DECISION RENDERED ON APRIL 16, 1981
T.D. 4/81

THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BEFORE: ROBERT W. KERR
BETWEEN:
MICHAEL WARD,
COMPLAINANT,
- and -
CANADIAN NATIONAL EXPRESS,
RESPONDENT,
- and -
CANADIAN HUMAN RIGHTS COMMISSION,
INTERVENANT.

RULING OF TRIBUNAL
APPEARANCES:
K.G. JURIANSZ Counsel for the Canadian Human Rights Commission and Michael Ward

L.L. BAND Counsel for Canadian National Railway Co.
DATE OF HEARING: March 4, 1981
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The respondent in this matter, Canadian National Express, has applied to the Tribunal, which consists of a single member, to disqualify itself on the basis of a reasonable apprehension of bias. This application was not based on any personal interest or prior involvement of the member of the Tribunal in relation to either the subject matter or the parties before it. Rather it was based on the communication to the Tribunal by the Canadian Human Rights Commission through its Chairperson of the following resolution:

RESOLUTION
MICHAEL WARD VS. CANADIAN NATIONAL EXPRESS
At the November 10, 1980 meeting of the Division of the Canadian Human Rights Commission, the following resolution was unanimously approved by the Commissioners:

'The Commission hereby resolves:

- that the complaint of Michael Ward of 128 Tarbart Terrace, London, Ontario against Canadian National Express alleging discrimination in employment on the ground of physical handicap has been substantiated;

- that a Human Rights Tribunal be appointed;
- that the Chief Commissioner establish himself and in his absence

the Deputy Chief Commissioner, a division of the Commission to appoint the Tribunal to inquire into the complaint.

Chief Commissioner
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- 2 This resolution, along with the Appointment of the Tribunal, a copy of the complaint and copies of letter to the parties apprising them of the appointment of the Tribunal, was sent to the Tribunal under a covering letter dated November 28, 1980 from the Chairperson of the Commission. The covering letter recited the enclosures, quoted section 40(1) of the Canadian Human Rights Act, referred to the availability of a Secretariat to handle administrative arrangements, and summarized By-law 4 of the Commission with respect to remuneration of the Tribunal.

The substance of the respondent's concern was that the transmission of the Commission's opinion on the merits of the case to the Tribunal in conjunction with the Tribunal's appointment could be interpreted by a reasonably informed person as an attempt to influence the Tribunal, particularly since the appointment is made by and remunerated under authority from the Commission. In light of the important maxim that justice must not only be done, but be seen to be done, Mr. Band submitted, this gave rise to a reasonable apprehension of bias which as a matter of law required the Tribunal, in view of its quasi-judicial role, to disqualify itself. There is no question that this Tribunal is quasi-judicial in nature. It is, therefore, bound by the rules of natural justice, including the rule against a Tribunal proceeding where there is a reasonable apprehension of bias.

Where factors which might otherwise give rise to an apprehension of bias are expressly authorized by statute, such factors are not grounds for disqualification of a quasi-judicial body: Law Society of Upper Canada v. French (1974), 49 D.L.R. (3d) 1 (S.C.C). Thus, although the Canadian Human Rights Commission may

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- 3 identify itself with the interests of a particular party at the hearing, the circumstances that the Commission appoints and regulates the payment of the Tribunal are not in themselves grounds for disqualification since the statute specifically authorises this. The respondent acknowledged this, but submitted

that the presence of these factors created an extra obligation to be scrupulous in avoiding anything else which might raise a suspicion of bias.
This submission does not seem supportable, however. Since one should presume
that Parliament is aware of the principles of natural justice and is itself

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careful to preserve them when constituting quasi-judicial bodies, the enactment of provisions which may appear to violate these principles must
reflect a determination either that these principles are not really violated
in a particular case or that they are out-weighed by other considerations.
This Tribunal can see no reason why such a determination should give rise to
an obligation to compensate for what Parliament has done by extra concern
with respect to other possible implications of bias.

The appropriate standard to be applied is the general one adopted by both the majority and minority in Committee for Justice and Liberty v. National Energy Board (1976), 68 D.L.R. (3d) 716 (S.C.C.). In the words of
Laskin, C.J.C., speaking for the majority, disqualification occurs where the
circumstances "give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment
of the issues to be determined": at p. 733. The role of the Commission in
appointing and regulating payment of the Tribunal does not give rise to any
higher standard. However, these factors may affect the way in which communications from the Commission to the

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are perceived by the reasonably well-informed person, and in this respect they will be considered further below.

Mr. Juriansz argued that the sole purpose of transmitting the Commission’s resolution to the Tribunal was to establish clearly the authority for the appointment of the Tribunal. He noted that the resolution
contained the authority for establishing a division of the Commission to
appoint the Tribunal without further action by the Commission as a whole. To
counter Mr. Band’s submission that the transmission of the Commission’s opinion on the merits of the case could reasonably be interpreted as an attempt to influence the Tribunal, Mr. Juriansz contended that one would
normally expect the Commission to have made the decision in question,

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is, that the complaint was substantiated, before it would take the step of
appointing a Tribunal. Thus, he submitted that a Tribunal would assume this
was the Commission's opinion from the mere fact of appointment and nothing
improper could be seen in making this explicit. He analogized the
Commission's finding to a decision to commit to trial at a preliminary
hearing in a criminal case, a proceeding which is well-known and which is not
regarded as a possible source of influence on the judge at the trial.

