Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

MICHAEL STEVENSON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

RULING ON JURISDICTION

Ruling No. 1

2001/03/23

PANEL: J. Grant Sinclair, Vice-Chairperson

I. INTRODUCTION

The Respondent, Canadian National Railway Company has brought this preliminary motion seeking to stay the commencement of any proceeding before the Canadian Human Rights Tribunal relating to this matter. The basis for this motion is that the Complainant , Michael Stevenson, has died and his complaint does not survive his death. Alternatively, the matter should be stayed having regard to the recent Federal Court decision in *Bell Canada v. C.T.E.A., C.E P., Femmes Action and the Canadian Human Rights Commission.*[(1)]

II. FACTS

[1] Michael Stevenson, filed a complaint dated August 25, 1987 with the Canadian Human Rights Commission, alleging that the respondent, Canadian National Railway Company, discriminated against him because of his disability (colour vision) contrary to sections 7 and 10 of the *Canadian Human Rights Act*.

[2] On September 16, 1999 the Commission referred the complaint to the Canadian Human Rights Tribunal for a hearing.

[3] By letter dated October 7, 1999, the Tribunal advised counsel for the Commission, CN and the Complainant counsel that the complaint had been referred for a hearing to the Tribunal. The letter also set out that a pre-hearing Case Conference Call would be scheduled shortly.

[4] Enclosed with the letter was an Agenda outlining the items to be discussed at the Case Conference Call. One of the Agenda items was "Mediation" offered by the Tribunal, whereby on the consent and request of all parties, the Tribunal Chairperson would designate a Tribunal member to mediate a resolution of the complaint.

[5] Other Agenda items included "Preliminary Matters", which requested the parties to identify any questions of law, jurisdiction and procedural matters; "Scheduling/Hearing Dates"; "Schedule for Disclosure/Written Particulars"; "Evidence/Time Required to Complete Cases"; and "Remedies Sought".

[6] The Case Conference Call was held on November 19, 1999. Counsel for the Commission, CN and the Complainant all participated. All counsel agreed to mediation. There was agreement among counsel as to the dates set for the hearing of the complaint.

All counsel agreed to the schedule of dates for disclosure. All counsel advised as to the number of witnesses to be called and the number of days to complete their evidence.

[7] When the Agenda item, "Preliminary Matters" was discussed, no counsel, including CN counsel, raised any preliminary objection to the jurisdiction of the Tribunal to proceed with the hearing or raised any question of law.

[8] The hearing was scheduled to commence on May 1, 2000, for three weeks. This hearing schedule and the disclosure schedule was confirmed by Tribunal letter dated November 23, 1999 to all counsel.

[9] A mediator was appointed by the Tribunal Chairperson on December 8, 1999. The mediation was held on February 3, 2000, but failed to resolve the complaint.

[10] A Notice of Hearing, dated February 10, 2000, after the mediation, was sent to all counsel confirming the scheduled hearing dates. The hearing commencement date was subsequently revised to commence on May 9, 2000, by Tribunal Notice to all counsel dated April 10, 2000.

[11] On April 12, 2000, the Commission advised the Tribunal and other counsel that it would not proceed with the section 10 part of the complaint leaving only the section 7 part of the complaint to be dealt with.

[12] On May 3, 2000, just prior to the commencement of the hearing, the parties advised the Tribunal that they had agreed in principle to settle the complaint and it remained only to finalize the Minutes of Settlement. Accordingly, all parties jointly requested that the hearing be adjourned *sine die* to allow this to happen. The Tribunal granted an adjournment on this basis on May 4, 2000.

[13] The Complainant died on May 26, 2000, before the Minutes of Settlement were signed and the settlement finalized.

[14] On January 10, 2001 the Tribunal wrote to the parties requesting an update on this matter. CN counsel replied by letter on January 23, 2001, that given the death of the Complainant, there was no further or continuing right to claim compensation or any other relief. CN did not make any independence objection in its letter.

