BETWEEN:

ENVIRONMENT CANADA

Employer

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

MOTION ON ALLEGATION OF BIAS

Ruling No. 1

2000/11/17

PANEL: Anne Mactavish, Chairperson

Grant Sinclair, Member

Sandra Goldstein, Member

I. THE ISSUE

[1] The Canadian Human Rights Commission asks that Sandra Goldstein be disqualified from this Review proceeding, alleging that her participation gives rise to a reasonable apprehension of bias.

[2] The Commission's motion is based upon the fact that, prior to her appointment to the Canadian Human Rights Tribunal, Ms. Goldstein was employed by the Canadian Human Rights Commission. According to written submissions filed by the Commission: "Ms. Goldstein's close temporal relationship with the Commission, a party to these proceedings, in precisely the same subject area as the issues she will be called upon to determine and, in particular, her employment in a subordinate position to the Commission's key expert witness, places her sufficiently close to give rise to a reasonable apprehension of bias and/or reverse bias."

[3] There is no suggestion of any actual bias on the part of Ms. Goldstein.

[4] Environment Canada supports the Commission's motion.

II. THE CONTEXT

[5] This motion arises in the context of a request by Environment Canada that the Employment Equity Review Tribunal review a direction issued to it by the Canadian Human Rights Commission. Environment Canada cites two grounds in support of its request:

1. That Environment Canada was not given an opportunity to make full representations to the Commission prior to the issuance of the Direction; and

2. That the Direction requires Environment Canada to provide information and carry out work which is beyond that required or warranted under the *Employment Equity Act* and *Regulations*.

III. THE TEST

[6] Both parties are in agreement that the appropriate test to be applied in motions of this nature is that articulated by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*.[(1)] According to the so-called 'de Grandpré test', the apprehension of bias must be a reasonable one, held by reasonable and right-minded people applying themselves to the question and obtaining thereon the required information.

[7] In the *National Energy Board* case, Mr. Justice de Grandpré went on to observe that the grounds sufficient to create a reasonable apprehension of bias must be substantial.[(2)] A subsequent decision of the Supreme Court of Canada noted that the person alleging an apprehension of bias bears a heavy burden. Such a finding must be carefully considered, as it calls into question the integrity of the entire administration of justice.[(3)]

[8] In a recent decision involving the Canadian Human Rights Tribunal, the Federal Court of Appeal noted that there is a presumption that members of Tribunals will act fairly and impartially, in the absence of evidence to the contrary.[(4)]

IV. THE FACTS

[9] Ms. Goldstein worked with the Canadian Human Rights Commission as an employee and as an independent contractor between November 16, 1992 and November 6, 1998. For much of the time that she was with the Commission, Ms. Goldstein was involved in the investigation and conciliation of "employment equity" complaints. According to the affidavit filed by the Canadian Human Rights Commission, in November, 1993, Ms. Goldstein commenced reporting to Rhys Phillips. Mr. Phillips is now the Chief of Legislation and Program Development, in the Commission's Employment Equity Branch. Although it was conceded that the affidavit was not as thorough as it might have been, it does suggest that Ms. Goldstein ceased reporting to Mr. Phillips in November, 1997. Commission counsel verbally confirmed that this was his understanding of the situation.

[10] Ms. Goldstein advised the parties that her role at the Commission was limited to the investigation and conciliation of complaints filed under section 10 of the *Canadian Human Rights Act* and complaints under the 1986 *Employment Equity Act*[(5)]. There is no suggestion that Ms. Goldstein ever had anything to do with the matter now before the Tribunal involving Environment Canada. Similarly, there is no evidence before the Tribunal that Ms. Goldstein had any involvement in any proceedings under the 1995 *Employment Equity Act*, or with the development or application of any policies or practices under the new legislation.

[11] Ms. Goldstein was appointed to this Employment Equity Review Tribunal on April 4, 2000, and the Commission gave notice of its intention to challenge Ms. Goldstein's appointment shortly thereafter.

V. THE ARGUMENT

[12] Counsel for the Commission submits that, like the Canadian Human Rights Tribunal, a high level of independence and impartiality is required for Employment Equity Review Tribunals. Principles of fairness and natural justice apply to proceedings before Employment Equity Review Tribunals.

[13] In his oral submissions, Commission counsel stated that Ms. Goldstein's past professional relationship with the Commission does not, itself, create a problem. Similarly, we were advised that the Commission is not alleging that any difficulties arise as a consequence of Ms. Goldstein's involvement in the implementation of the 1986 employment equity legislation. The key fact relied upon by the Commission to support its

contention that a reasonable apprehension of bias exists with respect to the participation of Ms. Goldstein in these proceedings is that the testimony of Ms. Goldstein's former supervisor will play a central role in the hearing.

[14] The Commission states that Rhys Phillips will be its principal expert witness. The Commission and Environment Canada each submit that findings with respect to the credibility of Mr. Phillips and Environment Canada's own expert witness will be central to the outcome of this case. Both sides submit that, having reported to Mr. Phillips while she worked at the Commission, Ms. Goldstein will not now be able to fairly assess Mr. Phillips' credibility.

