Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 36
Date: October 18, 2021
File No(s).: T2440/9919

Between:

Stephen Marshall

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Membertou First Nation

Respondent

Ruling

Members: Kathryn A. Raymond, Q.C.

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I. Introduction

[1] The Respondent, Membertou First Nation ("Membertou"), seeks an Order dismissing a human rights complaint brought against it in the middle of the hearing for lack of evidence. The Complainant, Mr. Marshall, seeks an Order to correct a significant procedural error to "save" his complaint from being dismissed before it is fully heard.

[2] Mr. Marshall is an under-represented litigant. Membertou says that as a matter of principle Mr. Marshall should be expected to be held to his decisions so that there is certainty and finality within this proceeding.

[3] It is not the Tribunal's role to advise the parties how to present their case or to "fix" any error made by a self-represented or under-represented litigant. At the same time, the errors made by Mr. Marshall based on his representative's advice could end his ability to have the inquiry into his complaint decided on its merits. Should he be bound by his reliance on his representative, to such prejudice?

[4] Finality and fairness, both principles that apply to legal proceedings, are in conflict here and raise fundamental issues respecting the appropriate procedure before this Tribunal.

II. Overview & Outcome

[5] In anticipation of the hearing into the complaint, Mr. Marshall had filed a Statement of Particulars with the Tribunal. At the hearing, evidence was presented on behalf of Mr. Marshall by his representative. After calling some of the listed witnesses, Mr. Marshall's representative announced that Mr. Marshall would not testify. It is routine that complainants will testify in support of their own complaint. After hearing from one additional witness, the representative closed Mr. Marshall's case. Mr. Marshall did not offer the further evidence that he had identified or disclosed as particulars in his Statement of Particulars.

[6] At the time, the Tribunal was under the impression that Mr. Marshall's representative was a licensed, practicing member of the bar, with litigation experience. The Tribunal was

advised on the third day of hearing that, while she holds a law degree and articled, in the twenty plus years since, she has not litigated, and she is not a practicing lawyer.

[7] Membertou immediately brought a motion for non-suit. A motion for non-suit is a somewhat unusual motion in an administrative law proceeding before a tribunal. Such motions are unusual before this Tribunal. In part, this is because complaints are screened for some evidence to ensure that they warrant at least inquiry; Mr. Marshall's complaint was screened, investigated, and referred by the Canadian Human Rights Commission for inquiry to this Tribunal. If the motion is granted, there will not be a full inquiry because of the Complainant's decision to not testify and to close his case.

[8] The motion for non-suit alleges that Mr. Marshall did not provide necessary evidence to meet the legal requirements of a valid complaint in accordance with the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act"). Membertou takes the position that, even if the Tribunal accepts all the evidence at face value that Mr. Marshall did present at the hearing through other witnesses, his case does not cross the threshold of a potentially valid complaint. Membertou submits that it should not be required to submit evidence to defend a complaint that cannot succeed. Its motion requests an Order dismissing the complaint without the need to complete the hearing.

[9] It is of relevance to these reasons that specific, allegedly missing evidence is the sole ground for Membertou's motion for non-suit. In this regard, complainants are required to prove that they have a characteristic that is protected by the Act, in short a "protected characteristic". Mr. Marshall's complaint is based on the protected characteristic of disability. Membertou submits that there is no evidence that Mr. Marshall has a disability because he did not testify that he has a disability. Membertou further argues that the Tribunal cannot make a factual finding that Mr. Marshall has a disability based on the evidence that was presented at the hearing. In summary, Membertou submits that, because there is no evidence that Mr. Marshall has a protected characteristic under the Act, namely disability, the complaint should be dismissed without any need for Membertou to call evidence in its defence.

[10] Mr. Marshall's representative made a serious error in not advising Mr. Marshall to testify and by closing Mr. Marshall's case, apparently having decided not to present the remainder of Mr. Marshall's evidence. She made other serious procedural errors, that did not appear to be appreciated by her or by Mr. Marshall at the hearing. In hindsight, she also appears to have possibly made other errors. These were not immediately clear to the Tribunal, as the Tribunal was in the process of reviewing the evidence for the first time at the hearing. The Tribunal is not privy to the strategic and procedural decisions parties make about how best to present their case or to the lack of any strategy or appropriate preparation in this regard. The latter tends to appear over time. It appears that some of these errors were also not immediately apparent to Membertou either, given the limited grounds of its motion. As explained below, these other errors provide factual background and significant context to these reasons, and, are therefore, necessary to identify.

[11] Mr. Marshall provided an explanation, likewise, described below, regarding why he decided not to testify at his hearing and to close his case. His motion asks that he be permitted to re-open his case so that he can provide further evidence.

[12] He further submits that there is sufficient evidence already upon which the Tribunal can find that he has the protected characteristic of disability. He asks that the hearing into his complaint proceed and, in his words, "relies upon the truth".

[13] Membertou objects to Mr. Marshall re-opening his case. Membertou argues that Mr. Marshall made an informed decision to close his case and a strategic decision to do so. It submits that Mr. Marshall finds himself in a situation, not of error, but rather, of regret, and that his motion to re-open his case is driven by "buyer's remorse".

[14] For reasons that follow, I have decided that it is in the interests of the proper administration of justice before this Tribunal, in the unique circumstances of this case, to grant Mr. Marshall's motion to re-open his case, to dismiss Membertou's motion for non-suit but to permit Membertou to provide evidence in support of its defence of the complaint. In other words, both parties are permitted to proceed with further evidence. This decision is necessary to avoid a miscarriage of justice.

III. The Facts

A. The Complaint

[15] Mr. Marshall is a member of Membertou First Nation. Mr. Marshall is, therefore, in the position of having brought a complaint against his First Nation. It is unfortunate that this matter was unable to be settled and has led to an adversarial hearing between these parties.

[16] Mr. Marshall is an avid and talented hockey player. Between August 2016 and May 2017, he was employed as a Zamboni driver and maintenance worker at the Membertou Sport & Wellness Centre in Nova Scotia. Mr. Marshall claims that Membertou, including its Chief and Council, was aware that he had a dependency on alcohol prior to hiring him. He says that this is because he worked seasonally for Membertou Public Works from 2006 to 2012 and that, during that time, Membertou arranged to provide him with treatment for alcoholism. Mr. Marshall apparently eventually stopped working for Membertou because of absenteeism. He was then rehired in 2016 but terminated in 2017.

[17] Mr. Marshall filed a complaint that he was discriminated against by Membertou in his position as Zamboni driver allegedly because 1) he was subjected to adverse differential treatment during his employment, and, 2) his employment was terminated based on the belief that he had an alcohol dependency and was drinking on the job.

[18] Mr. Marshall complains that he appealed the decision to the Chief and Council of Membertou but that they did not listen to him and upheld the termination. He alleges that the Councillors had their mind made up beforehand and that one said to him “Didn’t this happen to you before?”

B. The Proceeding Before the Tribunal

(i) The Need to Identify What Went Wrong in the Proceeding

[19] The extent and nature of what went wrong as this complaint has proceeded is a highly relevant reason why Mr. Marshall is successful in his motion. The Tribunal would not normally focus upon the errors or potential errors of a party’s representative, only on the

party's position. The Tribunal would prefer to not be critical of any representative's participation. However, in this case an explanation of major errors made by the representative is unavoidable and necessary to understand the Tribunal's reasoning and conclusion that Mr. Marshall is not bound by his initial decision to not testify and to close his case.

[20] Parties are usually bound by what their representatives do and the positions they take. The Tribunal had to decide what was more important: ensuring that the hearing allowed both parties a full and ample opportunity to be heard, as required by Rule 1(1)(a) of the Tribunal's *Rules of Procedure under the CHRA* (03-05-04) (the "Rules"), or, adhering to the principle of finality, which encompasses the expectation that a party has one shot at making their case and the rule that a party is bound by their representative's position, or, if self-represented, the positions that they take. The Tribunal also considered the importance of adherence to the evidentiary and procedural rules applicable to proceedings. Further, the Tribunal had to balance Rule 1(1)(a) with Rule 1(1)(c) respecting the need for the hearing process to be as expeditious and efficient as possible. As will be seen, the Tribunal has chosen to ensure the "full and ample opportunity to be heard". This is in the interest of the integrity of this specific proceeding and reflects to some degree the expectation that proceedings will be more informal than in a court, as is also prescribed in Rule 1(1)(c).

[21] The disparity between the parties' representatives is also relevant context. Membertou's representative raised several technical objections during the hearing that Mr. Marshall was unable to address effectively at the time. Membertou could even be perceived by some to be taking a technical position in response to Mr. Marshall's desire to continue with the evidence for his complaint.

[22] The Tribunal cannot ensure that there is an absolutely level playing field between the capabilities of the parties at a hearing in terms of how they choose to present their case. However, the Tribunal can balance a significant disparity to the extent of ensuring that the procedure is fair to all. This decision represents the Tribunal's effort to find a resolution that is procedurally fair to both parties.

[23] As a final contextual comment, it can take some time for a court or tribunal to recognize that errors are being made by a party that are endemic and not a “one off”. Adjudicators are trained to assume that the decisions counsel make on behalf of their clients are deliberate and perhaps strategic decisions, that a representative, at the outset, should know their case best, and that interfering can have unintended and sometimes prejudicial effects. That concern about intervening too much arose initially in this case.

[24] Parties who proceed to a hearing are required to file a Statement of Particulars with a list of arguably relevant documents and a list of proposed witnesses to make disclosure of the case they intend to present at the hearing. Of relevance here is that Mr. Marshall’s Statement of Particulars appeared well prepared and demonstrated an understanding of what appeared to be, from his perspective, relevant facts and arguments. The Statement of Particulars appeared to set out the necessary evidence to support a finding of discrimination, including that Mr. Marshall had an alcohol dependency. Eight witnesses were listed on behalf of Mr. Marshall. All were said to be able to testify either that Mr. Marshall was not drinking at work on the relevant occasions, or that Mr. Marshall had an alcohol dependency or that Membertou had knowledge that Mr. Marshall had a history of alcohol dependency. While not all the arguably relevant third-party documents had been collected and disclosed, Membertou did not raise any issue with the rest of the non-disclosure of these arguably relevant documents, including documents that were stated to confirm Mr. Marshall's alcohol dependency. Because of this background, the Tribunal assumed that Mr. Marshall’s representative was reasonably knowledgeable about what the issues were in this discrimination case.

[25] The decision begins with what went wrong. The first error was the failure of Mr. Marshall’s representative to recognize when the hearing was starting.

(ii) Case Management

[26] A case management conference call with the parties’ representatives was arranged by the Tribunal to plan for the hearing. I will note here that Membertou’s counsel is a noted and experienced litigator, having been awarded the distinction of Queen’s Counsel, with over 25 years of litigation experience.

[27] After a discussion of everyone's availability and the length of time required to present each case, four dates for the hearing were agreed upon by the parties. Dates were set for the provision of an electronic joint exhibit book to be provided to the Tribunal and for finalized witness lists to be exchanged. This was to occur a few weeks before the hearing was to commence. The Tribunal advised that there would likely be another pre-hearing conference close to the hearing dates to further plan for the hearing. Whether the hearing would take place in person or virtually by video was an outstanding issue at that time.

[28] A written summary of the decisions made at the case management session was provided to the parties by the Tribunal. This summary noted the agreed upon hearing dates.

[29] A separate hearing notice was later sent to the parties by the Tribunal.

[30] Other correspondence was sent by the Tribunal to the parties that either referenced the hearing dates or related to matters that required action by the parties shortly before the hearing was to commence, that had been agreed upon or discussed at the case management conference.

[31] In the meantime, it had been determined that the hearing would proceed virtually. The correspondence covered topics that included facilitating the attendance of witnesses at the virtual hearing and the use of Zoom technology for the hearing. The parties failed to provide the joint exhibit book to the Tribunal by the required date; emails were sent on behalf of the Tribunal in follow-up. Other email consulted the parties about scheduling a pre-hearing video test hearing using the Zoom platform, to help the parties prepare.

[32] The Zoom video conference was held about a week before the hearing was set to begin. It was a practice session.

[33] The other purpose of the pre-hearing conference was to discuss matters of procedure at the hearing. This included explaining the obligation upon parties to prove their case with evidence at the hearing and an explanation of the need to do so on a balance of probabilities, among other key general concepts. General practical advice was offered respecting the calling of witnesses, as one example. It appeared that the procedural explanations by the Tribunal were understood by all the participants.

