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Ottawa, Ontario, January 3, 2025

PRESENT: The Hon Mr. Justice Henry S. Brown

Docket: T-1539-23

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

THE ATTORNEY GENERAL OF CANADA, AMIR ATTARAN

Respondents

Docket: T-1598-23

AND BETWEEN:

AMIR ATTARAN
and

THE ATTORNEY GENERAL OF CANADA AND CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

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I. Nature and summary of the matter

[1] This Judgment and Reasons address two consolidated applications for judicial review of a decision by the Canadian Human Rights Tribunal [Tribunal] dated July 4, 2023 [Decision]. The

Decision dismissed a human rights complaint brought by the Applicant Dr. Amir Attaran [Dr. Attaran or Complainant]. The complaint alleged that Immigration, Refugees and Citizenship Canada [IRCC] (previously Citizenship and Immigration Canada [CIC]) engaged in discriminatory practices based on race, national or ethnic origin, age, and family status in the "provision of services" customarily available to the general public, contrary to s 5 of the *Canadian Human Rights Act,* RSC 1985, c H-6 [*CHRA*]. His complaint is in relation to the greater relative delay in allowing his application to sponsor his parents for permanent resident status versus much shorter time periods for processing other members of the family class such as spouse/partner and children.

[2] The Canadian Human Rights Commission [Commission or CHRC] participated in the hearing before the Tribunal and generally supports Dr. Attaran's position. Thus both Dr. Attaran and the Commission seek judicial review of the Decision under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The files were consolidated by Order dated August 30, 2023. A copy of these Reasons are to be placed on both Court files.

[3] For the reasons below, the Decision will be set aside and the matter remanded to a differently constituted panel of the CHRT for determination. I come to this conclusion because a reasonable apprehension of bias on the part of the member against Dr. Attaran arose in the panel member's unexpected completion of his Reasons with a "Bias Allegation Addendum" [Addendum].

[4] In summary, the panel's Addendum made a determinative finding rejecting Dr. Attaran's core allegation regarding "unconscious bias". Unfortunately, the panel did so without supporting

evidence, and without giving the parties an opportunity to know the case they had to meet, or a fair and full chance to respond. The parties had no notice “unconscious bias” would be decided by the panel in completing his Reasons, nor that “unconscious bias” (acknowledged by the Supreme Court of Canada as a form of bias) was by that time still under active consideration and might be rejected as the ground for the bias allegation.

[5] With respect, I have concluded the panel also lost the necessary objectivity, which is essential for Tribunal members, when he became personally involved in assessing Dr. Attaran’s allegation that an apprehension of unconscious bias arose from the panel’s comments. Contrary to what happened here, Supreme Court of Canada requires bias allegations to be assessed on an objective standard, namely a reasonable apprehension of bias, and not on a subjective basis as occurred here.

[6] The contents of the unexpected Addendum in these respects are sufficient to ground the Applicants’ allegation of apprehension of unconscious bias, such that the Decision must be set aside and the matter remitted to a different decision-maker. I find no merit in other alleged instances of apprehended bias.

II. Facts and background

[7] The Applicant Dr. Attaran is a 57-year-old dual citizen of the US and Canada. He was born in California and identifies as a visible minority of Iranian origin and an ethnic Persian. He is a professor at the University of Ottawa in the faculties of law and medicine, and a member in good standing of the Law Society of Ontario. Also by way of background it is a matter of public

record in this Court that Dr. Attaran has appeared as counsel in a number of cases in this Court, and as a party in additional matters.

[8] In July 2009, Dr. Attaran applied to sponsor his parents under the Family Class immigration program. His parents were US citizens when he filed the application for permanent resident status.

[9] Part 1 of the application process concerning the Applicant, Dr. Attaran, sat in a queue at the Case Processing Centre in Mississauga for 33 months. CIC began Part 2 of the application process (concerning his parents) in March 2012. Both parents were approved shortly thereafter, in December 2012, albeit approximately 42 months after Dr. Attaran's application was received. His parents became permanent residents of Canada in early 2013.

A. *Initial complaint*

[10] Dr. Attaran filed his initial Complaint in August, 2010. The Decision summarizes his complaint:

> [2] … The Complainant alleges that discriminatory practices by the Respondent contributed to the significant delay in the processing of his application to sponsor his parents for immigration, as well as delays for other similar applicants, compared to other immigration categories under the Family Class (as defined in the Regulations to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27) ("*IRPA*"), contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*CHRA*" or the "*Act*").
>
> [3] The original prohibited grounds of discrimination alleged were the age and family status. Upon a written motion, I also permitted Dr. Attaran to amend his complaint to add the prohibited grounds of race, and national or ethnic origin (see 2017 CHRT 21.)

> [*The Court notes Dr. Attaran in fact never amended his complaint, although the Tribunal treated it as if he had, dealing with all his grounds*.]
>
> …
>
> [14] … Dr. Attaran filed the first part of his application (the "Part 1" application) to sponsor his parents for immigration in July of 2009. When he filed his complaint with the CHRC, he noted that the Respondent's website indicated that IRCC was completing the processing of Part 1 applications to sponsor parents and grandparents ("PGPs") approximately 37 months after their receipt. By contrast, the same website indicated IRCC was completing the processing of Part 1 sponsorship applications for spouses, common-law or conjugal partners, dependant [*sic*] children and certain other relatives (referred to as "FC1s") in approximately 42 days (see Exhibit 1.) Dr. Attaran alleged that the longer processing time constituted adverse differential treatment on prohibited grounds under the CHRA.
>
> [15] IRCC ultimately approved Dr. Attaran's application and his parents landed in Canada as permanent residents approximately a decade ago. However, Dr. Attaran's final arguments allege multiple discriminatory practices involving systemic discrimination on behalf of all sponsors and their parents or grandparents in the Family Class who are "in a similar situation" to the one he was in when sponsoring his parents (Complainant's Factum at paras. 3 and 5). As such, he seeks systemic as well as personal remedies for the discrimination he alleges.

B. *Procedural history*

[11] The Commission exercised its gatekeeping function and initially declined to refer the Complaint to the Tribunal for an inquiry, holding the difference in processing times "was the result of the exercise of ministerial discretion and that the complainant had not directly challenged the Minister's authority to exercise such discretion." Dr. Attaran applied for judicial review of the Commission's decision, which was dismissed by the Federal Court (*Attaran v Canada (Attorney General)*, 2013 FC 1132 [per Strickland J]).

[12] However, the Federal Court of Appeal in a split decision per Stratas and Webb JJA writing separately, Near JA dissenting, granted judicial review of the gatekeeping decision and referred the matter back to the Commission for redetermination (*Attaran v Canada (Attorney General)*, 2015 FCA 37 [*Attaran 2015*]).

[13] Eventually the complaint was allowed to proceed to the Tribunal, which received his complaint on September 7, 2016. The time it took to go through the large volume of documents, combined with the Covid-19 pandemic delayed the Tribunal hearing. The hearing was ultimately held over 22 days by videoconference starting in February 2021 and ending in September 2021.

III. Decision under review

[14] In 395 paragraphs, the Tribunal held that while Dr. Attaran established differentiations in treatment, he did not establish a *prima facie* case demonstrating adverse differential treatment in the provision of a "service" by IRCC (whose name had changed since filing the original complaint). That is, there was no discriminatory practice by "differentiat[ing] adversely" as required by s 5(b) of the *CHRA*.

[15] The Tribunal concluded there was no "service" as required by s 5 of the *CHRA*, and thus no discriminatory practice through adverse differential treatment as required by s 5(b). It dismissed the complaint at the second of the three steps established by the Supreme Court of Canada in *Moore v BC (Education)*, 2012 SCC 61 at paragraph 33 [*Moore*].

[16] Among other determinations, the Tribunal concluded the Federal Court of Appeal's comments on the elements of the *prima facie* test made in a 2015 decision in this same matter

(*Attaran 2015*) were not binding on the Tribunal because of the distinction between the Commission's and Tribunal's roles, differences in the record before the Tribunal decision and the Commission's gatekeeper decision under review in 2015, and the fact there were "significant issues argued before [the Tribunal] that were not addressed by the Federal Court or the FCA in their consideration of the gatekeeper decisions," including the meaning of "service" outlined below which all agree is central to the Decision being judicially reviewed now.

A. *Bias allegation during Tribunal hearing April 29 and 30, 2021 that panel member's conduct "gives rise to an apprehension of unconscious bias"*

[17] About two-thirds of the way through the 22-day Tribunal hearing process, during Dr. Attaran's lengthy (seven-day) cross-examination of an expert witness put forward by the Respondent (Professor Haan, a sociologist and demographer from Western University), Dr. Attaran challenged the integrity of the panel by insinuating (twice) the panel had been racially and or sexually biased against Dr. Attaran's expert witness, an Asian woman.

[18] First, on April 29, 2021, Dr. Attaran insinuated the panel was giving preferential treatment to a witness because the witness shared the panel's gender and racial characteristics. Dr. Attaran stated. "There has to be a limit. Chair… <u>There is a propensity to think that every professor who is a white man is an expert in everything</u>" (Hearing Transcript, April 29, 2021, emphasis added).

[19] Secondly, the next morning (April 30, 2021), Dr. Attaran made a similar insinuation. He accused the panel of being inconsistent in a ruling on the Respondent's cross-examination of his witness when compared to his cross-examination of the Respondent's expert witness, Prof. Haan.

[20] A discussion ensued between Dr. Attaran and the panel member on this issue. The member made the following comment decorum and Dr. Attaran's "mannerisms":

> BOARD MEMBER: ... there's a very big difference in, in the way that you, you do approach things and maybe you don't recognize that, but it's, but it's true and, and it is concerning for me. And I, and I am trying to maintain some decorum here and so I would ask for your cooperation in that and in just in the mannerisms. They're little things, Dr. Attaran, that, that you say and you do and expressions you make, but they are intimidating to people, and I don't think it's necessary for us to get through the evidence that will allow this Tribunal to make a decision at the issues that are before it.
>
> [Emphasis added]

[21] Dr. Attaran replied:

> AMIR ATTARAN: … Mr. Stynes was allowed to ask a professor, an expert witness, about academic misconduct, namely plagiarism, and I'm not being allowed to ask a professor, an expert witness, about academic misconduct, namely misrepresentation of studies. The one time it happened, the professor was Asian and female, and this time it happened, the professor is white and male. I will leave that on the record and I'm being criticized for my mannerisms as a minority.
>
> [Emphasis added]

[22] The panel member called for a short break, after which Dr. Attaran asserted that the "manner in which [the panel member] criticized me for the way in which I speak or my mannerisms… gives rise to an apprehension of unconscious bias" (Hearing Transcript, April 30, 2021).

[23] Despite being questioned by the panel member (and urged by counsel for the Respondent) to bring a recusal motion (both properly in my view, as discussed below), Dr.

Attaran repeatedly declined. Instead Dr. Attaran (erroneously in my view) took the position his allegation of unconscious bias against the panel member did not require him to ask for recusal, but was instead something to be determined in the (unspecified) future on the "totality of the evidence". He submitted (correctly) he was required to place on the record his allegation of panel's bias when it happened.

[24] Dr. Attaran (improperly in my view) reiterated he was not asking for recusal, and in brief compass set out allegations he said supported his allegation of apprehension of unconscious bias.

[25] Dr. Attaran said he was ready to proceed with the hearing. The Respondent not surprisingly wanted time to obtain instructions and reply. The panel member ordered a lunch break after which both sides made short additional submissions which were made after the break.

