File Number: T503/2098

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

CANADIAN TELEPHONE EMPLOYEES ASSOCIATION,

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION

OF CANADA AND FEMMES-ACTION

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

BELL CANADA

Respondent

# INTERIM DECISION

TRIBUNAL: J. Grant Sinclair, Q. C. Chair

APPEARANCES:

Counsel for Bell Canada
Mr. Roy Heenan
Mr. Peter Blaikie
Mr. Guy Dufort
Ms. Elizabeth Camire

Counsel for Communications, Energy and Paperworkers Union of Canada
Mr. Peter Engelmann
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Counsel for the Canadian Human Rights Commission
Mr. Rene Duval
Ms. Julie Beauchemin

Counsel for Canadian Telephone Employees' Association
Mr. Bernard Fishbein
Ms. Judith King

Counsel for Femmes-Action
Mr. Alain Portelance
Ms. Michéle Brouillette

Dates and place of hearing: January 27, March 12, 13, 1999

Ottawa, Ontario

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**Background:**

The question to be decided is whether this Tribunal should proceed with a hearing to inquire into a number of complaints against Bell Canada filed by the Complainants over

the period 1990 to 1994. The complaints are on behalf of members of the Complainants, all of whom are Bell employees. The complaints allege that Bell pays its female employees in certain employment positions, lower wages than male employees who perform work of equal value, contrary to section 11 of the *Canadian Human Rights Act*. (1)

In May, 1996, the Commission requested the President of the Canadian Human Rights Tribunal to appoint a Tribunal to inquire into these complaints.

On June 14, 1996, Bell applied to the Federal Court for judicial review of the Commission`s decision to refer the complaints to a Tribunal. Mr. Justice Muldoon of the Federal Court, Trial Division , in a decision dated March 17, 1998, (2) set aside the Commission's decision to request a Tribunal. This decision was appealed by the Complainants (with the Commission as an intervenor) to the Federal Court of Appeal. In its decision of November 17, 1998, the Federal Court of Appeal allowed the appeal and restored the decision of the Commission. (3) On January 14, 1999, Bell filed leave to appeal to the Supreme Court of Canada. This leave application is pending.

In the meantime, on August 7, 1996, the President of the Tribunal appointed a three person tribunal (*Leighton Tribunal*) to enquire into the complaints against Bell. Bell made a number of motions to this Tribunal, including a motion that the Tribunal should not proceed because it was not independent and could not give Bell a fair hearing.

*The Leighton Tribunal* dismissed all the motions brought by Bell including the independence motion. (4) Bell sought judicial review of these decisions.

The judicial review applications were heard by McGillis J. in the Federal Court, Trial Division. In her decision dated March 23rd, 1998, (5) McGill, J. concluded that the Tribunal lacked the requisite security of tenure and financial security for a human rights Tribunal and ordered that there be no further proceedings in the matter until the problems identified in her decision relating to security of tenure and financial security are corrected by amendments to the *Act*.

The decision of McGillis J. was appealed by the Complainants and the Commission. The appeal will be heard in June, 1999.

In November 1998, following the decision of the Federal Court of Appeal, counsel for the Commission and the Complainants wrote to the Tribunal Registrar urging the Chairperson of the Tribunal to assign a panel and to set dates for hearing the complaints. Bell's response was that there should be no hearing at least until Bell's leave application to the Supreme Court has been heard. Plus, Bell asserted, the problems identified in the reasons for decision of McGillis J. have not been resolved by the recent amendments to the *Act*.

In March, 1999, as a result of the conflicting requests of the parties, the Tribunal held a hearing at which the parties argued their respective positions. This decision is in response to the positions taken and the arguments of the parties.

**Position of the Parties**

There are two aspects to Bell's position that the hearing should not proceed. First, the independence and impartiality of the Tribunal; second, the implications of the leave application.

The first aspect involves the question of the order of McGillis J. and whether the problems identified in the order have been cured by the recent amendments. And the related question of the statutory authority of the Commission, an interested party before the Tribunal, to issue guidelines that are binding on the Tribunal. This guideline power, conferred under s. 27(3) of the *Act*, allows the Commission to define the extent to which and the manner in which any provision of the *Act* applies; in this case, section 11. The Commission has issued the *Equal Wages Guidelines, 1986.*[(6)]

On the second aspect, the leave application, Bell argued that once filed, section 65 (1) of the *Supreme Court Act* operates to stay all proceedings. Further, says Bell, s.11 of the *Act* has a number of provisions which need clarification or definition by the Supreme Court. Once done, this would likely put an end to the complaints or, at least allow for a more expeditious hearing. Out of deference to the Supreme Court, this matter should not proceed until the leave of application is dealt with.

