Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

MINISTER OF PERSONNEL FOR THE

GOVERNMENT OF THE NORTHWEST TERRITORIES

AS EMPLOYER

Respondent

RULING ON SECTION 7 OF THE CANADA EVIDENCE ACT

Ruling No. 9

2001/07/25

Before: Paul Groarke, Chairperson

Athanasios Hadjis, Member

Jacinthe Théberge, Member

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I. INTRODUCTION

[1] The circumstances which give rise to the present ruling are straightforward. On June 29th, the Respondent sent the Complainant and the Commission a letter containing the Respondent's list of proposed witnesses, which was copied to the Tribunal. Although there may be some debate as to which witnesses should be considered experts, it is evident from the letter that the Respondent intends to call something in the order of 10 expert witnesses. This led to objections from counsel for the Complainant, who argued that the Respondent must seek leave, under section 7 of the *Canada Evidence Act*, if it wishes to call more than five expert witnesses.

[2] We have now received written submissions from all of the parties on the issue. In the course of argument, additional issues have arisen with respect to the interpretation of section 7 and the status of a ruling from the Federal Court.

II. ISSUES

A. DOES THE *CANADA EVIDENCE ACT* APPLY TO HEARINGS BEFORE THE TRIBUNAL?

[3] Although the procedural issue before us is relatively simple, the law is still undeveloped in the area. The first issue is accordingly whether the *Canada Evidence Act*, R.S.C. 1985, c. C-15, as amended, applies to hearings before the Tribunal.

i) The General Rule

[4] The general rule is that different statutes should be interpreted, if possible, in a reconciliatory fashion. In *The Interpretation of Legislation in Canada*, Pierre-André Côté writes:

Different enactments of the same legislature are supposedly as consistent as provisions of a single enactment. All legislation of one Parliament is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislature.(1)

It follows that we should begin with the presumption that the entire statutory regime is consistent and coherent.

[5] Ruth Sullivan takes a similar view in the third edition of *Driedger on the Construction of Statutes*:

The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature.(2)

Driedger recognizes the special status of human rights legislation, at page 184, which "prevails over ordinary legislation to the extent necessary to avoid conflict." This principle only applies, however, where there is a real conflict between statutes.

[6] We recognize that there are many situations where, notwithstanding the general presumption of harmony, it is impossible to reconcile the provisions of different *Acts*. This is relatively rare, however. As Côté writes:

The case law demonstrates that the courts are extremely reluctant to rule that there is a conflict between two enactments. . . . there is a strong presumption against implied repeal of one enactment by another. Any interpretation permitting reconciliation is to be favoured, because it is assumed this better reflects the work of a rational legislature.[(3)]

And on the following page:

It has long been recognized that statutes are not inconsistent simply because they overlap, occupy the same field or deal with the same subject matter. There is always the possibility that they complement each other.

We should accordingly favour harmonious interpretations of the *Canada Evidence Act* and the *Canadian Human Rights Act*.

ii) The Application of the *Evidence Act* to the Human Rights Process

[7] Section 2 of the *Canada Evidence Act*, which is in the same part of the *Act* as section 7, states as follows:

2. This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

This terminology is similar to the terminology used in the *Canadian Human Rights Act*. Section 48.9(1) of the *Act*, which governs the hearing process, refers to "proceedings before the Tribunal". The language of section 2 is notably inclusive and the term "civil proceedings" would normally include legal actions between employees and an employer. If there is any doubt on the matter, that doubt is removed by the additional reference to "other matters whatever".

[8] This position is supported by ordinary usage. The *Houghton Mifflin Canadian Dictionary of the English Language*, for example, states that the legal term "proceedings" refers to "Legal action; litigation".[(4)] We accept that this is the sense in which it has been used in both the *Canada Evidence Act* and section 48.9 of the *Canadian Human Rights Act*. It is the responsibility of the Tribunal to determine questions of admissibility, assess the evidence presented by the parties, make findings of fact, and protect the fairness of the process. These are all attributes of the litigation process.