[26] The transcript reports these events:

> AMIR ATTARAN: … But I think the manner in which you criticized me for the way in which I speak or my mannerisms and saying that I may not even be aware of it, but it's, it's disrespectful. I don't think you should have done that and I honestly feel it gives rise to an apprehension of unconscious bias. I have spent my entire working life as a minority person being told I should speak differently, I should behave differently. It is not something I welcome and I'm unhappy that it has happened here and from somebody who I respect, as I very much do you. The case law requires me to put notice of an apprehension of bias on the record when it happens and so I'm doing that without acrimony and I have nothing further to say on it except that by case law, I, I have to do what I've just done.
>
> BOARD MEMBER: Well, are you, are you saying that you're — you think I should recuse myself?
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> AMIR ATTARAN: Chair, ultimately whether there is bias or not is something that will be weighed on the totality of the evidence.

I'm asking you to give thought to whether you think you should or perhaps whether the statement you made was one that ought to have been made. I'm prepared to proceed with the hearing, but that sort of commentary upon me about my mannerisms, about my manner of speaking, does seem to me to go rather far and not be correct. And, and I have noticed as well, you know, earlier comments today that I — you know, I'm accused of having a course manner and I've repeatedly said Mr. Stynes has a habit of interrupting me and he has not drawn sanction for that, but I have drawn sanction from you. This does not seem right to me. The only thing I wish to do is ardently advocate for my case without favouritism being shown one way or the other, as I think every litigant is, is entitled to expect and I'm sure you agree with me. I know you agree with me. I would ask that you please be balanced in your criticism and the times, for instance, that I, I complain Mr. Stynes is interrupting me. That is disrespectful. That has an impact on me and I'd like that recognized as we go forward, and I think I'm fair to raise that point. That's all I have to say.

BOARD MEMBER: Mr. Stynes?

MR. STYNES: I think I'm going to need some time to get instructions here because what I've heard is a very serious allegation of bias, and I, I think I'm going to need to get some instructions on, on this because I'm not sure I'm clear of the answer of whether he's asking you to recuse yourself. We didn't get a yes or no, but I'm, I'm meaning to research the point here. My concern is that this is being raised as sort of — I'm not sure the, the way it's being raised —I'm going to need to research the point.

AMIR ATTARAN: For clarity, go ahead, but I, I can answer your question if you'd like.

BOARD MEMBER: Let's let Mr. Stynes finish, please.

MR. STYNES: I, I, the — yeah. The, the point I'm making is I think there's been a very serious allegation here and I think it's going to need to be researched before we, we proceed. I might...

AMIR ATTARAN: Chair — sorry.

MR. STYNES: Maybe I should take — well, I was going to suggest we might take a bit of time so I can, I can consult on this, but I, I think this needs to be researched.

AMIR ATTARAN: I'm not bringing a motion for recusal for greater certainty.

> MR. STYNES: Well, this is what, what I'm concerned about is that you're making the allegation and then, you know, it's, it's almost like a threat and I, I would need to research the point.
>
> AMIR ATTARAN: To be clear, I'm not bringing that motion. I'm just expressing my concern at what happened and it is, it is, I think, the Chair's decision to go ahead. I'm happy to go ahead with this hearing.
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> BOARD MEMBER: Mr. Stynes, you said you'd like a little bit of time. How much time are you thinking that you'd like? Would you like the rest of the day? Would you like — what do we, what are we — or you want an hour? What, what are we talking about?
>
> MR. STYNES: That's a good question, Chair. I, I think if we take, maybe if we take — we're, we're close to, we're close to the lunch hour. Maybe if we could take that, I could — like I mean I'm, I'm debating between it whether we, we break for the day or if we just take to the lunch hour. I'd like to talk and get instructions on this. Maybe for now I'll suggest that we, we break early for lunch and come back. Would it be at — we were going to break at 1:30, is that right, until...
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> BOARD MEMBER: Two-thirty.
>
> [Emphasis added]

[27] After the break, the Tribunal heard submissions from the parties:

> BOARD MEMBER: Okay. Mr. Stynes, did you want to say anything? I was giving you the option of — we broke and I said we could listen to whether you wanted to continue today or carry on. I have, I have my own opinion on that, but I'm interested to know what you say, what, if you have anything to add.
>
> MR. STYNES: Yeah. I did have a few remarks to make, but if, if you have views, Chair, on how we should proceed that […] may be useful to, to have those.
>
> BOARD MEMBER: Well […] yeah, maybe I should, maybe I should. I, I think frankly that we have to end this hearing today. I don't think we can go on with an allegation of bias being levelled against the, the member and it being unresolved, and I think that I'm going to need some time to decide what we need to do going forward. And so I think what we need to do is end this hearing for today now and I'm also going to vacate the days next week. I think

we just tell the current witness that we'll call him back if and when we get there and we can let Mr. Cardinal know that we will not need him next week. And I will need some time to think about what we're going to do next to move forward, if we can move forward. Dr. Attaran?

AMIR ATTARAN: Chair, my position is, of course, that I am not bringing a motion for your recusal. I'm just putting on the record that I have concerns with the comment that was made. I think, I think it is the case that everyone's nerves are pretty frayed right now. I'm speaking for myself, very much so, and I may be wrong about the rest of us, but I think I'm probably right. So I don't actually have a difficulty with standing down as you say. I would prefer that we continue at an early opportunity because we have a lot to get through, although it is also clear because we're waiting on the privy counsel office until the end of July that we wouldn't actually get to close evidence, I guess in August to speculate, unless everyone's on summer vacation in August. So we do have some time, but I would like to continue. And I'm going to just please ask everyone's reflection, and I do not need an answer on it now. This is because I don't want myself to feel my nerves are frayed and I don't want others to feel that. Number one, I think we should be speaking through you as counsel more often than to each other. And so should we resume, I am going to try and do that. I am, of course, frustrated at the interruptions Mr. Stynes throws at me even in the midst of me speaking. I'm going to in the future ask you to weigh in on that and I would ask him to likewise make his objections to you. I think that would help. Number two, whether there is bias or not, I have not expressed an opinion on that that rises to the point that I would ask for your recusal. I have simply chosen to note it in the record because I feel that the comment about my way of behaving was simply too much. I am prepared to continue, but please, and this is a polite request to me as an individual, if you have a problem with how I'm behaving, just tell me at the time. I, I understand you're frustrated. So am I, and I think so is everyone else, but just tell me at the time rather than saving it up and letting, letting it come out in that way. That's all I ask, so that I can actually address what's, what's being said at the time. To the extent that I've contributed in any way to making the situation for everyone tense, I, of course, apologize, and I think it would be nice if everyone did the same. That's all I have to say.

BOARD MEMBER: Okay. Thank you. Does anybody else want to comment? I'll maybe let Ms. Carrasco put her comments on the record.

MS. CARRASCO: Chair Thomas, I appreciate the position you're in and the need to take a break and I appreciate that there are serious statements that have been made and I understand why you'd want to vacate the days. But in terms of the commission, if you feel we can go forward the commission is prepared to go forward, and of course subject to what the respondent has to say as well.

BOARD MEMBER: Thank you. Okay. Mr. Stynes?

MR. STYNES: Yeah. So I just sent — I have a couple of remarks, Chair Thomas, and I just sent three cases. It's a bit last, last minute, and again this was just over the, over the hour break what I could come up with on the point, but I, I did want to touch on these quickly if I, if I could. The, the first case is a Federal Court of Appeal decision and it's just simply on a, on a point that I think is probably uncontroversial. It's paragraph 8 of that and the Court of Appeal states that:

...An allegation of bias, especially actual and not simply apprehended bias, against a Tribunal is a serious allegation. It challenges the integrity of the Tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard...

So it's just, that case is just simply for the point that it's a very serious allegation that goes to the integrity of the, of the Tribunal and, and you as the Chair. The other two cases that I've cited, one is from the Tribunal 2008 decision. That's where there was a recusal motion and in it there's a quote from Sara Blake's Administrative Law in Canada 4th Edition. This is from the 2006, which again I haven't looked at, but in that section which the Tribunal quoted, it says, "When an allegation of bias is made, the Tribunal should rule on the allegations" […] at paragraph 3, so it's the second, the second case. It should be [2008] CHRT29. And it, citing the Administrative Law text saying that:

When an allegation of bias is made, the Tribunal should rule on the allegation. If it rules...[it's] not biased, it may continue with the hearing. It is not obliged to halt the proceeding. A Tribunal is not to be paralysed every time someone alleges bias.

And then the, the third case that I cited is a similar, similar point at paragraph 8. This is a Federal Court decision where it says:

When an issue of bias arises in the middle of a hearing, the usual course of action is for the party alleging bias to raise the objection with the Tribunal and then move to have the individual recuse him or herself.... [And it cites Brown and Evans. And then] The Tribunal has authority to determine the issue....

And so I'm raising these just because here's, here's our concern, here's the respondent's concern, is that a very serious allegation is made and it's almost like in a sword of Damocles fashion where, you know, a trump card for judicial review if the outcome is not to the complainant's liking. And from our perspective we think it's — that there has to be a — some clarity here and some — and, and the complainant has to have it one way or the other. So it's not, in our view, appropriate to make the allegation of bias. And, and what's concerning is, is when he made the allegation of bias, he says — and you, quite properly, Chair Thomas, ask him, are you asking me to recuse myself? And the answer is, is not clear. I mean, he's saying whether bias or not, that can be weighed upon later on and that you should give thought to whether you should. And, you know, he's saying we can proceed, but if — so our, our point is if we're going to proceed, he has to take the position and he has to state that you're not, you're not biased and that you can impartially determine this and it can't be used in, as we say, in, in this sort of sword of Damocles fashion, and you can't have it both ways. The other concern I'll express is with respect to Dr. Haan and the delay here. You know, it — that is of, also of concern to us. You know, we're, we're proposing to lose this afternoon and, and then not come back next week and have a potentially very long delay, and that's problematic from our, our perspective as well. But if I can summarize the main point, it's that I, I don't think it's — it, it puts the, the Tribunal and the — certainly the respondent in a very difficult position to make such a serious allegation and then — and as if it's going to be used as a, as sort of a sword of Damocles and, you know, a trump card for later on and, and that's, that's problematic. Either he, he has to take the position that you're not biased and we can proceed and state that clearly, if, if we are going to proceed, and I think that's a fair, a fair position to take.

BOARD MEMBER: Dr. Attaran?

AMIR ATTARAN: Mr. Stynes has told me what position I have to take, and with great respect to him, no. I don't have to take the position he tells me to take. I've taken the position that I wanted the, the comment about my mannerisms, my way of speaking and so forth — I won't repeat it. I think we all know what the comment is. I wanted to record an objection to that and I said that it seemed to me as unconscious bias and I also said I was not

bringing a motion for your recusal. I just want it in the record. That's all. I don't have to take the, the position. I, I can see Mr. Stynes wants me to take the position saying, thou shalt recuse, but that's not the position I'm taking and he can't push me into it. What I think, Chair, is that was an unfortunate comment. I think you understand that probably yourself. I'm not asking you to say so, I'm not putting you on the spot that way. I think you understand it probably. Earlier today, you said that you were frustrated yesterday with something that I said and I was frustrated too at times. Let's put this behind us. Let's carry on. I would actually prefer to carry on today and next week. That would be my preference and the commission has said likewise, and the respondent is saying he's concerned about delay. If you don't want to, entirely your prerogative, but I think the rest of us are ready to go.

BOARD MEMBER: Well, unfortunately, I, I believe, Dr. Attaran, that the case law and the jurisprudence I had a chance to review myself over the break supports that position that I don't think we're, we're — I can move forward at this point […] with this hanging, this cloud hanging over my head. I, I think it's impossible for us to proceed at this point.

AMIR ATTARAN: Okay.

BOARD MEMBER: I think this does need to be resolved before we, we can resume. I, I hope we can resume. Maybe we won't be able to. I don't know at this point. I'm going to need some time to, to research this more and speak to others and — about the law on this matter, and, and, and we'll have to take it from there. But at this point, there's, we can't go on today, and I, and I — and it's already 2:45. Ten o'clock Monday morning doesn't give us — doesn't give me enough time to... […] decide on, on what we need to do to be able to move forward. So....