Of course, the Complainants and the Commission argue that the amendments to the *Act* meet the concerns of McGillis J. And if Bell wants to stay the proceedings pending its leave application, it should ask the Court to do so under s. 65.1 of the *Supreme Court Act*.[(7)]

**The Decision of McGillis J. and the Law**

McGillis J. reviewed in great detail, the institutional history of the Tribunal, its relationship to the Commission and the changes to this relationship leading to the institutional structure of the Tribunal, as it was when she heard Bell`s judicial review applications.

McGillis J. also made a detailed analysis of the legal authorities, particularly those of the Supreme Court of Canada, relating to the matter of judicial independence and impartiality. She summarized the law as follows: The requirement of judicial independence applies to tribunals performing an adjudicative role. The degree of independence required will vary with the nature of the tribunal, the interests at stake and other indices of independence. These principles were developed in *Valente v. The Queen* [(8)] and applied in many subsequent Supreme Court decisions.[(9)] It should be noted that McGillis J. recognized that there should be some flexibility when dealing with administrative tribunals. Indeed, this was so stated in the *Valente, Matsqui* and *Regie des*

*permis* cases where the Supreme Court recognized that such tribunals need not necessarily provide the same guarantees of independence as the higher courts. McGillis J. found this Tribunal performs a purely adjudicative role, dealing with quasi-constitutional rights and interests. As such, a high level of independence is required.

According to *Valente* and as elaborated in the *Judges Case*, judicial independence is premised on the existence of a set of objective guarantees or core characteristics. These are security of tenure, financial security and administrative independence. And there is a further requirement. The court or tribunal must be reasonably perceived as independent. The core characteristics are necessary to ensure a reasonable perception of independence.

The test for a reasonable apprehension of bias is "what would a reasonable/right-minded person, properly informed, and having thought the matter through, have concluded."

In *Katz v. the Vancouver Stock Exchange*,[(10)] the Supreme Court, (in affirming the decision of the British Columbia Court of Appeal) filled out the notion of "properly informed". It is not just the statute or legislative scheme that the reasonable person should consider, but also how it is applied or operates in practice. That is, properly informed means having knowledge of the operational facts and circumstances. Otherwise, the right-minded person may be right-minded, but uninformed.

McGillis J. concluded that the institutional arrangements of the Tribunal did not provide a sufficient guarantee of security of tenure and financial security. Under the *Act*, a member whose appointment expired during the currency of a hearing was dependent solely and exclusively on the discretion of the Minister of Justice to recommend reappointment. In the opinion of McGillis J., security of tenure in the case of a human rights Tribunal, requires that the Tribunal member have the right to complete the case without intervention from the executive or legislative branches. The ability to complete the hearing should not depend on ministerial discretion. This lack of security of tenure would raise a reasonable apprehension of bias in the mind of a fully informed and reasonable person.

As to the guarantee of financial security, under the *Act*, it was the Commission that set the rate of remuneration for Tribunal members. The Commission is invariably an interested party before the Tribunal. Further, the Commission had to agree to changes to the remuneration of Tribunal members and this involved negotiations between the Commission and the Tribunal, a litigant before the Tribunal.

McGillis J. concluded that these financial arrangements between the Tribunal and the Commission negatively impacts on the appearance of independence. And again, a reasonable, informed person, considering all of the facts would have a reasonable apprehension of bias.

On the question of administrative independence, McGillis J. considered changes in the administrative arrangements between the Tribunal and the Commission in recent years

and was satisfied that the Tribunal now had sufficient administrative independence relating to the exercise of its judicial functions.

McGillis J. came to no conclusion on the issue of the guidelines power of the Commission. She did, however, suggest that any potential problem could be eliminated by allowing the Commission to make guidelines which are not binding on the Tribunal.

**The Issues**

In my view, given the decision of McGillis J. the questions that remain to be answered are::

(i) Have the problems identified in the reasons of McGillis J. been corrected by the legislative amendments to the *Act*;

(ii) Does the Commission's power to issue binding guidelines create a perception of bias on the part of the Tribunal.

In argument, Bell referred to other aspects of the Tribunal's institutional arrangements that Bell claimed affected the Tribunal's independence. These included the per diem or part-time status of Tribunal members; their assignment to cases on an ad hoc basis; the requirement for special financial arrangements between the Tribunal and Treasury Board for hearings scheduled for more than forty days; and the lack of legislative restrictions on current or past members of the Tribunal acting as consultants.