[9] We have been directed to *He* v. *Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 76 (F.C.T.D.) (QL). In that case, the Federal Court reviewed the decision of a visa officer, who had interviewed the applicant and determined that he was not entitled to apply for permanent residence in Canada. At paragraph 14, Justice Teitelbaum states:

Proceedings before an administrative tribunal should be distinguished from legal proceedings to which the *Canada Evidence Act* applies. As submitted by the respondent

Minister, the *Canada Evidence Act* strictly applies to legal proceedings, not administrative tribunals.

As the Commission has submitted, however, a hearing before the Tribunal cannot be compared to a decision by an administrative officer. The fundamental purpose of a hearing is adjudicative rather than administrative.

[10] There is much to be said in favour of the position adopted by the Canadian Human Rights Commission, which has suggested that the Tribunal's exercise of its procedural powers should "be informed by" the underlying rules and principles of evidence in the federal *Evidence Act*. The Commission relies, as we have, on the broad wording of section 2 and argues that there is nothing to prevent the Tribunal from "adapting" the provisions of the *Act*, where it is appropriate, to meet the needs of the human rights process. There is no reason why this needs to interfere with the power of the Tribunal to set its own standards and procedures, where that is appropriate.

[11] The general purpose of the *Canada Evidence Act* seems self-evident: it provides a set of basic principles, which apply to any proceeding, and at least implicitly protects the consistency and integrity of the entire system. As the Commission states, the *Evidence Act* provides "a highly developed and carefully thought out body of evidence law", which should normally be respected. There are many reasons why this is advantageous, but the fundamental point is that it is an *Act* of general application and should not be supplanted without a clear expression of intent from Parliament.

[12] When one examines the different sections of the *Canada Evidence Act*, it becomes apparent that it contains a wide variety of provisions. Section 5 deals with incriminating statements. Other provisions deal with the right of a party to cross-examine its own witnesses. There are provisions which deal with the giving of evidence under affirmation, the use of published *Acts* and certified copies, the proof of orders in counsel, public documents, notarial acts, business records, and the like. Section 53 allows the taking of affidavits, outside Canada, by diplomatic officials. There is no obvious reason why many of these provisions would not apply to a human rights hearing.

[13] We should add that many of these provisions are designed to increase the efficiency and convenience of the legal process and avoid the rigid application of legal rules. This is entirely in keeping with the nature of the human rights process and complements the hearing process envisaged by the *Canadian Human Rights Act*. It would nevertheless be a mistake to extend the present ruling beyond the ambit of section 7 and we leave it to other panels to decide the relevance of individual provisions to the human rights process when it becomes necessary to do so.

(iii) The Application of the Procedural Provisions of the *Canada Evidence Act*

[14] There is an additional concern, however, that the procedural provisions in the *Canada Evidence Act* may impinge upon the procedural powers of the Tribunal. This arises because there are many provisions in the *Act* which do not deal specifically with

the admissibility of evidence. Sections 3 to 16, for example, deal with various aspects of the law relating to witnesses. There is a difference between evidentiary provisions, which establish whether certain forms of evidence are admissible, and procedural provisions which deal with the manner in which evidence may be adduced.

[15] Statutory provisions or rules which deal with the compellability of witnesses, or the manner in which testimony or other evidence may be adduced, are procedural rather than evidentiary in nature. This applies to provisions regarding witnesses and at least some of the restrictions on the use of experts. In *Porto Seguro* v. *Belcan S.A.* [1996] 2 F.C. 751 (F.C.A.), [1996] F.C.J. No. 422 (QL), for example, the Federal Court of Appeal considered a common law rule which prevented a party from calling experts in a case before the Admiralty Court. Justice Pratte also commented on section 7 of the *Canada Evidence Act*, however, at paragraph 7, and stated that the section "only applies to cases where expert evidence is admissible". He accordingly distinguished between the question of admissibility and the rule set out in section 7.

[16] The decision of the Court of Appeal in *Porto Seguro* was appealed to the Supreme Court of Canada, whose judgment is reported at [1977] 3 S.C.R. 1278. In a unanimous judgment, Justice McLachlin (as she then was), held that the common law rule preventing the use of expert witnesses was itself a procedural rule. At page 1286, she held as follows:

In my view, the rule is one of procedure. It is a rule about how the trial should be conducted, not about the issues at stake between the parties in the action.