[34] Before the hearing was to start, Membertou's representative provided a list of the witnesses he proposed to call in a Record of Appearance. When the hearing began, counsel advised that he had received the Complainant's "witness list" the day before.

[35] Because of these events, it is difficult to understand how there could have been any ambiguity about the actual starting date of the hearing or a lack of understanding that the hearing was about to start.

(iii) The First Day of Hearing

[36] Mr. Marshall and his representative did not appear at the hearing. His representative was contacted by the Tribunal's Registry Office respecting her whereabouts and that of her client. She and Mr. Marshall subsequently joined the hearing by video. Her explanation for their non-attendance was difficult to follow. Of greatest concern to the Tribunal, Mr. Marshall's representative did not appear to understand that dates had been set for the hearing to start. She was also completely unprepared for the hearing. She offered this explanation: "…I know that we had put all these dates together but I didn't know which they were going to start so I wasn't prepared to start today." She had not, in fact, prepared earlier for the hearing.

[37] Mr. Marshall's representative advised that she had been on a conference call for work that morning. She, therefore, had been working and, in my view, should have had access to her calendar. The representative further explained that she did not "see the hearing dates". She "knew they asked for many dates but I did not know that they said that we are starting on this date". She said that "for some reason she never saw that".

[38] Mr. Marshall's representative did not appear to recall that hearing dates had been set directly between the parties and the Tribunal with her participation at the first case management session. More recent requests for dates by the Registry Office had been made to follow up on other pre-hearing arrangements. At the initial case management session, we had discussed the likelihood of a second case management conference by Zoom to be held right before the hearing. It seemed incongruous to the Tribunal that Mr. Marshall's representative would attend the Zoom practice session but not understand that the hearing

was supposed to start, and that she would not ascertain the date if she did not recall it. The start of the hearing had been planned with her participation and was obviously about to begin.

[39] The Tribunal pointed out that hearing dates had been set with the parties, a summary of the case management conference had been sent to the parties, a notice of hearing had been sent to the parties and that there had been a recent flurry of correspondence in preparation for the hearing start date. While acknowledging the potential that this might be the representative's first hearing before this Tribunal, it was emphasized that she is to read communications received from the Tribunal and to remember what is arranged.

[40] It also became apparent that Mr. Marshall's representative had not provided electronic copies of any proposed exhibits to Membertou or the Tribunal. She was directed to provide Mr. Marshall's documents to Membertou's representative and agreed to do so that day. In fairness, Membertou's representative had not contacted Mr. Marshall's representative to make arrangements for a joint exhibit book to have been filed in advance of the hearing as he had agreed to do at the first case management conference. Membertou's representative had also been late in filing his proposed exhibits.

[41] As noted, counsel for Membertou advised that he had only received the "witness list" from Mr. Marshall's representative the day before. Upon later review of the record, it appears that this was in fact a Record of Appearance that both parties are required to file just before the hearing starts. Membertou's counsel had filed a Record of Appearance the day before Mr. Marshall's representative filed his Record of Appearance. In referring to Mr. Marshall's "witness list" at the hearing, counsel for Membertou stated that a "number of them are witnesses, if not all of them that would be, quote unquote, 'under the employer's direction'". He indicated that none had been subpoenaed. He stated he was assuming that Mr. Marshall was not calling them as witnesses, and expressed concern, stating that he did not know how to deal with that issue and noting that the witnesses were not likely to be available as Mr. Marshall's representative "had done nothing to secure their attendance".

[42] Mr. Marshall's representative indicated that she had two witnesses that would appear for certain. She said that for some reason she thought it all had to be done later.

Instead of addressing the issue of whether she had contacted the witnesses she intended to call, she spoke instead about adding a witness, Richard Stevens, in the “list of witnesses” she had just provided, offering that he was added because he was not on Membertou’s “list” (i.e. Membertou’s Record of Appearance). Mr. Stevens is the manager of Human Resources at Membertou. Mr. Marshall’s representative stated that Mr. Stevens was “the only one who is not on there” from Membertou’s list that she would like to have testify.

[43] Mr. Marshall’s representative also spoke about the reasons why she wanted Membertou’s Chief, Chief Terry Paul, to give evidence. Chief Paul was also not on Membertou’s “list” but was included on Mr. Marshall’s list. This included that he had been the Chief at Membertou for 30 years, that he was the Chief when Mr. Marshall had received help from the Band previously, Chief Paul’s alleged knowledge of the history “having seen what had happened over the years”, and his alleged involvement in the investigation. Mr. Marshall’s representative indicated that Chief Paul “knows her client and knows his situation”. She stated that she “really wanted Chief Paul to be at the hearing”. [It should be noted that subsequently Mr. Marshall’s representative did not call Chief Paul to testify at the hearing.] She also stated that it was good that Troy Paul, the Human Resources Director, was on Membertou’s list. He was on her list, as well.

[44] Because of the comment by Mr. Marshall’s representative about adding a witness to her list because he was not on Membertou’s “list of witnesses”, in hindsight, it is possible that Mr. Marshall’s representative was under the impression that Membertou would be calling the witnesses on its list so that she did not have to call them. However, this is unclear because of changes respecting who ultimately testified and who did not. This is simply to say that Mr. Marshall’s representative may not have absorbed the procedural reality that she was required to call witnesses to prove Mr. Marshall’s case, although this had been discussed in case management.

[45] Mr. Marshall’s representative said that she had spoken to a few witnesses generally about willingness to testify but she had not contacted them to advise that the hearing was taking place. She did not do so although the need for witnesses to have reasonable notice of the time that they would testify had been discussed during case management. The

representative then indicated that she would be prepared to proceed with the hearing the next day. This was of concern to the Tribunal.

[46] Counsel for Membertou advised that Membertou requires that employees called to give evidence during working hours receive subpoenas.

[47] Counsel stated that he did not believe that many of the witnesses could provide evidence that would assist the Tribunal in reaching a decision. He explained that Chief Paul had not been involved in the investigation that led to Mr. Marshall being terminated or any of the events that led to his termination and was only relevant to Mr. Marshall's appeal to Chief and Council. Counsel indicated that he did not believe that another witness, Blair Paul, had any involvement in Mr. Marshall's termination but that he needed to speak with Mr. Paul now that he knew he would be a witness. He advised that he had not spoken to all of the witnesses on the list provided by Mr. Marshall's representative and was unable to be prepared for the following day.

[48] Mr. Marshall's representative had, in fact, provided a list of potential witnesses with the Statement of Particulars that she filed months before. The Statement of Particulars filed by Membertou did not contain a list of proposed witnesses. In reviewing the record, it appears that when the parties were referring to "witness lists", they were, in fact, referring to the Record of Appearance that each party filed just prior to the Tribunal sitting to hear the case. To be clear, it was Mr. Marshall who did not have sufficient notice of the witnesses Membertou proposed to call at the hearing because Membertou failed to provide this information.

[49] Mr. Marshall's representative had not raised this issue, which is relevant to procedural fairness, with the Tribunal during case management.

[50] The hearing was adjourned to another previously scheduled hearing date to allow both party representatives additional time to prepare.

[51] Before adjourning, the Tribunal reviewed general procedural matters again with the parties. There was another discussion of the Tribunal's Rules, the order of proceeding, the burden of proof upon a complainant, the standard of proof, the steps of a hearing, the need

for evidence respecting discrimination and the issue of remedy, and the general approach to preparation for a hearing. This included such matters as cross-examination and the advisability of notetaking during the hearing. In part, it was explained that a complainant cannot put part of their evidence forward, wait to hear the respondent's case, and then provide more evidence, known as "splitting your case". General information was provided respecting what constitutes proper reply evidence. It was also re-explained that the Tribunal makes a decision based only on the evidence presented to it at the hearing and that it does not have access to the Commission's file.

[52] In the course of discussion about procedural matters, counsel for Membertou expressed frustration with Mr. Marshall and his representative, indicating that it had been like "pinning Jell-O to the wall" and "one day he has an alcoholic problem, the next day he doesn't". He also indicated that Membertou had been dealing with this type of chaos all along.

[53] At one point during discussions, Membertou's counsel asked Mr. Marshall's representative when she received her law degree. She advised that she had obtained her law degree over 20 years previously.

(iv) The Second Day of Hearing & Decision Not to Testify

[54] When the hearing resumed, Mr. Marshall's representative made an opening statement. She called five witnesses and questioned them. Counsel for Membertou cross-examined those witnesses.

[55] Mr. Marshall's representative unexpectedly advised the Tribunal that she was calling her last witness and that Mr. Marshall would not be testifying. Discussion subsequently ensued between the Tribunal and the parties' representatives about Mr. Marshall's decision to not give evidence. The Tribunal gave Mr. Marshall an opportunity to reconsider his position. He was also asked by the Tribunal whether there was any impediment to his ability to testify. He was advised that, if he was not comfortable being a witness, solutions could be found to address his concerns. Mr. Marshall's representative indicated that there was no impediment.

[56] The Tribunal asked Mr. Marshall's representative if she would like to have an opportunity to consult with her client privately. She responded to the Tribunal's comments without having spoken to or otherwise communicated with Mr. Marshall. The representative declined an opportunity to consult further with her client, stating that they had decided that they did not wish to put him on the stand. Mr. Marshall sat beside her. He remained silent throughout the proceedings. The representative confirmed that Mr. Marshall wished to close his case.

[57] Counsel for Membertou advised the Tribunal that Membertou was bringing a motion for non-suit. He requested an Order that the complaint be dismissed without the need for Membertou to offer a defence and provided initial oral submissions in support of the motion. As indicated, the arguments provided on behalf of Membertou hinged on the allegation that Mr. Marshall had not proven that he has a disability, namely alcoholism, which it submits is a required element of a successful complaint based on disability.

[58] There are a number of matters in Mr. Marshall's Statement of Particulars concerning which Mr. Marshall did not provide direct personal evidence because he declined to testify. There are other key statements in his Statement of Particulars for which Mr. Marshall would have been the best or only source of evidence based on his personal knowledge. Because he declined to testify, he also did not testify about matters relevant to the remedy he seeks.

[59] The hearing was adjourned to the next hearing date to give Mr. Marshall's representative an opportunity to prepare to respond to the initial submissions that Membertou's counsel made respecting the motion for non-suit.

(v) The Third Day of Hearing & Mr. Marshall's Explanation

[60] When the proceeding resumed, Mr. Marshall wished to speak on his own behalf. Mr. Marshall submitted that his representative had demonstrated in the evidence that she did offer at the hearing that he was wronged in this matter. He said that his disease, alcoholism, was first discovered when it was treated in 1998. He said, "it stays with you".

[61] He indicated to the Tribunal that his representative is not a practicing lawyer. He said that he has no legal expertise. He was on welfare and could not afford a lawyer.

[62] When asked if his representative made an error, he said he felt that she had done the best she could. He said he trusted that he did not have to testify to prove his case.

[63] As indicated above, on the first day of the hearing counsel for Membertou asked Mr. Marshall's representative when she obtained her law degree. The Tribunal notes that his representative referred to Mr. Marshall as her "client" at the hearing on one occasion and otherwise described herself as Mr. Marshall's representative. The reference to "client" reinforced the Tribunal's impression that the representative was a practicing lawyer. As explained above, the Tribunal was advised on the third day of hearing by Mr. Marshall's representative that she holds a law degree and articled. However, in the twenty plus years since, she had not litigated. Mr. Marshall's representative confirmed that she is not a "real lawyer".

[64] It was also disclosed that Mr. Marshall and his representative have a personal relationship. The representative is Mr. Marshall's girlfriend.

[65] It is the Tribunal's assessment that Mr. Marshall clearly trusted his representative's advice and was not prepared to criticize her directly to the Tribunal.

[66] Mr. Marshall's representative stated that she made an error when she advised Mr. Marshall not to testify in support of his complaint. She said that because she is his girlfriend, she wanted to protect him. She was concerned that being a witness would hurt him as alcoholism is a shameful thing to have to talk about. She submitted that in trying to protect Mr. Marshall from the embarrassment of a shameful disease, she had done him a disservice.

[67] The representative further explained that she thought that the fact Mr. Marshall was an alcoholic was "a given". She also pointed to evidence at the hearing that Mr. Marshall had gone to a facility called Crosbie House in Nova Scotia for a one-month alcoholism program. She stated, "you don't stop being an alcoholic".