[15] The Commission and the Complainant disagreed with CN's position. On February 8, 2001, the Tribunal convened a conference call in which all counsel participated. It was on this occasion that CN first raised its independence objection.

[16] The Chairperson directed the parties to provide written submissions relating to the status of the complaint and the implications of the *Bell Canada* decision. The hearing on the merits was rescheduled to June 11-15, 2001.

[17] The parties provided written submissions to the Tribunal and the motion was argued on March 8, 2001.

III. THE ISSUES

[18] The issues are as follows:

(a) whether, in the absence of any statutory provision, the principle of *actio personalis moritur cum persona* applies so that the complaint should be stayed or dismissed; and

(b) in the alternative, whether *Bell Canada* applies to this case and whether CN has impliedly waived its rights to object to the matter proceeding.

[19] CN also raised in its written submissions the argument that it is prejudiced in its ability to make full answer and defense to the complaint. This is because of the substantial delay between the filing of the complaint and the scheduled hearing date. As a result, the collection of evidence and fair recall by witnesses is significantly impaired. Further, CN contends that it will be prejudiced because it has been deprived of the opportunity to know the complainant's case through his vive voce evidence and of the opportunity to present evidence through cross-examination of the Complainant.

[20] The Commission and the Complainant dispute the submissions of CN. Their position is that the hearing should proceed. And, in addition, the Complainant contends that this matter has been settled.

[21] At the outset of the motion, I suggested to counsel that the question of prejudice and settlement are best dealt with within the context of the facts and evidence presented at the hearing, should the matter proceed. All counsel agreed to this and argument on the motion was confined to the issues set out above.

[22] This is without prejudice to CN to argue at any time at the hearing that its right to a fair hearing is prejudiced either because of delay or the death of the Complainant or both. This is also without prejudice to the Complainant to put forward at the hearing, that this matter has been settled. This is not to be taken as overriding any right of CN to argue the privileged or without prejudice nature of any settlement negotiations.

IV. DECISION

Actio Personalis Moritur Cum Persona

[23] The core of CN's argument is that this common law principle applies so that the complaint terminates with the death of the Complainant. No provision in the *Act* or any

other relevant legislation, nor a liberal interpretation of the *Act* allows for an Estate or Estate representative to continue the complaint before the Tribunal.

[24] The starting point is the *Act*, which must be read in light of its nature and purpose. The purpose of the *Act* as set out in section 2, is to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination. That task should not be approached in a narrow, literal fashion. Rather the *Act* is to be given a large and liberal interpretation that will best obtain the objectives of the *Act*[(2)].

[25] Reference to section 2 and other relevant provisions of the *Act* demonstrates that the *Act* extends beyond just individual rights and engages the broader public interest of freedom from discrimination.

[26] Section 40 of the *Act* permits an individual or group of individuals alleging discrimination to file a complaint with the Commission. These persons need not be the victims of the alleged discrimination. The Commission itself may initiate a complaint under Section 40(3) of the *Act*.

[27] As well, section 50(1) recognizes there may be "interested parties" to the complaint. The Tribunal has on many occasions given intervenor status to such parties in the hearing of the complaint.

[28] The Commission is a party in the hearing of a complaint. In such case the Commission does not appear as the representative of the individual Complainant but is there to represent the public interest (section 51).

[29] The Commission also exercises a screening role by way of the discretion given to it under sections 40(2) and Section 41 of the *Act*. In the exercise of this discretion, the Commission can determine whether or not a complaint goes forward to a hearing.

[30] The remedies provided by the *Act* are corroborative of the broader reach of the *Act*, beyond the interests of an individual complainant. Thus, under section 53(2), in addition to compensating the complainant, the Tribunal can:

- issue a cease and desist order against the person who committed the discriminatory practice;

- order such person to take or adopt practices in consultation with the Commission to redress the discriminatory practice, including the adoption of a special program under section 16(1) of the *Act* or the making of an application under section 17 of the *Act*.