AMIR ATTARAN: Couple other questions. Yeah, if you don't mind. So we were supposed to deal with a timetable for a motion with respect to documents and production, right? What are we going to do about that? […]

BOARD MEMBER: I don't know. Respondent counsel, you've got an opinion about that?

MR. STYNES: […] I would propose maybe towards the end of that week we come back and have a discussion on all of these things and come up with a plan rather than trying to do it now.

> MS. CARRASCO: I agree with respondent counsel.
>
> AMIR ATTARAN: I'm fine with that.
>
> […]
>
> BOARD MEMBER: Okay. So I'm going to bring back Professor Haan. I'm going to tell him that the other counsel are — I'll remind him, of course, that he's under oath. He shouldn't be discussing his testimony and then I will tell him that it has been agreed that Mr. Stynes be able to contact him about rescheduling his reappearance. […] And, and then, and then we'll have some time to reflect on, on next steps and we'll reconvene at noon next Friday, right? That's — everyone's okay with that?
>
> […]
>
> BOARD MEMBER: Okay. So I think that we'll leave it there and, and we'll reconvene, as I said, next Friday at noon on Zoom and we'll carry on at that time, and I may communicate with you in the meantime. We'll, we'll see. Okay. […] Thank you, everyone. Buh-bye.
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> [Emphasis added]

[28] The Tribunal vacated its scheduled hearings and adjourned the hearing from April 30, 2021 to September 15, 2021 when hearings resumed.

B. *Decorum Directive of May 21, 2021*

[29] Between the allegation of unconscious bias and the resumption of hearings four months later, by letter dated May 21, 2021, the panel sent the parties the so-called “Decorum Directive.” The Decorum Directive sets out the background of the proceedings, discusses the very serious nature of bias allegations, and outlines rules of decorum to follow henceforth.

[30] Specifically the Decorum Directive sets out the panel member's views on what transpired leading up to and at the hearing on April 30, 2021, including Dr. Attaran's unresolved allegation of apprehension of unconscious bias. The Addendum also summarizes the submissions of the parties.

[31] The Decorum Directive states:

> On April 30, 2021, I adjourned the above hearing to provide the time necessary for all involved to regain the equanimity required for a quasi-judicial proceeding.
>
> The purpose of this letter is to provide direction for the restoration of good order and proper decorum in these proceedings. This case before the Canadian Human Rights Tribunal (the "Tribunal") is of great importance. The parties have worked for years in preparation for the inquiry and we have already completed 14 days of hearing.
>
> However, the hearing has lost its way.
>
> Notwithstanding my best efforts to maintain decorum, throughout the hearing there have been numerous interruptions, with parties speaking out of turn or speaking over each other. Moreover, there have been personal attacks, antagonistic tones, frequent objections, and continuous sharp exchanges between the Respondent's counsel (Mr. Stynes) and the Complainant (Dr. Attaran). My role as the adjudicator has sometimes been like a sports referee, forced to make many calls on the spot, without time for reflection, just in order to keep matters moving along. In my good-faith attempts to control the proceeding, I have also displayed moments of frustration and could have chosen better words to express myself.
>
> Matters came to a head on Day 14 of the hearing, while Professor Haan was being cross-examined by the Complainant, and an objection was raised by the Respondent's counsel to a line of questioning alleging academic misconduct on the part of the witness. Mr. Stynes said that Dr. Attaran was attempting to intimidate and bully his witness by going after his academic integrity. An exchange ensued between the Tribunal and the Complainant, culminating in assertions by the Complainant that certain comments and decisions of mine, including decisions on the scope of cross-examination, gave rise to an apprehension of bias. Notwithstanding the allegation, the Complainant stated that

he was not seeking my recusal and would not be bringing a motion for such. He wanted to continue with his cross-examination of Professor Haan.

Dealing first with the cross-examination issue, I would make the following observations. When deployed correctly, cross-examination is an indispensable tool in the quasi-judicial process, and examiners are typically given wide latitude in their questioning. On the other hand, there are limits. In particular, repeated questions do nothing to advance the inquiry. Moreover, the Tribunal retains the discretion to limit questions that do more to embarrass the witness than actually elicit helpful testimony on matters in dispute. Relevance and potential probative value are always important considerations that inform a party's right under s. 50(1) of the CHRA "to present evidence" through cross-examination.

More generally on the issue of decorum, I would remind the parties that hearing room communication and courtesy are extremely important for a respectful proceeding. The issues before the Tribunal here are significant. An important inquiry such as this should not be derailed by needless personal attacks or continued interruptions. In order to move forward, I need to rely on all parties to comport themselves in a manner that is worthy of this case.

Finally, I need to address that the Complainant raised the issue of bias on the part of the Tribunal Member. The Tribunal is sensitive to the fact that the Complainant is self-represented and concerned about the need to make timely objections to preserve his rights when he believes they have not been respected. However, there is a distinction to be drawn between, on the one hand, objecting to a course of action adopted—or even a ruling made—by the Tribunal, and on the other hand, impugning the Tribunal's impartiality and integrity. The latter should not be asserted outside of a recusal request. It is well established that in certain contexts, a party must bring a timely objection on an allegation of bias to prevent an assertion of waiver. However, waiver can have no application in cases where the bias allegation is tied to what is said or done during the decision-making process (*Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al*., 2006 NBCA 61 (CanLII), at para 14).

Bias is a serious matter. In *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8, 283 NR 346, the Federal Court of Appeal explained that an allegation of bias against a tribunal is a serious allegation that cannot be made lightly. When deployed during the hearing as a simple advocacy tool, allegations of bias undermine

the respectful atmosphere that is required for the quasi-judicial process to operate. They inflame the proceedings and distract from the matters to be decided. Because they do not seek a recusal decision from the member, such advocacy allegations erode confidence in the administration of justice since they offer no avenue for either substantiation or dismissal. As indicated, the Complainant thus far has indicated that he does not seek my recusal.

Giving consideration to the fact the Complainant is self-represented, the Tribunal will not insist on a formal motion for recusal for the allegation of bias made on the last day of hearing. However, in order to move forward, the Tribunal directs that parties refrain from making any further allegations or allusions to bias on the part of the Tribunal unless it is in the context of an actual motion for recusal.

Moreover, in light of the observations above, when the hearing resumes, the following directions will apply to the parties going forward:

A) The parties will maintain a proper level of decorum at all times;

B) The parties will not interrupt each other;

C) The parties will not speak directly to each other when making objections. They will speak only to the Tribunal Member;

D) The parties will not make any comments about each other's ethical duties as members of the Law Society or of breaching obligations under the Rules of Professional Conduct. If they seriously have concerns about the professional conduct of another lawyer, then they should report that conduct directly to the Law Society in accordance with the rules of that body;

E) The parties will refrain from attacks on the character of a party, representatives, counsel, or witnesses; and

F) If a party believes that any actions or decisions of the Tribunal (either considered individually or cumulatively) have given rise to a reasonable apprehension of bias, that party must immediately bring a motion for recusal in writing in accordance with Rule 3 of the Tribunal's Rules of Procedure. Otherwise

> parties are to refrain from directing allegations of bias at the Tribunal.
>
> Failure to comply with the above directions may result in the Tribunal placing the case in abeyance again and seeking submissions on whether there has been an abuse of process in this proceeding, and if so, the appropriate sanction for same.
>
> The Tribunal will shortly issue deadlines for the written submissions for the Complainant's new disclosure motion. The Registry Officer will also contact the parties for new hearing dates. We will re-commence with three scheduled days to allow for the remainder of Prof. Haan's evidence. Thereafter, the parties will be canvassed for further dates for the testimony of Mr. Cardinal. Further days may be reserved for additional testimony depending on the outcome of the Respondent's application for certification of privilege from the Clerk of the Privy Council.
>
> [Emphasis added]

[32] As just set out, the panel decided he would not insist on a formal motion for recusal for the allegation of bias (mistakenly in my view), "giving consideration to the fact Dr. Attaran is self-represented". In fact, the member repeats his finding that Dr. Attaran is "self-represented": twice in the Decorum Letter (and repeats it again in the Addendum at paragraph 415). In this connection and while Dr. Attaran technically represented himself, I may take judicial notice that he is a member of the Ontario bar, and at least in this Court has on numerous occasions acted as counsel for others and pursued his own matters: counsel appearances in *Gray v Canada (Attorney General)*, 2019 FC 1553; *Gray v Canada (Attorney General)*, 2019 FC 301; *Canada (Attorney General) v Clayton*, 2018 FC 436; *Amnesty International Canada v Canada (Chief of the Defence Staff) (FC)*, 2008 FC 336, and as a party he appeared in *Attaran v Canada (Foreign Affairs)*, 2009 FC 339; *Attaran v Canada (National Defence)*, 2011 FC 664; and *Attaran v Canada (Attorney General)*, 2013 FC 1132).

[33] Nothing suggests nor was it argued that Dr. Attaran had any shortage of counsel and or legal knowledge. Thus the panel in error to have afforded Dr. Attaran any latitude in alleging bias and failing to seek recusal because he was “self-represented”.

[34] That said, the panel directed the parties moving forward to refrain from making any further allegations or allusions to bias on the part of the panel unless in the context of an actual motion for recusal.

[35] As seen, the member did not determine the merits of Dr. Attaran’s allegation that the panel member’s conduct gave rise to an apprehension of unconscious bias. In my view this was also an error on the panel’s part – as will be seen, the Court is of the view the bias allegation should have been resolved either on application of Dr. Attaran, or by the panel without his application.

[36] Instead, the allegation of unconscious bias was left on the record unresolved.

[37] Nor was any process put in place by which the parties could make further submissions should they have wished to do so, leading to a determination of the alleged apprehension of unconscious bias.

[38] Thus, except in short submissions on April 30, 2021, outlined above, no aspect of the unconscious bias allegation was further addressed by the parties. No evidence was led on the merits of the concept of “unconscious” bias.

[39] The hearing resumed September 15, 2021 and concluded September 24, 2021 with a decision reserved.

C. *Unexpected "Bias Allegation Addendum" in Decision rejected Dr. Attaran's allegation of unconscious bias*

[40] The Decision was released July 4, 2023. It sets out the facts and law leading to the Tribunal's conclusion to dismiss Dr. Attaran's complaint at the second stage of the *Moore* test, i.e., because there was no discriminatory practice. This flowed from the panel's conclusion no "provision of service" was established as required by s 5 of the *CHRA*.

[41] In my view and I find completely unexpectedly, the member completes his reasons with an annex called "Bias Allegation Addendum." The Addendum summarizes the views of the panel as to what took place before him. Centrally and materially, and without notice to the parties or opportunity to respond, the panel effectively dismissed Dr. Attaran's allegation of "unconscious bias" because the concept of unconscious bias is "unhelpful" and in effect "unsupportable."

[42] The Addendum states:

> [395] Any allegation of bias against a decision-maker is a very serious matter. Unfortunately, this allegation was made during the hearing. This decision would be incomplete if I did not address the incident and give my reasons for continuing with the inquiry after the allegation was levelled. The allegation did not affect my analysis in this decision in any way.
>
> [396] To briefly give context, when the hearing resumed on April 29, 2021, it began with my ruling to admit the Respondent's expert witness. Prof. Michael Haan and his expert report. As noted above, this followed almost two days of cross-examination of Prof. Haan on

his expertise and an entire afternoon of argument about whether or not I should accept him as an expert at all.

[397] It appeared to me that Dr. Attaran was displeased with my ruling. During Mr. Stynes' direct examination of Prof. Haan's expert report. Dr. Attaran made two objections when reference was made to data sets involving health costs. Dr. Attaran's objected that Prof. Haan was not qualified as a health expert. When I overruled the second objection, Dr. Attaran made his first of several insinuations that I was giving preferential treatment to the witness because he shared my gender and racial characteristics. Dr. Attaran said. "There has to be a limit. Chair….There is a propensity to think that every professor who is a white man is an expert in everything." (Hearing Recording at 2:49 on April 29, 2021.)