[68] Mr. Marshall also said that he was concerned that the experience of testifying and being cross-examined in the hearing would lead him to begin drinking again. He stated that if he is accused of drinking, he starts to drink again. In support of his reasons for concern, he alleged that he had a relapse years before when a family member incorrectly accused

him of drinking. He indicated that, likewise, his termination by Membertou occurred because they assumed that he was drinking when he was not. He spoke to a further alleged relapse after losing his job with Membertou.

[69] Mr. Marshall and his representative submit that it should be known to Membertou that Mr. Marshall is an alcoholic and, therefore, has a disability which is a protected characteristic under the Act. While Mr. Marshall avoided directly criticizing his representative, he also said that he trusted that not testifying would not be an obstacle to his complaint. I find, therefore, that Mr. Marshall relied upon the erroneous advice of his representative.

[70] As explained above, Mr. Marshall asked to be allowed to re-open his case after the motion for non-suit began.

[71] After initial discussions about the issues, the hearing was adjourned to permit the opportunity for further research by the parties and the filing of written submissions respecting Membertou's motion for non-suit and Mr. Marshall's motion to re-open his case.

[72] Before the case adjourned, Membertou's counsel did not indicate what he intended to do if the motion for non-suit was unsuccessful. In other words, he did not raise the issue of whether he was under an obligation to make an election because of bringing a motion for non-suit, a procedural step that is explained below. Mr. Marshall's representative did not ask whether Membertou's counsel should have to make an election as a result of bringing a motion for non-suit.

IV. Framing the Issues

A. The Order of Decisions

[73] Membertou submits in its written submissions that the key issue is whether Mr. Marshall should be permitted to re-open his case. I agree. Ultimately, if successful, Mr. Marshall's motion would overtake and negate a successful motion for non-suit by Membertou. Therefore, Mr. Marshall's motion to re-open his case should be decided first.

[74] It is appropriate to also consider the merits of Membertou's motion for non-suit so that there is a decision on this motion. This is of importance in the event I am incorrect in my ruling with respect to Mr. Marshall's motion.

B. The Need to Define the Issues

[75] One of the most significant and contentious issues in these motions is how the issues in the motions should be framed. During initial oral submissions, Membertou's counsel did not refer the Tribunal to case law explaining the legal test for a motion for non-suit. Instead, Membertou structured the issues by reference to case law where a party was trying to re-open their case after a final decision had been made by the court. This case law and Membertou's submissions are explained below. This case law did not appear to the Tribunal at first blush to be strictly applicable to Mr. Marshall's motion or to address all its issues.

[76] Both parties focussed on how the legal test in the case law provided by Membertou could be fitted to the facts here. It was not a good fit.

[77] None of the cases provided by Membertou involved a request to re-open a case prior to the defendant or respondent beginning their case. The case law provided sought the introduction of completely new evidence after the case ended. No case law was provided that discussed an under-represented litigant, or that touched upon the issue of whether a party should be bound by a highly prejudicial procedural or evidentiary error by their lawyer or representative. None of the case law involved a complainant closing their case in error, without testifying, based on the erroneous advice of their representative. Mr. Marshall's representative advised that she had been unable to locate case law respecting errors by representatives or re-opening a case in these circumstances by the time we reconvened for what became initial oral submissions. As a result, the Tribunal discussed with the parties its preliminary view of how the issues could potentially be framed and what issues could benefit from the provision of further research and case law before we adjourned to allow time for further research and written submissions.

[78] It was the Tribunal's preliminary view that one issue was whether it is fair for a party to be confined to an egregious error made by their representative that prematurely ends

their case. The Tribunal encouraged the parties to locate and provide case law that was relevant to the facts or any analogous circumstance. The Tribunal privately wondered whether the type of representative might be relevant in terms of a parties' reliance upon their advice, given the information that Mr. Marshall's representative has a law degree from twenty years ago but is not a practicing lawyer.

[79] As explained, the motion for non-suit could end the inquiry on these facts before hearing from the Complainant, without all relevant evidence being presented. The Tribunal indicated during those preliminary discussions that, if the case law provided by the parties with their written submissions did not appear to apply, or if none were of direct relevance to procedural errors by representatives, the Tribunal would likely conduct research itself to determine whether there was such relevant case law. It is appropriate for the Tribunal to ensure that it does not overlook any key decision, whether the decision is ultimately found to assist the complainant or the respondent. The Tribunal indicated that, if it found any case law that would influence its decision on the motions, it would provide that case law to the parties and give the parties an opportunity to make further submissions.

[80] The Tribunal has not found cases on point with the facts here or that influenced its decision respecting the merits of the motions. The Tribunal did find authorities of general relevance to the practice of active adjudication by a tribunal or court, which has already been undertaken in certain respects in this case. Given the general nature of these authorities, it is not necessary to incur the delay that sharing them with the parties, allowing response and reply, would involve. Further, the fact that the Tribunal engaged in active adjudication was appreciated by both parties; it was not contentious. However, a section on active adjudication is included in these reasons because of the anticipated need for ongoing active adjudication, given the outcome of the motions. I intend to be guided by the "CJC Guidelines" described below and wish to expressly endorse them.

C. The Need for Active Adjudication

[81] Active adjudication has risen to prominence, in part, as a response to the rise in self-represented parties before tribunals. It is a way of addressing the issue of untrained

advocates by bending the process to permit the provision of information about how hearings work to the self-represented person. In R.W. Macaulay & J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomas Reuters, 2019), the authors opine that, where there is an imbalance in the ability of parties to navigate the tribunal's rules, or where a party is not able to provide the information or perspective an adjudicator needs, the adjudicative approach should be more engaged. The goal is the pursuit of fairness and access to justice. At chapter 12.2A(d), they state that active adjudication is "simply a new term capturing long-standing practices by tribunal members to elicit the necessary information and/or evidence from self-represented or poorly represented parties in their proceedings."

[82] Since 1985, the Supreme Court of Canada has also accepted the need to deviate from the passive adjudicator to an active one for justice to be done: "Judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for [the judge] to do so for justice in fact to be done" (see *Yukon Francophone School Board, Education Area Number 23 v Yukon Attorney General*, 2015 SCC 25 at para. 27, quoting Lamer, J. in *Brouiliard v The Queen*, 1985 CanLII 56 (SCC), [1985] 1 SCR 39.)

[83] In 2006, the Canadian Judicial Council (CJC) issued guidelines for judges in the context of self-represented litigants: Canadian Judicial Council, "Statement of principles on Self-Represented Litigants and Accused persons" (CJC 2006 at https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf). The Supreme Court of Canada endorsed these guidelines in 2017: "We would add that we endorse the *Statement of Principles on Self-Represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council." (*Pintea v. John*s, 2017 SCC 23) The guidelines state that depending on the circumstances and nature of each case, the judge may:

> (a) explain the process;
> (b) inquire whether both parties understand the process and the procedure;
> (c) make referrals to agencies able to assist the litigant in the preparation of the case;

(d) provide information about the law and evidentiary requirements;
(e) modify the traditional order of taking evidence; and
(f) question witnesses.

[84] Phil Bryden and Jula Hughes studied active adjudication and found circumstances when reviewing courts tend to agree with adjudicators actively intervening in the process:

> …Courts have generally agreed that judicial interventions designed to promote efficiency do not give rise to a reasonable apprehension of bias. Similarly, it is appropriate for judges to seek to focus the inquiry, to uncover evidence that would crystallize issues; to clarify an unclear answer, to resolve a potential misunderstanding of the evidence; to safe-guard the interests of third parties and to correct inappropriate conduct by counsel or witnesses. (Jula Hughes and Philip Bryden, "Implications of Case Management and Active Adjudication for Judicial Disqualification" (2017) 54 *Alberta Law Review* 849 at 857, emphasis added).

[85] In *J.S. v. Dufferin-Peel Catholic District School Board*, 2018 HRTO 644, the Ontario Human Rights Tribunal explained its powers to actively approach hearings at para 20:

> In some cases the Tribunal may exercise its powers to narrow the issues, limit the scope of evidence or decide to hear issues in a particular order following a motion for a summary hearing or other request. Nonetheless, it is the exercise of Tribunal's powers to control its process that is at the heart of the matter. Whether prompted by a request from a party, or on its own motion, the approach developed in Pellerin requires the Tribunal to ask, what is the question that needs to be determined, what evidence is needed to determine that question, and what is the most fair, just and expeditious manner to proceed in the circumstances.

[86] Although the Tribunal process is different from the courts, administrative tribunals have started applying the CJC guidelines. For instance, the British Columbia Human Rights Tribunal used these guidelines as a point of departure in outlining how the tribunal intended to adopt active adjudication during a hearing: *A and B obo Infant A v School District C (No. 5)*, 2018 BCHRT 25, at paras 28-33.

[87] The case of *A. K. v Minister of Employment and Social Development*, 2019 SST 1345 (CanLII) (*A.K.*) is not binding on this Tribunal but is a case where a tribunal applied the CJC guidelines requiring that proactive steps be taken to ensure that all the evidence was provided, rather than a passive approach. In that case a claimant referenced evidence in their case before the initial General Division of the Social Security Tribunal but did not

produce it. The General Division will consider evidence after its hearing is over and has a Practice Direction that sets out the procedure for dealing with documents provided after the hearing. The General Division did not provide this information to the claimant and took no steps to find out whether the claimant wanted the General Division to accept that evidence after the hearing was over. The Appeal Division applied the CJC guidelines discussed above to allow the claimant to provide evidence after the hearing had closed. The Appeal Division stated explicitly that parties who are "underrepresented or even well-represented" can benefit from the tribunal providing active guidance. It found that providing information of this nature was not overstepping one's role as an adjudicator for reasons it explained at paras 29-33. This includes the Appeal Division's conclusion that:

> The Federal Court of Appeal is clear that the burden is always on claimants to make out their case, and to put forward all the evidence they intend to rely on. Giving procedural information about how to put forward evidence (when it is clear the claimant has the evidence and the General Division member does not) does not shift the burden in any real way from the claimant to the Tribunal. (emphasis added)

[88] The Federal Court recently affirmed that the right to a fair hearing places an ongoing obligation on a decision-maker to provide more heavy-handed guidance to underprepared litigants. In *Clarke v. Canada (Citizenship and Immigration*), 2018 FC 267 (CanLII) (*Clarke*), the Immigration Appeal Division (IAD) had rules that permitted an applicant to file more documents after the end of the hearing. The IAD did not tell the applicant about those rules or that she could supplement her evidence with more material. At para 13, the Federal Court wrote:

> [13] However, as the hearing unfolded it became evident that the Applicant had not understood the nature of the legal proceeding before the IAD; she did not arrange for any witnesses to testify, nor did she obtain witness statements. She produced very little written information, and several key elements of her evidence were not substantiated by any oral or written evidence. During the proceeding, the Applicant stated on several occasions that she could have provided more information, and that she was not prepared.

[89] The Federal Court found that the IAD denied the Applicant procedural fairness because it failed to inform her that she did not provide the evidence that was necessary to meet her burden of proof and that she could file documents after the hearing was closed.

[90] There were rules in *A.K.* and *Clarke* that permitted the filing of more information before the tribunal. The tribunal was alerted to the existence of additional evidence and should have directed the parties to the rules. In this case, there are no practice directions or rules about adding evidence after a hearing has concluded or that are applicable when a motion for non-suit is pending. *A.K.* and *Clarke* are not directly relevant and are not determinative of the issues here.

[91] Here, the Tribunal must make a discretionary decision on the merits of Mr. Marshall's motion. There is no specific, pre-existing applicable procedural rule. *Clarke* is, however, consistent with the CJC guidelines and captures the common law concept that procedural fairness places an ongoing obligation on a tribunal to provide more heavy-handed guidance to under-represented litigants. The *Clarke* decision signals that the Federal Court expects that, once a tribunal member realizes that a self-litigant (or under-represented litigant) is misunderstanding the legal proceedings, the duty of procedural fairness obliges the member to do what they can (within the rules of procedural fairness, I add) to provide them with a full opportunity to present their views and evidence and thus, for the tribunal to engage in active adjudication.

[92] I would be remiss if I did not address the source of authority for an active adjudication approach by this Tribunal. This authority lies in the broad discretionary powers granted to the Tribunal in the Act (section 50) and the Rules (Rule 1(1)).

