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Can a Tribunal's Former Counsel Appear Before the Tribunal? A Comment on *Certain Container Chassis*

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Can a Tribunal's Former Counsel Appear Before the Tribunal? A Comment on *Certain Container Chassis*

A N D R E W F L A V E L L E M A R T I N *

ABSTRACT

Lawyer mobility has been recognized as an important but not determinative consideration in legal ethics, particularly when it comes to conflicts of interest. Mobility poses particular issues for counsel to a tribunal. Those counsel may well at some point leave that position and pursue other opportunities. Prospective opportunities may sometimes involve appearing as counsel for a party before the same tribunal – especially where the tribunal operates in a highly specialized area of law. Can a lawyer appear before a tribunal if they were previously counsel to that tribunal? This discrete issue, though it rarely arises in the case law, presents unique considerations for analysis at the intersection of administrative law and legal ethics. In this comment, I analyze and critique the reasons of the Canadian International Trade Tribunal in *Certain Container Chassis* for declining to remove such a lawyer from a matter before it. I reconceptualize the Tribunal's analysis into two separate questions and then add a third question. I conclude that, aside from confidentiality issues, a context-dependant analysis is preferable to an absolute rule.

Keywords: *Legal Ethics; Administrative Law; Tribunals*

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INTRODUCTION

Lawyer mobility has been recognized as an important but not determinative consideration in legal ethics, particularly for the analysis of conflicts of interest.¹ Mobility poses special issues for counsel to a tribunal. Those counsel may well at some point leave that position and pursue other opportunities. Such opportunities may involve appearing as counsel for a party before the same tribunal – especially where that tribunal operates in a highly specialized area of law. Can a lawyer appear before a tribunal if they were previously counsel to that tribunal? This discrete issue, though it rarely arises in the case law or literature,² presents unique considerations for analysis at the intersection of administrative law and legal ethics. In this comment, I analyze and critique the reasons of the Canadian International Trade Tribunal in *Certain Container Chassis* for declining to remove such a lawyer from a matter before it.³

While there are many different circumstances that could require the removal of counsel appearing before a tribunal, the situation in *Certain Container Chassis* is one of a unique class of cases that raises unique considerations. The past existence of a lawyer-client relationship between the lawyer and the tribunal imposes on that lawyer duties to the tribunal as client, some of which persist after the termination of the lawyer-client relationship. Indeed, the previous existence of a lawyer-client relationship between the lawyer and the tribunal makes this class of situations potentially more complicated than that where a former tribunal member appears before the tribunal.

¹ See e.g. the seminal case *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1243, 77 DLR (4th) 249 [*MacDonald Estate*], Sopinka J for the majority. Contrast Cory J for the dissent at 1265.

² But see Robert W Macaulay, James LH Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada, 2022) (looseleaf, release 3, 3-2023) 52.II.C at para 52.12 [Macaulay, Sprague & Sossin] (now Justice Sossin of the Court of Appeal for Ontario).

³ *Certain Container Chassis*, 2021 CanLII 84563 (CITT), [2021] CITT No 102 (QL), 2021 CarswellNat 3896, 2021 CarswellNat 3897, online: <<https://decisions.citt-tcce.gc.ca/citt-tcce/a/en/item/512691/index.do>>.

This comment is organized in three parts after this Introduction. In Part 1, I canvass the reasons of the Tribunal. I then provide my main critique and analysis in Part 2. Finally in Part 3 I conclude by considering the implications of my analysis.

A. The Tribunal's Reasons in Certain Container Chassis

The sole issue in *Certain Container Chassis* was whether former counsel to the Canadian International Trade Tribunal could represent a complainant before the tribunal. The Tribunal denied a request by counsel for the moving parties to order the lawyer for the other parties to withdraw pursuant to a proposed “cooling-off period” for former Tribunal counsel.⁴

While the moving parties framed the issue as the existence of a reasonable apprehension of bias,⁵ the Tribunal viewed the request as “essentially merg[ing] conventional grounds for removal of counsel with allegations of a reasonable apprehension of bias on the part of an adjudicator”.⁶ The Tribunal organized its analysis around an application of *MacDonald Estate v Martin* as “the leading case for removal of counsel”,⁷ more specifically the three elements of the integrity of the administration of justice, litigants’ access to counsel of choice, and “reasonable mobility in the legal profession”.⁸

The Tribunal first found that the despite the previous lawyer-client relationship, the lawyer had no access to relevant confidential information, as he had left the Tribunal before the underlying complaint had been filed and “[t]he subject matter of this particular trade remedy case is novel as before the Tribunal.”⁹ The Tribunal also distinguished *MacDonald Estate* on the basis that “the Tribunal is not adverse in interest to the parties who appear before it” and thus the lawyer owed the Tribunal as the former client no duty of loyalty and could not use any relevant information against the Tribunal as the former client.¹⁰

⁴ *Ibid* at para 7.

⁵ *Ibid* at para 7.

⁶ *Ibid* at paras 18-20 (quotation is from para 20); *MacDonald Estate*, *supra* note 1.

⁷ *Certain Container Chassis*, *supra* note 3 at para 21.

⁸ *Ibid* at para 21.

⁹ *Ibid* at para 26.

¹⁰ *Ibid* at paras 27-31 (quotation is from para 29).