[15] Counsel for Environment Canada also submits that Ms. Goldstein's lack of legal training is an additional factor that must be considered. As a non-lawyer, Ms. Goldstein is not subject to the same rules of professional conduct that govern the conduct of lawyer/adjudicators.

[16] Counsel further submit that as this case is the first Tribunal proceeding under the new *Employment Equity Act*, it is particularly important that members be free from any apprehended biases. Not only is there a complete absence of any jurisprudence in the area to guide the members in our deliberations: in addition, the outcome of the proceeding will undoubtedly be closely scrutinized by the community at large.

VI. ANALYSIS

[17] Employment Equity Review Tribunals are appointed by the Chairperson of the Canadian Human Rights Tribunal, from the members of the Canadian Human Rights Tribunal. The *Canadian Human Rights Act* stipulates that, to be eligible for appointment to the Canadian Human Rights Tribunal, individuals must have experience, expertise and interest in, and sensitivity to human rights.[(6)] In selecting members for appointment to Employment Equity Review Tribunals, the *Employment Equity Act* directs the Chairperson of the Canadian Human Rights Tribunal to take into account members' knowledge and experience in employment equity matters.[(7)]

[18] Counsel for the Commission acknowledges that in a specialized area such as employment equity there is a finite pool of individuals with the requisite expertise eligible for appointment. This expertise has to be obtained somewhere. In such circumstances, it is reasonable to assume that many of those appointed to such specialized tribunals may have some prior association with those coming before the Board in question. [(8)]

[19] Commission counsel did not pursue the issue of Ms. Goldstein's prior involvement in the employment equity area in argument. In any event, it should be noted that there are significant differences between the 1986 *Employment Equity Act* and the 1995 *Employment Equity Act*. The earlier legislation required private sector employers to file

annual employment equity reports. Failure to file such reports was a summary conviction offense. In contrast, the 1995 *Act* establishes a sophisticated legislative scheme allowing for a mandatory, pro-active approach to employment equity matters, with enforcement of the legislation now to occur through the mechanism of Employment Equity Review Tribunals. In addition, the ambit of the legislation was extended to cover public sector employers.

[20] In order to dispose of this motion it is not necessary to determine whether Employment Equity Review Tribunals should be held to the same standard as the Canadian Human Rights Tribunal with respect to issues of independence and impartiality. In our view, even if we were to assume that Employment Equity Review Tribunals are at the higher end of the spectrum in this regard, the evidence before this Tribunal does not satisfy the de Grandpré test.

[21] The fact that Ms. Goldstein reported to Mr. Phillips for a part of the time that she worked at the Canadian Human Rights Commission is not sufficient to create a reasonable apprehension of bias. As the Federal Court of Appeal noted in *Flamborough v. National Energy Board et al.*[(9)], a prior business association between a Tribunal member and a witness, even the principal witness for one of the parties, does not, in and of itself, create a reasonable apprehension of bias.

[22] Based upon the terms of the respondent's request for a review of the Direction issued by the Canadian Human Rights Commission, we are of the view that the issues in this proceeding are, to a large extent, legal issues. The determination of the ambit of the *Employment Equity Act* is question for the Tribunal. While the evidence of the expert witnesses may be of some assistance to us, the extent to which the credibility of the parties' experts will be a factor must be viewed in this light.

[23] As far as the fact that Ms. Goldstein is not a lawyer is concerned, we note that in *Zundel*, the Federal Court of Appeal did not draw a distinction between legally trained Tribunal members and those without legal training when it comes to the presumption of impartiality.

[24] In light of all the circumstances, including the statutory requirement for expertise, the passage of time between the point at which Mr. Phillips stopped supervising Ms. Goldstein and this proceeding, and the nature of the proceeding itself, we find that a reasonable apprehension of bias does not exist with respect to the participation of Ms. Goldstein in this case.

VII. DECISION

[25] For the foregoing reasons, the motion is dismissed.

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Anne L. Mactavish, Chairperson

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Grant Sinclair, Member

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Sandra Goldstein, Member

OTTAWA, Ontario

November 17, 2000

EMPLOYMENT EQUITY REVIEW TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: E001/0100

STYLE OF CAUSE: Environment Canada v. Canadian Human Rights Commission

PLACE OF HEARING: Ottawa, Ontario

October 16, 2000

RULING OF THE TRIBUNAL DATED: November 17, 2000

APPEARANCES:

Brian Saunders For Environment Canada

René Duval For the Canadian Human Rights Commission

1.[1978] 1 S.C.R. 369 at 394

2. Supra, at p. 395

3. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at 532

4. *Zundel v. Citron*, A-253-99, 18 May 2000

5. R.S. (2nd Supp.), c. 23, as rep. by S.C. 1995, c. 44, s. 54

6. Section 48.1 (2), *Canadian Human Rights Act*

7. Section 28 (3), *Employment Equity Act*

8. See *Re Marques et al. v. Dylex Ltd. et al.*, 81 D.L.R. 554 at 566

9. 55 N.R. 96 at 104