[93] Section 50 directs the Tribunal to "give all parties…a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence, and make representations". Pursuant to section 50(2), the Tribunal may "decide all questions of law or facts necessary to determining the matter". Pursuant to section 50(3), the Tribunal may compel witnesses to "give oral or written evidence on oath and to produce any document and things that [the Tribunal] considers necessary for the full hearing and consideration of the complaint", and, pursuant to section 50(3)(c), "receive and accept any evidence or other information, whether on oath or by affidavit or otherwise, that the member…sees fit, whether or not that evidence or information is or would be admissible in a court of law". Pursuant to section 50(3)(d), the Tribunal may "decide any procedural or evidentiary question arsing during the hearing."

[94] Rule 1(1) requires the Tribunal to apply the rules to ensure that:

> (a) all parties to an inquiry have the full and ample opportunity to be heard;
> (b) arguments and evidence be disclosed and presented in a timely and efficient manner; and
> (c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.

[95] The general rule is that the Tribunal is the master of its own procedures: *Constantinescu v. Correctional Service Canada*, 2018 CHRT10 at para 10, citing *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC). In my view, at its core, the authority to engage in active adjudication is inherent within the Tribunal's process through the powers granted to it by the Act and Rules.

[96] We return to the merits of the motions.

D. The Parties' Initial Submissions Respecting the Motion to Re-Open

[97] Counsel for Membertou says that, in effect, Mr. Marshall has put his hand up and said "I made a mistake" without making out the legal case regarding why that means that Mr. Marshall and his representative should be allowed to re-open their case. Counsel submits that it is Mr. Marshall's obligation to meet that burden and it is counsel's obligation to respond afterwards.

[98] It is true that Mr. Marshall initially indicated that he could not find relevant case law to support his request to re-open his case. This does not mean that Membertou does not have to respond. Parties raise issues where they should provide case law but do not always do so, especially parties without legal training. Sometimes there are no cases on point. The Tribunal still must make a decision. Membertou's position on this point illustrates the sometimes-technical approach it chose to take in what are administrative law proceedings. In any event, Mr. Marshall subsequently provided written submissions with case law and Membertou has responded.

[99] As explained above, Membertou characterized the issue as being whether a party should be allowed to re-open a proceeding following judgement to present new evidence. At paragraph 6 of its submissions, it submitted that this is an extreme measure and should

only be allowed sparingly and with great care. Membertou's counsel says that the leading case of *Scott v. Cook*, 1970 CanLII 331 (ON SC), 2 OR 769, (*Scott*) requires that a party meet two criteria; 1) the party must show that the evidence they wish to provide is such that, if it had been presented at the hearing, it would probably have changed the result; and, 2) the party must provide proof that the evidence could not have been obtained by reasonable diligence before the hearing. Counsel indicates that the test in *Scott* was adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59 and is binding upon this Tribunal. Counsel for Membertou submits that Mr. Marshall does not meet either part of the test in *Scott*.

[100] Mr. Marshall takes the position that the *Scott* case does not apply to this situation. He points out that, in *Scott*, the hearing was over. A party was trying to change the decision. This case involves a motion to re-open a case before the Tribunal has issued a decision about the complaint.

[101] Mr. Marshall relies on a recent decision by Justice Nakatsura in *Brasseur v. York*, 2019 ONSC 4043 (CanLII) (*Brasseur*) which canvasses various factors that should inform the test for reopening a case to admit fresh evidence. In *Brasseur*, the court adopts a more relaxed standard of admission when a motion to reopen a case is brought before a formal decision is rendered.

[102] Mr. Marshall further relies on *Johnson v. Canadian Broadcasting Corporation*, 1994 CanLII 284 (CHRT) (*Johnson*). In *Johnson*, a complainant was self-represented. During the hearing, they became represented by legal counsel. Complainant counsel filed a motion to reopen the case to recall the Complainant to testify. The Tribunal underscored that "whether or not an application to re-open is granted is a matter of discretion for the Tribunal" (at para. 8). Importantly, it also recognized at the same paragraph that "where the application to reopen is received prior to a decision being rendered, a broader discretion to reopen has been recognized." The Tribunal, however, ruled against the complainant in that case.

[103] Membertou rejects the application of *Brasseur*. It asserts that *Sagaz*, as a decision of the Supreme Court of Canada, is binding over lower courts, including on *Brasseur*.

[104] Membertou further responds that there are authorities that indicate that *Scott* applies to a motion to re-open a case before a tribunal has reached a decision. However, the test is modified so that the first part of the test becomes 1) whether the evidence Mr. Marshall seeks, if it had been presented, would have had *any* influence on the result. Membertou further submits that, where a tribunal has not reached a decision, more importance is placed on part 2) of the test such that Mr. Marshall must: "prove that such evidence could not have been obtained by reasonable diligence earlier in the hearing."

[105] Membertou agrees with Mr. Marshall that part 1) of the test in *Scott* is not in issue in this case because it is not applicable/irrelevant. There is no result to be influenced.

[106] Membertou submits, therefore, that the real issue respecting Mr. Marshall's motion to re-open his case concerns whether the evidence could have been obtained and presented at the hearing.

[107] Respecting part 2) of the test in *Scott*, Membertou submits that there is no proof that evidence of alcoholism could not have been obtained before the hearing. Membertou points out that Mr. Marshall acknowledges that the evidence of his alcoholism was available because he says he has been an alcoholic for many years. Essentially, Membertou argues that Mr. Marshall acknowledges that he cannot meet part 2) of the test in *Scott*. Membertou submits that, because Mr. Marshall cannot meet the second part of the test in *Scott*, his motion to re-open his case must fail.

[108] Membertou further submits that the second part of the test involves the "proper procedural administration of justice" and is of great concern to a respondent. The Tribunal believes that Membertou is referring to a party's obligation to obtain evidence by due diligence before the case is heard and to present their case fully when it is their turn to do so.

[109] Further, there is a need for certainty and finality in legal proceedings. Membertou's position is that parties should be held to their positions in the interests of finality.

E. Analysis: Framing the Issues in the Motion to Re-Open

[110] As mentioned above, one of the issues discussed in advance of written submissions was whether and to what extent the *Scott* case applies to this case. The Tribunal invited further submissions respecting whether the *Scott* criteria would apply where the issue involves a complainant's representative making an error leading to a decision by a complainant not to testify, and to close his case, who then asks to re-open their case before the respondent has begun its case.

[111] By way of comment, in my view, the *Brasseur* decision relied upon by Mr. Marshall and the *Scott* and *Sagaz* decisions are not, in theory, necessarily at odds. The overall framework in *Scott* and *Sagaz* remains applicable and is regularly quoted in motions to reopen cases; *Brasseur* does not change that. *Scott* and *Sagaz* dealt with requests to reopen a case where reasons for judgement had been released. *Brasseur* discusses how that test should be altered for specific situations where a decision has not been made or is under reserve. The premise is that, when a decision is made, greater caution is needed. The standards can be loosened if the trial judge has yet to render judgement.

[112] The facts in *Brasseur* are more analogous to the present case. However, this case differs from *Brasseur*. We are not dealing with fresh evidence. In this case, Mr. Marshall voluntary elected not to testify in his case in chief which led Membertou to bring a non-suit motion.

[113] I agree with the general principles in the *Johnson* case relied upon by Mr. Marshall. However, on the facts, it is distinguishable. In that case, the Tribunal ruled against the complainant for the following reasons, at para 5:

> The Complainant is clearly entitled to decide at any time during the course of the hearing that she wished to be represented by counsel of her own choice but that does not mean that when, as had happened in this case, the Respondent had commenced its case, the Complainant is entitled to in effect re-open her case and give her evidence in chief again. When a Complainant or any other party decides part way through a hearing to appoint counsel or to change legal counsel, the new counsel cannot expect the hearing to begin again. The commonly accepted rules with respect to the order in which the evidence in support of a complaint is presented, followed by presentation of evidence by the Respondent, followed by reply evidence have been

> developed over decades. Their object is to promote fairness in the hearing process. The Respondent is entitled to know the full case that it has to meet before it commences the presentation of its evidence. It would be unfair to the Respondent, which had commenced its defence based on the case that had been presented by the Commission and the Complainant, to provide another opportunity, in the middle of the Respondent's case, for the Complainant to recast its evidence by recalling the Complainant.

[114] *Johnson* is distinguishable for two reasons. Here, Membertou has not commenced its defence and, because Mr. Marshall did not testify, he will not be recasting his evidence. Any concerns about preparation of its own case that Membertou may now have about adjusting to the provision of evidence by Mr. Marshall can be addressed through case management. Secondly, *Johnson* is distinguishable in that dismissing the complainant's motion to re-open her case did not lead into a pending decision respecting a non-suit motion. In my view, the potentially harsh outcome of a non-suit motion is the particularity in this case, when compared to other cases referenced by the parties. This is not a case where there have been no procedural steps taken in reliance on Mr. Marshall's representative closing her case.

[115] I agree with the parties that part 1) of the test in *Scott* is not in issue in this case because it is not applicable and/or is irrelevant. There is no final result respecting the complaint to be influenced. This is one of the reasons that the test in *Scott* is not a good fit with these circumstances.

[116] As an aside, the case law provided speaks to the final results concerning the complaint. I also considered the impact of Mr. Marshall's motion upon Membertou's motion for non-suit in terms of potential prejudice to Membertou.

[117] There is no result in relation to the motion for non-suit to be influenced because the request to proceed with additional evidence was made before that motion was decided or was even fully argued. In theory, if additional evidence is provided on behalf of Mr. Marshall, that could mean that Membertou's motion for non-suit will be unsuccessful or become moot, which is an "influence" on a potential result. The alleged factual grounds for the non-suit motion (i.e. no evidence of alcoholism) would likely be removed. But the test for permitting additional evidence should not be that the other side will lose a motion for non-suit. The motion for non-suit may not be successful in any event. There is no theoretical entitlement

to a successful motion based on a snapshot taken within a hearing. Such an entitlement is not what “influencing the result” in *Scott* encapsulates. In my view, counsel for Membertou quite properly took the position that the motion to re-open should be decided first.

[118] Respecting the second part of the test in *Scott*, the issue of whether Mr. Marshall has alcoholism could have been more directly addressed by his testimony, as it concerns matters within his personal knowledge. Mr. Marshall’s complaint alleges that he had an alcohol dependency that arose before his complaint was filed. Mr. Marshall cannot say that his own testimony is new evidence that he could not obtain through reasonable diligence. One could conclude that Mr. Marshall fails this part of the *Scott* test. However, Mr. Marshall is not suggesting that he has new evidence. His motion does not seek to introduce new evidence. Mr. Marshall is saying that he made a mistake in presenting his case. His motion definitively raises the issue of whether he should be permitted to re-open his case because he relied upon the erroneous advice of his representative. That is the relief requested by Mr. Marshall.

[119] In my view, the second part of the legal test in *Scott* does not apply because Mr. Marshall is not seeking to introduce new evidence at all. I conclude that the second part of the test in *Scott* does not fit the factual circumstances and is arguably irrelevant given the nature of Mr. Marshall’s motion.

[120] The decision in *Scott* may be distinguished because it was made in a different factual context. It applies where a party wishes to adduce new evidence at a late stage in the presentation of the evidence or after a decision has been made.

[121] What then, is the more accurate way to frame the issue in Mr. Marshall’s motion? I agree with Membertou that Mr. Marshall’s motion raises issues relevant to the “proper procedural administration of justice” for respondents that are appropriately considered here. I decided to reframe the issue in Mr. Marshall’s motion to re-open his case to be whether it is in the interests of justice to do so, namely, whether a denial of his motion would lead to a clear miscarriage of justice. Concern about ensuring the proper administration of justice must be addressed in the context of the issues raised by these motions for all parties, not one. I continue with my determination in this regard below.

F. The Parties' Initial Submissions Respecting Motion for Non-Suit

[122] The key issue in Membertou's motion for non-suit is whether Mr. Marshall provided evidence that he suffers from alcoholism. Membertou says he did not do this. Mr. Marshall says he did. Membertou submits that the "evidence" that Mr. Marshall relies upon is not evidence of alcoholism, for various reasons.

[123] Membertou submits that Mr. Marshall's decision to close his case means that there is no further evidence that could prove alcoholism.

[124] Membertou also suggested that Mr. Marshall, had he testified as a witness, could not prove that he has the protected characteristic of being disabled by reason of alcoholism and that medical evidence to this effect was required.

