Thursday, November 29th, 2012;

(c) Was consenting personally and on behalf of Cheryl Bristol to this Court's form of Order directing that he, along with Cheryl Bristol, quit and deliver up vacant possession of the subject premises not later than 3:00 o'clock in the afternoon of Thursday, November 29th, 2012;

(d) Would permit the attendance of a representative of the Respondent, in the company of Sheriff's officers and members of the Bridgewater Police Service, if necessary, to inspect the subject premises between the hours of 3:00 o'clock and 4:00 o'clock on the afternoon of Tuesday, November 27th, 2012;

> ***WHEREUPON IT IS ORDERED***:
>
> (1) That the Appellant, along with Cheryl Bristol, quit and deliver up vacant possession of the subject premises not later than 3:00 o'clock in the afternoon of Thursday, November 29th, 2012;
>
> (2) That the Appellant, along with Cheryl Bristol, permit the attendance of a representative of the Respondent, in the company of Sheriff's officers and members of the Bridgewater Police Service, if necessary, to inspect the subject premises between the hours of 3:00 o'clock and 4:00 o'clock on the afternoon of Tuesday, November 27th, 2012;
>
> (3) That there be no Order as to costs or as to any unpaid rents which may have been claimable by the Respondent;
>
> (4) That all Sheriff's officers and peace officers are commanded to give effect to this Order if necessary.

[29] Notwithstanding the consensual nature of the negotiations resulting in the above-noted Order, the Applicant now contends that he thereafter "spoke to several different legal advisors who informed [him] that to be treated in such a manner would be grounds for appeal to the Supreme Court of Nova Scotia, which is called failure to follow the requirements of natural justice." The Applicant has only partially explained what he meant by that statement on his pending Motion for my recusal.

[30] According to the Applicant, his basis for the above-noted criticism of me was that I permitted to the Respondent in the prior proceedings to be represented by legal counsel but not him. That is, of course, not at all what happened. Rather, what happened was that the Applicant presented his issues with respect to legal counsel very late in his former proceedings and, as submitted by the Respondent in those proceedings, only as an after-thought. Moreover, selecting legal counsel who could only see him in almost three (3) weeks hence and who even at that could make no commitment to the Applicant's representation for the purposes of his past Appeal could not have been other than unfair to the Respondent who was seeking the vacant possession of his premises.

[31] The Applicant continued in his written submission in support of his current Motion for my recusal with the following criticism:

> As well several times I observed eye contact and smiling back and forth between Adjudicator Gavin Giles and the other parties' lawyer

> Tom Fiendel [sic]. Gavin Giles stated 'they tell me you've been through this whole situation several times in the past, and that you have a conflict with every other local adjudicator' another comment Mr. Giles made direct toward myself that he heard I wasn't a very nice guy. The entire legal proceeding back in Nov. of 2012 was 100% lop-sided against me and Adjudicator Gavin Giles was the ring leader of it all.

[32] I have no recollection from the hearing of the Applicant's past Appeal of any eye contact with Mr. Feindel other than when I was speaking to him in the course of that hearing or he was speaking to me. As for "smiling back and forth", there was nothing of the sort. There would be no reason or basis for Mr. Feindel and me to be "smiling back and forth". We do not know each other. We have not practiced in conjunction or even opposite each other. Prior to the hearing of the Applicant's past Appeal, Mr. Feindel had only appeared before me on one occasion. On that occasion, Mr. Feindel had been taxing one of his accounts. It was at least a decade ago.

[33] As for any comment I may have made in open court with respect to the Applicant's knowledge of the process or personal habits and mannerisms, it would only have been to reflect either the pleadings or submissions made on behalf of the Respondent in that regard.

[34] In terms of more subjective assessment, the Applicant offered the following in his written submission in support of his Motion for my recusal:

> Like previously mentioned other legal authorities have advised me of the same and that the 'failure to follow the requirements of natural justice' was most definitely their [sic]. And to this day I never ever did receive any copy of any order from the court. I have made several legal figures fully aware of how Gavin Giles treated me in court from November 2012 I did so back then as well as recently. I do not trust Gavin Giles, I do not want any dealings with Gavin Giles whatsoever. He / Mr. Giles makes me feel very uncomfortable. Very, very unprofessional does not run the courtroom in a proper manner. Very irritating, one-sided, and inappropriate comments are unreal! No judge or authority of power acts like I witnessed November 2012 [sic]. Let's just say it like this, back then 9 months ago I'm quite confident things were all arranged before I even entered the courtroom.