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The tribunal then addressed the potential for a reasonable apprehension of bias. It first emphasized the presumption of impartiality of tribunal members.¹¹ It then emphasized that “[n]otwithstanding the institutional support provided to Tribunal members by legal and non-legal staff, the conduct of Tribunal inquiries and the decision-making function under [the Act] are reserved to the panel of Tribunal members assigned to hear the case and to them alone”.¹² It then characterized the purported apprehension of bias as “purely speculative and unrealistic”.¹³ Importantly for my purposes, the Tribunal characterized the experience of the lawyer as counsel for the Tribunal as merely one among many potential kinds of “tactical advantage”, including counsel with better research resources or more experience,¹⁴ none of which constitute bias.¹⁵ The Tribunal also “categorically rejected” the proposition that the identity of counsel would “sway” or “add credibility... in the eyes of the tribunal”.¹⁶

The identity of a party’s counsel is a wholly irrelevant consideration to the determination of proceedings on its evidential and substantive merits. The fact that counsel may be known to the Tribunal does not operate to create favouritism, much less bias, operating to the detriment of other parties or their counsel. Cases are heard and decided by the Tribunal having regard to their substantive merit and the evidence and the arguments presented.¹⁷

However, the Tribunal offered no support for this bald assertion. In particular, it did not differentiate between actual bias and a reasonable apprehension of bias, nor did it consider the reasonable view of either the general public or the client of opposing counsel.

¹¹ *Ibid* at paras 38, 40-47. See also para 39 on the relevance of the adjudicators’ oath.

¹² *Ibid* at para 48

¹³ *Ibid* at para 51.

¹⁴ *Ibid* at paras 52-53. See also para 59: “this would suggest that the same conclusion may flow from the fact that more experienced counsel will possess greater familiarity with the Tribunal due to more frequent appearances, in contrast to more junior counsel or those having a less active practice before the Tribunal.”

¹⁵ *Ibid* at para 53.

¹⁶ *Ibid* at paras 57-58.

¹⁷ *Ibid* at para 60.

The Tribunal also distinguished on two bases its previous decision, *Flat Hot-Rolled Steel*,¹⁸ in which it had disqualified a former Tribunal counsel from appearing. (While the Tribunal in *Certain Container Chassis* recognized that a reasonable apprehension of bias typically results in the removal of the adjudicator, not the removal of counsel,¹⁹ it seemed to implicitly accept that removal of counsel may potentially be an appropriate remedy for a reasonable apprehension of bias. I note that the Tribunal held this explicitly in *Flat Hot-Rolled Steel*.²⁰) The first basis was that the lawyer in that decision had left the Tribunal after the matter had begun and thus had access to confidential information.²¹ The second basis was the intervening case law on the presumption of impartiality and the requirement of “cogent justification” for a reasonable apprehension of bias.²²

The Tribunal then more briefly addressed the elements of counsel of choice and mobility in the legal profession. It held that counsel of choice was particularly important given the short statutory timelines in the matter and the delay in filing the request for disqualification.²³ On lawyer mobility, the Tribunal rejected a proposed cooling-off period patterned after a cooling-off-period required of some former federal civil servants.²⁴ Moreover the Tribunal (curiously in my view) distinguished appearance as counsel from the lobbying that was prohibited of former federal civil servants during that cooling-off period.²⁵ Later in their reasons, the Tribunal also recognized the practical problem that cooling-off periods can render lawyers

¹⁸ *Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet Products, Re*, 1999 CarswellNat 6610, 6611 [*Flat Hot-Rolled Steel*].

¹⁹ *Certain Container Chassis*, *supra* note 3 at para 19.

²⁰ *Flat Hot-Rolled Steel*, *supra* note 18 at para 21 [citation omitted]: “The Tribunal is well aware that a reasonable apprehension of bias normally gives rise to a member of the panel having to recuse himself from the proceeding. However, the Tribunal is of the view that, in certain circumstances, it is appropriate for counsel to be disqualified from a proceeding.”

²¹ *Certain Container Chassis*, *supra* note 3 at paras 63-64. The Tribunal at paras 14 and 56 also distinguished on this basis another previous decision in which the Tribunal had declined to remove counsel, *Black Granite Memorials (Re)*, [1999] CITT No 38 (QL).

²² *Certain Container Chassis*, *supra* note 3 at para 65.

²³ *Ibid* at paras 68-83.

²⁴ *Ibid* at paras 86-87.

²⁵ *Ibid* at para 92.

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“unemployable”,²⁶ and that such periods would be “highly and unduly restrictive” “given the specialized nature of trade remedy law”.²⁷ The Tribunal again emphasized that there could be no conflict of interest because “the Tribunal is not adverse in interest to any of the parties to these proceedings or to their counsel.”²⁸ The Tribunal also rejected a proposed analogy between former Tribunal counsel and former judicial law clerks to the Supreme Court of Canada as not “a relevant comparison”, although the Tribunal did not explain why the comparison was not relevant.²⁹

ANALYSIS

Against this backdrop, I now analyze the reasons of the Tribunal in *Certain Container Chassis*. I suggest that, even once re-conceptualized, the reasons are problematic in several respects. There are essentially three primary options for whether former tribunal counsel can appear before that tribunal: a categorical or absolute prohibition, whether permanent or of fixed duration (“cooling-off period”); no prohibition; or a contextual analysis. As I will explain, the appropriate option will differ depending on what issue is engaged. While the Tribunal in *Certain Container Chassis* was correct that confidentiality concerns require an absolute prohibition, its remaining contextual analysis was incomplete.