G. Analysis: Framing the Issues in Motion for Non-Suit

[125] I turn to Membertou's suggestion that Mr. Marshall could not prove that he is disabled by reason of alcoholism and that medical evidence was required. This point was mentioned but not seriously pursued by Membertou. I do not believe that this is an issue that needs to be addressed in these reasons in any detail. There is case law that has settled the point that expert medical evidence by a physician, usually tendered in advance via a medical report, is not required to prove the existence of a disability in a human rights complaint. As stated in *Chisholm v. Halifax Employers Association*, 2021 CHRT 14 (CanLII) at paras 87, quoting *Mellon v. Human Resources Development Canada*, 2006 CHRT 3, (CanLII), there must be evidence but the "…evidence can be drawn from the medical information and from the context in which the impugned act occurred" [Emphasis added][See *Hopps v. Shadow Lines Transportation Group*, 2020 CHRT 14 (CanLII) at para 48 and *Lafreniere v. Via Rail Canada Inc*., 2019 CHRT 16 (CanLII) at paras 88-105 regarding other examples where it was not necessary to have a diagnosis from an expert.]

[126] As explained above, the parties' representatives did not provide case law to establish the legal test applicable to motions for non-suit. The legal test for a successful motion for non-suit is stated in the leading case of *Prudential Securities Credit Corp., LLC v. Cobrand*

Foods Ltd., 2007 ONCA 425 (*Prudential*) at para 35. In describing the legal test, *Prudential* speaks to the need of a plaintiff in court to establish a *prima facie* case. *Prudential* states that, for a non-suit motion to be successful, the moving party must establish that there is no evidence or there is missing evidence such that the plaintiff cannot establish a *prima facie* case. This use of "*prima facie*" in *Prudentia*l in relation to a motion for non-suit can be confusing in the context of a human rights complaint, as explained below. For present purposes, the legal test applicable to a motion for non-suit in a human rights context can be simplified to this: whether the complainant has presented any evidence capable of supporting a claim of discrimination or a key part of such a claim. In other words, has the complainant in a human rights complaint established a presumptive case? Membertou's motion in this case is made on the limited ground that Mr. Marshall has not proven that he has the protected characteristic of disability, i.e. disability by reason of alcoholism. Therefore, the only issue to decide in this motion for non-suit is whether there was any evidence at the hearing that could prove that Mr. Marshall suffers from alcoholism.

[127] The question is not whether Mr. Marshall needed to testify that he has alcoholism. This latter proposition is, at times, implicitly suggested in Membertou's submissions. It is not an accurate representation of the applicable test. The issue is whether there is any evidence. The source of the evidence is not the issue.

H. Procedural Considerations for the Motion for Non-Suit

(i) Motions for Non-Suit in Context

[128] Motions for non-suit have technical legal aspects. As explained, in a human rights case, the legal test for the motion is whether there is any evidence to support a finding of discrimination, or whatever necessary element of a claim of discrimination is disputed in the motion. This is different from the overall requirement in a human rights complaint that the complainant establish a *prima facie* case of discrimination. There are differences in the evidentiary burden, the standard of proof and unique procedural issues associated with a motion for non-suit.

(ii) Making a *Prima Facie* Case of Discrimination

[129] In the context of the merits of a human rights complaint, *prima facie* is a Latin phrase that essentially captures the concept of the Tribunal's "first impression" of the evidence. This is not a fleeting impression. The complainant must prove discrimination on a balance of probabilities. So rests the burden upon the complainant at the beginning of the hearing.

[130] The complainant proceeds first. This is their opportunity to prove the three key elements required to convince the Tribunal that they have a valid human rights complaint, absent any evidentiary challenge by the respondent. They must prove each of these three elements on a balance of probabilities: 1) prove that they have a protected characteristic; 2) prove that they experienced adverse treatment; and, 3) prove that the protected characteristic was a factor in the adverse treatment.

[131] In practice, the assessment of whether a complainant has established a *prima facie* case occurs after all the evidence from all parties is in. It is at that point that the Tribunal decides whether a *prima facie* case has been proven on a balance of probabilities. The Tribunal then proceeds, if applicable, to determine whether the respondent has proven a defence on a balance of probabilities.

[132] However, in theory, at the close of a complainant's case, the Tribunal could make a preliminary assessment regarding whether the required elements of a complaint are proven by the complainant. That is where a motion for non-suit may be made and the differences mentioned above become relevant.

[133] A motion for non-suit is based on the idea that the respondent will prove that there is no evidence to establish a key pillar of the complainant's case. The burden is on the respondent, not the complainant. The respondent must demonstrate that there is no evidence of one or more key elements of a discrimination claim. The concept of "a balance of probabilities" as the standard of proof does not apply; the issue is whether there is any evidence.

[134] Because usually there is some evidence of whatever is in issue, motions for non-suit are made very infrequently. They are granted only in cases where the complainant cannot be successful because there is no evidence on a key issue.

(iii) The Election

[135] Obviously, because a respondent indicates at the conclusion of the complainant's case that they intend to bring a motion for non-suit, both sides will not have presented their evidence at that point in time. In this case, Membertou wished to argue the motion and did not suggest that it wished to lead evidence first; it did not raise the issue of making an election, explained below, with respect to its own evidence. Membertou, therefore, assumes the risk that it does not need to provide any evidence that could challenge the existence of a disability. It also does not produce other evidence relevant to the complaint or its defence.

[136] In cases before the courts, these motions are governed by procedural rules developed by judges. Motions for non-suit are considered strategically risky: *Prudential*, at para 14. That is because the defendant is asking the court to dismiss the case on the basis that the plaintiff has failed to make out any case for the defendant to answer. If there is some evidence, the motion will not succeed.

[137] In many provinces, the defendant must decide whether to present evidence when they decide whether to bring this type of motion. This is called making an "election". A defendant may "elect" not to provide evidence in support of their own case and proceed to argue the motion at the close of the plaintiff's case. As indicated, these motions can be difficult to win. If the defendant proceeds with the motion and is not successful, they have, by election, given up their opportunity to present evidence. They may make closing submissions respecting the merits of the complaint, but the door to further evidence is closed. Alternatively, a defendant may indicate at the close of the plaintiff's case that they believe that the plaintiff has not established a legal case but elect to lead evidence, nonetheless. The defendant then argues at the end of the hearing that the plaintiff has no case because of a lack of evidence.

[138] I return to the point that the defendant may make closing submissions on the merits of a civil claim or a human rights complaint after being unsuccessful on a motion for non-suit. This is because the parties in a civil case only make submissions in the motion for non-suit respecting whether the plaintiff has established a *prima facie* case, or, in a human rights complaint, respecting a presumptive case, as described above. The defendant is entitled to an opportunity to make submissions respecting the more onerous burden on a complainant to prove their case on a balance of probabilities if the defendant is unsuccessful on the non-suit motion. But the defendant is not allowed to introduce evidence. The *Prudential* case is an example of this procedural point.

(iv) Practical & Strategic Considerations

[139] In *Prudential*, Justice Laskin had this to say about the use of non-suit motions, at para 14:

> A non-suit motion adds to the time and expense of a trial. And because of the election requirement, it has little practical value. Perhaps a defendant bringing the motion sees a tactical advantage in being able to argue first. To succeed on the motion, however, the defendant must show that the plaintiff has put forward no case to answer, in most lawsuits an onerous task. Why not simply take on the less onerous task of showing that the plaintiff's claim should fail? It is small wonder that most commentators consider that in civil judge alone trials, non-suit motions gain little and are becoming obsolete. See Phipson on Evidence, 16th ed. (London: Sweet & Maxwell, 2005) at 274, and John Sopinka, Donald B. Houston & Melanie Sopinka, The Trial of an Action, 2d ed. (Toronto: Butterworths Canada, 1999) at 151-52.

(v) Non-suit Motions Before the Tribunal

[140] We turn to a motion for non-suit in the context of a human rights complaint. There are no set rules in the Rules about these types of motions or about the need for a respondent to elect whether to call evidence and the timing of submissions for the motion. Procedural determinations for this type of motion fall within the Tribunal's procedural discretion pursuant to *Rule 1* and *3* of the Rules.

[141] There are cases where this Tribunal has decided to require a respondent to elect to call no evidence if it wished to have a motion for non-suit heard and cases where the

respondent was relieved of this procedural rule. In my view, *Chopra v. National Department of Health and Welfare*, 1999 CanLII 19857 (CHRT) (*Chopra*) is the seminal case on this issue. In the later decision of *Khalifa v. Indian Oil and Gas Company*, 2009 CHRT 27 (CanLII), the Tribunal further applied and clarified the reasoning in *Chopra*.

[142] Beginning at page 2 of *Chopra*, the Tribunal explained its reasons for requiring an election in this way:

> The Board of Inquiry in *Nimako* set out what are probably the most persuasive reasons for maintaining the practice of putting respondents to their election in matters relating to human rights legislation, in the following passage:
>
> > In approaching this question it is important to bear in mind that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of the defendant (or an accused) tips the scales against him or her. Having regard to the difficulties complainants face in getting access to all the information relevant to establishing discrimination, this may well be more likely to be the case in hearings under the Human Rights Code than in civil actions generally. Unlike the criminal process, which pits the state against an individual who risks criminal sanction, and who must be found guilty beyond a reasonable doubt, a civil action involves the resolution of conflicting individual interests on a balance of probabilities. In that context, it seems only fair that the defendant must make up his or her mind whether to close the case after the plaintiff's evidence is in, thus thwarting the plaintiff's access to evidence that might have made the latter's case, or to proceed to call witnesses at the risk of assisting the plaintiff's case. Otherwise, the defendant would appear to be saying to the tribunal: I want you to decide this case without hearing all the evidence, some of which might be helpful to the plaintiff, but only if you decide it in my favour, the effect of which is to dismiss the action; if you are unprepared to decide in my favour on the basis of the evidence adduced by the plaintiff, then I want you to postpone deciding the case until my evidence is in as well, even though some of it may prove of assistance to the plaintiff. <u>If such a heads I win, tails I don't lose suggestion appears unseemly in relation to an action before a civil court, it would seem even less acceptable in a hearing before a Board of Inquiry such as this.</u>

> I find this argument compelling particularly in the context of alleged discrimination in the workplace as in the present case. Quite often in such matters, the complainant may be the victim of discriminatory conduct by representatives of the employer which conduct he may not be able to prove directly. Dr. Chopra, in his submissions before the Tribunal, described this type of behaviour in his case as boardroom discrimination. The complainant and the Commission in such situations must therefore frequently resort to proving their case by circumstantial evidence. Some of that circumstantial evidence may in fact be established through the testimony of some of the respondent's witnesses. **It would be inappropriate therefore in a case where there may in fact been a breach of the** Canadian Human Rights Act**, for the complainant to be denied the relief to which he is entitled because he has not been able to establish his case by this stage in the proceedings, when the tribunal has not had the benefit of hearing all of the evidence, especially when some of that evidence was not available to the Commission or the complainant.** (Emphasis added).

[143] For the reasons stated in *Chopra*, in my view, in a human rights case, if a respondent is going to argue a motion for non-suit at the close of a complainant's case, rather than when all the evidence is in, that respondent should be required by the Tribunal, by direction or order, to elect not to call evidence as a condition to proceeding with the motion. This is to discourage respondents from bringing motions for non-suit in human rights cases by attaching a consequence to their decision.

[144] If respondents are permitted to take a "heads I win, tails I don't lose position", this is a reason for respondents to make motions for non-suit. It could be seen as strategically advantageous or as a step that thorough respondent counsel should take. Accordingly, an unintended effect of not requiring a respondent to make an election could be an increased use of these motions. This would be the antithesis of section 48.9(1) of the Act which requires that "Proceedings before the tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." In that respect I agree with *Chopra* that requiring an election by the respondent is appropriate.

[145] However, I would take the reasoning in *Chopra* further. In my view, non-suit motions are presumptively not appropriate in human rights cases; correspondingly, given its ability to control its own process, the Tribunal would be entitled to decline to hear such a motion.

[146] My reasons are based on procedural efficiency, consistency with the Tribunal's statutory purpose, procedural fairness and the public interest.

(a) Procedural Efficiency

[147] In a civil court setting, anyone is entitled to file a legal action. A motion for non-suit can be used by a defendant as a potential screening mechanism to address spurious or unfounded actions. If there is no evidence of a required element to a civil claim, the defendant should theoretically be able to bring a motion for non-suit in the midst of the case and not lead evidence. Electing not to call evidence may be seen as consistent with the goal of procedural efficiency.