The same comment applies with yet more force to section 7, which should not be treated as a substantive rule of evidence.

[17] This is relevant in the immediate circumstances because it was argued that section 7 implicitly trespassed on the powers of a panel under section 50(3)(c) of the *Canadian Human Rights Act*. That subsection states that a panel may:

(c) subject to subsection (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence is or would be admissible in a court of law.

Subsections (4) and (5) deal with questions of privilege and the evidence of conciliators, which do not concern us. It is true that the wording of this provision and the use of the term "receive" is very broad: section 7 of the *Evidence Act* does not prevent a panel from receiving the evidence of additional expert witnesses, however, and merely requires that the matter be considered by the panel. The restrictions in section 7 go to practice and procedure rather than admissibility and do not derogate from the powers of a panel under section 50(3)(c).

[18] This raises a separate question, which relates to the procedural powers of the Tribunal. The Respondent has relied on the following passage from *Bombardier* v.

Restrictive Trade Practices Commission (1980), 48 C.P.R. (2d) 248 (F.C.T.D.), at page 256:

It is generally accepted that administrative tribunals are *prima facie* free to choose their own procedure whether they have statutory authority to do so or not. The most frequent expression is that they are "the authors of their own procedure" except, of course, where express provisions are contained in the statute governing the particular tribunal.

This would seem to suggest that a tribunal is not bound by the procedural provisions in a statute like the *Canada Evidence Act*.

[19] The court in *Bombardier* was speaking in the most general terms, however, and immediately goes on to state:

Apart from express procedure imposed by statute the rule that is clear and upon which there is general agreement is that tribunals are not bound to follow the formal procedures of the courts of law.

We do not believe that the court intended to suggest that the statutory provisions regulating the practice of the Tribunal must be confined to a single statute. There is no obvious reason why the procedure cannot be imposed by a complementary statute.

[20] There is no doubt that the Canadian Human Rights Tribunal is master of its own procedure. Section 48.9(1) of the *Canadian Human Rights Act*, for example, states that:

48.9(1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

The Tribunal has the authority to issue its own rules of procedure. Section 48.9(2) of the *Act* gives the Chairperson of the Tribunal the power to "make rules of procedure governing the practice and procedure before the Tribunal".

[21] There is presently a set of "interim" rules in use before the Tribunal, which have not been published under section 48.9(3). Under section 6(1) (f) of these rules, each party is obliged to give "written notice" of:

(f) the witnesses it intends to call, including expert witnesses identified as such, and a summary of their testimony.

Although section 6(4) of the Rules deals with expert reports, there is nothing which stipulates the number of expert witnesses which may be called by each side.

[22] At this point in time, the status of the rules is uncertain, since they have not been formally issued. Section 48.9(3) of the *Canadian Human Rights Act* states that rules must be gazetted, in order to give "interested persons" the opportunity to make representations with respect to the rules. It is not entirely clear that the situation would be different if the

rules had been issued, however, since they do not refer to the number of expert witnesses which may be called by a party. The question is accordingly whether the apparent lacuna created by the lack of rules is filled by the provisions of the *Canada Evidence Act*.

[23] This requires an examination of the specific sections of the *Act*. As a general principle, however, we do not believe that the procedural provisions of the *Canada Evidence Act* need to derogate from the procedural powers of the Tribunal. We are reluctant to assume that the *Evidence Act* and the *Canadian Human Rights Act* are in conflict, and prefer to take the view that the rules supplement the provisions of the *Evidence Act*. Although the Chairperson of the Tribunal clearly has the authority to issue rules stipulating the procedures to be followed in calling expert witnesses, we are not convinced that the *Evidence Act* was ever intended to prevent her from doing so.

B. DOES SECTION 7 OF THE *EVIDENCE ACT* APPLY TO HEARINGS BEFORE THE TRIBUNAL?

[24] The question before us concerns section 7 of the *Canada Evidence Act*. The issue is ultimately whether the section complements the human rights process and the provisions of the *Canadian Human Rights Act*. This calls for an examination of the section, which reads as follows:

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without leave of the court or judge or person presiding.

