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

**BETWEEN:**

**CANADIAN TELEPHONE EMPLOYEES' ASSOCIATION,**

**COMMUNICATIONS, ENERGY AND**

**PAPERWORKERS UNION OF CANADA,**

**FEMMES-ACTION**

**Complainants**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**BELL CANADA**

**Respondent**

# MOTION TO STAY PROCEEDINGS

**Ruling No. 6**

**2002/03/11**

**PANEL:** J. Grant Sinclair, Chairperson

Pierre Deschamps, Member

## I. BACKGROUND

[1] On January 7, 2002, Bell Canada asked this Tribunal to stay/adjourn its proceedings until the Supreme Court of Canada rules on Bell's appeal of the decision of the Federal Court of Appeal dated May 24, 2001.

[2] These proceedings have had a long and tortuous history. The first complaints under section 11 of the *Canadian Human Rights Act* were filed as long ago as 1991, and the latest complaints were filed in 1994.

[3] The complaints were referred by the Commission for hearing by the Tribunal on May 27, 1996. On June 14, 1996, Bell applied to the Federal Court for judicial review of the Commission's decision to refer the complaints to the Tribunal.

[4] On August 7, 1996, a Human Rights Tribunal (Leighton Tribunal) was appointed. Bell brought a motion asking this Tribunal to adjourn its proceedings pending its judicial review application. This motion was heard by the Leighton Tribunal on October 24, 1996. The Tribunal dismissed the motion.

[5] Bell applied for judicial review of the Tribunal decision on December 11, 1996. Bell also filed a motion with the Federal Court in January 1996 to stay the Leighton Tribunal

proceedings pending its judicial review application regarding the Commission's referral of the complaints to the Tribunal.

[6] Bell's application to stay the Leighton Tribunal proceedings was dismissed by Richard J. of the Federal Court, Trial Division on February 21, 1997[(1)].

[7] In reaching his decision, Richard J. applied the three-part test enunciated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (A.G.)*[(2)], namely, that the applicant :

a) must demonstrate a serious question to be tried;

b) must establish that it will suffer "irreparable harm" if the relief is not granted. Irreparable refers to the nature of the harm rather than to its magnitude. It is harm which cannot be quantified in monetary terms or cannot be cured; and,

c) must show that the balance of convenience favors its position. The balance of convenience involves weighing or considering which of the parties will suffer the greater harm from the granting or refusal of the stay.

[8] Bell argued that it would have to expend considerable effort to prepare for the Tribunal hearing, which would result in disruption to its business and would cause it to incur substantial litigation costs. If the proceedings were not stayed, and it was successful in its judicial review application, Bell could not be compensated for any of these costs because the Tribunal had no power to order compensation.

[9] Richard J. rejected Bell's argument that exposure to litigation costs and business disruption amounted to irreparable harm. In coming to his conclusion, Richard J. followed the reasoning of the Federal Court, Trial Division in *Brocklebank v. Canada (Minister of National Defence)*[(3)]. In that case, although the Court was not prepared to say that the inability to recover costs may never be irreparable harm, it did say that the inability to recover costs incurred in the ordinary course of litigation is not sufficient to meet the irreparable harm test.

[10] As to the balance of convenience, Richard J. noted that six years had elapsed since wage gaps between male employees and female employees at Bell had been identified. He also noted that many employees had either left Bell, retired or died and, as time passed, it would become more difficult to locate those employees who may be entitled to compensation. The balance of convenience must take into account the public interest in having complaints of discrimination dealt with expeditiously. It was not in the public interest, on the facts of this case, to delay the proceedings before the Tribunal.

[11] The Federal Court, Trial Division in *ICN Pharmaceuticals Inc. v. Canada*[(4)] came to a similar conclusion on the question of irreparable harm. In its decision, the Court concluded that the expenditure of time and costs was a matter of inconvenience rather than irreparable harm.