These arguments have a certain "déjà vu all over again" quality to them. They were before the *Leighton Tribunal* and before McGillis J. In my view, these matters and the effect on the Tribunal's independence need not be litigated again. They have already been decided in the Federal Court. The Federal Court of Appeal decision in *M.N.R. v. Chevron Resources Ltd.*[(11)] (and the cases cited on pages 55-57 of that decision) support this conclusion. Speaking for the Court, Noel, J. stated: "In my view, the position of the respondent that the only issues that have been "conclusively" determined are those that have been specifically decided is untenable if the doctrine of res judicata, insofar as it bars further litigation with respect to undecided but related matters, applies."[(12)]

**Security of Tenure**

The Act was amended, effective July 1, 1998. The amendments constituted the Canadian Human Rights Tribunal consisting of fifteen members including a Chairperson and a Vice- Chairperson as may be appointed by the Governor-in-Council. The Chairperson and Vice-Chairperson are full time members of the Tribunal up to a maximum term of seven years. The other members can be either full time or part time up to a maximum term of three years. All hold office during good behaviour. The Chairperson may be removed for cause, the Vice Chairperson and members are subject to disciplinary and remedial measures as set out in the *Act*. There is no run-off provision in the *Act* for members whose appointment expires during the currency of a hearing. In such cases, the

Tribunal member may conclude the inquiry with the approval of the Chairperson. Thus, a Tribunal member 's right to complete a hearing no longer depends on ministerial discretion. The Tribunal member is able to complete the task without executive or legislative intervention.

In my opinion, this amendment addresses the problems identified in the reasons of McGillis J. But Bell does not accept that this is a sufficient guarantee of security of tenure. Bell argues that a member is still beholden to the Chairperson to complete the inquiry. The question is, would the right-minded, informed person have an apprehension of bias? My answer is, no.

Because of the newness of the amendments, the Tribunal practice as to the approval of the Chairperson, has yet to develop. There are other considerations, however, that guide me to my conclusion. It is now the Chairperson and only the chairperson (not the Minister and the Governor- in-Council) who makes the decision. Can it be assumed that the Chair will act arbitrarily or, capriciously or, in bad faith and not allow a member to complete the case? We have no evidence to conclude that the Chairperson would act in this way.

A reasonable and properly informed person would know that the Chairperson's discretion is not absolute or unfettered. The exercise of this discretion implies good faith and the discretion must be exercised within the perspective of the legislation.

The *Act* does not provide any criteria in s. 48.2 (2), but it does provide a perspective. If the question were asked as to what circumstances should guide the exercise of this discretion, the matters set out in s. 48.3 (13) (a) - (d) of the *Act* provides a rational and logical answer. A right-minded person informed of all of the above would conclude that there is a sufficient guarantee of security of tenure.

Bell also objects to the disciplinary and remedial measures for the Vice-Chairperson and members introduced by the amendments. The argument is that members will act or decide in a way so as not to fall into disfavour with the Chairperson.

Certain things should be noted about the disciplinary process. It is heavily layered such that no one person can decide to discipline a member. The Chairperson can only request; the Minister may or may not respond to the request and the Minister's response is conditional on those matters in s. 48.3 (13) (a) - (d); the Minister may recommend to the Governor-in-Council who may appoint a judge to conduct an inquiry; the judge must hold a full hearing, make a report to the Minister with findings and recommendations if any; the judge can only recommend disciplinary or remedial action if the matters in s. 48.3 (13) (a) - (d) are present. Finally, it is up to the Governor-in-Council to decide what action, if any, to take.

The essence of these provisions is that a Tribunal member can only be removed for cause, and only after a full judicial inquiry. This process parallels the process in the *Judges'Act* [(13)] which also applies to Tribunal members. The basis for taking action are the same as in

the *Act*. The differences are that it is the Minister of Justice or a provincial attorney-general that initiates the process and it is the Canadian Judicial Council that holds the inquiry; and a judge can only be removed from office by joint address of the Senate/House of Commons. A Tribunal member may be removed by order or the Governor-in-Council. This accords with the proposition in *Valente* that the same standards that apply to superior courts should not necessarily apply to tribunals. I conclude that the disciplinary and remedial procedures do not give rise to an apprehension of bias.

**Financial Security**

McGillis J. was concerned with the fact that the Commission, an interested party before the Tribunal, set the rates of remuneration Tribunal members. And any increase in the rates of remuneration could only be accomplished through negotiations between the Tribunal and the Commission.

This is no longer the case. The amendments to the *Act*, provide that the remuneration for Tribunal members is prescribed by the Governor-in-Council, by order-in-council. In *Valente*, the Supreme Court rejected the argument that the salaries of provincial court judges should be set by the legislature and be a charge on the Consolidated Revenue Fund. The Court said that neither of these two features are essential to financial security. It is acceptable for these judges' salaries to be fixed by the executive, and requiring annual appropriations. And the current method of remuneration for Tribunal members should be acceptable.

**The Guidelines Issue**

It is interesting, and I say this, *en passant*, that on this issue, the Commission took the position at one point in its argument, that the *Equal Wage Guidelines, 1986* should not be regarded as binding on this Tribunal. This is so, even though the Commission has the power under the *Act* to pass binding guidelines and has done so.