[398] The next morning, Dr. Attaran made a similar insinuation. He accused me of being inconsistent in a ruling when compared to questioning of his expert witness. He said. "The one time it happened, the professor was Asian and female, and this time it happened, the professor is white and male. I will leave that on the record." (Hearing Recording at 2:10 on April 30, 2021.) Over the course of these two days, I counted several instances when Dr. Attaran made insinuations that I was treating Prof. Haan with some preference because, like the witness, I am also white and male.

[399] In an administrative hearing such as this one, the adjudicator has different roles to play. Firstly, the adjudicator must be impartial, and must not be in any conflict of interest with the parties, whether that conflict is real or perceived. The adjudicator sits in the hearing to receive information, testimony and legal argument. The parties are entitled to test each other's evidence to ensure the adjudicator gets the best information upon which to base their decision.

[400] This hearing was unlike any I have adjudicated before in terms of the sheer number of objections and rulings I was asked to make. I was also forced on several occasions to ask the parties to maintain proper decorum and to refrain from making petty comments and insults to each other. I also asked that parties refrain from suggesting others are not meeting their obligations under the *Rules of Professional Conduct* of the Law Society of Ontario. I had to make all sorts of rulings over the course of this inquiry. I suspect all parties were unhappy with some of my rulings from time to time.

[401] Dr. Attaran made his allegation of bias after we returned from a 20-minute break during his cross-examination of Prof. Haan. Before the break, Respondent counsel, Mr. Stynes, had raised

objection to the questions being put to his witness. He said that Dr. Attaran was attempting to intimidate and bully his witness by going after his academic integrity. Dr. Attaran started to lead questions to the witness about his possible ethical violations and professional misconduct.

[402] The exchange concerning the questioning of ethical violations and professional misconduct was heated, which eventually led me to call for the 20-minute break. Prof. Haan had been excluded from the hearing room after Mr. Stynes' objection while counsel discussed the line of questioning. I told Dr. Attaran that I did not want witnesses bullied, threatened or intimidated. I reiterated that as the adjudicator. that. "I am trying to maintain some decorum here, and so I would ask for your cooperation in that, and just in the mannerisms, and there are little things, Dr. Attaran, that you say and you do, and the expressions you make. but they are intimidating to people. And I don't think it's necessary for us, to get through the evidence that will allow this Tribunal to make a decision on the issues that are before it."

[403] In hindsight, these were not the best words I could have chosen. I was trying to avoid inflammatory language, but I thought it was clear to all parties, and members of the gallery about what I meant when I referred to "mannerisms" and things that Dr. Attaran did during the course of the hearing. I used the word "mannerisms". but the more accurate word would have been "theatrics" that Dr. Attaran performed as others spoke, such as rolling his head back, mock-laughing and throwing his face into his hands.

[404] Nevertheless, Dr. Attaran stated he had never before been criticized for his "mannerisms" by an adjudicator and made the suggestion that what I had just said had something to do with him being a visible minority. Dr. Attaran then again implied that I was racially biased and sexist in my conduct. My comment had nothing to do with any ethnicity of Dr. Attaran. This is when I decided it was time to take the 20-minute break.

[405] I had resolved to bring order back to the hearing room, and grant the widest discretion permissible for Dr. Attaran to ask the questions he wanted for the remainder of his cross-examination. However, before I said anything upon our return, Dr. Attaran made a statement about his perception of my bias:

"But I think the manner in which you criticized me, for the way which I speak or my mannerisms. and saying that I may not even be aware of it. but it's disrespectful. I don't think you should have done that. And I honestly feel it gives rise to an apprehension of

unconscious bias. I have spent my entire working life, as a minority person, being told I should speak differently, I should behave differently, it is not something I welcome. And I am unhappy that it has happened here and from somebody I respect, as I very much do you. The caselaw requires me to put notice of an apprehension of bias on the record when it happens. So I am doing that without acrimony." (Hearing Recording at 2:12 on April 30, 2021.)

[406] I immediately asked Dr. Attaran if he was asking me to recuse myself. He said in reply that he was asking me to give thought to whether I should or if I should have made the statement that was made.

[407] The Respondent counsel was surprised at the allegation and sought clarification if Dr. Attaran intended to bring a motion for my recusal. Dr. Attaran replied that he did not intend to bring such a motion and that he was "happy to proceed" with his cross-examination of Prof. Haan.

[408] Respondent counsel requested a lengthy recess to conduct research on the matter, which I granted. Dr. Attaran went into a caucus with counsel for the Commission. I thought over the break the parties might absorb the magnitude of what had just transpired.

[409] When we returned from the recess, the Respondent counsel presented caselaw about the seriousness of making an allegation of bias against a decision-maker, especially mid-hearing. They suggested that Dr. Attaran should either bring a motion for recusal or completely withdraw his allegation of bias before we proceeded further with the hearing.

[410] Dr. Attaran scolded Mr. Stynes for suggesting he be told what position he would have to take. Dr. Attaran went on to again criticize me for my comment about his mannerisms and his way of speaking. He again re-iterated that it seemed to him to be the result of my unconscious racial bias. Dr. Attaran said that I probably regretted saying it and implied that I probably wanted to apologize for saying it. This was the fifth time Dr. Attaran implied or stated that I was racially biased against him.

[411] Dr. Attaran and the Commission both said they were prepared to continue with the hearing that day. Dr. Attaran wanted to put his allegation of bias aside and continue with his cross-examination of Professor Haan. The hearing was also scheduled to continue on the following week with the testimony of another witness.

[412] An allegation of bias against a decision-maker, especially in the midst of a hearing, is a matter which must be addressed. I determined that I would need more time to reflect and review the jurisprudence before making a decision. As such, I terminated the hearing that day and we vacated the hearing days for the following week.

[413] Before describing how the matter was resolved, I feel the need to speak on the record from a personal perspective. Allegations of racial bias are very toxic in today's world. The mere allegation of such impropriety carries with it significant stigmatization and it is often very difficult for the accused to achieve redemption because the allegation, though difficult to prove, is also quite difficult to disprove. My personal reputation was impugned by Dr. Attaran's allegation, so I wish to reply to defend myself. Firstly, I do not observe Dr. Attaran to speak with an accent or differently from anyone else in North America. He was born and raised in California and educated and employed at some of the most prestigious universities in the English-speaking world. I have never met Dr. Attaran in person. I have only seen him on a video screen. He does not even appear to me to be a visible minority. Perhaps it might be different in person. I also highly doubt that I have a subconscious bias against people with a Persian ethnic background. Some of my closest friends are from Iran, including my college roommate who has remained a lifelong friend and participated as a groomsman at my wedding. In the absence of a motion for my recusal, I did not view the allegation as being serious. I perceived it more as an attempt to intimidate me, which it did not.

[414] In the moment of contentious litigation, it is possible for tempers to flare and judgement to be impaired. In the forum of a human rights tribunal hearing, allegations of discrimination are always top of mind, and perhaps this might influence perceptions.

[415] The Tribunal is sensitive to the fact that Dr. Attaran was self-represented and he was concerned about the need to make timely objections to preserve his rights when he believed they had not been respected. However, there is a distinction to be drawn between, on the one hand, objecting to a course of action adopted—or even a ruling made—by the Tribunal, and on the other hand, impugning the Tribunal's impartiality and integrity. The latter should not be asserted outside of a recusal request.

[416] It is well established that in certain contexts, a party must bring a timely objection on an allegation of bias to prevent an assertion of waiver. However, waiver can have no application in

cases where the bias allegation is tied to what is said or done during the decision-making process (*Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61 (CanLII), at para 14).

[417] Bias is a serious matter. In *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8, the Federal Court of Appeal explained that an allegation of bias against a tribunal is a serious allegation that cannot be made lightly. When deployed during the hearing as a simple advocacy tool, allegations of bias undermine the respectful atmosphere that is required for the quasi-judicial process to operate. They inflame the proceedings and distract from the matters to be decided. Because they do not seek a recusal decision from the member, such advocacy allegations erode confidence in the administration of justice since they offer no avenue for either substantiation or dismissal.

[418] Mr. Stynes described Dr. Attaran's allegation of bias without a motion for recusal as a "sword of Damocles" hanging over the proceeding. In Mr. Stynes' view, unless fully withdrawn, an allegation of bias would serve as a "trump card" for Dr. Attaran to play for a judicial review if the final decision herein did not substantiate his complaint. (Hearing Recording at 2:34 on April 30, 2021.)

[419] The inherent problem with any allegation of unconscious bias is that it is next-to- impossible to prove what is going on inside the mind of another person, especially when part of the argument is that the person is not even aware themself of it. Unconscious bias finds its roots in the implicit-bias test developed by a group of American social psychology researchers around 30 years ago. Despite the wide use of the test for training in the work place, it has been controversial within the scientific community because of its inability to meet the accepted standard of consistent test results, suggesting to many that the implications, insofar as test results may relate to a propensity for discrimination, are not supportable. A bald allegation of unconscious bias made before a Tribunal member should be received in a careful and measured way. While the complainant may argue that the respondent is discriminatory due to the unconscious bias that is unseen, the respondent is equally open to argue that the complainant is delusional and seeing discrimination where it doesn't exist. Neither of these arguments are helpful to the adjudicator.

[420] With the hearing suspended indefinitely, I took time to reflect on how the matter could proceed. All parties had invested years of preparation into this inquiry and we had already

> completed 14 days of hearing. It would be an enormous set-back if a new adjudicator had to be appointed to take over the inquiry.
>
> [421] After some reflection, I issued a letter to the parties concerning decorum on May 20, 2021, which outlined my expectations for hearing decorum and the good order required to complete the inquiry. The parties referred to these directions as the "Decorum Directives" for the remainder of the hearing. There were several allegations made that parties were breaching the Decorum Directives as we concluded the hearing in September. However, I did not view any breaches as being sufficiently prejudicial as to warrant a further suspension of the proceedings. The inquiry had come so far and was getting close to the end. It needed to reach its conclusion.
>
> [Emphasis added]

[43] In the Addendum, the panel makes a series of what I consider material and negative findings on the concept of "unconscious bias", i.e., the exact same allegation Dr. Attaran made against him. The panel ruled "the inherent problem with any allegation of unconscious bias is that it is next-to-impossible to prove," that the concept of unconscious bias is based on the "implicit-bias test developed by a group of American social psychology researchers around 30 years ago," and that unconscious bias is "controversial within the scientific community because of its inability to meet the accepted standard of consistent test results, suggesting to many that the implications, insofar as test results may relate to a propensity for discrimination, are not supportable."

[44] The member concludes his negative assessment of Dr. Attaran's unconscious bias allegation by ruling "while the complainant may argue that the respondent is discriminatory due to the unconscious bias that is unseen, the respondent is equally open to argue that the

complainant is delusional and seeing discrimination where it doesn't exist. Neither of these arguments are helpful to the adjudicator."

[45] The Addendum also sets out the panel's account of what occurred during Dr. Attaran's first four days of his seven-day cross-examination of the Respondent's expert witness (Prof. Michael Haan) and his expert report, noting that Dr. Attaran made "several insinuations" that the panel member "was giving preferential treatment to the witness because he shared [the panel member's] gender and racial characteristics… [of being] white and male," compared to the expert witness called by Dr. Attaran who was Asian and female. These are set out in Part III, A of these Reasons, above.