[35] The Applicant in his written submissions in support of his Motion for my recusal continued with his general comments:

> Gavin Giles is so bias [sic], unfair, and the most disgraceful Small Claims Court I've ever seen. I have a very – legitimate appeal to proceed with and I can not [sic] and won't be able to do that – with Gavin Giles involved. I want Giles to take his garbage attitude and unprofessional ways and stay very clear of my court matters now, and for the for see able future. I have seen judge Anne Crawford more than once recuse herself from dealing with my matters in provincial. Judge Crawford stated in open court when an accused does not trust or feel they'll receive a fair trial from a certain judge in all fairness the judge should recluse [sic] themself [sic].

[36] Against the backdrop of this loose factual matrix, the legal question nevertheless remains: would a reasonable observer, fully and properly informed, against the backdrop of the presumption that judges and other decision-makers will conduct themselves in manners which are fair and impartial, arrive at the conclusion that my limited contact with the Applicant in November of 2012 was such as to found a contention of bias, likely bias or partiality?

ANALYSIS:

[37] It appears from the jurisprudence that all analyses on Motions for recusal stem from the decision of the Supreme Court of Canada (per: de Grandpré, J.) (in dissent)) in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369. There, de Grandpré, J. held (at p. 394) of the basis upon which a Motion for recusal is generally argued that:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining their wrong the required information … [The] test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.'

[38] Though a dissenting one, de Grandpré, J.'s decision in *Committee for Justice and Liberty* gained prominence as a result of the much later Supreme Court of Canada decision (per: Corey, J.) in *R. v. S. (R.D.),* [1997] 3 S.C.R. 498. There, Corey, J. (commencing at para. 111) held with respect to de Grandpré, J.'s reasoning in *Committee for Justice and Liberty* that:

> The test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. ... Further [,] the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold' ...

[39] Corey, J. then continued at paras. 112, 113 and 114 that:

> Nonetheless the English and Canadian case law that does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough ...
>
> ...
>
> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high ...
>
> ...
>
> The onus of demonstrating bias lies with the person who is alleging its existence ... . Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[40] Taken at its highest, the Applicant's Motion for my recusal is that he has apprehended a bias on my part, contrary to his interests, based on what he has referred to as the prior "dealings" which he and I have had. Taken at its lowest, the Applicant's Motion would have to be seen to be based upon a personal *animus* which he has cultivated against me for the purposes of any future proceedings involving him over which I might be called upon to preside.

[41] With obvious respect to the Applicant, his views of the latter concern as expressed above are irrelevant to the answer to the central question his Motion poses. As to the former concern, the case law set out above is clear: there is a strong presumption that decision-makers are impartial and will act impartially, the threshold test is high and the test is an objective one, engaging a hypothetical person, fully and properly informed and acting reasonably.

[42] Those tests having been articulated, there has been no demonstration by the Applicant of "a reasonable apprehension of bias" when considered "entirely on the facts of the case". In short, as held by the Supreme Court of Canada (per: Le Dain, J.) in *Valente v. Her Majesty the Queen*, [1985] 2 S.C.R. 673 (at p. 685), "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' as Howland, C.J.O. noted, notes absence of bias, actual or perceived."

[43] As a practical matter, the application of the decision-maker's discretion in motions for recusal is difficult. In some respects, the common practice casts the decision-maker in the roles of witness, advocate and decider. The conundrum was in fact put as follows by the Supreme Court of Nova Scotia (per: Richard, J.) in *Mitsui & Co. (Point Aconi) Limited v. Jones Power Co. Limited*, 2001 N.S.S.C. 29 (CanLii) (at para. 4):

> It appears to be the practice that such applications are made before the judge to whom the application is directed – see *Cominco Ltd. v. Westinghouse Canada Ltd., et al.* (1979) 108 D.L.R. (3d) 579 (B.C.S.C.) and *Arsenault – Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851. As *Jones* said in its opening remarks:
>
> > Having looked that the authorities, it's quite clear that the application has to be made before the judge himself which is a difficult position to put a judge in and in effect to try and be an informed observer standing to the side but that's what the authorities seem to say and so that's why we are before you today.
>
> This places the judge at a rather unique but challenging position of having to rule upon his or her own conduct and rule whether or not such conduct raises a real likelihood of probability of bias. Except in the most egregious of circumstances, it is only the presiding judge who can properly determine the question of his or her own bias. The judge must be careful to bring the same degree of impartiality and attachment into these deliberations as would be the case in regular court proceedings. The judge must be careful to assume the role of an informed person with a complex and contextualized understanding of the issues. To do otherwise would be to subvert the process and bring into question the whole notion of judicial impartiality and fairness.

