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

BETWEEN:

MAE PERLEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TOBIQUE BAND

Respondent

RULING ON JURISDICTION

Ruling No. 1

2001/03/22

PANEL: Anne Mactavish, Chairperson

[1] This case involves a complaint brought by Mae Perley against her former employer, the Tobique Band. Ms. Perley alleges that the Band discriminated against her on the basis of her family status and disability. In particular, Ms. Perley alleges that the Band treated her differently, failed to accommodate her disability and terminated her employment, all in contravention of Section 7 of the *Canadian Human Rights Act*.

[2] The Tobique Band objects to this matter proceeding on the basis that a reasonable apprehension of institutional bias exists with respect to the Canadian Human Rights Tribunal. Specifically, the Band asserts that the Tribunal lacks sufficient institutional independence so as to allow it to provide the parties with a fair and impartial hearing.

[3] In this regard, the Band relies upon the recent decision of the Federal Court in *Bell Canada v. CTEA, Femmes Action and Canadian Human Rights Commission* ("*Bell Canada*").(1) In *Bell Canada*, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court of Canada found that the Canadian Human Rights Tribunal was not an institutionally independent and impartial body as a result of the Canadian Human Rights Commission having the power to issue guidelines binding upon the Tribunal.(2) Tremblay-Lamer J. also concluded that the independence of the Tribunal was compromised by requiring the Chairperson of the Tribunal's approval for members of the Tribunal to complete cases after the expiry of their appointments.(3) As a consequence, Tremblay-Lamer J. ordered that there be no further proceedings in the *Bell Canada* matter until such time as the problems that she identified with the statutory regime were corrected.

[4] The Band submits that the statutory scheme identified by Tremblay-Lamer J. as being inadequate to ensure the independence of the Canadian Human Rights Tribunal is engaged in this proceeding, and that, as a result, this case should not proceed until the problems identified by Tremblay-Lamer J. have been corrected.

[5] The Canadian Human Rights Commission submits that the *Bell Canada* decision is distinguishable from the present case. Unlike *Bell Canada*, this is not a pay equity case. There are no guidelines in effect that could fetter the discretion of a Tribunal member or members hearing this matter. In addition, the Commission contends that it is unlikely that the term of a member hearing this case will expire before the hearing is completed, and thus the issue of extending members' terms is not likely to arise. Finally, the Commission argues that the Band has implicitly waived its right to challenge the institutional

impartiality of the Tribunal as, in the Commission's submission, the Band failed to raise its objection at the earliest practicable opportunity.

[6] Ms. Perley has not made any submissions with respect to these issues.

I. Applicability of *Bell Canada* Decision to the Present Case

[7] I am of the view that the reach of the decision in *Bell Canada* is not limited to cases in which guidelines have actually been issued by the Commission pursuant to Section 27 (2) of the *Canadian Human Rights Act*. According to Tremblay-Lamer J., the problem relating to the guidelines stems from the provisions of the *Canadian Human Rights Act* giving the Commission *the power* to make guidelines, and not from the existence of the guidelines themselves.[(4)] This view is reaffirmed in the dispositive portion of Tremblay-Lamer J.'s decision where she states:

I conclude that the Tribunal's Vice-Chairperson erred in law and was not correct in determining that it was an independent and impartial body with respect to *the power of the Commission to issue guidelines binding on the Tribunal* ...[(5)] (emphasis added)

[8] The power of the Commission to issue guidelines is derived from the statute. This power is not limited to pay equity cases. The *Canadian Human Rights Act* governs all proceedings before the Tribunal. As a consequence, I am of the view that the decision in *Bell Canada* applies to cases where no guidelines may actually be in existence.