There is nothing in the section which prevents a party from calling more witnesses: the section merely requires that the party seek leave before doing so, and provide some justification for encumbering the process further.

[25] The purpose of section 7 of the *Canada Evidence Act* seems readily apparent. As Sopinka and Lederman write, in the second edition of The Law of Evidence in Canada, at §12.134:

These statutory restrictions are meant to save the court's time and acknowledge the fact that the case is not to be decided on the basis of a numerical count of experts called on each side. The provisions grant the trial judge a discretion to control the number of experts, otherwise he or she would be subject to appellate review for rejecting relevant evidence.[(5)]

The section would accordingly give a panel the power to reject evidence which is relevant and probative, on the basis that it is repetitious or unnecessary to decide the case.

[26] This is a delicate issue. In *R.* v. *Higgins,* cited *infra*, at paragraph 12, Limerick J.A. puts the matter in the following manner:

I am further of the opinion that the provision was enacted to prevent the abuse of the right to introduce expert testimony. Without such a provision a party could call any number of experts whom the court could not refuse to hear if their testimony was relevant, without leaving itself open to an allegation of wrongly rejecting evidence.

Section 7 is apparently intended to balance two competing interests. The parties to a case should be given an ample opportunity to present evidence on the issues in the case, but should not be allowed to turn the proceedings into a showcase of experts.

[27] We see no reason why section 7 compromises the authority of the Tribunal in procedural matters. In giving the Tribunal some additional authority to limit the number of experts that may be called, in spite of its admissibility, it arguably extends the powers of the Tribunal. This complements the powers of the Tribunal under section 48.9(1) of the *Canadian Human Rights Acts*, which states as follows:

48.9(1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

In our view, section 7 protects the expeditiousness of the human rights process and improves the efficacy of hearings. As the Complainant has submitted, the calling of additional witnesses inevitably increases costs and delays the final resolution of a case, an issue of considerable concern in the immediate instance.

[28] The practical question is whether the party seeking to call a number of expert witnesses is obliged to apply for leave or whether it is for another party to object. Section 7 is a reasonable compromise, and gives the Respondent the prerogative to call up to five expert witnesses, for all intents and purposes, as a matter of right. The limit must be set somewhere, and we see no reason why a party should not demonstrate why additional experts are needed. The section is sound, procedurally, since it forces all of the parties in a case to deal with the issue before evidence is called. This allows the side seeking leave to adjust its witness list, before calling evidence, to accommodate any ruling from a court or tribunal.

C. DOES SECTION 7 OF THE *EVIDENCE ACT* REFER TO THE TOTAL NUMBER OF WITNESSES WHICH MAY BE CALLED, OR THE NUMBER OF WITNESSES WHICH MAY BE CALLED ON EACH ISSUE?

(i) The Decision in *Eli Lilly*

[29] We have been provided with a number of authorities on the proper interpretation of section 7. The major issue between the parties is whether we are obliged to follow the ruling of the Federal Court in *Eli Lilly* v. *Novopharm Ltd.* (1997), 147 D.L.R. (4th) 673

(F.C.T.D.), a complex case in which the court heard from a wide variety of expert witnesses and received 51 experts reports. Although the case was appealed to the Federal Court of Appeal, at [2000] F.C.J. No. 2090 (QL), and the Supreme Court of Canada, at [2001] S.C.C.A. No. 100 (QL), those courts did not comment on the interpretation of section 7. The Complainant and Commission have argued that the ruling in *Eli Lilly* is *per incuriam*.

[30] The controversy between the parties arises from the following passages in the judgment of Justice Reed in the Trial Division:

Section 7 has been interpreted as referring to expert opinion evidence only and as limiting the evidence to five witnesses per subject matter or factual issue in a case, not five witnesses in total (*Buttrum* v. *Udell*, [1925] 3 D.L.R. 45 (Ont.S.C.), *re: Scamen and Canadian Northern Railway Co.* (1912), 6 D.L.R. 142 (Alta.S.C.), *Fagnan* v. *Ure*, [1958] S.C.R. 377, 13 D.L.R. (2d) 273, *Hamilton* v. *Brusnyk* (1960), 28 D.L.R. (2d) 600 (Alta. S.C.), *R.* v. *Morin,* [1991] O.J. No. 2528 (Q.L.) [summarized 16 W.C.B. (2d) 416], *B.C. Pea Growers Ltd.* v. *City of Portgage LaPrairie* (1963, 43 D.L.R. (2d) 713 (Man.Q.B.)).