A. Re-interpreting the Reasoning: Two Distinct Questions

To better understand and analyze the reasoning in *Certain Container Chassis*, it is helpful to first reconceptualize that reasoning. The Tribunal organized its reasoning around the three elements of *MacDonald Estate*: the integrity of the profession and the administration of justice, choice of counsel, and lawyer mobility. However, the reasons can be more clearly organized into two questions: confidentiality and reasonable apprehension of bias. As I will discuss, the reasoning of the Tribunal is strong as to confidentiality and weaker as to reasonable apprehension of bias – but is ultimately incomplete. A third question must also be asked.

²⁶ *Ibid* at para 96, citing Andrew Flavelle Martin, “Legal Ethics and Judicial Law Clerks: A New Doctrinal Account” (2020) 71 UNBLJ 248 at 264-265.

²⁷ *Certain Container Chassis*, *supra* note 3 at para 98.

²⁸ *Ibid* at para 91.

²⁹ *Ibid* at paras 93-97 (quotation is from para 97), discussing Martin, *supra* note 26.

The first question is whether the lawyer had access to relevant confidential information about the specific matter while they were counsel to the tribunal. The Tribunal was correct on this question insofar as it held that the lawyer could not appear before the Tribunal if they did have access to such information about the specific matter while they were counsel to the Tribunal.³⁰ (Indeed, they cannot represent a party before the tribunal in that matter, any related matter, or any matter where that confidential information “may prejudice the client” i.e. the Tribunal.³¹)

However, the Tribunal’s further statement on this point – that there cannot be a conflict because the Tribunal and the lawyer’s new client are not “adverse in interest” – is questionable.³² I acknowledge here that the relevant rule of professional conduct specifically prohibits a lawyer acting “against” the former client,³³ and that may explain why the Tribunal emphasized that “the Tribunal is not party [and] has no interest or stake in the outcome.... the Tribunal is not adverse in interest to the parties who appear before it”.³⁴ The legal interests of a tribunal, though not adverse to those of the parties before it, are certainly separate and legally distinct interests from those parties. If nothing else, this follows from the concept of impartiality. In other words, the mere fact that counsel in *MacDonald Estate* was disqualified because the former and current clients were adverse in interest does not mean that counsel should be disqualified *only* if those clients are adverse in interest. Moreover, even if the relevant rule is correctly and exhaustively read strictly as referring only to actions “against” a former client,³⁵ the Tribunal is incorrect in its further assertion that the lawyer “owes no ‘duty of loyalty’ to the Tribunal in the same sense that a lawyer would owe to a private client” merely because the Tribunal and the party before it are not adverse in interest.³⁶ As former counsel to the tribunal, a lawyer owes the tribunal the same or similar duties that all lawyers owe to

³⁰ *Ibid* at paras 26-27; Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2022), r 3.4-10, online: *Federation of Law Societies of Canada* <www.flsc.ca> [*FLSC Model Code*].

³¹ *Ibid*, r 3.4-10.

³² *Certain Container Chassis*, *supra* note 3 at para 29.

³³ *FLSC Model Code*, *supra* note 30, r 3.4-10.

³⁴ *Certain Container Chassis*, *supra* note 3 at paras 27-29.

³⁵ *FLSC Model Code*, *supra* note 30, r 3.4-10.

³⁶ *Certain Container Chassis*, *supra* note 3 at para 29.

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former clients. (As duties to former clients are not time-limited, a cooling-off period cannot solve these issues.)

Here the Tribunal's finding – that the lawyer had left their position as Tribunal counsel before the matter at issue had begun – was determinative.³⁷ Furthermore the Tribunal held, correctly in my view, that the relevant inquiry is whether former Tribunal counsel “could have seen or had access to” such confidential information,³⁸ not the degree of official or formal involvement that the lawyer actually had with the specific file. This inquiry gives fuller protection to the crucial value of confidentiality. However, the application of this approach is complicated somewhat by how one understands what constitutes a related matter. Recall that the Tribunal found that “[t]he subject matter of this particular trade remedy case is novel as before the Tribunal.”³⁹ It seems reasonable to presume that the Tribunal – indeed any tribunal – has specialized expertise in determining what matters were related to the matter before it, subject of course to the persuasiveness of counsel and oversight by superior courts on judicial review.

I do note that *MacDonald Estate* was specifically about, and is now primarily applied as being about, disqualification of the firm to which the former lawyer moved, as opposed to the automatic disqualification of the individual moving lawyer. While this point was not squarely at issue on the facts of *Certain Container Chassis*, I would note that *MacDonald Estate* would require disqualification of the new firm unless confidentiality screens had been properly implemented. Indeed, the Tribunal's determinant of mere access to relevant confidential information, as opposed to actual knowledge of such information, dovetails with the holding in *MacDonald Estate* that the “there is ... a strong inference that lawyers who work together share confidences” and that the transferring lawyer's knowledge should be presumed to be the knowledge of the whole firm in the absence of sufficient safeguards.⁴⁰

At this confidentiality question, choice of counsel and lawyer mobility should play no role other than their role in *MacDonald Estate*. If former

³⁷ *Ibid* at paras 25-27.

³⁸ *Ibid* at para 26.

³⁹ *Ibid* at para 26.

⁴⁰ *MacDonald Estate*, *supra* note 1 at 1262, Sopinka J for the majority. (Justice Cory, dissenting, would have irrebutably imputed the knowledge to the new firm: 1270.)

tribunal counsel joins a firm, that firm can continue to participate in a matter that was already before that tribunal if and only if sufficient confidentiality protections are put in place at the outset. However, it is less than clear whether the Tribunal suggested that those factors are relevant to confidentiality. Likewise, a cooling-off period is no solution to this confidentiality problem since the obligations around confidential information are not time-limited.