[46] The Addendum notes Dr. Attaran did not bring a motion for recusal, but instead asked the panel member "to give thought to whether… [he] should have made the statement that was made." The member states, "I did not view the allegation as being serious. I perceived it more as an attempt to intimidate me, which it did not," implying Dr. Attaran's allegation was used an "advocacy tool":

> [415] The Tribunal is sensitive to the fact that Dr. Attaran was self-represented and he was concerned about the need to make timely objections to preserve his rights when he believed they had not been respected. However, there is a distinction to be drawn between, on the one hand, objecting to a course of action adopted—or even a ruling made—by the Tribunal, and on the other hand, impugning the Tribunal's impartiality and integrity. <u>The latter should not be asserted outside of a recusal request.</u>
>
> [416] It is well established that in certain contexts, a party must bring a timely objection on an allegation of bias to prevent an assertion of waiver. …
>
> [417] Bias is a serious matter. In *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8, the Federal Court of Appeal

> explained that an allegation of bias against a tribunal is a serious allegation that cannot be made lightly. When deployed during the hearing as a simple advocacy tool, allegations of bias undermine the respectful atmosphere that is required for the quasi-judicial process to operate. They inflame the proceedings and distract from the matters to be decided. Because they do not seek a recusal decision from the member, such advocacy allegations erode confidence in the administration of justice since they offer no avenue for either substantiation or dismissal.
>
> [Emphasis added]

[47] In this connection the Decision at paragraphs 416 and 417 (quoted above) refers to *Rothesay Residents Association Inc v Rothesay Heritage Preservation & Review Board et al*, 2006 NBCA 61 and *Arthur v Canada (Attorney General)*, 2001 FCA 223 at paragraph 8 [*Arthur*].

IV. Issues

[48] The Commission raises:

1. What are the standards of review for these consolidated applications?
2. Did the panel member breach principles of procedural fairness by reason of actual or apprehended bias?
3. Did the panel member act unreasonably by ignoring the central arguments of the Chinese and Southeast Asian Law Clinic [CSALC] and Dr. Attaran concerning adverse impacts on PGPs?
4. Did the panel member act unreasonably by not assessing the service at issue?
5. Did the panel member act unreasonably by applying the principles of *Matson* and *Andrews* (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31) to the facts before him?

6. Did the panel member act unreasonably by departing from the Tribunal's longstanding practice of using *Mohan* and related common law principles in assessing an expert's qualifications?

[49] Dr. Attaran raises:

1. What is the appropriate standard of review?
2. Did the panel member exhibit bias or an apprehension of bias?
3. Did the Tribunal err in failing to consider the "extended family" argument?
4. Did the Tribunal violate procedural fairness or proceed unreasonably by relying on incompletely cross-examined evidence?
5. Did the Tribunal err by finding no *prima facie* case of discrimination?
6. Did the Tribunal err by slicing the s. 5 CHRA "service" into subcomponents?
7. Did the Tribunal err in finding the Levels Plan is binding?

[50] Respectfully, at its root the issues are whether the Decision meets the test of procedural fairness in relation to the apprehension of unconscious bias allegation.

[51] Because the Applicants have succeeded on the unconscious bias issue, it is not necessary to determine the reasonableness of the Decision.

V. Standard of review

A. *Procedural fairness*

[52] The Respondent submits questions of procedural fairness are not decided according to any particular standard of review, particularly when bias is alleged. More importantly, the Federal Court of Appeal had conclusively determined, and I agree, that on procedural fairness "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond": see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 55-6 [*Canadian Pacific Railway*, per Rennie JA]:

> [55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As Suresh demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
>
> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
>
> [Emphasis added]

[53] The Federal Court of Appeal recently relied on "the long line of jurisprudence, both from the Supreme Court and" the Federal Court of Appeal itself, that "the standard of review with respect to procedural fairness remains correctness": see *Canadian Association of Refugee*

Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at paragraph 35 per de Montigny JA (as he then was). Notably, to the same effect is the judgment of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at paragraph 43:

> [43] Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> *(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). This is confirmed by s. 18.1(5). It may have been thought that the Federal Court, being a statutory court, required a specific grant of power to "make an order validating the decision" (s. 18.1(5)) where appropriate.

[54] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada also establishes what is required on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonable apprehension of bias*

[55] The objective test for apprehension of bias is confirmed in *Committee for Justice & Liberty v Canada (National Energy Board*) [1978] 1 SCR 369 at 394 [*National Energy Board*] per de Grandpré J (dissenting, but followed by subsequent jurisprudence):

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

[56] The Supreme Court of Canada links the issue of bias and the need for an impartial tribunal in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon*]:

> [22] The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[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" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see *S. (R.D.)*, at para. 49, per L'Heureux-Dubé and McLachlin JJ.
>
> [23] In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:
>
> . . . public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

> The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis added; paras. 57-58.]

[57] *Arthur* also confirms bias is a serious allegation that challenges the integrity of the tribunal and its members at paragraph 8:

> [8] … An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. …
>
> [Emphasis added]

The Applicants emphasize that "actual bias need not be established" to find a reasonable apprehension of bias (*R v S (RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para 109 [per Cory J]; see also *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 62–68; *R v Curragh Inc*, 1997 CanLII 381 (SCC), [1997] 1 SCR 537 at para 2 [*Curragh*]). In my view, if a reasonable apprehension of bias is established in this case, it will satisfy the test in *National Energy Board*.

VI. Submissions of the parties and analysis

[58] Given my decision to grant judicial review based on bias and procedural unfairness, it is not necessary to deal with alleged unreasonableness. I therefore also adopt the following from *Gardaworld Cash Services Canada Corporation v Smith*, 2020 FC 1108, where Justice Grammond states at paragraph 3: "Although the parties filed a considerable volume of evidence

and made wide-ranging submissions, I will confine myself to the issue of bias, which is sufficient to dispose of the case, and I will say as little as possible about the merits."

[59] The Applicants submit an apprehension of bias and procedural unfairness arises from the panel's Addendum. They further allege other matters during and outside the hearing support their bias allegations.

[60] The Respondent submits there is no breach of procedural fairness nor reasonable apprehension of bias on the part of the panel member.

A. *Is the Decision procedurally fair?*

[61] The Applicants submit the Tribunal breached its duty of procedural fairness due to actual and/or a reasonable apprehension of bias and a lack of opportunity to be heard. The Commission argues this last point with respect to the Addendum. Dr. Attaran also addresses the Commission's inability to complete its cross-examination of another Respondent witness (not Dr. Haan, but a federal government public servant).

[62] The Respondent submits the hearing occurred in a procedurally fair manner and the record shows the decision-maker remained impartial, open to persuasion, and committed to ensuring the Complainant had a fair opportunity to make his case.

[63] The issues of apprehension of unconscious bias in the Addendum are raised by the parties.

[64] With respect, I conclude procedural unfairness is established in this case, for two reasons. First, the panel did not give the Applicants an opportunity to know the case against them and to fully and fairly respond. Second, the panel lost its necessary objectivity by engaging personally and subjectively in the assessment of the bias allegation against him.

(1) The panel did not give the Applicants an opportunity to know the case against them and to fully and fairly respond

[65] The panel stated that it issued the Addendum to complete his reasons. In the Addendum, the panel discusses in material detail and rejects the Applicants' allegation of "unconscious bias" because the panel considers the concept "unhelpful." This is a conclusion contrary to the Supreme Court of Canada's recognition of "unconscious bias" in *National Energy Board*, quoted at paragraph 55 above.

[66] The panel rejected the unconscious bias allegation without any notice to the Applicants that this was under consideration, and without giving them any opportunity, let alone a full and fair chance, to respond. Therefore this part of the Decision was arrived at, with respect, in a procedurally unfair manner very contrary to *Canadian Pacific Railway*.

[67] The Respondent argues the Addendum should be severed from the rest of the Decision. I do not accept this submission. The Addendum is not simply an irrelevant or immaterial afterthought. In my view, it is a direct determination of Dr. Attaran's allegation of "unconscious bias."

[68] In addition, the Addendum is the completion of the panel's Decision. The panel states the Addendum is provided to 'complete' the Decision: see paragraph 395: "Any allegation of bias against a decision-maker is a very serious matter. Unfortunately, this allegation was made during the hearing. This decision would be incomplete if I did not address the incident and give my reasons for continuing with the inquiry after the allegation was levelled. The allegation did not affect my analysis in this decision in any way." [Emphasis added]

[69] Moreover the panel itself states the Addendum is necessary at para 413: "Before describing how the matter was resolved, I feel the need to speak on the record from a personal perspective" [Emphasis added]. In these circumstances, I am unable to find the Addendum severable.

[70] Nor, and with respect, do I accept the Respondent's submissions that Dr. Attaran had an opportunity to be heard because he could (and in my view should, as outlined below) have brought a motion to recuse but repeatedly declined. In my respectful view, while the Applicants knew the bias allegation was up in the air upon the panel's adjournment on April 30, 2021, I find they had no reason to believe "unconscious bias" was still a live issue after the Decorum Directive of May, 2021. None of the parties expected the Decision would include an assessment and determination of the merits of Dr. Attaran's unconscious bias allegation.

[71] I also find the panel had a strong negative view of the legitimacy of the concept of "unconscious bias." If the panel had put issue before the parties, there is no doubt relevant evidence could and likely would have been submitted, tested and determined. All parties

certainly knew “unconscious bias” was the core of the Applicants’ position as stated and repeated on April 30, 2021.

[72] In summary on this point, I find the panel rejected Dr. Attaran’s core allegation of “unconscious bias,” not only without supporting evidence, but without giving the parties an opportunity to know the case to meet, or a fair and full chance to respond as required by *Canadian Pacific Railway*. The parties had no notice unconscious bias would be decided by the panel in completing his Reasons, nor that “unconscious bias” (acknowledged by the Supreme Court of Canada as a form of bias that might be apprehended) was still under active consideration and might therefore be rejected as a ground for their bias allegation. This breached procedural fairness.

(2) The panel lost its necessary objectivity by engaging personally and subjectively in its assessment of the bias allegation

[73] I am also of the view the member lost the necessary objectivity when he injected himself into his analysis of the allegation of unconscious bias. In this respect, as just noted, the Addendum at para 413 states he felt the need to speak from a “personal” perspective on the bias allegation: “Before describing how the matter was resolved, I feel the need to speak on the record <u>from a personal perspective</u>”.

[74] He went further saying his personal reputation was impugned, that he wished to reply “to defend [him]self,” and that to him he “did not observe Dr. Attaran to speak with an accent or differently from anyone else in North America,” and that Dr. Attaran did “not even appear to

[him] to be a visible minority." Here again he is assessing the matter from his subjective viewpoint, not objectively as required by *National Energy Board*.

[75] The panel continued by asserting he highly doubted he had a subconscious bias against people with a Persian ethnic background.

[76] The panel further personalized his analysis by saying (in what Dr. Attarran describes as a trope) "some of [his] closest friends are from Iran, including [his] college roommate who has remained a lifelong friend and participated as a groomsman at [his] wedding." Undoubtedly here again the panel member erroneously assessed the matter from his own personal and subjective viewpoint, not objectively as required by the Supreme Court of Canada in its *National Energy Board* judgment.

[77] Paragraph 413 of the Addendum sets out the foregoing:

> [413] … I feel the need to speak on the record from a personal perspective. Allegations of racial bias are very toxic in today's world. The mere allegation of such impropriety carries with it significant stigmatization and it is often very difficult for the accused to achieve redemption because the allegation, though difficult to prove, is also quite difficult to disprove. My personal reputation was impugned by Dr. Attaran's allegation, so I wish to reply to defend myself. Firstly, I do not observe Dr. Attaran to speak with an accent or differently from anyone else in North America. He was born and raised in California and educated and employed at some of the most prestigious universities in the English-speaking world. I have never met Dr. Attaran in person. I have only seen him on a video screen. He does not even appear to me to be a visible minority. Perhaps it might be different in person. I also highly doubt that I have a subconscious bias against people with a Persian ethnic background. Some of my closest friends are from Iran, including my college roommate who has remained a lifelong friend and participated as a groomsman at my wedding…

[Emphasis added]

[78] With respect, these comments in the Addendum evidence a misstatement of the test for apprehension of bias as a subjective one, instead of the objective test confirmed by the Supreme Court of Canada in *National Energy Program* (page 394) and *Yukon* (paras 22 and 23).