Prior to counsel for the defendants calling some of their experts, counsel for the plaintiffs raised a concern that it appeared as though the defendants were planning on calling more than five witnesses per "side" on a factual issue . . .[(6)]

The problem, it is suggested, is that all of the parties in the case assumed that this was a correct statement of the law.

[31] There are many difficulties with the authorities cited by Justice Reed. As all the parties are aware, *Buttrum* v. *Udell* went before the Ontario Court of Appeal at (1925), 57 O.L.R. 97, which overturned the ruling which she cites. The issue in the case arose as a result of a difference between the relevant sections of the *Ontario Evidence Act*, R.S.O. 1914, and the *Alberta Evidence Act*, R.S.A. 1912, c. 87. As counsel for the Complainant has stressed, the section in the Alberta *Act* did not contain a provision permitting the Court to grant a party leave to call more than three witnesses.

[32] Section 10 of the Ontario *Act*, which was considered by the court in *Buttrum*, read as follows:

10. Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon by either side without leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses.

In *Buttrum*, at page 100, Ferguson J.A. rejected the position of the Alberta courts in *Scamen* and held that the Ontario section referred to the total number of opinion witnesses:

. . . with deference, I am of opinion that the remedy proposed by these Courts is worse than the disease, and that it is much better that the number of such witnesses called during a trial should be limited to three on each side, and such others as the Court may on application allow, than that the number of these witnesses should be limited only by the number of issues of fact that may actually arise in the course of a trial, or that counsel can with some show of reason argue will arise or have arisen during the trial.

This would open the trial process to a virtually unlimited number of witnesses, particularly in a complex case, and deprive the court of its power to regulate the process.

[33] The strongest authority in the list of cases cited by Justice Reed is *Fagnan* v. *Ure*, since it is a decision of the Supreme Court of Canada. *Fagnan* deals with the same section as *Scamen*, however, in a later version of the *Alberta Evidence Act*. That section stated as follows:

10. Where it is intended by a party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon by either side.

In point of fact, Justice Cartwright held that it was a mistake to characterize one of the plaintiff's witnesses as an expert witness and found that there was no violation of the section. He nevertheless accepted that the section refers to the number of witnesses which can be called on each factual issue, rather than in total. In doing so, he relied on the decision of the Supreme Court of Alberta *en banc* in the *Scamen* case.

[34] Counsel for the Respondent has also referred us to the decisions of the New Brunswick Court of Appeal in *R.* v. *Higgins* (1979), 28 N.B.R. (2d) 450, followed by the New Brunswick Court of Queen's Bench in *R.* v. *Turner*, [1995] N.B.J. No. 534 (QL), and the decision of the Ontario General Division in *Gordon* v. *Snell* (1997), 10 C..P.C. (4th) 325. These cases merely follow the decision of the Supreme Court of Canada in *Ure* v. *Fagnan*, however, and do not add to the discussion. The New Brunswick cases also deal with criminal matters, which raise a separate set of concerns.

[35] Nor is this all. The decision in *R.* v. *Morin* merely allows an application from the Crown to call 28 experts: although it mentions *Fagnan* v. *Ure*, in passing, it offers no advice on the manner in which section 7 should be interpreted. It is true that the decision in the *B.C. Pea Growers* case deals with a section in the *Manitoba Evidence Act*, which gave a court the discretion to allow a party to call additional witnesses. This decision was appealed to the Manitoba Court of Appeal, however, which sided, at (1964), 49 D.L.R. (2d) 91, with the court in *Buttrum* and held that the decisions in *Scamen* and *Fagnan* v. *Ure* should be restricted to the Alberta legislation.