[9] With respect to the power conferred on the Chairperson of the Tribunal to approve members completing cases after the expiry of their appointments, I note that this type of provision is by no means unique to the *Canadian Human Rights Act*. Comparable provisions exist in the enabling legislation governing many administrative tribunals.[(6)] Nevertheless, Tremblay-Lamer J. has concluded that Section 48.2 (2) of the *Canadian Human Rights Act* interferes with the security of tenure of members of the Tribunal in such a way that the independence and impartiality of the Tribunal is compromised. Her conclusion in this regard is binding upon me.

[10] I do not accept the Commission's submission that it is unlikely that the term of a member hearing this case will expire before the hearing is completed, and thus the issue of extending members' terms is not likely to arise. The problem that Tremblay-Lamer J. identified with the statute relates not to the way that the Chairperson's discretion may be exercised in a particular case, but rather to the existence of the discretion itself. [(7)]

[11] Tremblay-Lamer J. notes that there is no objective guarantee that the continuance of a member's duties after the expiry of the member's term would not be adversely affected by decisions *past or present* made by that member. Using Madam Justice Tremblay-Lamer's analysis, decisions made by members during the course of their mandates could

thus presumably be affected by the knowledge that the member might, at some future date, require leave of the Chairperson to complete a proceeding.

[12] Even if I were to conclude that it is the exercise of the Chairperson's power that creates the concern with respect to the independence of Tribunal members, there is no evidence before me as to when the terms of members of the Tribunal will expire, and thus no evidentiary basis on which I could conclude that the problem is unlikely to arise. If I were to take official notice of the mandates of the members of the Tribunal, I would find that, in fact, the terms of the majority of the members of the Tribunal are scheduled to expire within the next year, some as early as June of 2001. While no Tribunal member has yet been assigned to hear this case on its merits, given the exigencies of the litigation process, it is by no means clear that the expiry issue will not arise.

[13] For these reasons I am satisfied that the decision in *Bell Canada* applies to this case.

II. Has the Tobique Band Impliedly Waived its Right to Object to the Jurisdiction of the Tribunal?

[14] The Commission submits that the Band did not raise the independence issue at the first reasonable opportunity, and has thus waived its right to object.

[15] It is apparent from the jurisprudence that where a party has a concern with respect to the independence of a decision maker, that party must raise that concern at the earliest practicable opportunity.[(8)] There are several reasons favouring such a policy: a timely objection allows for the early determination of the issue. Parties are not put to the unnecessary expense of preparing for a hearing that may not proceed at the last minute. Early determination of the objection also allows the Tribunal to manage its process, the scheduling of its members, and the allocation of tax-payer funded resources in the most efficient manner possible.

[16] In order to determine whether or not the Band should be deemed to have waived its right to object to the jurisdiction of the Tribunal on the ground of lack of institutional independence, it is helpful to consider the chronology of events surrounding this case.

[17] Ms. Perley filed her complaint with the Commission on October 15, 1997. The Commission referred Ms. Perley's complaint to the Tribunal by letter dated January 16, 2001. On January 24, as part of its case management process, the Tribunal sent a questionnaire to the parties, seeking information to assist the Tribunal in planning the hearing. Because the decision in *Bell Canada* goes to jurisdiction, and calls into question the institutional integrity of the Tribunal, as part of the questionnaire process, the Tribunal sought submissions from the parties with respect to the implications of the *Bell Canada* decision as it may relate to these proceedings. On March 1, the Band filed submissions outlining its objection to the jurisdiction of the Tribunal, based on the decision in *Bell Canada*.

[18] It should be noted that, according to Tremblay-Lamer J., it is the provisions of the *Canadian Human Rights Act* that give rise to the concerns regarding the independence and impartiality of the Canadian Human Rights Tribunal. That is, it is the wording of the statute, and not the decision in the *Bell Canada* matter that creates the concern, although it may well be that it was the decision of Tremblay-Lamer J. that alerted the Band to the problem in this case. The Band is deemed to have had notice of the law of Canada, and thus to have been in possession of all of the information necessary to challenge the jurisdiction of the Tribunal, from the time at which the complaint was referred to the Tribunal.