If the lawyer had access to confidential information in that matter or a related matter while acting as tribunal counsel, the analysis is complete and the lawyer must be removed. If there was no access to confidential information, most likely because the lawyer had left the tribunal before the specific matter or any related matters had been initiated, then one moves to the second question.

The remainder of the Tribunal's reasoning is best understood as a second analytical question, i.e. the existence of a reasonable apprehension of bias. It is here that, with respect, the Tribunal's analysis has several major weaknesses.

First, the Tribunal's assessment of the role of Tribunal counsel understated their close working relationship with Tribunal members and failed to adequately distinguish a previous decision in which the Tribunal had recognized the impact of that close working relationship. The Tribunal in *Certain Container Chassis* found that "[n]otwithstanding the institutional support provided to Tribunal members by legal and non-legal staff, the conduct of Tribunal inquiries and the decision-making function under [the Act] are reserved to the panel of Tribunal members assigned to hear the case and to them alone".⁴¹ However, the Tribunal in its previous decision of *Flat Hot-Rolled Steel* made a very different finding that readily acknowledged the extensive role of Tribunal counsel:

Tribunal counsel work closely with Tribunal members and staff, as did [the lawyer]. Further, in the course of their duties, Tribunal counsel participate in seminars and training sessions for members, provide legal opinions to members and assist members in substantive legal and procedural matters before, during and after oral hearings. Counsel also represent the Tribunal in matters before the Federal Court of Appeal and Binational Panels. [The former Tribunal counsel] worked closely on files with every current

⁴¹ *Certain Container Chassis*, *supra* note 3 at para 48.

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member at the Tribunal, including those members who will hear this case.⁴²

Thus the Tribunal in that previous matter actually found a reasonable apprehension of bias not only because the lawyer left the Tribunal after the matter was opened, but also because of “the close working relationship which [the lawyer] had with Tribunal members”.⁴³ (Notably, the decision in *Certain Container Chassis* in this respect is an improvement because access to confidential information was separated out of the reasonable apprehension of bias analysis.) Moreover, there is little support for the assertion that the twin intervening legal developments of the presumption of impartiality and the higher threshold for a reasonable apprehension of bias are sufficient to distinguish that prior decision,⁴⁴ at least as a matter of this factual finding.

Second, the Tribunal's bare and conclusory assertions are unpersuasive and, with respect, somewhat self-serving. First, the assertion that experience as Tribunal counsel is merely one of many forms of “tactical advantage” is unconvincing in itself.⁴⁵ Likewise, it is unclear that a reasonable and informed person would accept the assertion that the identity of counsel has no effect on Tribunal members.⁴⁶ Even if there is no actual bias, there may well be a reasonable apprehension of bias. Moreover, even if there is no reasonable apprehension of bias *per se*, there is still something inherently unfair and unjust.

Third, the Tribunal appeared to overlook the relevant rules of professional conduct in at least two respects. First, lawyers are prohibited from using confidential information to their own benefit or the benefit of a third party without the client's permission.⁴⁷ For former tribunal counsel,

⁴² *Flat Hot-Rolled Steel*, *supra* note 18 at para 18.

⁴³ *Ibid* at para 19. See also *Black Granite Memorials*, *supra* note 21, which the Tribunal in *Certain Container Chassis* at para 56 characterized as concerning the distinction between general “know-how” and confidential information, although the Tribunal in that decision also considered at para 19 that the lawyer while Tribunal counsel had not worked closely with the specific panel members.

⁴⁴ *Certain Container Chassis*, *supra* note 3 at para 65.

⁴⁵ See above notes 14 and 15 and accompanying text.

⁴⁶ See above notes 16 and 17 and accompanying text. See e.g. Martin, *supra* note 26 at 264: “Lawyers who have recently acted as the court's trusted advisors conceivably have more credibility and persuasiveness than other lawyers.” While I was discussing former judicial law clerks, the same point holds for former Tribunal counsel.

⁴⁷ *FLSC Model Code*, *supra* note 30, r 3.3-2: “A lawyer must not use or disclose a client's or

the tribunal is the former client. This reinforces my argument above that the “adverse in interests” inquiry is incomplete. Second, lawyers are prohibited from appearing before decision-makers with whom they have relationships that may be seen as impairing impartiality by “pressure, influence, or inducement”.⁴⁸

Fourth, the Tribunal neither gave an explanation as to why it found inapt the moving parties’ proposed analogy – between former Tribunal counsel appearing before the Tribunal and former judicial law clerks at the Supreme Court of Canada appearing before that Court – nor considered any other analogies.⁴⁹ In my view the law clerk analogy is apt. Judicial law clerks operate in a close lawyer-client relationship in which the Court or the individual judge is the client, which might result in undue influence (whether actual or perceived) when those former clerks appear before the Court or the specific judge.⁵⁰ Parallel considerations would apply to former tribunal counsel appearing before that tribunal. In contrast to judges, however, judicial law clerks are hired for a fixed term and have little if any security of tenure.⁵¹ (While counsel to a tribunal may have open-ended employment and may have the limited security of tenure provided by a collective agreement, they remain vulnerable to removal as compared to judges.) Indeed, just as I have argued elsewhere that a prohibition or cooling-off period for former judicial law clerks appearing in front of the judge or court may be “destructive to the institution of clerking”,⁵² so too did the Tribunal in *Certain Container Chassis* hold that “given the specialized nature of trade remedy law”, a cooling-off period would be “highly and unduly restrictive.”⁵³ In fact, whereas a prohibition or cooling-off period

former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.”