[44] Richard, J. in *Mitsui* held that a reasonable apprehension of his bias had not been made out. On appeal, the Nova Scotia Court of Appeal (per: Hallett, J.A.) disagreed. In Hallett, J.A.'s analysis, Richard, J. had made findings against Jones Power which were or which at least could be crucial to the assessment of matters which remained outstanding between

Jones Power and its opponent. Both the findings made and the matters still pending were held by Hallett, J.A. as reasonably leaving Jones Power with the perception that Richard, J.'s mind with respect to the whole case had effectively been made up. That was, as held by Hallett, J.A., a sufficient apprehension of bias as to warrant Richard, J.'s recusal.

[45] Those are not the type of circumstances which inhere in the instant case. In the instant case, the Applicant is looking to the past, mischaracterizing his past appearance before me in another matter entailing another Respondent and then attempting to project that mischaracterization into the future. In such circumstance, I find his apprehension of bias to be unreasonable and incapable of substantiation by a reasonable observer, properly informed, and bearing in mind both the high threshold test and the presumption of my impartiality as a decision-maker.

[46] Additional support for this determination has been set out by the Supreme Court of Nova Scotia (per: Murphy, J.) in *R. v. Black*, 2003 N.S.S.C. 079. At issue in *Black* was an accused's allegation with respect to a trial judge "that through [his] conduct and [his] decisions, [he had] exhibited what a reasonable person would consider an apprehension of bias (or prejudice) as [the accused] has referred to it".

[47] In rejecting the motion for recusal, Murphy, J. held (commencing at para. 9) as follows:

> I find that the test for determining that the judge is biased has not been met in this case. Mr. Black has not established the threshold required in order that it be necessary that I recuse myself.
>
> I have concluded that no belief or opinion expressed, decision made or action taken by me in the proceeding to date would give a reasonable apprehension that I am biased or prejudiced, either as suggested by Mr. Black or otherwise.
>
> I find that there is no basis on which I would conclude that would be unable to reach, or unable to appear to reach, a decision based on the evidence which will be presented in the case.

[48] From there, Murphy, J. went on to consider a number of the specific bases upon which the motion for recusal had been made. Murphy, J. conceded that each one of those bases as potential errors on his part but that they were reviewable (*viz.*: curable (on appeal)).

Having made decisions reviewable on appeal was not, in Murphy, J.'s conclusion, evidence of his bias.

[49] Further on in *Black*, Murphy, J. held (at paras. 19-20) that:

> With respect to the evidence of Mr. Piper during the *Charter* motions, and the exhibit containing his notes, both of which Mr. Black referred to during argument, I did inquire concerning Mr. Black's interpretation of the evidence, and my inquiry generated discussion among Mr. Black, Mr. Holt and myself. It is not unusual when a case is being argued to have discussion concerning interpretation of evidence, that Mr. Black had full opportunity to indicate what his position was with respect to the evidence. If it is determined at some point that I misinterpreted the evidence, that again is a matter that can be dealt with by another court, but in my respectful view would not constitute bias on my part.
>
> Mr. Holt has correctly indicated that Mr. Black's personal views are not the test to be applied to determine whether I should recuse myself based on bias or prejudice. The test is an objective one, based upon what a reasonable person would conclude in circumstances and with respect to my disposition towards the case. The fact that I have made rulings against Mr. Black's position from time to time in interlocutory matters does not give rise to an inference of bias.

[50] Murphy, J.'s decision in *Black* is particularly apposite the instant motion for recusal. Past rulings by a Judge against a party do not support an inference of future bias.

[51] Referred to above were the Applicant's suggested experiences with Mr. Justice Carver and Judge Crawford. I have already commented on the past approaches which Mr. Justice Carver and Judge Crawford may have taken with the Applicant. If the Applicant is correct in his assessment of those approaches, I have concluded that they were in error. That is not an error which I propose to compound through repetition in these proceedings.

[52] Another authority helpful to my analysis in the instant case is that of the Federal Court of Canada (per: Crampton, J.) in *Cervenakova v. The Minister of Citizenship and Immigration*, 2010 F.C. 1281.

[53] The principle issue before Crampton, J. in *Cervenakova* was the judicial review of a decision by the Canada Immigration and Refugee Board denying the Applicants "refugee status" upon their entry into Canada. A preliminary issue raised by those Applicants was that

Crampton, J. ought to recuse himself on the basis of apprehended bias. The allegation by the Applicants was that Crampton, J. had heard cases (or a case) similar to theirs in the past and had ruled against the applicants in those cases. In the Applicants' submission, that fact (or facts) stood for the proposition that Crampton, J. was predisposed to rule against the judicial review of applications for refugee status initially rejected by the Canada Immigration and Refugee Board.