[148] A human rights proceeding is different. There is no direct access by the public to the Tribunal, as there is to a court. This complaint was screened and investigated by an independent public body, the Commission. It was reviewed by the Board of Commissioners of the Commission. The Commission made a statutorily authorized decision pursuant to section 49 of the Act to require the Tribunal to institute an inquiry because the Commission was satisfied that an inquiry was warranted. This does not mean that the complaint is valid, it means that a "from scratch" inquiry by the Tribunal is required. The point is that the "screening out" of most complaints, for which there is no evidence, should have already occurred at the Commission stage. In my view, there is much less of a place for a motion for non-suit in a human rights complaint. The chance that a motion for non-suit will be unsuccessful and only serve to delay the progress of the case on the merits is very high. This is a reason for respondents to not make motions for non-suit.

(b) Consistency with Statutory Purpose

[149] Asking the Tribunal to dismiss a human rights complaint in the middle of the proceeding without any evidence from the respondent seems contrary to the purposes of the Act. As stated, a key purpose in the Act is to provide an inquiry by a tribunal into a complaint where an inquiry appears warranted to the Commission.

[150] Looking at the English version of the Act, is it significant that this Tribunal has been asked to conduct an “inquiry” pursuant to section 49 of the Act? I conclude that it is. The term “inquiry” is not typical in the civil procedure rules applicable to court proceedings. In my view, the statutory language of “inquiry” in the English version of the Act, chosen by legislators, must have intended significance.

[151] The language of “inquiry” is used in statutes where there is public interest in the discovery of the root causes of an event. The *Public Inquiries Act*, RSNS 1989, c 372 in Nova Scotia is one example of this wording in a statute. That legislation provided authority for the Westray Mine Inquiry and a number of other public inquiries.

[152] Other common examples where the language of “inquiry” is used include provincial human rights legislation.

[153] This is not a civil action involving the resolution of conflicting interests between individuals with only private interests at stake. Once a human rights complaint is referred to the Tribunal, even settlement of the complaint, and, therefore the private resolution of the individual rights and remedies involved, requires the approval of the Commission, whose role it is to protect the public interest. The Act requires that an inquiry into complaints that do not settle be conducted in the public interest and the Commission may be involved in any hearing.

[154] In my view, if the Tribunal’s statutory mandate is to conduct an inquiry, an inquiry requires the provision of information. Indeed, the Tribunal is granted broad powers to ensure that it has the information before it to conclude the inquiry (see: Section 50(2)(3) and (4)).

[155] When a respondent brings a motion for non-suit and elects to not call evidence, the respondent asks the Tribunal to dismiss a complaint without the respondent defending the complaint at all. This seems to me to be the antithesis of an inquiry. To be meaningful, a statutory inquiry, in my view, anticipates some response on the record, at minimum, from those alleged to be at fault, just as much as information provided by the complainant is needed. In my view, for those cases where an inquiry is required, it undermines the purpose of the proceeding for a named respondent to fail to respond to the merits of a statutory

inquiry. I would be concerned that the Tribunal would not meet its statutory responsibilities if its processes permit a respondent to avoid providing a response on the merits.

(c) Procedural Fairness

[156] *Chopra* makes the point that it is inappropriate in a human rights case for a complainant to be denied relief to which the complainant is entitled due to a complainant's lack of access to information in the possession of the respondent respecting their defence at the time the complainant completes their *prima facie* case respecting their complaint. In other words, the Tribunal in *Chopra* required a respondent make an election because of pre-existing evidentiary barriers to determining a complainant's entitlement, in what appeared to be an attempt by the Tribunal to level the playing field by attaching a condition to the motion for non-suit. In my view, the playing field is more effectively levelled by expecting both parties to provide their evidence.

[157] Motions for non-suit, where the respondent avoids responding to the complaint, create a potential evidentiary barrier to the truth-seeking function of the Tribunal.

[158] If a respondent brings a motion for non-suit, elects to not call further evidence and the motion for non-suit is dismissed, the Tribunal is required to decide an inquiry based on whatever evidence the complainant presented, which is almost certain to be incomplete, without a response by the named respondent. If the motion for non-suit is successful, that may be because the complainant cannot prove their entitlement for the reasons illustrated in *Chopra*.

[159] Alternatively, making what may be a final decision about a human rights complaint without having the respondent's evidence cannot be in the theoretical best interests of respondents or be consistent with truth-seeking.

[160] Motions for non-suit when respondents do not call evidence are rife with opportunity for procedural unfairness.

(d) Public Interest

[161] There is a public interest in educating the public about human rights. At the Tribunal stage, this education occurs primarily through the decisions the Tribunal issues. Education cannot occur without answers about what happened. If respondents do not respond to explain their side of the story, the opportunity for education is impaired because the Tribunal only has half the story. It is in keeping with the Tribunal's obligation to conduct an inquiry to expect both parties to present evidence and to secure the evidence it needs for a "full hearing and consideration of the complaint" (section 50(3)(a) of the Act).

[162] Further, in an important way, the public interest is addressed by educating those persons who become respondents or who are an involved employee of a respondent. Discrimination is often not intentional. It happens because respondents do not fully understand human rights obligations. The process of explanation by the respondent and reply by the other parties creates an opportunity for in-depth education, if it is needed. That opportunity is lost if the explanation stage does not occur.

(e) Practice Conclusions

[163] I conclude that, in a human rights case, motions for non-suit whereby respondents do not present evidence to respond to the inquiry are not appropriate. I add the caveat that there may be an exceptional situation, but frankly find it difficult to contemplate a situation that would override the Tribunal's obligation to conduct a full and fair inquiry as the Act requires. If a respondent wishes to bring a motion for non-suit, they should be required to do so after all of the evidence has been submitted. In my view, motions for non-suit where the respondent elects not to call evidence should not be permitted by the Tribunal, as an exercise of its procedural discretion.

(vi) Approach to the Lack of Election in Considering the Motion

[164] In this case Membertou proceeded to argue the motion for non-suit without calling its evidence. It appears that Membertou expects to proceed with evidence in support of its overall position on the merits if its motion for non-suit is unsuccessful. As explained above,

counsel for Membertou did not raise and address the issue of election, as he should have. Mr. Marshall's representative did not appear to be cognisant of this issue and did not raise it.

[165] If the Tribunal had sought submissions from the parties respecting whether Membertou was required to make an election, this would have led to additional procedural complexity and delay by reason of the need to hear from both parties on this issue.

[166] The Tribunal decided to determine the merits of the motions first and to then decide whether the election issue needed to be addressed by the parties. If it concluded that the election issue was necessary to address, it would not have released its ruling until this was determined.

I. Summary of Issues to be Determined

[167] Accordingly, the issues for these motions are:

> 1) Whether Mr. Marshall should be permitted to re-open his case because he relied upon the erroneous advice of his representative;
> 2) Whether there was any evidence at the hearing that Mr. Marshall suffers from alcoholism; and,
> 3) Whether Membertou should be permitted to lead evidence if the motion for non-suit is dismissed.

V. Motion to Re-Open Case

A. Analysis & Ruling

[168] In my view, the concept of the need for finality to legal proceedings is not persuasive or even applicable in circumstances here, where a proceeding has not fully concluded. When a proceeding has not concluded, and when a response to a complaint has not begun, the goal of truth seeking should be foremost.

[169] I have decided that the decision in *Scott* does not provide a complete framework for the analysis of this motion. The fundamental consideration in deciding whether to exercise the Tribunal's discretion to reopen this case is whether a miscarriage of justice would occur

if the case were not reopened and the complaint were dismissed without consideration of the merits. On the other hand, the Tribunal's discretion must be applied sparingly, especially if reopening a case could serve as an incentive for parties to conduct cases carelessly, or with disregard of procedural rules.

[170] Our understanding of what constitutes the proper administration of justice includes the balancing of any prejudice to both parties that could arise from any proposed course of action. This is foundational to the fairness of any legal proceeding. In my view, identifying and weighing any prejudice to either party is a relevant and appropriate part of the legal test to apply in these circumstances. So is a consideration of the proper administration of justice.

[171] Membertou has not explained how it would have been prejudiced by permitting Mr. Marshall to immediately re-open his case and to proceed with the hearing as planned. Membertou moved for non-suit immediately upon Mr. Marshall's ill-advised decision to close his case. After initial oral submissions, the proceeding adjourned briefly to allow Mr. Marshall time to react. Upon return, Mr. Marshall sought permission to continue his case. Some parties would have sighed in exasperation but not voiced serious objection to permitting Mr. Marshall to resume the presentation of his case or they would have objected but abandoned their motion for non-suit or offered to place it in abeyance. Membertou proceeded with its motion for non-suit.

[172] Membertou has provided no evidence of prejudice. It is hard to see how Membertou could be materially prejudiced, given that it has not started presenting its own case. There is nothing to suggest that permitting Mr. Marshall to retract his decision and resume the presentation of his case would have a practical or negative effect upon Membertou's ability and opportunity to defend itself from the merits of the complaint. Reliance on the mere fact of a short-lived decision by an opposing party is notional prejudice, at best, on these facts.

[173] Membertou brought a motion for non-suit, which would arguably be rendered moot if Mr. Marshall's motion to re-open his case is granted. However, Membertou took the position that Mr. Marshall's motion should be decided first. Membertou also chose to continue with its motion at the same time.

[174] On these facts, if Membertou's motion for non-suit becomes unnecessary or moot because of Mr. Marshall's motion in response, that procedural result does not constitute extraneous prejudice. That is simply the procedural result and is a risk attached to all motions.

[175] Granted, as Mr. Marshall brought a motion to re-open, there is prejudice to Membertou in terms of additional cost and delay respecting Mr. Marshall's motion. However, this is notional at best because Membertou brought a motion first, leading to additional cost and delay for Mr. Marshall. Arguably any prejudice here is the result of Membertou's strategic decision to continue to pursue its motion and object to Mr. Marshall's motion, rather than objecting and moving on.

[176] I have considered whether there will be added delay or cost, or unnecessary complexity added to this proceeding to Membertou's detriment if Mr. Marshall's motion is granted. Mr. Marshall's case did not proceed as it was originally planned. This conclusion is based on the more comprehensive content in Mr. Marshall's Statement of Particulars for the hearing compared to what was presented at the hearing. There can be no additional, "new" prejudice to Membertou by way of undisclosed evidence by permitting Mr. Marshall to re-open his case and to proceed in accordance with his prior disclosure to Membertou through the Statement of Particulars he filed. Had Mr. Marshall not been under-represented, it is reasonable to expect that he would have testified, that the remaining witnesses that were on the List of Witnesses would have been called, and that most, if not all, of the remaining issues in the Statement of Particulars would have been addressed, as is typically the case.

[177] For these reasons, I find that there is no significant prejudice to Membertou in permitting Mr. Marshall to re-open his case.

[178] I turn to the assessment of prejudice to Mr. Marshall if he is not permitted to re-open his case. Here, a return to the nature and extent of errors made by his representative is necessary to understand the Tribunal's reasons for decision. As explained, the Tribunal had concerns about identifying erroneous decisions made by Mr. Marshall's representative. However, these reasons would not be understood if offered in a factual vacuum. The

Tribunal considered that it was somewhat in a “catch 22” in this regard in preparing its reasons in this regard.

[179] To be clear, these include procedural errors that have been acknowledged or agreed upon as such, such as not being prepared to proceed on the first scheduled day of hearing or advising Mr. Marshall not to testify, and perceived examples of possible errors based on the differences between what Mr. Marshall indicated in his Statement of Particulars and what happened at the hearing. There may be good reasons for the latter. These may not be errors. For example, a proposed document may have been lost. In the event they are errors, the Tribunal has tried to avoid crossing the line by not identifying whether these errors may be fixed and, if so, how.