⁴⁸ *Ibid*, r 5.1-2(c): “When acting as an advocate, a lawyer must not ... appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice”.

⁴⁹ *Certain Container Chassis*, *supra* note 3 at para 97.

⁵⁰ Martin, *supra* note 26 at 257-259.

⁵¹ *Ibid* at 263.

⁵² *Ibid* at 265.

⁵³ *Certain Container Chassis*, *supra* note 3 at para 98. See also para 75: “For the most part,

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only on former clerks appearing before the Court would allow them to appear before lower courts and tribunals, a prohibition or cooling-off period on tribunal counsel appearing before that tribunal would seem much more restrictive given the specialized practice area.

Another potential analogy, indeed the one I proposed elsewhere as an analogy to judicial law clerks, is former judges appearing in the court on which they served or a court or tribunal over which that court exercised appeal or review jurisdiction. While the analogy is imperfect, it is still illuminating. For example, Pitel & Bortolin explain that, aside from a former judge having or appearing to have unfair sway over former colleagues or other current judges,⁵⁴ a former judge may have a conflict of interest where their previous decision may be legally relevant:

A former judge might be faced with a personal conflict of interest if asked to represent a client in a matter requiring one of his or her prior judicial decisions to be addressed. It could sometimes be in the best interests of the client to argue that a previous decision is incorrect. On the other hand, a former judge has a personal interest, or at least an apparent interest, in defending the correctness of his or her previous decisions, not only as to findings of fact but also as to conclusions of law." This could well conflict with making submissions in the best interests of the client.⁵⁵

Moreover, arguing such wrongness may affect public respect for the administration of justice.⁵⁶ Conversely, a former judge "might try to reinterpret or expand a previous decision for the benefit of a client."⁵⁷ Parallel concerns apply to a lawyer who, as tribunal counsel, advised on that previous case. A third potential analogy is recusal of judges or adjudicators sitting, or disqualification of counsel practicing, in small-bar settings.⁵⁸ Whereas these cases largely deal with geographically underserved areas, they would seem to be relevant to small bars as defined by narrow and specific

counsel appearing before the Tribunal in trade remedy cases comprise a relatively small and specialized segment of the bar."

⁵⁴ Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483 at 488-490 [Pitel & Bortolin].

⁵⁵ *Ibid* at 496-497 [footnote omitted].

⁵⁶ *Ibid* at 497.

⁵⁷ *Ibid* at 522.

⁵⁸ Thanks to a peer reviewer for this suggestion.

expertise as opposed to geography. For example, the Northwest Territories Court of Appeal has held that:

[I]t is not in the public interest to have judges easily disqualified.... A low standard would lead to delays because it would encourage tactical motions by litigants seeking another judge whenever they may anticipate an unfavourable outcome. It would also make it extremely difficult to run cases on an efficient basis in small centres ... where there may be few judges and a likelihood that litigants who appear frequently in the courts would often appear before the same judge.⁵⁹

Likewise, Julia Hughes & Philip Bryden note that “the practical consequences for the parties of the recusal of the sole judge in a small town or a judge on circuit are likely to be different than the impact of recusal by a judge in a major centre.”⁶⁰ Similarly, where a tribunal functions in a highly specialized area of law,⁶¹ the disqualification of former tribunal counsel could make it not only difficult for the tribunal to recruit counsel, but also difficult for parties appearing before that tribunal to find competent

⁵⁹ *R v Werner*, 2005 NWTCA 5, 205 CCC (3d) 556 at para 15, Vertes JA (in chambers). See also *Newfoundland and Labrador (Director of Child, Youth and Family Services) v Thome*, [2007] NJ No 414 (QL) at para 5 (Prov Ct), as quoted in Julia Hughes & Philip Bryden, “Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification” (2013) 36:1 Dal L 171 at 177: “as a practical matter, if a Judge presiding in a rural judicial district might be disqualified from hearing more than one or two matters relating to any one individual, then she or he would soon find her or him self unable to hear anything” [Hughes & Bryden]; *BW v CYS*, 2019 NLSC 166 at para 54, applying *Thome*: “It would be extremely difficult, if not impossible, for trial courts in small centres ... to function if different judges had to sit on matters involving the same parties.”; *LJ (Re)*, 2004 CanLII 56522 (ON CCB) at 4: “There are some practical realities that require that panel members may well be scheduled on a number of different occasions concerning the same patient. This may be more likely to occur in smaller centres. Each motion for a recusal must be considered on its own facts.” Thanks to Julia Hughes for bringing these cases to my attention.

⁶⁰ Hughes & Bryden, *supra* note 59 at 177. See also Philip Bryden & Julia Hughes, “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges concerning Judicial Disqualification” (2011) 48:3 Alta L Rev 569 at 597.

⁶¹ *Certain Container Chassis*, *supra* note 3 at para 98: “the specialized nature of trade remedy law”. Again, see also para 75: “For the most part, counsel appearing before the Tribunal in trade remedy cases comprise a relatively small and specialized segment of the bar.”

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counsel.⁶² This analogy suggests that specialized tribunals should use a high threshold not only for recusal of members but also for disqualification of former tribunal counsel.