[79] With respect, it seems to me the member lost the necessary objectivity which is essential for Tribunal members, by his becoming personally involved in assessing Dr. Attaran's bias allegation, and in addition misstated the relevant test which is objective not subjective.

[80] The member also stated at para 413 of the Addendum: "In the absence of a motion for my recusal, I did not view the allegation as being serious. I perceived it more as an attempt to intimidate me, which it did not." Again with respect, this assessment is mistaken. Again, the member's assessment erroneously relies on his view of the subjective impact of the bias allegation on him, when instead, bias must be determined objectively per *National Energy Board*.

[81] While the member may have correctly identified the personal impact of the bias allegation on him, that is not the proper test for bias. In my respectful opinion, viewed per the objective test in *National Energy Board*, Dr. Attaran's bias allegation constituted a serious attack on the impartiality and competence of the member, and upon the integrity of the Tribunal and administration of justice. This challenge required resolution by the panel under the jurisprudence, regardless of the panel's personal views of its impact on him.

(3) No merit in Dr. Attaran's additional submissions re procedural fairness

[82] Dr. Attaran also alleges the duty of procedural fairness was breached because the Applicants were not able to complete cross-examining a Respondent's witness excused by the panel for medical reasons. This witness had previously been on the stand for three days, including two days of cross-examination by Dr. Attaran. The outstanding cross-examination by the Commission was estimated to take only two or three more hours.

[83] This submission is without merit. The Respondent gave the Tribunal, the CHRC and Dr. Attaran two doctor's letters relating to the ill health of the witness. Dr. Attaran made submissions on the matter to the panel, including what the Respondent quite correctly describes as a "baseless" allegation that one of the physician's letters "bears several hallmarks of forgery." Moreover, Dr. Attaran addressed this issue in his final written submissions to the Tribunal. The Tribunal considered but rejected these submissions, as set out in its Reasons at paragraphs 366 to 369. Dr. Attaran now asks to place the letters on the public record. However, in my view they were properly sealed by the Tribunal as confidential and I reject his request that they now be unsealed.

[84] Dr. Attaran knew the case to answer, made submissions, but did not succeed. I am unable to see any unfairness particularly given that in proceedings such as this, these panels are masters of their procedures (see e.g. *Canada (Citizenship and Immigration) v Dhaliwal-Williams*, 1997 CanLII 6074 (FC), [1997] FCJ No 567 (QL); *Veres v Canada (Minister of Citizenship and Immigration) (TD)*, 2000 CanLII 16449 (FC), [2001] 2 FC 124; *Genex Communications v Canada (Attorney General)*, 2005 FCA 283 at para 165).

[85] Dr. Attaran also argues, without merit, that he is entitled to have "authenticated copies" of the medical opinions sealed by the Tribunal, citing s 31.1 of the *Canada Evidence Act*, RSC 1985, c C-5. With respect, this argument overlooks Parliament's legislative determination that the Tribunal may "*receive and accept any evidence and other information*, whether on oath or by affidavit or otherwise, that the panel sees fit, whether or not that evidence or information is or would be admissible in a court of law" [emphasis added]. See s 50(3) of the *CHRA*:

Additional powers	**Pouvoirs**
(3) In relation to a hearing of the inquiry, the member or panel may	**(3)** Pour la tenue de ses audiences, le membre instructeur a le pouvoir :
…	…
(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;	**c)** de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

[86] Notably, the Commission makes no submissions on this argument.

[87] I agree with the Respondent that the Tribunal proceeded in this respect in a procedurally fair manner, having heard argument from the parties, and particularly given the considerable length of time the witness had already been cross-examined. I also agree there were reasonable alternatives offered to the Applicants "in light of the circumstances," including that the

Commission put its questions to another of the Respondent's witnesses and subsequently decide if any prejudice exists—which, as noted in the Commission's Application record, it agreed to do.

(4) Confidentiality Order related to limited audio and written transcript

[88] This matter was further litigated at the hearing in this Court. The Court had before it a written request by the Respondent to file a redacted 2-second excerpt of the Tribunal hearing audio recording and related transcript instead of those provisionally filed by the Commission under seal with this Court. The redacted portions identify this witness' medical condition.

[89] After hearing argument, I invited the Respondent to file a draft Order and provide a copy to the Applicants so they might make submissions on the Order. The Commission takes no position on the redacted versions of the audio and transcripts but submits if they are accepted by the Court, they should be filed subject to a Rule 151 sealing order.

[90] Dr. Attaran filed written submissions opposing the Respondent's proposed Order. He submits the request must be made by motion and affidavit not by letter, that it is moot because this information is already on the public record, that it is "a futile attempt to 'put the toothpaste back in the tube' once the Tribunal put the recording on a website," that the "Respondent's refusal to disclose this obviously relevant fact to the Court appears calculated, and arguably in breach of counsel's duty of candour toward the Court," that journalists are interested in this case and have reported on it, and that it would offend the *Charter* and the open court principle. He filed additional submissions by letter dated December 30, 2024.

[91] I am not persuaded. With respect, it seems to me the effect of Dr. Attaran's argument would make public indirectly the very same specific medical information that was directly refused and now properly covered by the Tribunal's confidentiality Order. As noted above, the Court has considered and will uphold that Tribunal's Order because the Court has determined the redacted portions are confidential pursuant to the *Federal Courts Rules*. The requested information is private and confidential to the witness and was properly so held. I waived the requirement for the Respondent to bring a formal motion; there is no merit in the argument this Court is without jurisdiction to decide this issue.

[92] In the result, I agree with the Commission and will order the sealing of the unredacted audio and transcript filings, with redacted filings of both to be placed on the Court's record. I sought and received input from the parties in this regard in the course of hearing this application, and my resulting Order forms part of this Judgment.

B. *Addendum gave rise to reasonable apprehension of bias*

[93] In addition to the foregoing, and my conclusions that the Decision is procedurally unfair and engaged the wrong test for bias, and for many of the same reasons, I am also of the view the Addendum itself establishes a reasonable apprehension of bias on the part of the panel per *National Energy Board*. This is a second basis on which the Decision must be set aside.

[94] In this respect, the CHRC makes the following submissions, with which I substantially agree (except regarding social media reports dealt with later in these Reasons):

> [33] Courts have held that deciding on a matter not properly before the decision maker can be indicative of a reasonable apprehension

of bias. This is the case here. Nowhere in the affidavits in support of application record or in the audio recordings did the adjudicator state that he would be addressing the bias allegation in his reasons.

[34] On May 20, 2021, the adjudicator had written to the parties advising them, among other things, that they should avoid "impugning the tribunal's impartiality and integrity" unless such allegations are raised in the context of a motion for recusal. However, the adjudicator stated that he was sensitive to the fact that the complainant was self-represented, and that thus he "will not insist on a formal motion for recusal for the allegation of bias."

[35] The absence of notice to the parties that the bias allegation remained a live issue also meant that the parties had no opportunity to present their views. Principles of procedural fairness require that parties must have notice of decisions that affect their legal rights. This enables a party to take steps to defend their interests, such as making representations to a decision-maker. The failure to obtain representations from the parties is analogous to a decision-maker's failure to consider a party's representations, which courts have found to be evidence of bias. An adjudicator cannot consider a party's views if they do not have them to begin with.

[36] In the addendum, the adjudicator described the bias issue as "a very serious matter" and that his decision would be incomplete if he did not give reasons for having continued the inquiry "after the allegation was leveled." Given the importance of this issue, and the fact that they are part of the adjudicator's reasons, the absence of an opportunity for the parties to be heard is evidence of the adjudicator's bias.

…

[40] An adjudicator's becoming a witness has been held to be an indication of adjudicator bias. In the addendum, the adjudicator suggests that he is an "accused" who must "defend" himself against an allegation of racial bias because such allegations are "very toxic in today's world" and stigmatization resulting from them makes it "very difficult" to "achieve redemption." With such a characterization, the adjudicator essentially became an adversary of a party in a complaint he was entrusted to decide impartially. The adjudicator, in effect, initiated an application for recusal; assumed the role of his own advocate by offering opinions without an appropriate evidentiary foundation or submissions from the parties; and decided that he was not biased. As the Ontario Court of Appeal observes, it is not open to a decision maker to enter "the fray as an advocate for his actions and decisions."

[41] An adjudicator who declines to receive or consider submissions from the parties cannot say that they have an open mind. Here, the adjudicator did not invite the parties to address the issue. The adjudicator issued an order with consent of the parties to proceed to closing submissions based on written argument without a hearing. The order states that should the tribunal have questions, it would invite the parties to make further submissions. If the issue of bias was of sufficient importance to address, the adjudicator could have asked the parties for submissions after the hearing as part of closing arguments. He did not. Once again, this Court has stated that an adjudicator's consideration of extrinsic evidence is a breach of procedural fairness.

[42] The adjudicator's focus on the difficulties of proving an individual's unconscious biases in relation to allegations of racial discrimination is also of concern. The adjudicator is presumed to know the law in his area of expertise, thus aware that courts and tribunals have accepted that often there is no **direct** evidence of discrimination because discrimination is not a practice often displayed overtly. In disregarding this fundamental principle, the adjudicator placed himself beyond the law's reproach overlooking that bias and race discrimination can be assessed based on surrounding circumstances. Instead, he makes unequivocal, inaccurate, conclusory statements about race allegations and proof of discrimination in his July 4, 2023 reasons more than two years after the incident; thus, still affected by the incident for a long period of time and while the decision was under reserve. He thus could not decide the complaint fairly.

[43] Adjudicators in racial discrimination cases are often called upon to assess circumstantial evidence to determine whether there exists a **subtle scent** of discrimination. This is because courts and tribunals have accepted that racial discrimination is often insidious, nuanced and rarely displayed overtly. Human rights tribunals have applied the *Basi* subtle scent test in case after case since the release of the decision in 1988.

…

[45] In its closing submissions, the CHRC had directed the adjudicator's attention to these fundamental tenets of proving discrimination in the human rights jurisprudence. Nevertheless, a human rights tribunal member and former chairperson of the tribunal ought to have known that circumstantial evidence can be used to establish unconscious bias. However, the adjudicator's comments in the addendum and social media posts, addressed

below, suggest that he was not mindful of these basic principles or closed to them.

…

[47] The adjudicator unreasonably relied on the Implicit Association Test (IAT), a measure scientists use to measure the state of mind of an individual bias, to support his views on unconscious bias. He stated that "[u]nconscious bias finds its roots in the implicit-bias test developed by a group of American social psychology researchers around 30 years ago." This is inaccurate. The IAT was developed in 199878 while academic Patricia Devine provided some of the first empirical evidence for unconscious racial bias approximately a decade earlier. Devine's research showed that when people perform tasks under time pressure, even egalitarian-minded individuals can react with prejudiced responses. As well, both the extent and limits of the instrument are not objectively explored in the adjudicator's reasons. Had the CHRC been aware that the IAT would be raised in the reasons, it could have provided submissions about the instrument for the adjudicator to rely on.

[48] The adjudicator also states that "[s]ome of [his] closest friends are from Iran." This phrase, and others like it, are frequently used by individuals from the dominant majority to convey an impression that they are unbiased and fair in their views. However, academics have long argued that having a cross-race friendships does not equate with the absence of bias.

[49] The adjudicator's statements in the addendum evince, minimally, apprehended bias and, arguably, actual bias. These include that Dr Attaran does not appear to be a visible minority, does not speak with an accent and sounds like anyone else in North America; that Dr Attaran's allegation of bias was an unsuccessful attempt to intimidate him and that Dr Attaran's comments were "insinuations" and "bald allegations"; and that because he has friends who are Persian, he does not hold biases against Persian people. And the most concerning—coming from a human rights adjudicator and former chairperson of the federal human rights tribunal—is the adjudicator's statement that "allegations of racial bias are very toxic."