[180] These examples include that Mr. Marshall’s representative:

1) failed to schedule the hearing for herself and Mr. Marshall, remember events and directions from the Tribunal and failed to have herself and Mr. Marshall attend the hearing;

2) failed to prepare for the scheduled starting date of the hearing;

3) failed to notify or contact a number of proposed witnesses before the hearing started;

4) appears to have failed to inform Mr. Marshall that advancing this complaint requires disclosure of certain personal information at the hearing respecting his disability; alternatively, she may have failed to inform him of the Tribunal’s authority in the Act to address privacy concerns in certain situations;

5) advised Mr. Marshall not to testify in support of his own complaint to establish a breach of the Act;

6) did not initially consult Mr. Marshall about the Tribunal’s inquiry about whether there was any impediment to Mr. Marshall testifying, nor did she consult Mr. Marshall about the Tribunal’s offer to address any concerns in this regard;

7) responded inaccurately to the Tribunal in response to a direct question by not disclosing the fact that there was an impediment to Mr. Marshall testifying, namely shame, embarrassment and concern about triggering a relapse;

8) tried to avoid having Mr. Marshall admit that he is an alcoholic during the hearing, which theoretically was going to either be necessary for his complaint to succeed or would be helpful to the evidentiary foundation of his case, when he clearly is an alcoholic; even though Mr. Marshall's representative knows that alcoholism is a lifelong disease and pointed this out to the Tribunal; even though Mr. Marshall admits in his Statement of Particulars that he has an alcohol dependency and even though Mr. Marshall had another relapse recently after losing his position with Membertou;

9) failed to call other witnesses that Mr. Marshall had indicated would be called in support of the content of his Statement of Particulars;

10) failed to have Mr. Marshall testify regarding the issue of remedy, namely what he alleges he has experienced as a result of the alleged discrimination and the outcome he seeks if his complaint is successful, in support of the positions he took respecting remedy in his Statement of Particulars; and,

11) failed to raise any issue about whether Membertou should be allowed to present evidence if its motion for non-suit was unsuccessful or, at least, did not effectively use the additional time she was given to research motions for non-suit; had she done so it is likely that she would have become aware that she could ask to put Membertou to an election in this regard.

[181] It is not known by the Tribunal, because the Tribunal is not privy to everything Mr. Marshall and his representative considered, but it is possible that his representative erred in two other ways:

1) She may have accepted Membertou counsel's assessment of what witnesses would have relevant evidence when it is his responsibility to act in the best interests of his client and not give neutral advice to the opposing party. For example, Membertou's counsel indicated that Chief Paul would not have relevant information because he

was not involved in the investigation that led to Mr. Marshall's termination. Counsel also pointed out that Chief Paul was relevant to the appeal of that termination. As indicated, Chief Paul is referenced in Mr. Marshall's Statement of Particulars and was listed as a witness. He was said to be able to speak to Mr. Marshall's appeal to the Band Council and Band Council's knowledge of Mr. Marshall's alcohol dependency. Chief Paul was not called as a witness by Mr. Marshall's representative although she took the position, before counsel for Membertou's comments were made, that it was important that he be at the hearing;

2) She possibly failed to obtain or to request documents from all third parties and Membertou and/or put all documents into evidence, given the list of documents she provided with the Statement of Particulars because she entered very few exhibits into evidence.

[182] The fact that Mr. Marshall's representative obtained a law degree appears to have led to an unfortunate reliance by Mr. Marshall upon her procedural advice. No doubt the fact that Mr. Marshall and his representative have a personal relationship is a complicating factor that impeded Mr. Marshall's access to objective advice and his willingness to question the advice he received or to proceed differently. Clearly, Mr. Marshall has been egregiously prejudiced in this proceeding in relying upon the acts and omissions of his representative.

[183] I have compared the extent of any prejudice to Membertou against the prejudice to Mr. Marshall if he is not permitted to re-open and proceed with his case, as set out in his Statement of Particulars. The prejudice to Mr. Marshall amounts to a miscarriage of justice. Membertou is not prejudiced by Mr. Marshall's request to re-open his case, apart from theoretically negating the motion for non-suit which arguably became unnecessary within a short timeframe. The cost of this motion is offset by the cost of the motion it necessitated. Re-opening the case will not unduly prolong the proceedings or prolong them at all beyond what they would have been if the presentation of Mr. Marshall's case proceeds in accordance with his Statement of Particulars. There is no substantive prejudice to balance, as between the parties. The weight of severe prejudice lies upon Mr. Marshall.

[184] I have also considered Mr. Marshall's explanation for not testifying. His actions reflect fear, and lack of knowledge, not strategic decisions or manipulation of the Tribunal's processes. He is asking for an opportunity to tell his story.

[185] At this stage of the proceeding, before a decision is made, the Tribunal's role and priority is that of truth-seeking.

[186] In considering the extent of prejudice to Mr. Marshall, the underlying reasons for his omissions and the Tribunal's role in securing truth-seeking, I conclude that a miscarriage of justice would result if Mr. Marshall is not permitted to re-open his case so that the complaint may be addressed on its merits. I find that it is in the interests of the proper administration of justice, as well as consistent with the purposes of the Rules respecting the exercise of procedural discretion by this Tribunal, to grant Mr. Marshall's motion to re-open his case.

B. Conditions Upon Re-Opening the Case & Commentary

[187] Mr. Marshall is being permitted to re-open his case, which includes being allowed to call other witnesses and provide more evidence in support of his Statement of Particulars, in addition to his own testimony. This is in the interests of truth-seeking.

[188] I had significant concerns about the implications of granting Mr. Marshall's motion, notwithstanding that, in my view, it is the correct thing to do.

[189] The first concern is that Mr. Marshall might perceive that this ruling gives him licence to re-do his case with new evidence not previously disclosed by him in his Statement of Particulars, including new witnesses or new documents not referenced before. This ruling is based on the premise that Mr. Marshall's case will be presented in accordance with the disclosure that has been made in his Statement of Particulars, unless leave is first sought and granted by this Tribunal upon motion, as is permitted by the Rules.

[190] If Mr. Marshall wishes to add previously undisclosed evidence to the evidence at the hearing, Rule 9(3) will apply. Rule 9(3) prohibits a party from using evidence at a hearing that has not been disclosed, without leave of the Tribunal. The issue of prejudice to

Membertou would be re-visited in any such motion. Rule 9(3) applies to Membertou, as well, should it stray outside its previous disclosure respecting its defence.

[191] The proviso that Mr. Marshall will present his case in accordance with the disclosure he made in his Statement of Particulars does not negate his ongoing obligation pursuant to Rule 6(5) as a party to this proceeding to make disclosure and to produce newly discovered evidence to Membertou, even if it helps Membertou's cause. Again, this Rule, which confirms an ongoing obligation upon parties, applies to Membertou, as well as Mr. Marshall.

[192] A second concern is that Mr. Marshall may perceive that, because he has been found to be an under-represented litigant, if he makes a mistake, this Tribunal tell him or will fix it. There is a difference between active adjudication and inappropriate intervention. As explained during case management, the Tribunal does not advise the parties what specific evidence to obtain and present to prove their case. What the Tribunal can do is provide general procedural information to parties. It can alert the parties to applicable Rules and explain them. It can discuss the law in general respecting relevant issues, including providing explanations in advance respecting the legal tests and analysis applied in all human rights cases. It can discuss remedies that could be applicable. It can discuss general evidentiary requirements. If it is made aware that evidence exists, it can provide procedural guidance about how to get that evidence before the Tribunal. The CJC Guidelines include that a tribunal may question witnesses. The extent of procedural guidance and truth-seeking exercise is dependant on the nature and circumstances of each case. I do not mean to provide a comprehensive list of what active adjudication may encompass.

[193] Mr. Marshall also would be incorrect to assume that he can be successful in his complaint if he corrects or responds to what the Tribunal has referenced in these reasons or that he will be able to fix everything. The Tribunal has not turned its mind to what would be required for Mr. Marshall to be successful in his complaint as it would wrong for the Tribunal to do so and highly unfair to Membertou. As has been stated repeatedly, the onus of proving the elements of Mr. Marshall's complaint rests upon Mr. Marshall. If Mr. Marshall does not prove the elements of his case of discrimination, this Tribunal will find that he has not proven his case.

[194] A third concern is this. Unrepresented and under-represented individuals appear before the Tribunal frequently. There are situations where cases are lost because an self-represented individual nods agreeingly but does not fully understand the importance of presenting all relevant evidence or forgets to do so, even when it is emphasized during case management that the Tribunal decides the case based only on what is presented to it at the hearing. The concern is that this decision could inadvertently encourage unrepresented and under-represented litigants to make motions to re-open their case. This could arise if they receive a decision they do not like, realize that they made a mistake and failed to present a winnable case, and believe they could have done so. This decision is not intended to open the floodgates to the Tribunal addressing buyer's remorse over erroneous decisions made respecting what evidence to present or other procedural matters. The parties need to understand that the work of this Tribunal would unravel, and, therefore, so would access to justice in relation to human rights in the federal sphere, if un-represented and underrepresented litigants could return to the Tribunal because of decisions by the Tribunal they do not agree with, to re-present their case because of errors they made.

[195] In cases where a litigant believes that they presented a persuasive case but that the Tribunal "got it wrong", that party may have the Tribunal's decision judicially reviewed by the Federal Court. The Federal Court reviews the Tribunal's decision based on the existing record of evidence before the Tribunal. If anything, this should underscore to unrepresented and under-represented litigants that they must ensure that they put evidence on the record at the hearing to prove the elements of their complaint of discrimination.

VI. Motion for Non-Suit

A. Evidence respecting Alcoholism

[196] Mr. Blair Paul was called as a witness by Mr. Marshall. Mr. Paul is a Community Alcohol and Drug Counselor who has been employed by Membertou for fifteen years. He provided support to members of Membertou, including Mr. Marshall, by making arrangements to send these individuals to Crosbie House.

[197] Mr. Paul testified that Membertou paid for the cost of Crosbie House in relation to Mr. Marshall and other members of Membertou. He advised that Membertou had an established arrangement with Crosbie House whereby 20 beds were reserved for its members. This was to ensure that First Nation members could immediately access beds without the need to wait for admission to the facility.

[198] Mr. Paul testified that members requiring his services were referred to him by Membertou's Human Resources ("HR"). His role was to ensure that the member was safely transported to Crosbie House.

[199] In terms of process, he testified that HR usually gave him a direction to make the arrangements for a member requiring the services of Crosbie House. Usually the member also received a letter from HR advising them that they are recommended to do a 28-day program at Crosbie House. Mr. Paul would register the member and ensure that they got on a bus that he had arranged for their transportation to the facility.

[200] Mr. Paul testified that Mr. Marshall went to Crosbie House in 2010 to participate in its 28-day program. He recalls that he drove Mr. Marshall to Crosbie House as they had not begun using the bus yet. Mr. Paul testified that, during his interactions with Mr. Marshall at the time, Mr. Marshall told him that he had a problem with alcohol.

[201] Mr. Paul explained that the treatment provided at Crosbie House is confidential and that he did not have access to the files there. The files were not in evidence. Apparently, Crosbie House does not retain the records of its patients beyond seven years.

[202] He testified that HR asks him whether the member completed the program and he says "yes". He recalled that Mr. Marshall successfully completed the program.

[203] On cross-examination, Mr. Paul was asked whether he discussed his clients with Chief Paul. He testified that when a client came in, it was confidential.

[204] Mr. Richard Stevens, the HR Manager, was also called as a witness by Mr. Marshall. Mr. Stevens has been employed by Membertou since 2004. In 2010, he was the Payroll Administrator. He testified that he was aware that Mr. Marshall was previously employed by Membertou and went to Crosbie House in 2010. He testified that the Director of Human

Resources at the time told him that Mr. Marshall was going to Crosbie House. He confirmed that Membertou covered the cost of Mr. Marshall attending Crosbie House. He testified that he was aware that Mr. Marshall had a dependency on alcohol. He also spoke about working with Blair Paul, who he described as the addiction counsellor, and explained that Mr. Paul would identify the type of addiction.

[205] Mr. Stevens explained that Crosbie House considered the information about its patients to be confidential, but that Crosbie House would confirm that someone was a client in attendance. He said that Blair Paul would follow up to make sure the member attended and afterwards to ensure that they were attending support meetings. Mr. Paul would inform HR when the program was complete, and they would let the employee return to work.

[206] Mr. Stevens checked his business records during his evidence. He confirmed that the records show that Mr. Marshall had a break in service in his employment with Membertou between July and October 2010, which is the period he believes Mr. Marshall had treatment. The records show that he subsequently returned to employment.

[207] On cross-examination, Mr. Stevens testified that he had heard about an incident involving Mr. Marshall drinking in December 2016 but that the incident was handled by Mr. Troy Paul, the Director of Human Resources at the time. Mr. Stevens indicated that he did not offer Mr. Marshall any accommodation because it was handled by Mr. Troy Paul. He also stated that any knowledge of Mr. Marshall being an alcoholic was based on “whatever we had written up on file by Troy Paul”. Any knowledge before this was “based on the previous Director….” Mr. Stevens had not seen any medical diagnosis.