[19] The Commission argues that the point at which this case was referred to the Tribunal was the first practicable opportunity to raise any objection to the jurisdiction of the Tribunal based upon a lack of institutional independence, and that having failed to do so, the Band should now be deemed to have waived its right to object.

[20] In my view, the principle of waiver should not operate here to deprive the Band of its right to object to the jurisdiction of the Tribunal on the basis of the statutory institutional scheme. Nothing substantive has occurred with respect to the case in the six weeks between the date of referral and the point at which the jurisdictional objection was raised. No dates have yet been set for the hearing, nor has a timetable been established for pre-hearing disclosure. In these circumstances, I do not think that the Band can fairly be said to have impliedly submitted to the jurisdiction of the Tribunal by its conduct.

III. Conclusion

[21] As a consequence, I am of the view that I have no alternative but to adjourn this matter *sine die*, until such time as the problems with the *Canadian Human Rights Act* identified by Tremblay-Lamer J. are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial. It is with great reluctance that I come to this conclusion. It is well established that there is a public interest in having complaints of discrimination dealt with expeditiously. [(9)] The effect of my decision to adjourn this matter *sine die* does not serve this public interest. It does not serve the interest of the complainant, who, more than three years after filing her complaint of discrimination with the Commission remains unable to have her 'day in court'. It also does not serve the interests of the individual or individuals within the Band who are allegedly responsible for discriminatory conduct: they continue to have the Sword of Damocles of unproven allegations of discrimination hanging over their heads for an indefinite period of time, with no opportunity for vindication.

[22] However, the public interest extends beyond speedy justice: Canadians involved in the human rights process are entitled to hearings before a fair and impartial Tribunal. According to the Federal Court, the Canadian Human Rights Tribunal is not such a Tribunal.

IV. Order

[23] For the foregoing reasons, the respondent's motion is granted, and this matter is adjourned *sine die* until such time as the problems with the *Canadian Human Rights Act* identified by Tremblay-Lamer J. in *Bell Canada* are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial.

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Anne L. Mactavish

OTTAWA, Ontario

March 22, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T617/0501

STYLE OF CAUSE: Mae Perley v. Tobique Band

RULING OF THE TRIBUNAL DATED: March 22, 2001

APPEARANCES:

Mae Perley For the complainant

Patrick O'Rourke Canadian Human Rights Commission

B. Richard Bell Counsel for the Tobique Band

1. Docket T-890-99, November 2, 2000.

2. See Section 27 (2) and (3) of the *Canadian Human Rights Act*.

3. Section 48.2 (2) of the *Canadian Human Rights Act*.

4. *Bell Canada*, at para. 86.

5. *Bell Canada*, at para. 128.

6. See, by way of example: Section 63 of the *Immigration Act*, R.S.C. 1985, c- I-2, with respect to members of the Immigration and Refugee Board; Section 9 (1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th supp.), Section 12 (2) of the *Canada Labour Code* governing members of the Canada Industrial Relations Board; Section 14 (3) of the *Status of the Artist Act*, 1992, c. 33 with respect to members of the Canadian Artists and Producers Professional Relations Tribunal; and Section 7 (1) of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18. See also Section 45 (1), *Federal Court Act* and Section 16 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

7. *Bell Canada*, at paras. 109-111. In this regard, I respectfully disagree with my colleague in *Stevenson v. Canadian Security and Intelligence Service*, Reasons for Decision, November 7, 2000 (C.H.R.T.).

8. See *Zündel v. Canadian Human Rights Commission et al.*, Docket A-215-99, November 10, 2000, *In Re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 at p. 112, and *Eyerley v. Seaspan International Ltd.*, Ruling No. 4. December 19, 2000 (C.H.R.T.)

9. Coincidentally, this principle was restated by Mr. Justice Richard, then of the Federal Court (Trial Division) in an earlier decision in the *Bell Canada* case. (See *Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.*, [1997] F.C.J. No. 207)