[50] The adjudicator's concerns about the relevance of actual states of mind of an adjudicator are incompatible with settled law both concerning reasonable apprehension of bias and human rights jurisprudence concerning proof of discrimination. Because an action may be motivated by an unconscious bias does not, as the

> adjudicator says, make discrimination "next-to-impossible to prove" or arguments about unconscious bias unhelpful to an adjudicator.
>
> [51] The adjudicator's evident skepticism about unconscious bias and insistence on preserving his "impugned" reputation led him to ignore fundamental human rights law principles when assessing an allegation of unconscious racial bias, the only difference being that the allegation, here, was against him. Moreover, in asserting that he did not believe that he held subconscious biases, the adjudicator also ignored the law on reasonable apprehension of bias and effectively substituted the law with his personal views. Although it is open to adjudicators to use their common sense and experience to guide their decisions, it is not open to them to substitute the law with their personal beliefs.
>
> …
>
> [53] The statements in the addendum reveal a discernable predisposition to **not** find discrimination based on race and national or ethnic origin in the case on the merits—grounds the adjudicator was entrusted to decide on the facts before him. The social media posts, both while the decision was under reserve and in the weeks that followed, amplify the adjudicator's general skepticism about race-based allegations and also suggest that he would not have approached the decision under reserve with an open mind.
>
> [Footnotes omitted, emphasis in original]

[95] For his part, Dr. Attaran draws attention to the two years that passed between his allegation of unconscious bias and the issuance of the Decision. He makes essentially the same points concerning the Addendum as the CHRC, with emphasis. Dr. Attaran argues the panel member was "airing long-simmering resentment over the bias objection—resentment he bore while the Decision was under reserve":

> 29. These comments offer a window into the Chair's state of mind. Instead of regarding the Applicant as a party in the hearing, in the Chair's telling he was an adversary who "impugned" him and from which he had to "defend [himself]" and "achieve redemption".

Strikingly the Chair calls himself "the accused", adopting the language of a criminal defendant.

30. In answer to the Applicant's objection that, as a racial minority person, he took Chair's *ad hominem* comment on "mannerisms" to be unwelcome, the Chair *denied* that the Applicant actually is a racial minority …

31. The Chair's racial stereotyping in this passage is remarkable. It implies that an essential quality of visible minority persons is "to speak with an accent or differently." It also implies that being a minority person is incompatible with being "educated and employed at some of the most prestigious universities in the English-speaking world."

32. The Chair also opines that the Applicant "does not even appear … to be a visible minority"—a denial *contradicted* by his factual finding elsewhere in the Decision that "Dr. Attaran has the protected characteristics of race." Why there is this internal contradiction is unclear, but it may be a feigned inability to see race so as to deny having unconscious bias, and it casts serious doubt on the Decision's fairness (or *Vavilov* reasonableness, for that matter).

33. The Chair attributes his doubts about the Applicant's race to "only [seeing him] on a video screen," adding that "perhaps it might be different in person." But it is not hard to perceive race on video—one does so watching TV or the movies all the time—so it is credible that the Applicant's race remained a cipher for twenty-two days of Zoom hearings?

34. After all this, the Chair denies he could be racially biased because of this reason:

I also highly doubt that I have a subconscious bias against people with a Persian ethnic background. Some of my closest friends are from Iran, including my college roommate who has remained a lifelong friend and participated as a groomsman at my wedding.

35. With respect, in this comment the Chair improperly gives evidence: who his closest friends are, or the guests at his wedding, are obviously not in the Tribunal's record. He appears to be arguing a defence *in sua propria causa* that he cannot harbour "subconscious bias," and does so by echoing the tropist apologia that "*I can't be racist because I have a* _____ [*sic,* blank space] *friend!*"

36. The Chair also invented evidence to buttress his allegation about the Applicant's "mannerisms". Over two years after uttering that comment, he wrote in the Addendum that the Applicant was guilty of "rolling his head back, mock-laughing and throwing his face into his hands"—but the hearing record contains no mention that anything of this kind occurred, nor does the Decision cite any actual instance.

37. The Chair wrapped up by finding that unconscious bias is an invalid concept …

38. This entire passage uses fabricated evidence. The hearing record contains neither mention of "the implicit-bias test," nor evidence that it is "controversial within the scientific community." Rather these are the Chair's *personal opinions*, parachuted into the Decision without the procedural fairness of giving the parties' notice of these issues and seeking submissions. As for the Chair's opinion that unconscious bias is "not supportable" as a concept, the Supreme Court does not agree: It has **affirmed** that unconscious bias exists in the courtroom.

39. With respect, the Chair's statements in the Addendum evince not just a reasonable apprehension of bias, but a powerful one approaching a certainty. Statements in which the Chair calls himself "the accused"—implying that the Applicant is an accuser—or engages in rejoinders "to defend myself," portray the Chair as *entering the forum personally* and surrendering the detachment and adjudicative impartiality that the Supreme Court requires. According to the Court, "the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was". Here, any reasonable person reading the Chair's Addendum would regard it as *very* out of the ordinary for the Tribunal, and virtually impossible to explain except as bias.

40. Further, the Chair's stereotyping of racial minority persons—as speaking with an accent or not being associated with top universities—is a red flag for bias in the case law. The Ontario Court of Appeal writes that one who has "unconsciously allowed racial stereotypes to influence his decision … may not believe he is being untruthful" in denying that he is biased, but that the Court may still have reason "based on the circumstances … [to find] that unconscious bias and racial profiling were factors in the decision." Here, the aggravating circumstances include contradictions in the Decision about whether the Applicant is a racial minority,

> unpersuasive rationalizations of not seeing race on video, and claiming absolution in having Iranian friends.
>
> 41. Just the sheer vehemence and heatedness of the Chair's reaction to issues of race, first when the Applicant protested the "mannerisms" comment during the hearing, and years later in the Addendum, suggests that the Chair "had a fixed and negative view of … raising issues of race," incompatible with his duty to hear and decide dispassionately.
>
> 42. It is significant that when the Applicant protested the Chair's "mannerisms" comment, the Chair did not apologize, but brooded for years and doubled down in Addendum. The Ontario Court of Appeal has held that an appearance of bias becomes "particularly troubling" when a decision maker chooses "to defend his actions and his comments … [in an] after-the fact attempt not only to justify but also to bolster his decision." The Addendum does this.
>
> 43. There is also extrinsic evidence suggesting Chair has issues with race. He has publicly denigrated campaigns against racial hatred, called them "way overstated," and inveighed against "reckless allegations of racism." That this invective issues from the former Chair of the *Canadian Human Rights Tribunal* is, respectfully, disappointing.
>
> [Footnotes omitted, emphasis in original]

[96] The Respondent agrees that while the Member "made certain personal comments in the Addendum that were both unfortunate and ill advised for an adjudicator," they "were unrelated to the Tribunals' reasoning on issues that were presented to it for decision," and the Applicants "have not met the heavy burden to establish a reasonable apprehension of bias."

[97] Per *National Energy Board*, the test for bias is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would [they] think that it is more likely than not that [the decision-maker], <u>whether consciously or unconsciously</u>, would not decide fairly." [Emphasis added]

[98] Having accepted the substance of the Commission's submissions (and the core of Dr. Attaran's submissions), and having regard to my findings on procedural fairness, I conclude the Applicants have met the heavy burden on them to establish that reasonable apprehension of bias arises from the Addendum because this legal test is met.

(1) Social media posts do not establish bias

[99] The Commission submits the Applicants' reasonable apprehension of bias is strengthened by social media posts made on a Twitter account associated with the panel member. These posts were made when the Decision was still under reserve and in the weeks that followed. These posts, among other things, comment on the harm of "reckless race allegations" and include a tweet stating "When you're in the anti-hate business, you'll see it everywhere. Their case is way overstated based on my experience …," seemingly responding to a statement about the prevalence of anti-Muslim hate movements.

[100] In response, the Respondent submits the Commission's social media posts lack detail and context. For example, the identity of the individual(s) to whom the member is responding is redacted, web links included in the posts (accessible to individuals seeing the posts online) are not included, and comments from other users are not visible so it's unclear if they are being responded to or are relevant to the context. Moreover, in some circumstances it is unclear to which specific information the member is responding.

[101] I note the Commission filed no evidence as to when it discovered the posts. Had it concerns earlier it should of course have raised them at the time with the Tribunal, as discusses above.

[102] On the whole, on this point I am not satisfied a reasonable, informed person would conclude these somewhat fragmentary and very much context-lacking documents meet the high burden to establish a reasonable apprehension of bias.

[103] I also note that if a recusal motion had been brought, these matters could have been explored and put before the panel.

(2) Issues raised in oral submissions

[104] The CHRC submits the Addendum also raises doubts for the litigants about the fairness of the proceedings such that it invited them to look back on the hearing for other instances of potential bias, which the Commission now says it has found.

[105] The CHRC points to two related examples: 1) the cross-examinations of the expert witnesses, and 2) an interaction between the panel and Ms. Avvy Go (as she then was – she is now a Justice of this Court), counsel for CSALC. While these events are referred to in the CHRC's written submissions, they were not specifically raised as issues of procedural fairness until oral submissions.

[106] The first issue concerns an alleged difference in the panel's treatment of expert witnesses Dr. Chuang and Dr. Haan. The Commission points to how the member allowed the Respondent

to cross-examine Dr. Chuang in reference to plagiarism, while Dr. Attaran was not allowed to question Dr. Haan on his qualifications. This is suggested as entailing some sort of bias or panel preference for white male as opposed to Asian female expert witnesses.

[107] This is a meritless submission.

[108] Ms. Go conducted the direct examination of the Applicant's expert witness Dr. Chuang. When it came time for cross-examination, Ms. Go objected to the Respondent's questions about possible plagiarism. The panel, however, told her that she did not have standing to make such submissions. Subsequently, Dr. Attaran insinuated panel bias or preference based on race and sex (see paras 17–19 above).

[109] With respect, there is no basis for these improper insinuations. The panel stopped Ms. Go because the order granting her client, CLSAC, leave to intervene did not permit her to make oral submissions. In my view the panel member simply enforced the Tribunal's Order granting CLSAC "limited interested party status" (*Attaran v Citizenship and Immigration Canada*, 2018 CHRT 6 [*Attaran* 2018]). The Order states:

> [14] CSALC has submitted a comprehensive brief in support of its motion, and outlined in detail the wealth of experience the organization has in helping immigrant families and participating in law reform initiatives and test case litigation. The original CSALC motion sought an order from the Tribunal for:
>
> a) Permitting CSALC to intervene in this case;
>
> b) Granting interested party status to CSALC;
>
> c) Permitting CSALC to file a Statement of Particulars and evidence as the Tribunal may deem appropriate;

d) Permitting CSALC to make oral submissions and file written submissions at the hearing;

e) Permitting CSALC to call witnesses and evidence at the hearing; and

f) Any further or other order that the Tribunal may deem appropriate.

…

[19] In Reply to the submissions of the Respondent and Mr. Attaran, CSALC amended its request for participation and proposes intervention on the following terms:

A. CSALC be permitted to intervene but restricted to the right to make written submissions based on the evidence adduced by the parties and the Tribunal record; and

B. CSALC be granted access to the Tribunal record, including the audio recording of the proceeding, if any, and the evidence adduced by the parties in electronic format.

…

[24] Having taken full stock of the submissions of the parties and the revised scope of CSALC's requested participation, the Tribunal will permit the limited interested party status of CSALC on the following conditions:

A. At the conclusion of the hearing, CSALC will have the right to make written submissions based on the evidence adduced by the parties and the Tribunal record to a maximum of 30 pages;

B. The other parties will be given an opportunity to reply in writing to the submissions of CSALC; and

C. CSALC will not participate in case management conference calls or other pre-hearing matters and will not have input in to the selection of hearing dates.

[Emphasis added]

[110] Thus, while CSALC originally asked for permission to make oral submissions, CSALC itself withdrew that position. Critically, while the Tribunal allowed CSALC to make written submissions, it did not grant CSALC permission to make oral submissions.