A fourth potential analogy is whether part-time tribunal members can appear before that tribunal.⁶³ Here the Nova Scotia Labour Relations Board held that the mere fact that counsel for a party is a member of the Board cannot constitute a reasonable apprehension of bias, particularly given the specialized nature of the Board's jurisdiction:

[T]he institutional constraints as well as the underlying policy role of the Board make it inevitable—and indeed even appropriate—that Board members have an active involvement in the labour relations community. The Board lacks the resources to employ its members on a full-time basis. Those members must earn a living, which in turn means that they will often be actively employed in the world they help regulate. Board members will know or interact with each other and with counsel and agents of the parties that appear before the Board in [several] capacities.... [A] reasonable and right minded person, knowing all this, would not believe that a reasonable apprehension of bias arose merely because a Board member might appear before a panel of the Board as a representative for a party on an application.⁶⁴

Again, the key difference here is that former tribunal counsel was in a lawyer-client relationship with the tribunal and thus they have some permanent obligations to the tribunal as a former client.⁶⁵ Nonetheless, this

⁶² See above notes 52-53.

⁶³ *Canadian Union of Public Employees, Local 5050 v Cape Breton - Victoria Regional School Board*, 2008 CanLII 92035 (NS LRB).

⁶⁴ *Ibid* at paras 26-27. Consider also *Law Society of Ontario v Khan*, 2020 ONLSTA 4 at para 31: the mere fact that a tribunal member and counsel before it both serve as members of another tribunal is an insufficient basis to remove counsel.

⁶⁵ While this question remains largely unaddressed in the literature, Robert W Macaulay, James LH Sprague & Lorne Sossin observe that “the fact that a counsel, appearing in an adjudicative proceeding may have himself or herself or his or her firm performed some legal services for the agency or the member will not itself create a reasonable apprehension of bias”: Macaulay, Sprague & Sossin, *supra* note 2 at para 52.12. However, with great respect, the authorities they rely on for this observation are not conclusive to the specific situation of former tribunal counsel appearing before that tribunal.

analogy, like the small-bar analogy, suggests that specialized tribunals should use a high threshold for disqualification of former tribunal counsel.

I note that none of these analogies are mutually exclusive – instead, each offers a slightly different dimension to the question of former tribunal counsel appearing before that tribunal.

Analogies aside, the Tribunal did not consider a remarkably similar case – however, the reasoning in that case was even more conclusory than the reasoning in *Certain Container Chassis*. Perhaps the closest case to *Certain Container Chassis* is the 2003 decision of the Ontario Labour Relations Board in *International Assn of Heat and Frost Insulators and Asbestos Workers v Adam's Industrial Insulations Ltd.*⁶⁶ Here a party argued that it was improper for the opposing party to be represented by counsel who had, until ten months before the hearing, been counsel to the Board.⁶⁷ While the Board decided the issue on other grounds, it rejected both the argument that the former Board counsel was in a conflict of interest and the assertion that the Board's failure to inform the parties of the counsel's past role created a reasonable apprehension of bias. Although the relevant events had taken place while the lawyer was counsel to the Board, the Board accepted the lawyer's assertion that he had not worked on the file. (As I mentioned above, this is too narrow a test for a transferring lawyer.⁶⁸) Moreover, the Board asserted that "there was nothing in the Board's ruling which could have been affected by his employment at the Board", as the facts were not disputed, and thus that the "prior employment at the Board was therefore irrelevant to the decision".⁶⁹ As for bias, the Board held:

There is not a reasonable apprehension of bias every time someone who formerly worked at the Board, appears before it. Labour lawyers could not practice their profession without doing so. The mere fact that the adjudicator and counsel both worked at the

⁶⁶ *International Assn of Heat and Frost Insulators and Asbestos Workers v Adam's Industrial Insulations Ltd*, 2003 CanLII 44357, [2003] OLRD No 32 (QL) (Ont LRB) [*Heat and Frost*].

⁶⁷ *Ibid* at paras 2, 4.

⁶⁸ See above notes 30-31 and accompanying text.

⁶⁹ *Heat and Frost*, *supra* note 66 at para 3.

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Board at the same time does not raise a reasonable apprehension of bias.⁷⁰

With respect, these statements were conclusory, unsupported, and unexplained. Thus, even if this case had been raised by counsel before the Tribunal, its limited persuasive value means it would have added little to the decision.

While this two-question reinterpretation of the Tribunal's reasoning provides a helpful framework for analysis, it remains incomplete. An additional question is necessary.⁷¹

B. Adding a Third Question

To adequately recognize the unique considerations that apply to former tribunal counsel appearing before that tribunal, it is necessary either to reimagine the analysis of a reasonable apprehension of bias – the second question of the analysis of the Tribunal in *Certain Container Chassis* – or to add one or more additional questions. In my view, the reasonable apprehension of bias analysis does not and cannot incorporate all the relevant legal ethics considerations. In particular, former tribunal counsel may face a conflict of interest because the interests of the current client clash with the interests of the tribunal (the former client) or the interests of the lawyer themselves. That is, confidentiality is not exhaustive of the grounds for potential conflicts of interest. Moreover, absent a reasonable apprehension of bias, there may still be an unavoidable impression of unfairness to the party that has not retained former tribunal counsel.

As with former judges appearing in court, the critical point is that a reasonable apprehension of bias is not exhaustive of the problems that manifest when former tribunal counsel appear in front of that tribunal. These same considerations would apply to former tribunal counsel even though they are not actually the decision-makers – because they closely advise those decision-makers. Former judges and former tribunal counsel may well have, or more importantly be perceived by a reasonable and informed person as having, undue influence on judges of that court,

⁷⁰ *Ibid* at para 4.