[12] On June 4, 1997, Bell brought another motion to the Leighton Tribunal asking the Tribunal to adjourn its proceedings because it was not institutionally independent and impartial. The Tribunal rejected this motion and on June 10, 1997, Bell applied to the Federal Court for judicial review of this decision.

[13] On March 17, 1998, the Federal Court, Trial Division granted Bell's application for judicial review of the Commission's decision to refer the complaints to Tribunal. This decision was reversed by the Federal Court of Appeal on November 17, 1998. The Commission's referral of the complaints to the Tribunal was upheld. Bell's leave to appeal to the Supreme Court of Canada was denied.

[14] On March 23, 1998, the Federal Court, Trial Division[(5)] decided that the Tribunal was not institutionally independent and impartial (McGillis Decision) and all proceedings before the Leighton Tribunal came to a halt until these deficiencies were corrected.

[15] The *Act* was amended on June 30, 1998. Certain of the amendments were in response to the problems identified in the McGillis Decision. In January 1999, following the November 17, 1998, Federal Court of Appeal decision, the current Tribunal was assigned to hear the complaints.

[16] Bell challenged this Tribunal's jurisdiction to hear the complaints on the basis that the amendments to the *Act* had not cured the defects identified in the McGillis Decision. In its April 26, 1999 decision, the Tribunal rejected Bell's arguments and concluded that the amendments to the *Act* were curative so that the Tribunal could proceed. Bell applied to the Federal Court for judicial review of this decision.

[17] The Tribunal commenced hearing the complaints in June 1999, dealing first with a number of preliminary motions which continued into March 2000. In April 2000, the Tribunal commenced hearing the merits of the complaints and continued until October 27, 2000.

[18] On November 2, 2000, the Federal Court, Trial Division[(6)] allowed Bell's judicial review application of the Tribunal's April 26, 1999 decision, finding that the Tribunal was not institutionally independent and impartial (Tremblay-Lamer Decision). The Court ordered a cessation of the proceedings until the problems identified in the decision were corrected.

[19] The Commission appealed this decision on November 8, 2000 to the Federal Court of Appeal. In addition, CEP, one of the Complainant unions with the support of the Commission and CTEA, the other Complainant union, sought a stay of the Tremblay-Lamer Decision, pending the appeal.

[20] CEP's stay application was dismissed by the Federal Court of Appeal on November 29, 2000. CEP had argued that if the stay was not granted, its members would suffer irreparable harm because of the delay in receiving the monetary compensation they

may be entitled to relating to the breach of their rights under the *Act*. Sharlow J. A. did not consider such a delay in the resolution of the complaints irreparable harm.

[21] On the question of balance of convenience, Sharlow J.A. considered, as had Richard J., that the public interest had to be taken into account. The public interest, however, involved not only the expeditious resolution of human rights complaints, but also the constitutional value of the independence and impartiality of tribunals. On the facts of this application, the balance of convenience favoured the latter.

[22] In our opinion, this decision of the Federal Court of Appeal does not, as Bell argued before this Tribunal, depart from or limit in any way the reasoning of Richard J. in *Bell v. CEP* or that of Rothstein J. in *Brocklebank*. As Sharlow J.A. noted, in most cases where a stay is sought, the party is seeking the stay pending a decision on the merits. In this case, CEP was seeking a stay of the Tremblay-Lamer Decision that would have the effect of allowing the Tribunal to resume its proceedings in the face of a judicial determination that the Tribunal was fatally flawed.

[23] Indeed, Sharlow J.A. had the occasion to consider an application for a stay of a human rights Tribunal proceeding in the "usual" situation. In *Northwest Territories. v. Public Service Alliance of Canada*[(7)] the applicant, the Government of the Northwest Territories, applied to the Federal Court of Appeal for a stay of the Tribunal proceedings. GNWT had challenged the independence and impartiality of the Tribunal, which challenge was rejected both by the Tribunal and by the Federal Court, Trial Division on GNWT's application for judicial review of the Tribunal's decision.