[208] Mr. Troy Paul, the current Director of HR and Murray Jessome, the Head Operator at the Membertou Sportsplex, testified respecting the events in 2016 and 2017 that led to Mr. Marshall’s termination. As indicated, this involved allegations that Mr. Marshall was intoxicated at work on two occasions. Disciplinary notices and the letter of termination were put into evidence as examples of documentary evidence that Mr. Marshall was terminated because he was either intoxicated at work or perceived to be so. Mr. Troy Paul’s evidence focussed on Mr. Marshall’s refusal to admit that he had been under the influence at work or

to request help for alcoholism. Mr. Troy Paul testified that help would have provided had help been requested.

[209] Another witness testified about how well-known Mr. Marshall is in the Membertou community. For context, the Tribunal was advised that Membertou has a population of about 1700 people. Mr. Marshall is said to be very well-known within the community for two reasons. He is the brother of the late Donald Marshall Jr., who gained national attention when he overturned a wrongful conviction for a murder he did not commit and became a champion for the rights of Indigenous peoples. He also was subsequently instrumental in securing important aboriginal treaty rights. The second reason that Mr. Marshall is said to be well-known is because of being a fantastic hockey player. As a result, he has numerous nicknames, including the "Membertou Legend".

[210] Because Mr. Marshall did not testify, he did not provide evidence to the Tribunal under oath. However, Mr. Marshall did make statements respecting his alleged disability during his submissions for his motion, to which Membertou did not object, although they were not specifically in evidence. As noted above, Mr. Marshall stated in his submissions that he has been an alcoholic since 1998. Mr. Marshall also advised the Tribunal during his oral submissions for his motion that he has had relapses.

[211] Mr. Marshall submits that there is evidence that he is an alcoholic because Mr. Blair Paul testified that he went to Crosbie House in Nova Scotia for a one-month alcoholism program. He submits that once you become an alcoholic you do not stop being an alcoholic. It is a disease, he says, that "you have to stay on top of every day".

B. Submissions

[212] Membertou submits that the only evidence that there may be a disability is that Mr. Marshall went to Crosbie House in 2010. Counsel added that we only know that now because Mr. Blair Paul, the counselor employed by Membertou, testified to this. Counsel indicated that Membertou relies upon Mr. Paul's further testimony that the information about Crosbie House is confidential and that he did not tell anyone about it.

[213] Membertou counsel argues that no witness has come forward to explain what Crosbie House is about, to advise whether Mr. Marshall completed the program at Crosbie House, or to indicate if Mr. Marshall was diagnosed as suffering from alcoholism while he was at Crosbie House, or was diagnosed by any other entity.

[214] Counsel further made the point that Mr. Troy Paul began his position as Membertou's HR Director in 2014. This was long after Mr. Marshall had gone to Crosbie House. It also means that Mr. Marshall returned to employment with Membertou before Mr. Paul became HR Director.

[215] As explained above, Mr. Marshall's representative submitted that it was obvious that Mr. Marshall has a disability. She also relies on the fact Mr. Marshall was sent for treatment at Crosbie House.

C. Analysis and Ruling

[216] As the moving party, Membertou bears the onus of establishing that there is no evidence upon which a factual finding of disability can be made by the Tribunal. This is the legal test it must meet.

[217] We begin with the definition of disability in section 25 of the Act: "*disability* means any previous or existing mental or physical disability and includes… previous or existing dependence on alcohol or a drug."

[218] Mr. Blair Paul and Mr. Richard Stevens testified that Mr. Marshall attended Crosbie House for addiction to alcohol in 2010. There is, therefore, at least some evidence of previous disability. This evidence about prior disability meets the definition of disability in the Act. The motion for non-suit could be dismissed on this basis alone.

[219] Counsel for Membertou attempted to negate this evidence by submitting that no witness came forward to explain what Crosbie House is about. It is correct that Mr. Marshall's representative did not call an employee from Crosbie House to testify regarding what the facility does. However, this would have been unnecessary. It is apparent from the testimony of the witnesses from Membertou that they knew that Crosbie House was an

addiction and recovery treatment centre. It was understood by everyone in the hearing room that Crosbie House treated alcohol dependency. Membertou used to pay to retain 20 beds in the facility for members. It is not credible that Membertou would not know that it was paying for services for those members because they suffered from addictions.

[220] Mr. Marshall qualified in the eyes of Membertou to attend a 28-day program at Crosbie House which Membertou arranged and paid for. Mr. Marshall agreed to attend and did attend the program. This alone is sufficient evidence that Mr. Marshall has had an alcohol dependency.

[221] Membertou argues that there is no evidence that Mr. Marshall completed the program at Crosbie House. There is such evidence, as described above, and successful completion of the program is not, in my view, relevant to whether Mr. Marshall had an addiction requiring treatment in the first place. It is also not necessary that there be specific evidence that Mr. Marshall was medically diagnosed as an alcoholic at Crosbie House. There is no evidence that Crosbie House does anything other than provide addiction treatment and rehabilitation services.

[222] Further, having lived most of my life in Nova Scotia, I am aware that Crosbie House is a recovery and addiction centre. This is a fairly well-known fact in the province of Nova Scotia. Had a different Member been presiding who was not aware of this, they would have properly asked, in accordance with active adjudication, what services Crosbie House provided and thereby put this evidence on the record, if it was unclear. Mr. Marshall's undisputed attendance at Crosbie House is evidence that he has an addiction or alcoholism and therefore has a disability.

[223] The evidence is clear that Membertou knew in 2010 that Mr. Marshall attended Crosbie House and, therefore, there is persuasive evidence that Membertou knew that Mr. Marshall suffered from an alcohol dependency as of 2010.

[224] Counsel for Membertou submits that we only know this now because Mr. Blair Paul, the counselor employed by Membertou, testified to this. He points out, however, that Mr. Paul also testified that the information about Crosbie House is confidential and that he did not tell anyone about it.

[225] In my view, this is not relevant to this motion, for the reasons explained below. However, it is also not an accurate representation of the evidence respecting Mr. Blair Paul's testimony or the evidence respecting the issue of confidentiality.

[226] It is not the case that Membertou only found out during this hearing that Mr. Marshall attended Crosbie House through Blair Paul's testimony. Membertou knew this in 2010 because its employees knew this and because it paid for this service.

[227] Also, Mr. Paul did not testify that he did not tell anyone that Mr. Marshall attended Crosbie House. He testified about communications he had with the Director of HR before and after Mr. Marshall attended Crosbie House. What he testified to was that he did not discuss his clients with Chief Paul or anyone else. He confirmed that what happens at Crosbie House is confidential. That is what he meant to the extent that he indicated that the information about Crosbie House is confidential and that he did not tell anyone about it.

[228] What occurs while at Crosbie House is confidential. This specific information is personal health information. Employers are not entitled to receive the medical records of their employees in such a situation, only basic information about attendance. It is not surprising that Blair Paul, an employee of Membertou, was not privy to the records of Crosbie House in the circumstances and that Membertou does not have these records.

[229] There is also no suggestion in the evidence that Membertou wanted or needed additional information from Crosbie House or a medical diagnosis at the time. The facts are that at least several employees of Membertou knew or had to know that Mr. Marshall attended Crosbie House. Membertou knew full well what Crosbie House does, having paid for its services for years.

[230] Counsel for Membertou points out that Mr. Troy Paul did not become the Director of HR until 2014. Membertou appears poised to take the position on the merits that it did not know that Mr. Marshall was an alcoholic in 2017. Some of the evidence through the testimony of witnesses at the hearing goes to the issue of Membertou's knowledge of whether Mr. Marshall had a disability. It appears that Membertou intends to offer this as a defence.

[231] It is not appropriate to delve into the merits of the complaint in this motion. The date that Mr. Troy Paul became the Director of HR is not relevant to whether Mr. Marshall has a protected characteristic.

[232] Similarly, the above arguments advanced by Membertou are not relevant. That Membertou did or did not know that Mr. Marshall has a disability is not relevant in this motion for non-suit as the motion has been advanced.

[233] Of course, to prove a *prima facie* case, a complainant must establish that they have a protected characteristic that was a factor in their adverse treatment or termination. As explained above, there are three components that a complainant must prove to establish a *prima facie* case. However, this motion is limited to the alleged non-existence of a protected characteristic. It does not raise the issue of Membertou's knowledge of it, which may be relevant to proving that there is a link between a protected characteristic and an adverse effect. However, Membertou has not alleged that Mr. Marshall failed to establish a *prima facie* case in any other respect other than not testifying (or otherwise leading any evidence) that he has a disability.

[234] There was one ground advanced by Membertou for its motion. That ground is that there is no evidence of disability. All Mr. Marshall needed to do to defeat the motion for non-suit is to show that there is some evidence that he has an alcohol dependency, which he has done.

[235] Membertou could have brought a motion for non-suit alleging that Mr. Marshall failed to establish a *prima facie* case on broader grounds, based on Membertou's alleged lack of knowledge of the disability. However, Membertou did not raise this issue directly in the motion or address the evidence at the hearing about its knowledge in its submissions for the motion, subject to the exceptions noted. Because Membertou did not raise this issue directly and clearly in its motion, Mr. Marshall did not have an opportunity to make submissions in response. It would be unfair to Mr. Marshall to change the grounds of the motion underneath his feet, so to speak. Accordingly, this motion is decided based on the ground originally identified expressly by Membertou.

[236] As highlighted above, disability as defined in section 25 of the Act includes a previous or existing dependency on alcohol. Under the Act, a finding of discrimination may be based on a perceived disability. The evidence confirms that Mr. Marshall had a previous dependency on alcohol. It was not disputed by the witnesses who were employed by Membertou in 2010. There is, therefore, some evidence of disability. Membertou has failed to establish that there is no evidence that Mr. Marshall has a dependency on alcohol. Its motion for non-suit must fail accordingly.

[237] If I am wrong, there is also some evidence of disability or perceived disability at the time of his termination. The documentary evidence shows that Mr. Marshall was disciplined and/or terminated by Membertou because he was either intoxicated at work or perceived to be intoxicated at work.

[238] Employees do not typically attend work under the influence. If an employee does this, particularly if it happens repeatedly, a reasonable employer would wonder if there could be an underlying issue with alcoholism.

[239] Membertou's Director of HR appears to have reasonably considered the possibility that Mr. Marshall had such a dependency at the time of termination. He testified that Mr. Marshall denied having a dependency on alcohol and he found this denial to be problematic. It was his testimony that help for alcohol dependency would have been provided had it been requested. Help for alcohol dependency was clearly contemplated. Membertou's Director of HR appeared frustrated with Mr. Marshall's refusal to admit that he had an alcohol dependency. Logically, Membertou cannot give evidence that it took issue with an alleged denial of alcoholism by Mr. Marshall and say that there is *no* evidence that a perception of alcoholism existed.

[240] This other evidence leads to the further conclusion that there was some evidence that Mr. Marshall was perceived to have a dependency on alcohol.

D. Decision respecting Membertou's Election

[241] The Tribunal has granted Mr. Marshall's motion to re-open his case intending to ensure that this human rights complaint is heard on its merits and is decided on its merits,

rather than maintaining strict adherence to procedural rules. In other words, the Tribunal decided that, in these circumstances, fairness trumps the finality of procedural decisions.

[242] What is fair for one party is fair for the other. It is, in my view, an absolute requirement of fairness that Membertou be given the same opportunity to have its defence to the complaint heard and decided on its merits. Procedural technicalities respecting the issue of whether Membertou should be required to make an election should fall to the side, given the discretion exercised in favour of Mr. Marshall having an opportunity to present his case. Accordingly, the Tribunal exercises its discretion to permit Membertou to lead evidence in support of its defence. Had an election been made, I would have released Membertou from its election in the unusual circumstances of this case.

[243] When all the evidence is in from both parties, if Membertou wishes to argue that Mr. Marshall has not established a presumptive case because of lack of evidence or a failure to establish a *prima facie* case on a balance of probabilities, Membertou may do so in its final submissions.

VII. Summary of Outcome and Orders Granted

[244] For the above reasons, Mr. Marshall is permitted to re-open his case. Membertou's motion for non-suit is dismissed. Membertou is permitted to present its case on the merits.

[245] An Order is granted that the Complainant, Mr. Marshall may resume the presentation of his case. It is further Ordered that, after Mr. Marshall re-closes his case, Membertou may present its case.

Signed by

Kathryn A. Raymond, Q.C.
Tribunal Member

Ottawa, Ontario
October 18, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2440/9919

Style of Cause: Stephen Marshall v Membertou First Nation

Ruling of the Tribunal Dated: October 18, 2021

Written representations by:

Sheila Isaac, for the Complainant

Tony W. Mozvik, for the Respondent