[31] In my opinion, having regard to the regime of the *Act*, one must conclude that a human rights complaint filed under the *Act* is not in the nature of and does not have the character of an "action" as referenced in the *actio personalis* principle of law. The *Act* is aimed at the removal of discrimination in Canada, not redressing a grievance between two private individuals.

[32] If CN has its way, the death of the complainant would extinguish not only the interests of that complainant, but also all the other interests involved in the complaint, including the very significant public interest.

[33] Should the maxim *actio personalis,* a maxim that has its origins in medieval common law, a maxim whose anachronism is illustrated by the fact that in England and all common law jurisdictions in Canada the rule has been abolished,[(3)] be allowed to override the purpose and objectives of the *Canadian Human Rights Act?* I think not.

[34] Counsel cited a number of authorities. In my opinion, the most relevant case on this issue is *Barber v. Sears Canada Inc. (No.2)*[(4)]. This case supports the conclusion that, taking into account public interest considerations, a human rights complaint should not be stayed because of the death of the Complainant.

[35] Accordingly, for the above reasons, I have concluded that the *actio personalis* maxim does not and should not apply to a human rights complaint under the *Act* and this proceeding should not be stayed on that ground.

V. DOES BELL CANADA APPLY

[36] In my view, *Bell Canada* applies to this case. It is the power to make binding guidelines and not the existence of the guidelines that creates the independence problem. Comparably, the discretion of the Chairperson to extend a member's term rather than the actual exercise of the discretion in a particular case is what the Federal Court found to be offensive.

[37] However, the case law is clear that if CN seeks to rely on *Bell Canada*, it must demonstrate that it objected to the Tribunal's lack of institutional independence at the earliest practical opportunity. Otherwise it is deemed to have waived its right to object[(5)].

[38] CN was invited during the Case Conference Call on November 19, 1999 to raise any preliminary objections to the Tribunal's jurisdiction or any other question of law. If CN had any misgivings about the Tribunal's independence that was the earliest practicable opportunity to raise the question. Instead, CN expressly advised that it had no preliminary objections. Further, it agreed to the scheduled dates, the disclosure schedule and provided at that time information as to its witnesses and time estimates for its evidence.

[39] When the parties were contacted by the Tribunal on January 10, 2001 for an update on the complaint, in its response, CN did not raise any questions as to the Tribunal's lack of independence. The first time CN raised its objection was during the Conference Call on February 8, 2001.

[40] As the Federal Court of Appeal noted in *Zundel*, it was the provisions of the *Act* as they existed at the time of this complaint that created the reasonable apprehension of bias. *Bell Canada* did not change anything in this regard and did not present any new facts.

[41] Thus it was open to CN to challenge the validity on that basis and it was certainly given the opportunity to do so during the November 19, 1999 Case Conference Call when the question was front and center. CN did not do so.

[42] I have concluded on the facts of this case, that CN did not raise its objections at the earliest practicable opportunity. Having failed to do so, CN has implicitly waived its right to object to the jurisdiction of the Tribunal to proceed in this matter.

[43] Accordingly, CN's preliminary motion is dismissed.

J. Grant Sinclair, Vice Chairperson

OTTAWA, Ontario

March 23, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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STYLE OF CAUSE: Michael Stevenson v. Canadian National Railway Company

RULING OF THE TRIBUNAL DATED: March 23, 2001

APPEARANCES:

David J. Wylupek For the Complainant

R. Daniel Pagowski For the Canadian Human Rights Commission

Kenneth R. Peel For Canadian National Railway Company

1. [2000] F.C.J. No. 1747, Docket T-890-99

2. see *Canadian National Railway Co. v. Canada*, [1987] 1 S.C.R. 1114 and the other Supreme Court decisions referred to.

3. except for actions in defamation

4. (1993) 22 C.H.R.R. D/409 (Ont. Bd. Inq.)

5. See *Zundel v. Canadian Human Rights Commission et al.*, Docket A-215-99, November 10, 2000 and In Re *Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1F.C. 103 at p. 112.