[36] It follows that two of the six decisions cited by Justice Reed do not stand for the proposition which she advances. They stand, indeed, for the contrary proposition. Three of the other cases refer to the Alberta law, which differs substantially from section 7. The remaining decision is mute. The Complainant has also referred us to *Rex* v. *Barrs*, [1946]

2 D.L.R. 655, where the Alberta Court of Appeal itself stated, at page 660, that the *Scamen* decision "can have no application" to section 7 of the federal *Act*. The more relevant caselaw is found in the opposing line of cases, which deal with sections that permit a party to apply for leave to call additional witnesses.

[37] We have also been given the judgment of the Ontario General Division in *Bank of America* v. *Montreal Trust* (1998), 39 O.R. (3d) 134, [1998] O.J. No. 1524 (QL), which examines the relevant section in the *Ontario Evidence Act*, R.S.O. 1990, c. E.23 . This is a helpful decision, which reviews the history of the *Scamen* and *Fagnan* cases and suggests, at page 138, that they "should be relegated to the curiosity cupboard as obsolete cases which were required to correct an historical oddity of the then Alberta legislation."

(ii) Was the Decision in *Eli Lilly* Rendered *Per Incuriam*?

[38] The argument advanced by the Complainant is that the ruling in *Eli Lilly* is *per incuriam*. This is a concept which developed out of the need to recognize exceptions to the principle of *stare decisis*. In Drafting and Interpreting Legislation, Louis-Philippe Pigeon describes a "judgment *per incuriam*" as "one which has been rendered inadvertently."[7] This is in keeping with the statements in the caselaw.

[39] Justice Pigeon gives two examples of *per incuriam* decisions, the first of which is instructive in the immediate case. That is:

. . . where the judge has forgotten to take account of a previous decision to which the doctrine of *stare decisis* applies. For all the care with which attorneys and judges may comb the case law, *errare humanum est*, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered *per incuriam*: thus it has no authority.[8]

This is a natural rule of construction, which allows legal bodies to correct relatively obvious errors in the caselaw.

[40] We need to begin with the observation that the Canadian Human Rights Tribunal is primarily a fact-finding body and is bound by the rulings of the Federal Court. It follows that the Tribunal should exercise an element of caution, in determining whether a concept like *per incuriam* should be applied in a particular case. The concept should only be applied where there is a clear oversight on the part of the courts and should not be used in a way which undermines the principle of *stare decisis*.

[41] There are at least a few decisions in the Federal Court which apply the concept of *per incuriam*. In *Tetzlaff* v. *Canada (Minister of the Environment)*, [1991] 2 F.C. 212 (F.C.T.D.), for example, Justice Muldoon dealt with the question whether the Saskatchewan Water Corporation could be added as a respondent to an action. The issue was a delicate one, in that the Court of Appeal had unanimously restored it to such a

status, apparently after being struck out by the Trial Division. Justice Muldoon nevertheless held that the decision was *per incuriam*, on the basis that the Court of Appeal had not "adverted" to section 2 of the *Federal Court Act*, which restricted the jurisdiction of the court to federal entities.

[42] In *Armstrong Cork* v. *Domco Industries*, [1981] 2 F.C. 510 (QL), the Federal Court of Appeal discussed whether the principle of *stare decisis* applies to "intermediate courts of appeal". At paragraph 19, it adopts the following passage from *Murray* v. *Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 518, at pages 519-520, where the Federal Court of Appeal held that it had a basic obligation to follow its recent decisions, whatever the status of a principle like *stare decisis* in an appellate court.

I am following what, in my view, is the proper course to follow from the point of view of sound judicial administration when a court is faced with one of its recent decisions. It would, of course, be different if the recent decision had been rendered without having the point in mind or, possibly, if the Court were persuaded that there was an obvious oversight in the reasoning on which it was based.

This appears to catch the substance of what occurred in the *Eli Lilly* case.

[43] The question is ultimately whether the ruling in *Eli Lilly* was rendered inadvertently, without any real consultation with the jurisprudence. It is evident, from a reading of the decision, that counsel in the case essentially assumed that the interpretation of section 7 had been settled by the caselaw. As it turns out, this was an empty assumption, rather than an accurate reading of the caselaw. It is revealing, in this context, that there is no analysis of the caselaw in Justice Reed's decision, since any examination of the cases which she cites would have quickly revealed the error. In the circumstances, it is apparent that the decision in *Eli Lilly* only compounds an error in the existing jurisprudence.