⁷¹ The Tribunal itself left open this possibility. See *Certain Container Chassis*, *supra* note 3 at para 99 [emphasis added]: “In the absence of potential misuse of information arising from a solicitor-client relationship, or other compelling justification, *such as* the absence of a reasonable apprehension of bias”.

particularly but not only their former colleagues.⁷² But there are other risks. Former judges may have to argue that one of their decisions was then, or is now, incorrect.⁷³ Likewise, where the tribunal adopted a legal analysis proposed by the lawyer while tribunal counsel, the lawyer may now have to argue that their advice was incorrect and that the tribunal was wrong to adopt it. In such a situation, the former judge or former tribunal counsel have a personal interest in the competence and correctness of their prior work that conflicts with the interests of the current client.⁷⁴ Moreover, they are undermining the work they provided in their previous role.⁷⁵ Conversely, where the tribunal rejected a legal analysis proposed by the lawyer while tribunal counsel, the lawyer may now be required by resolute advocacy to use that knowledge and that analysis to undermine the precedent. Whereas in answering the first question a related matter is one that is *factually* related, for this third question the concern is previous decisions that are *legally* relevant even if no relevant confidential information was involved. As with the first question, here a cooling-off period is no solution.

Here I acknowledge the limits of my suggestion that former judicial law clerks can adequately sidestep these kinds of issues, when a case from the court during their service is relevant, merely by “choos[ing] their words carefully, avoid[ing] speculating as to the judge’s intended meaning, and avoid[ing] insofar as possible commenting on the merits of the decision.”⁷⁶ In other words, former law clerks – like former tribunal counsel – in some circumstances cannot avoid commenting on or arguing against the merits of a decision issued during their previous service. Where that happens, there is a clear conflict of interest.

These considerations are best incorporated into a third question, which might be referred to as the interests of justice or the proper administration of justice. In addition to legal ethics issues, this question can also consider systemic or structural factors that may cause unfairness to the opposing party but are not properly captured by the more individualized

⁷² Pitel & Bortolin, *supra* note 54 at 489-490.

⁷³ *Ibid* at 496-497, as discussed e.g. in Martin, *supra* note 26 at 264.

⁷⁴ Pitel & Bortolin, *supra* note 54 at 496-497.

⁷⁵ Consider by analogy *Stewart v Canadian Broadcasting Corp* (1997), 150 DLR (4th) 24 (Ont SC).

⁷⁶ Martin, *supra* note 26 at 266.

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considerations in the reasonable apprehension of bias analysis in the second question. For example, previous service as tribunal counsel is, in my view, qualitatively different than what the Tribunal described as sources of “tactical advantage”.⁷⁷ This particular kind of advantage is undue and inherently unfair, aside from the potential absence of a reasonable apprehension of bias.

This third analytical question unavoidably involves a contextual analysis that may turn on the particular circumstances, including the nature of the tribunal and the nature of the services provided by tribunal counsel. As a specific cooling-off period would be arbitrary,⁷⁸ so too would an analysis that turns formalistically on the number of years that the lawyer spent as counsel to the tribunal and how recently the lawyer had left that role. For example, where the tribunal operates in a particularly specialized area of law, as the Tribunal noted of itself in *Certain Container Chassis*,⁷⁹ that factor may increase the importance of lawyer mobility. If lawyers cannot practice in a tribunal’s specialized area of law after leaving their service to the tribunal, whether for a non-trivial cooling-off period or indefinitely, that inability would be a strong disincentive to performing such a role and the tribunal would have difficulty retaining qualified counsel.⁸⁰ While an absolute prohibition promotes clarity and predictability,⁸¹ outside of the confidentiality question such an approach would be not only unnecessary but problematic in its practical effects.

I emphasize here that just as superior courts have the inherent jurisdiction to control their own processes, including the power to remove counsel in the interests of justice even where there was no breach of a rule of professional conduct or the broader law of lawyering,⁸² so too do

⁷⁷ See above notes 14-15 and accompanying text.

⁷⁸ See e.g. Pitel & Bortolin, *supra* note 54 at 496-497.

⁷⁹ *Certain Container Chassis*, *supra* note 3 at para 99.

⁸⁰ *Ibid* at para 96, framing this as “the risk of making individuals unemployable, for practical purposes”. See also Martin, *supra* note 26 at 265: “in the age of the megafirm, a law clerk serving for a single year would be *de facto* prevented from seeking employment... such a cooling-off period for law clerks would be impractical in practice and destructive to the institution of clerking.”

⁸¹ Thanks to a peer reviewer for this suggestion.

⁸² See e.g. *Everingham v Ontario* (AG) (1992), 8 OR (3d) 121, 88 DLR (4th) 755 (Div Ct), *aff’d* on other grounds 84 DLR (4th) 354, 1991 CarswellOnt 400 (Gen Div).

tribunals unless that power is removed by statute.⁸³ While this might not require an absolute prohibition on former tribunal counsel appearing before the tribunal, removal may become necessary as the matter proceeds. Indeed, the duty of candour may require the lawyer to inform the tribunal that a decision that was open during the lawyer's time as tribunal counsel has become relevant and that they must withdraw as counsel at that time.