[111] The Commission's allegation of racial or sex-based bias or preference is baseless.

C. *CSALC is not a proper respondent*

[112] As noted above, CSALC was granted "limited interested party status" and had no right to make oral submissions. Notably, it was not given any right of appeal (*Attaran 2018*). Both Applicants name CSALC in their Notice of Application.

[113] CSALC did not file a Notice of Appearance or made any submissions in this Court.

[114] In advance of the hearing, presumably noting their error, both the Commission and Respondent informally requested CSALC be removed as a party. However in the absence of any formal motion their request was denied.

[115] In my respectful view, CSALC is not a proper Respondent to this application, per Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], because it "could [not] have brought a judicial review application" itself (*Forest Ethics Advocacy Association v Canada*, 2013 FCA 236 at para 18). The style of cause is amended to remove CSALC with immediate effect.

D. *Remedy*

[116] In *Curragh*, the Supreme Court of Canada held:

> 8 Certainly, every order of a trial court is enforceable and must be obeyed until it is declared void by an appellate court. In this sense the order may be viewed as voidable. However, when a court of appeal determines that the trial judge was biased or demonstrated a reasonable apprehension of bias, that finding retroactively renders all the decisions and orders made during the trial void and without effect.
>
> 9 In the case at bar, the court of appeal correctly found the trial to be unfair as a result of the demonstrated apprehension of bias. The order of the trial judge staying the charges was void. It was made in the course of the trial after the impugned telephone call which clearly rendered the trial unfair. The order of the trial judge was enforceable until the court of appeal dealt with it. However there can be no doubt that once the court of appeal ruled that the trial judge had demonstrated a reasonable apprehension of bias it retroactively rendered void and without effect the order staying the charges.
>
> [Emphasis added]

[117] The Applicants request this matter be sent back with directions concerning the use of previously gathered information, which of course was gathered under the direction of the very panel member whose conduct gave rise to an apprehension of unconscious bias.

[118] I am not persuaded this is possible given our highest Court has determined that a bias finding retroactively renders all decisions and orders made void and without effect.

[119] This matter, then, will follow the usual course, namely being remanded for redetermination by a differently constituted panel.

VII. Conclusions

[120] These consolidated applications for judicial review will be allowed, the Decision will be set aside and the matters remanded to a differently constituted panel of the CHRT for redetermination by a differently constituted panel.

VIII. Costs

[121] The Commission does not seek costs and submits no costs should be awarded against it because it appears in its capacity as a representative of the public interest and has limited its submissions accordingly.

[122] Dr. Attaran requests "[c]osts, including assessable (Tariff) costs for time and effort on an identical basis as counsel" as a self-represented litigant and licensee of the Law Society, per *Sherman v Canada (National Revenue)*, [2003] FCJ No 710 (FCA) at paragraph 52:

> [52] The appellant devoted the time and effort to do the work that would have normally been done by the lawyer who would have represented him if one had been retained to conduct litigation. In addition, the two proceedings in which the appellant was involved were not trials at which his attendance would have been required. They were proceedings which he would not have had to attend but for the fact that he was self-represented. While staying within the parameters of our Rules, I believe it is proper to award the appellant, in addition to his disbursements and on his filing appropriate evidence to support the claim, the following costs: a moderate allowance for the time and effort devoted to preparing and presenting the case before both the Trial and the Appeal Divisions on proof that the appellant, in so doing, incurred an opportunity cost by forgoing remunerative activity.
>
> [Emphasis added]

[123] He submits "the Tribunal's omission to mitigate bias should be taken into account in the costs award." In oral submissions, Dr. Attaran requested costs in the amount of $20,000, and

submitted that no costs should be awarded against him given that the case "should have never come" to the judicial review stage.

[124] The Respondent requests the Application be dismissed with lump sum costs in the amount of $10,000 based on the size of the record, complexity of the case, and number of motions made. The Respondent also submits that while the Federal Court has discretion as to costs under Rule 400 of the *Federal Courts Rules*, "costs are not appropriate due to an alleged 'omission to mitigate bias' on the part of the current Tribunal Chair. The authority [Dr. Attaran] cites for this proposition does not support it, nor would it be appropriate to speculate on the internal processes of the Tribunal."

[125] Cost are discretionary and context dependent. A cost order may reflect the conduct of the parties in the litigation at issue. In my respectful opinion, for the following reasons, Dr. Attaran should have moved for the panel recusal, and in default of Dr. Attaran acting in accordance with established precedent, the panel itself ought to have resolved the bias allegation before it resumed hearings.

[126] As noted above, *Arthur* establishes that an allegation of an apprehension unconscious bias is a very serious allegation.

[127] The Federal Court of Appeal determines the procedure Dr. Attaran should have followed in *International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178 [*International Relief*]. There, Stratas JA establishes that those who allege bias *must* bring a formal allegation of bias, that is a motion to recuse:

> [19] Allegations of bias are most serious and must be raised clearly at the earliest possible time: *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 S.C.R. 892; *In re Human Rights Tribunal and Atomic Energy of Canada Ltd*., 1985 CanLII 5528 (FCA), [1986] 1 F.C. 103 (C.A.). One cannot discover facts that might indicate impermissible bias on the part of the administrative decision-maker, remain silent on the matter of bias, await the outcome of the administrative decision, and then, if the decision is adverse, claim on appeal that the decision-maker was biased.
>
> [20] Some of the allegations made in the October 1, 2012 submissions letter and the documents in Exhibit "A" to the Affidavit that predate the December 11, 2012 Notice show that the appellant knew many of the facts it now seeks to put before the Court in support of a claim of bias. It could have clearly raised bias before the December 11, 2012 Notice was made, but did not.
>
> [21] This conclusion is not only founded upon the authorities cited. It is also founded upon procedural fairness to the Minister. Had this bias issue been clearly raised, the Minister would have been able to respond in her decision. Then this Court would have the benefit, on review, of the formal allegation of bias and the decision-maker's response.
>
> [Emphasis added]

[128] This principle was applied in *Beddows v Canada (Attorney General)*, 2020 FCA 166 at paragraph 10 [*Beddows*]; *Yeager v Canada (Attorney General)*, 2018 FCA 187 at paragraph 21 [*Yeager*]; and *Chan v Canada (Citizenship and Immigration)*, 2021 FC 1378 [*Chan*].

[129] *Beddows* states:

> [10] One of the appellant's allegations – that of the alleged bias flowing from the role of the current CDS in the 2014 Grievance and as instructing authority – must be dismissed at the outset as the appellant raised this issue for the first time before this Court. It is well settled that allegations of bias are serious allegations that must be raised at the earliest possible opportunity (*Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 S.C.R. 892, 117 N.R. 191). In *International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013

> FCA 178, 449 N.R. 95 at para. 19, Justice Stratas of this Court cautioned that "[o]ne cannot discover facts that might indicate impermissible bias on the part of the administrative decision-maker, remain silent on the matter of bias, await the outcome of the administrative decision, and then, if the decision is adverse, claim on appeal that the decision-maker was biased." Thus, the appellant's bias arguments cannot be entertained.

[130] *Yeager* states:

> [21] Finally, the judge found that the admissibility of the affidavits was affected because they had not been put before the decision-maker, in this case, the CSC official who was responsible for approving attendance at the event. This relates to the well-established principle that "[a]llegations of bias are most serious and must be raised clearly at the earliest possible time" (*International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013 FCA 178 at para. 19, 449 N.R. 95).

[131] *Chan* states:

> [39] ... I find that the Applicant has waived her right to raise the issue of bias based on the Member's previous employment with the government of Hong Kong SAR. Even if the Applicant could not have known about Member Campbell's prior connection with Hong Kong SAR until after the RPD hearing, by the time she filed her appeal with the RAD, she was fully aware of his previous position with the Tribunal. While I accept that the Applicant was understandably apprehensive about making a complaint against someone who has the power to determine her claim, her decision to remain silent about the facts she had uncovered and wait until the adverse outcome of the RAD appeal before raising the issue of bias based on his prior employment, is precisely the type of situation that the FCA has frowned upon in *International Relief Fund*, at para 19, and should not be condoned by this Court.

[132] For the same underlying reasons, namely the protection of the integrity of the tribunal and confidence in the administration of justice, and by the same authority, namely *Arthur* and *International Relief*, those who discover such facts and who then make an allegation of bias on

the record — such as Dr. Attaran in this case — must also request recusal in a timely manner such that the matter is properly before the decision maker to resolve before it proceeds further.

[133] As noted above, while Dr. Attaran technically represented himself, he is a member of the bar of Ontario and has acted as counsel in this Court in addition to pursuing matters on his own behalf as noted above. In my view the panel erred in affording Dr. Attaran any latitude in failing to request recusal because he was "self-represented." He had no shortage of counsel and legal knowledge, and neither he nor any party argued otherwise.

[134] Most notably also, Dr. Attaran advances no authority in support of his meritless argument that he was entitled to make serious allegations of bias and thereby to attack the integrity and competence of the panel and the administration of justice, to then expressly place such a serious allegation on the record, and then inexplicably refuse to request the panel's recusal. I reject that argument as contrary to *International Relief* and the jurisprudence just cited.

[135] With respect, there is also no merit in (and Dr. Attaran advanced no authority for) arguing he was free to leave this serious allegation unresolved "to be determined in the future on the totality of the evidence," i.e., at a time of his choosing. That is also directly contrary to *International Relief* at paragraph 21:

> [21] This conclusion is not only founded upon the authorities cited. It is also founded upon procedural fairness to the Minister. Had this bias issue been clearly raised, the Minister would have been able to respond in her decision. Then this Court would have the benefit, on review, of the formal allegation of bias and the decision-maker's response.
>
> [Emphasis added]

[136] In the circumstances and with respect, I conclude Dr. Attaran should have requested the panel recuse itself.

[137] That said, and for the same underlying reasons, I am also of the view the duty to make and resolve this bias allegation lay equally on Dr. Attaran and on the Tribunal. With respect again, the panel member breached his duty to resolve the bias allegation in a timely way before proceeding further, given the bias allegation was a direct challenge to the Tribunal's integrity and competence, and to the administration of justice as discussed above.

[138] In my discretion and in the circumstances of this case, this is not a case for costs.

JUDGMENT in T-1539-23 and T-1598-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Decision is set aside.

3. These matters are remanded for reconsideration by a differently constituted panel of the Tribunal.

4. There is no order as to costs.

5. The style of cause is amended to remove Chinese and Southeast Asian Law Clinic with immediate effect.

6. A copy of these Reasons shall be placed on both Court files in this matter.

7. The unredacted audio recording and corresponding transcript of the April 30, 2021 hearing day before the Canadian Human Rights Tribunal in *Attaran v Immigration, Refugees and Citizenship Canada* (formerly *Citizenship and Immigration Canada),* Tribunal File T2163/3716, filed by the Commission under provisional seal in these consolidated applications, are determined to be confidential and shall be sealed as confidential, shall not be disclosed to any person without prior Order of this Court obtained on notice to the Respondent, it being further Ordered that the Respondent shall file redacted copies of the audio recording and corresponding transcript with the Court, and it being further ordered that the Respondent be and the same is hereby relieved from the formal motion requirements contained in the *Federal Courts Rules* in respect of this part of the Court's Judgment.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1539-23
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v THE ATTORNEY GENERAL OF CANADA, AMIR ATTARAN AMIR ATTARAN v THE ATTORNEY GENERAL OF CANADA AND CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 24-25, 2024
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 3, 2025

APPEARANCES:

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Amir Attaran	FOR THE APPLICANT (ON HIS OWN BEHALF)
Sean Stynes Kelly Keenan	FOR THE RESPONDENT (THE ATTORNEY GENERAL OF CANADA)
Amir Attaran	FOR THE RESPONDENT (ON HIS OWN BEHALF)

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Canadian Human Rights Commission Ottawa, Ontario	FOR THE APPLICANT (CANADIAN HUMAN RIGHTS COMMISSION)
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