[44] We see no reason to blindly follow the decision in *Lilly*. The Tribunal is master of its own procedure and we feel that it would be a mistake to import the existing confusion into the law of human rights. We are accordingly of the view that the decision in *Eli Lilly* was rendered *per incuriam* and can be safely disregarded. This view is borne out by the plain wording of section 7, which is free from ambiguity, to borrow a phrase from the court in *Buttrum*, *supra*, at page 100. There is nothing in the section which would suggest that it is referring to the number of expert witnesses that may be called on each factual issue.

III. THE PROCEDURE BEFORE THE TRIBUNAL

[45] We are accordingly of the view that section 7 of the *Canada Evidence Act* applies to a hearing before the Tribunal. This should not be allowed to interfere with the nature of the human rights process and there is no reason to be unduly formal in the matter. It is more important to respect the spirit rather than the letter of the *Act*, and it may be

sufficient, in at least some cases, if neither the parties nor the panel raise an objection to the witness lists. Whether this constitutes an implicit form of leave can be left for another time.

[46] Although it would be appropriate to deal with this kind of matter by Notice of Motion, under the interim rules, this is new territory. Counsel for the Respondent has already advised us that she was applying for leave, if we found that leave was necessary. We are accordingly prepared to dispense with any formalities and proceed as if a Notice of Motion had been presented to the Tribunal. The purpose of a Notice of Motion is to provide the Tribunal and the other parties with adequate notice of the point that will be argued. This is unnecessary in the present instance, as the other parties are well aware of the nature of the application.

[47] In deciding whether to grant leave to a party to call additional expert witnesses, a panel is governed by section 50(1) of the *Canadian Human Rights Act*, which states, *inter alia*, that a panel:

50(1) . . . shall give all parties . . . a full and ample opportunity . . . to appear at the inquiry, present evidence and make representations.

The french text may go even further:

50(1) . . . il donne á ceux-ci la possibilité *pleine et entière* de comparaître et de présenter . . . des éléments de preuve ainsi que leurs observations. (emphasis added)

As the Respondent has argued, in words taken from the decision of the Supreme Court in *Porto Seguro*, a tribunal must exercise its discretion in a manner which respects "the litigant's fundamental right to be heard."

IV. RULING

[48] We have concluded that a party who wishes to call more than five expert witnesses at a hearing must apply for leave under section 7 of the *Canada Evidence Act*. Since we are willing to proceed on the basis that there is an application before us, we would like the matter dealt with at the next sitting. The Respondent has already indicated that it is willing to provide the Tribunal and the other parties with a letter clarifying why it is calling each of the expert witnesses and the issues on which they will testify. We would accordingly direct that the letter be provided by August 3rd, 2001, the Friday before the next sitting date.

Paul Groarke, Chairperson

Athanasios Hadjis, Member

Jacinthe Théberge, Member

OTTAWA, Ontario

JULY 25, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

TRIBUNAL FILE NO.: T470/1097

STYLE OF CAUSE: Public Service Alliance of Canada v. Minister of Personnel for the Government of the Northwest Territories as Employer

PLACE OF HEARING: Ottawa, Ontario

July 4-5, 2001

RULING OF THE TRIBUNAL DATED: July 25, 2001

APPEARANCES:

Judith Allen and Elizabeth Drent For the Complainant

Ian Fine For the Canadian Human Rights Commission

Joy Noonan and Annette Bouzi For the Respondent

1. Pierre-André Côté, *The Interpretation of Legislation in Canada* (3d) (Scarborough: Thomson, 2000), p. 342-343.

2. Ruth Sullivan, *Driedger on the Construction of Statutes* (Toronto and Vancouver: Butterworths, 1994), p. 288.

3. Côté, p. 349

4. (1969, 1980)

5. John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (2d) (Toronto: Butterworths, 1998)

6. *Eli Lilly* v. *Novopharm* , *supra,* p. 714

7. Louis-Philippe Pigeon, Drafting and Interpreting Legislation (Toronto: Carswell, 1988), p. 59

8. *ibid*., p. 60