In order to determine whether the apprehension of bias claimed on behalf
of the respondent was a reasonable one, it is necessary to examine carefully
the role of the Canadian Human Rights Commission. Before this is done, it
must be observed that the question is not whether Mr. Band's interpretation
of the facts or Mr. Juriansz's interpretation is the more reasonable. It is
quite conceivable in such situations that reasonable people would differ in

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interpretations and consequently in their apprehensions.
Disqualification would occur if apprehension of bias is any one of the
possible reasonable interpretations.

Under the Canadian Human Rights Act, S.C. 1976-77, c.33, as amended, the
Commission receives complaints of alleged discriminatory practices, or it may

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initiate complaints itself: s. 32(1) & (4). The Commission has a number of
options in disposing of a complaint, although the availability of various
options is subject to certain findings by the Commission. The Commission may
dismiss a complaint on the ground that it is beyond its jurisdiction, is
trivial, frivolous, vexatious or made in bad faith, or is based on events
more than a year past (subject to a discretion to consider cases in this last
category): s. 33(b)(ii)-(iv). The Commission may decline to deal with the
complaint on the basis that the complainant ought to exhaust available
grievance or review procedures or that the complaint can be better dealt
with, initially or completely, by procedures under another federal

statute:
s. 33(a)2(b)(i). The Commission may designate a person to investigate the
complaint and report back, and following the report it is required to dismiss
the complaint if satisfied that the complaint is not substantiated or a
condition for dismissal, as already outlined, exists: s. 36(3)(b).
Alternatively, the Commission is required to refer the complainant to the
appropriate other procedure if satisfied that such procedure ought to be
exhausted in the case of a grievance or review procedure or that such
procedure is more appropriate in the case of another statutory procedure: s.
36(2). The Commission may adopt the investigator's report if satisfied that
the complaint is substantiated:

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36(3)(a). The Commission may appoint a conciliator to attempt to settle
the complaint: s. 37(1). The Commission may appoint a Tribunal to inquire
into and make a binding decision with respect to a remedy of the complaint:
s. 39(1) & 41.

While logically a certain natural sequence can be seen in these options,
and some of them are expressly inter-related, it is not clear if certain
implicit sequences or inter-relations are expected to occur, or merely
permitted. Moreover, it would seem that, even if expected to occur, some such
sequences or inter-relationships are clearly subject to the power of the
Commission to proceed differently. For example, it is not clear whether the
Commission should appoint an investigator before dismissing a complaint
unless a ground for dismissal is apparent on the face of the complaint. It is
at least open to question whether this is a matter to be left entirely in the
Commission's discretion. Similarly, it is not clear whether it is expected
that the Commission would designate an investigator before appointing a
conciliator or whether it is expected that it would provide either or both an
investigator and a conciliator before appointing a Tribunal. Here, however,
it would seem clear that the Commission can proceed to appoint either or both
a conciliator and a Tribunal without necessarily proceeding in sequence
through investigation to conciliation to appointment of a Tribunal.

Moreover, even with the extensive listing of options for the Commission,
it is not clear that all options are expressly provided for. It may he that
some options are merely implicit. For example, it is conceivable that, following an investigation, it

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be uncertain whether a complaint is justified. There is no express provision for this situation. This may mean that such a situation is to be
treated as one in which the complaint is not substantiated, since clearly it
is not one in which the complaint is substantiated. That would bring the case

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under s. 36(3)(b) and require dismissal of the complaint. On the other hand,
it may be implicit that such a case is simply not within s. 36(3) and the
Commission is free to appoint a Tribunal to resolve the matter.

This specific ambiguity is, in the view of the Tribunal, particularly critical to the question of whether the transmission of the Commission's
opinion to the Tribunal creates a reasonable apprehension of bias. If s.
36(3) is exhaustive of the options available to the Commission upon receipt
of an investigator's report, the Commission would be bound to dismiss the
complaint unless it found it to be substantiated. This would mean the Commission could only appoint a Tribunal either before receiving an investigator's report or after receiving such a report and finding the complaint to be substantiated. Since it might be assumed that the Commission
would rarely appoint a Tribunal in the former case, it might be overly sensitive, rather than reasonable, for a reasonably well-informed person to
apprehend that express confirmation by the Commission of its finding on substantiation would influence the Tribunal.

On the other hand, if an implicit option exists for the Commission to decline to resolve whether the complaint has been substantiated after it
receives an investigator's report, and to proceed to appoint a Tribunal, more
credibility may he accorded to

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apprehension of bias. If the Commission is not bound to resolve the question of substantiation, it might be inclined to leave that question

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in many cases where it might otherwise find substantiation. It might be reasonable, in these circumstances, for a reasonably well-informed person to
apprehend that, if the Commission advised the Tribunal of a finding of substantiation, this would lead the Tribunal to expect a clearcut case and
thus bias the hearing.