[24] GNWT raised two arguments. First, if a stay was not granted and GNWT was successful in its appeal, it would have spent considerable time and money for the Tribunal proceedings, but could not recover the associated costs. Second, if a stay was denied, GNWT's participation in the Tribunal proceedings would result in an incurable denial of its right to a fair hearing.

[25] Sharlow J.A. did not accept either argument as constituting irreparable harm. There was no irreparable harm to the GNWT in participating in the hearing while the Commission and the Complainant completed their evidence. Further, Sharlow J.A. held that costs incurred in litigation do not amount to irreparable harm, relying on the decision of Richard J. in *Bell v. CEP*.

[26] On May 24, 2001, the Federal Court of Appeal reversed the decision of Tremblay-Lamer J.[(8)]. Thus, as the law now stands, this Tribunal has been found to be institutionally independent and impartial and there is no legal impediment on the Tribunal continuing to hear the complaints.

## II. DECISION

[27] As we understand it, it was the granting by the Supreme Court on December 13, 2001 of Bell's leave application that prompted this motion. In the time period from May 24, 2001 to January 8, 2002, Bell did not bring any application either to this Tribunal or to the Federal Court to stay the Tribunal proceedings.

[28] Bell has put forward two arguments in support of its motion. First, even if its appeal is successful, Bell cannot be compensated for costs incurred in participating in the Tribunal's proceedings. Secondly, being compelled to appear before this Tribunal which is not impartial or independent constitutes *per se*, irreparable harm and amounts to damage that cannot be remedied.

[29] Bell did not cite any judicial authority in support of the proposition that costs thrown away before a human rights Tribunal amounts to irreparable harm. This proposition was expressly rejected by the Federal Court in *Bell v. CEP, in Brocklebank* and in *Northwest Territories v. PSAC*.

[30] Further, we do not accept Bell's argument that it is being compelled to appear before a Tribunal which lacks the requisite independence and impartiality. This is not the case vis-à-vis this Tribunal. On the contrary, the Federal Court of Appeal has determined that this Tribunal is not so flawed.

[31] On the question of balance of convenience, the Federal Court has established that the public interest considerations must be taken into account. That is, both the public interest in having complaints of discrimination dealt with expeditiously and the public interest that those involved in a human rights process be accorded a fair hearing before an independent and impartial Tribunal.

[32] As stated above this Tribunal has been found to be an impartial and independent Tribunal by the Federal Court of Appeal. In our view, the granting of leave to appeal by the Supreme Court amounts to no more than a statement by that Court that there is a serious issue to be determined. The public interest in according Bell a fair hearing is not now in issue. The balance of convenience favours the speedy resolution of the human rights complaints referred to this Tribunal.

[33] Bell has failed to satisfy the irreparable harm test and the balance of convenience test as required by *RJR-MacDonald*. Accordingly, its motion to stay/adjourn the proceedings before this Tribunal, pending a decision by the Supreme Court of Canada on Bell's appeal, is hereby dismissed.

"Original signed by"

Grant Sinclair, Chairperson

Pierre Deschamps, Member

OTTAWA, Ontario

March 11, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

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APPEARANCES:

Larry Steinberg For the CTEA

Peter Engelmann For the CEP

Alain Portelance and Odette Gagnon For Femmes-Action

Andrew Raven and Patrick O'Rourke For the Canadian Human Rights Commission

Gary Rosen and Peter Mantas For Bell Canada

1. [1] Bell Canada v. Communications Energy and Paperworkers Union, [1997] F.C.J. No. 207(TD) (QL)

2. [2] [1994] 1 S.C.R. 312, 348.

3. [3] [1994] F.C.J. No. 1496 (TD) (QL)

4. [4] [1995] F.C.J. No. 1644 (TD) (QL)

5. 5 [1998] 3 F.C. 244

6. [6] [2000] F.C. 392

7. [7] [2001] F.C.J. No. 19 (FCA) (QL)

8. [8] [2001] 3 F.C. 481