[54] At para. 19 of *Cervenakova*, the Applicants' basic position was put as follows:

> In short, [counsel] submitted that the Applicants perceive that I have a pre-disposition to deny their application because: (i) I denied the application for judicial review in *Denova v. Canada (Minister of Citizenship and Immigration*) 210 F.C. 438; and (ii) I denied, last month, the application for leave and judicial review in *Servanak v. Canada (Minister of Citizenship and Immigration)*, Imm-4574-10. Both those cases involved allegations of bias that are similar to the allegations being made in this proceeding.

[55] In dismissing the Applicants' Motion for recusal, Crampton, J. held at para. 21 that: "[t]here is a big difference between being biased and exercising, even consistently, one's judicial responsibilities based on one's interpretation of the law."

[56] In the instant case, the Applicant has submitted that I am biased (or appear to be biased) against him because I do not appear to like him and because I ruled against him on a preliminary issue (only) in one of his past Appeals from an Order of the Director of Residential Tenancies over which I presided. I have already responded (to follow the approach taken by Murphy, J. in *Black*) to both of those allegations: (i) that in commenting upon the Applicant's character, I was merely highlighting the comments which had already been made about him by the Residential Tenancy Officer from whose decision he was appealing and (ii) that in rejecting his Motion for an adjournment in that earlier proceeding, I had ruled that the Motion had been made too late, was not supported by sufficient evidence, provided no indication that the counsel the Applicant said to be seeking was or would ever be available to him and that the matter, from the perspectives of the Respondent, had been pending before the court long enough. It was on the basis of that ruling that the Applicant decided not to proceed with his appeal in the earlier case. It was then that he "worked things out" with the Respondent in that case. I had nothing whatever to do with the terms and conditions of those arrangements, other than to note them, by way of memorial, in an Order which was later issued.

[57] Returning to the decision by Crampton, J. in *Cervenakova* I refer to para. 23:

> In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 76, the Supreme Court confirmed the high test to be met when alleging bias, when it observed that 'the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality.' The Court proceeded to approvingly "Justice de Grandpré's observation, in *Committee for Justice and Liberty*, above at 394, that '[t]he grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.

[58] In terms of the Applicant's implied submission that I might rule against him in the future as a result of my limited past dealings with him set out above, the comments made by Crampton, J. (at paras. 27 and 28) of *Cervenakova* are especially apposite:

> I acknowledge that a reasonable and informed person might conclude that it is more likely than not that an adjudicator who is faced with a case that is highly similar to a case recently considered by the same adjudicator would approach the issues in the two cases in similar fashion. In absence of any facts, evidence or new arguments that might provide a basis for distinguishing two cases, such a person might also reasonably believe that it is more likely than not that the adjudicator would make determinations in the second case that are similar to those made in the first case. However, believing that it is more likely than not that an adjudicator will approach similar issues in a consistent manner is a far cry from apprehending, on substantial grounds, that the adjudicator is or may be bias.
>
> It would be entirely reasonable for the public to expect that an adjudicator would be consistent in his or her approach to, and disposition of, cases involving highly similar facts, evidence and arguments. Indeed, the principle of judicial comity encourages consistency as between judges in such circumstances. That principle is 'that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law' (*Almrei v. Canada (Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness*), 2007 F.C. 1025, at para. 61). This principle is relevant in this case not just because of my prior decisions in *Dunova*, above and *Servanak*, above, but also because of Justice Zinn's more recent decision in *Gabor v. Canada (Minister of Citizenship and Immigration*), 2010 F.C. 1162 where he rejected a very similar allegation of bias.

[59] Cited by Crampton, J. in *Cervenakova* were the principles set out by Hallett, J.A. in *Jones Power*. Crampton, J. distinguished that case, and the principles arising from it, on the basis that Hallett, J.A. had found, as a fact, that the judge in the Court below "had prematurely made up his mind on a serious issue." I have not done that and it has not been established by the Applicant that the hypothetical reasonable person, being fully and properly informed and applying the proper objective test, would be likely to so find.