REFLECTIONS AND CONCLUSION

While tribunal counsel are not tribunal members, they nonetheless have a distinct, largely hidden, yet irreducibly non-trivial role in the adjudication process. When reconceptualized as I have in this comment, the reasons of the Canadian International Trade Tribunal in *Certain Container Chassis* provide a partial albeit incomplete framework for this analysis. An analysis parallel to the well-established case law on the protection of confidentiality when lawyers change firms does not adequately capture the issues at stake. Neither does a traditional analysis of a reasonable apprehension of bias. The unique considerations applicable to former tribunal counsel require an additional analytical question focused on the interests of justice and encompassing other legal ethics and fairness concerns. In some cases, appearing before the tribunal which a lawyer previously served as counsel may put that lawyer at risk of a legal ethics dilemma that can only be solved by withdrawal. The spectre of such a situation may require the pre-emptive removal of the lawyer from the record in even a larger set of cases. Nonetheless, a blanket prohibition on such appearances is not a viable solution. A contextual inquiry will be necessary in each case where confidentiality is not at issue. At the same time, tribunals should be wary of opposing counsel abusing or overstating these issues to tactically remove counsel.⁸⁴

⁸³ See e.g. *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569, 57 DLR (4th) 663, Sopinka J for the majority: "We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice." See also e.g. *Administrative Tribunals Act*, SBC 2004, c 45, s 11(1).

⁸⁴ See by analogy tactical abuse of the bright-line rule, e.g. in *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 32.

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Whereas the confidentiality question is not a contextual one, the other analytical questions – reasonable apprehension of bias and interests of justice – are contextual ones. This contextual analysis might consider how many years had elapsed since the former tribunal counsel left that role; whether the members of the panel had been appointed to the tribunal before the lawyer left that role; and if so, how closely those members worked with that counsel and what were the nature of the services provided by counsel.⁸⁵ Indeed, this last factor was held to be a relevant consideration in the Tribunal's previous decision in *Black Granite Memorials (Re)*.⁸⁶

While these determinations should hold lawyers to high standards, I acknowledge that the practical problem identified by the Tribunal cannot be avoided: if former tribunal counsel cannot appear before the tribunal, especially where the tribunal operates in a highly specialized area of law, many tribunals will have difficulty attracting their counsel of choice, much less any counsel at all.⁸⁷ In this respect lawyer mobility is unavoidably necessary and requires some protection. Nonetheless, this harsh reality cannot undo or absolve counsel from their ethical obligations under the law of lawyering, nor can it dissipate a reasonable apprehension of bias. At the same time, the analysis I have proposed is context-dependent and not an absolute blanket prohibition on former tribunal counsel appearing before the tribunal.

While a cooling-off period – during which former tribunal counsel cannot appear before the tribunal – is admittedly inherently arbitrary,⁸⁸ its symbolic function may serve to increase public confidence both in the tribunal and the lawyers who appear before it.⁸⁹ Thus the best approach may be to combine a cooling-off period – perhaps of one or two years – followed by a contextual analysis after that period has elapsed.

In closing, I emphasize that even in the absence of a motion to remove former tribunal counsel from the record, such a lawyer may have an obligation to withdraw pursuant to the rules of professional conduct or the law of lawyering more broadly. The lawyer will certainly have such an obligation to withdraw where a relationship with specific tribunal counsel

⁸⁵ Thanks to a peer reviewer for this suggestion.

⁸⁶ *Black Granite Memorials*, *supra* note 21 at para 19.

⁸⁷ See above notes 26-27 and accompanying text.

⁸⁸ Martin, *supra* note 26 at 264, discussing Pitel & Bortolin, *supra* note 54 at 513.

⁸⁹ Martin, *supra* note 26 at 264.

“give[s] rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice”.⁹⁰ Likewise, the lawyer will certainly have such an obligation to withdraw where there is a conflict of interest, “unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client”.⁹¹ As discussed above, the conflict may be between the lawyer’s duties to the tribunal as the former client and to the new client, or between the lawyer’s duty to the new client and the lawyer’s own interests.⁹² Of course, it may well be that both the tribunal as former client and the current client consent to the lawyer acting despite the conflict and the lawyer believes that they can do so ethically. Indeed, the tribunal’s readiness to consent may be one viable strategy to ameliorate the practical problem of decreased lawyer mobility. The failure of opposing counsel to request the removal of the former tribunal counsel does not in any way absolve the lawyer of these responsibilities.

Thus, whenever former tribunal counsel considers appearing before that tribunal, they should not only be alive to these risks but proactive in evaluating them such that any withdrawal can be early enough to minimize prejudice to the client’s interests,⁹³ or to the tribunal or opposing counsel.⁹⁴

Moreover, pursuant to their duty of candour to the client,⁹⁵ former tribunal counsel should ensure they caution the client or potential client about the possibility and probability of withdrawal or removal and receive

⁹⁰ *FLSC Model Code*, *supra* note 30, r 5.1-2(c). See above note 48 and accompanying text.

⁹¹ *Ibid*, r 3.4-1.

⁹² See above notes 39-40 and accompanying text (confidentiality) and 75 and accompanying text (undermining services to the former client).

⁹³ *FLSC Model Code*, *supra* note 30, rr 3.7-1 (“A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.”), 3.7-8 (“When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.”)

⁹⁴ *Ibid*, r 3.7-1, commentary 2: “Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question”.

⁹⁵ *Ibid*, r 3.2-2: “When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.”

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clear written instructions to proceed nonetheless. As a more mundane strategic matter, an improper appearance by former tribunal counsel, even if successful at first instance, may leave the client vulnerable to judicial review and a re-hearing with new counsel. Clients may well decide that any risk is tolerable to retain their counsel of choice, but such a decision should be a fully informed one. Likewise, clients may decide to consent to the lawyer acting for them despite the conflict of interest.