The Tribunal concludes that s. 36(3) is not exhaustive of the options available to the Commission upon request of an investigator's report. The
obvious contrast between "may" in clause (a) and "shall" in clause (b) makes
it clear that the Commission has a discretion not to adopt the investigator's
report, even if it is satisfied that the complaint is substantiated. There is
no provision as to what the Commission should do if it decides not to adopt
the investigator's report in such a case, although obvious possibilities are
to ask for further investigation by the same or another investigator, to call
for conciliation, or to appoint a Tribunal. If the section is not exhaustive
in this respect, there is no reason to think it exhaustive in other respects.

The express provisions cover situations where the Commission is satisfied that the complaint is substantiated or not substantiated. It leaves
completely untouched the possibility that the Commission is not satisfied as
to whether the complaint is substantiated or not. The appointment of a Tribunal would be an appropriate way to resolve such a situation, if not
indeed the only effective way of achieving final resolution in many such
cases. This in turn means that a Commission decision that a complaint is
substantiated may be significant,

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than routine. This gives some credibility to an apprehension

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of bias where a finding of substantiation is communicated to a Tribunal.
Even if this interpretation ultimately proves to be wrong, the existence
of such areas of ambiguity at this stage in the implementation of the Canadian Human Rights Act necessarily leaves individuals uncertain of their
rights. In this context, an apprehension of bias might reasonably arise

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it would not once the ambiguity is ruled upon and the uncertainty
removed.

Another important factor in determining whether the claimed
apprehension
of bias is reasonable is the connection between the opinion of the
Commission
and the actual issues before the Tribunal. The Oxford Dictionary
defines
"substantiate" as "give good grounds for". In the context of a decision
by
the Commission which has no power to legally alter the rights of the
parties,
this might be interpreted as no more than a finding that there is an
arguable
case sufficient to justify appointing a conciliator or Tribunal.
However,
when one looks at the language of s. 41 relating to the Tribunal's
ultimate
decision, one finds the same language used. The Tribunal's decision is
to be
based on its finding of whether the complaint is, or is not,
"substantiated".
This use of the same language adds weight to the credibility of an
apprehension that the finding of the Commission might influence the
Tribunal
because the issue on the merits appears to be identical before both
bodies.
This gives the Commission's finding on substantiation the appearance of
being more than a mere threshold determination comparable to the
decision at
a preliminary hearing in a criminal case. On the contrary, it really is
a
prior judgment on the key issue before the Tribunal.

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The way in which the Commission actually framed its resolution is also
relevant. The resolution that was transmitted to the Tribunal expressed
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Commission's opinion that the complaint was substantiated as part of
the
actual resolution. s. 36(3)(a) of the Act, on the other hand,
contemplates
that substantiation is a factual conclusion on the basis of which the
Commission may then resolve to take certain action. The inclusion of
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Commission's opinion as to substantiation in the body of the
resolution,
rather than in a preliminary recital, could encourage an apprehension
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the Commission was actually instructing or influencing the Tribunal,
and not
merely stating routine particulars.

No one of these factors by itself would necessarily create a reasonable apprehension of bias in a reasonably well-informed person, particularly since such a person should be familiar with the tradition of scrupulous fairness that has been developed by boards of inquiry or tribunals under human rights legislation in Canada. If only one of these factors were present, the transmission of the Commission's opinion to the Tribunal might be regarded as a merely technical indiscretion which does not create a reasonable apprehension of bias. Even together these factors might not produce a reasonable apprehension of bias if the Tribunal were not appointed by the Commission and remunerated under its regulation. However, when the Commission proceeds to notify the Tribunal of its opinion on the main issue before the Tribunal, when that opinion is not necessarily a routine precondition to the appointment, and when that opinion is expressed as a matter of resolve rather than as a preliminary recital, a reasonably well-informed

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person could reasonably interpret this as an attempt to instruct and influence the Tribunal. When the Commission, being the body responsible for appointing the Tribunal and for regulating its remuneration, makes this communication in conjunction with the notification of appointment, this interpretation could give rise to a reasonable apprehension of bias.

This decision should not be taken as implying that the Commission or its Chairperson intentionally attempted to influence the Tribunal. There is no evidence of this. The concern of the Commission to ensure that a clear line of authority for the establishment of the Tribunal was placed on the record at the outset is understandable. It was undoubtedly an oversight that the possible implication of bias as a result of incorporating the Commission's finding of substantiation into the resolution was not foreseen. In so far as establishing the line of authority for appointment of the Tribunal is concerned, the finding of substantiation is mere surplusage since such a finding is not a condition precedent to the appointment. Thus, there is no practical difficulty for the Commission to show the line of authority without

creating an apprehension of bias by simply not including its finding on substantiation in the resolution authorizing the appointment of a Tribunal.

The application of the respondent that this Tribunal disqualify itself is granted. It will be necessary for the Commission or a division thereof to
constitute a new Tribunal to proceed with the matter.