[60] In terms of the sworn duty and expected ability devolving to any decision-maker to carry out the proper and expected judicial function, reference is also made to paras. 31-34 of Crampton, J.'s decision in *Cervenakova*:

> The Applicants also relied upon two other cases in which an allegation of bias against a judge was dismissed. In *Arsenault – Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 5, Justice Bastarache observed that 'partiality is 'a state of mind or attitude ... in relation to the issues and the parties in a particular case', a real disposition to a particular result. The Applicant would have to show wrongful or inappropriate declarations showing a state of mind that sways judgment in order to succeed' (emphasis added). He proceeded to find that there was no evidence adduced to demonstrate that his beliefs or opinions expressed when he was counsel, a law professor or otherwise would prevent him from coming to a decision in the case before him, on the basis of the evidence. In my view, those comments and findings are applicable to the case at bar, particularly given that the only basis upon which the Applicants based their apprehension of bias is that I did not accept similar arguments made in other cases.
>
> This brings me to the final case relied upon by the Applicants in respect of this issue. In *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 7 Imm. L.R. (3d) 1 at para. 7 (F.C.A.), the Court quoted approvingly the following passage from *Arthur v. Canada*, [193] 1 F.C. 94 at 105:
>
> > The most accurate statement of the law would thus appear to be that the mere fact of a second hearing before the same adjudicator, without more, does not give rise to a reasonable apprehension of bias, but that the presence of other factors indicating a predisposition by the adjudicator as to the issue to be decided on the second hearing may do so.
>
> The Applicants suggest that in this case, there are such 'other factors.' I disagree. The mere fact that I made adverse determination in respect of a similar issue, in two different prior cases, based on the facts, the evidence adduced and the arguments made in those cases, is not a sufficient basis upon which to conclude that such 'other factors' exist. To reiterate, the mere fact that I rejected similar arguments in two previous cases involving different applicants is not a sufficient basis upon which to conclude that an

> informed person, viewing the matter realistically and practically, and having thought the matter through, would apprehend that I am biased in relation to the issue that the Applicants in this case have raised in respect of bias by the Board.
>
> To establish the existence of 'substantial grounds' for a reasonable apprehension of bias, one must go further and demonstrate that a judge 'has been influenced by some extraneous or improper considerations.' (*Geza,* above, at para. 57), has made 'inappropriate declarations showing a state of mind that sways judgement in order to succeed.' (*Arsenault – Cameron*, above), has prejudged one or more important issues.

[61] In the more than 3,500 cases I have heard as an Adjudicator (and later Chief Adjudicator) of the this Court, presiding as such for almost two decades, there have been many allegations and counter-allegations made by the parties who have appeared before me. Many of them I have accepted. Many others I have rejected. Such is the nature of the adjudicative function. And if past decisions or actions were to be held against every adjudicative or judicial decision-maker in an attempt to establish the apprehension of bias, the whole process of civil justice would fail and access to justice, as we know and understand that broad concept, would effectively be denied.

CONCLUSION:

[62] It goes without saying that the matters being raised by the Applicant in the within appeal are very near and dear to his, and to his co-tenant's hearts. Next to basic sustenance itself, a roof over one's head must be the most sought after and protected living condition.

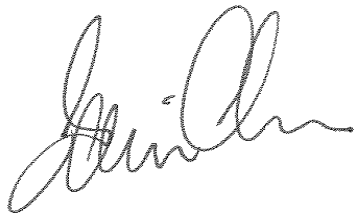
[63] But that factor, alone, cannot permit the party affected by the related judicial or adjudicative proceedings to effectively dictate the tribunal or officer before whom those proceedings will unfold. Were it to be otherwise, all of those coming before the courts could potentially raise their subjective concerns over decision-maker bias and, through those means, just as effectively select those adjudicators (perhaps even *the* adjudicator) before whom they are prepared to appear. The spectre would amount to the very antithesis of the strong presumption, referred to above, of open and transparent access to impartial civil justice.

[64] Well understood is the position taken by many adjudicative and judicial decision-makers that in such circumstances, they will simply stand aside in favour of a colleague who is or may be more palatable to the party seeking the recusal then in issue. As easy and inviting as

such a prospect might be, it does not accord with the view that adjudicative and judicial decisions ought to be principled and supported with clearly-articulated reasons.

[65] Having found that the Applicant has fallen short of the objective establishment of a real apprehension of bias against him on my part, his Motion for my recusal is dismissed. Subject to any appeal, or stay pending appeal, the Applicant's pending appeal will proceed before me, in Bridgewater, on Friday, September 6th, 2013, commencing at 11:00 o'clock.

DATED at Halifax, Nova Scotia, this 26th day of August, 2013.



Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

Solicitors:

For the Applicant:

The Applicant was self-represented.

For the Respondent:

Power, Dempsey, Leefe & Reddy