On the other hand, Bell who considers that the binding nature of the guidelines prevents it from getting a fair hearing in this case, argued strenuously that the guidelines are binding.

In my opinion, the *Equal Wage Guidelines, 1986* are binding on the Tribunal. The reason is that the guidelines are subordinate legislation, and must be interpreted and applied as such by the Tribunal as any other law. Subordinate legislation complements and particularizes the parent legislation. This is in contrast to administrative directives issued by an executive officer as part of the administrative process for which he/she is responsible. These are not usually binding on a court or tribunal.

It is my view that the word "binding" in s.27(3) makes it clear that the guidelines are more than administrative directives. This is in accord with the statement of Joyal, J. in *Canada v. the Public Alliance of Canada* [(14)] where he considered the fact that the

Tribunal is bound by the guidelines as stating no more than that the Tribunal is bound by law to the extent that such a law is valid and binding.

Bell introduced considerable documentation including Annual Reports of the Commission and memoranda from successive Tribunal presidents and one Minister of Justice, all recommending that the power of the Commission to issue binding guidelines be eliminated. This was in support of the proposition that reasonably informed persons consider that this statutory power of the Commission adversely affects the independence or impartiality of the Tribunal.

In the 1990's, two Bills were introduced in Parliament, Bill C-108, ( in 1992), Bill C-98 (in 1997) and Bill S-5 (in 1998) was introduced in the Senate. All three Bills proposed amendments to the *Act*. Only Bill S-5 was enacted into law which became the recent amendments to the *Act*. Bill C-108 proposed to repeal S. 27(3) & (4) of the *Act*. However, the *Equal Wages Guidelines, 1986* were to remain in force. Bills C-98 & S-5 left the guidelines powers intact.

Thus, there is one group of persons who consider the guidelines power to be a problem for the independence and impartiality of the Tribunal. And, another group, the drafters of the legislation, the Parliament and the Senate and the Committees who, apparently did not consider it a problem.

The parties in their argument did not provide any information as to which sections of the guidelines are relevant to the complaints in this case; or generally, how the guidelines are to be applied, or even whether the guidelines will be referred to at all. It would also have been useful if the parties had provided information as to how the guidelines have been interpreted or applied in other s. 11 cases under the *Act*. Such information as to the operational realities of the guidelines was 1not provided. There may be a right-minded person, but such person is not properly informed.

For this reason, it could be said that it is premature to make any decision on the guideline issue until the hearing is completed. As Sopinka, J. noted in *Katz*, the case law has tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment.

But the right-minded, informed person would know that Parliament has chosen to maintain s.27 (3) and (4) in the *Act* and has not followed the recommendations of the Commission or the Tribunal Presidents. The informed, right-minded person would also know that any guideline issued by the Commission is subject to a systematic review and scrutiny under the *Statutory Instruments Act*.[(15)] The guidelines must be submitted to the Clerk of the Privy Council. The Clerk is required to examine the guidelines in consultation with the Deputy Minister of Justice to ensure that the guidelines are authorized by statute; are not an unusual or unexpected use of the statutory authority; do not offend existing rights; and are not inconsistent with the *Canadian Charter of Human Rights and Freedoms* or the *Canadian Bill of Rights*.[(16)] The guidelines must be published in the Canada Gazette.

In addition, under s. 19 of the *Statutory Instruments Act*, any statutory instrument made after December 31, 1971 are permanently referred to the Standing Joint Committee of the House of Commons and to the Senate for the Scrutiny of Regulations.[(17)] The criteria that the Joint Committee uses in the review and scrutiny includes whether any instrument: is not authorized by the enabling statute; is not in conformity with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights;* appears for any reason to infringe the rule of law or is not consistent with rules of natural justice or; trespasses unduly on rights and liberties.[(18)]

The power delegated by Parliament to the Commission allows Parliament to call on the expertise of the Commission to flesh out the broad, legislative framework in s.11 of the *Act*. The Joint Committee review and the review by the Clerk of the Privy Council provides a mechanism for Parliament to examine and supervise the exercise of the legislative powers it has delegated to the Commission.

In my opinion, a reasonable person would perceive that there is sufficient institutional distance between the Commission issuing guidelines and the guidelines becoming law. The guidelines are not binding on the Tribunal solely because s.27 (3) of the *Act* so provides. The guidelines are only binding after registration under the *Statutory Instruments Act*, and having gone through the processes described above. Therefore, I conclude that the Commission's power to pass guidelines binding on the Tribunal does not create a reasonable apprehension of bias.

**Bell's Leave Application to the Supreme Court**

I agree that it would be very helpful to have clarification from the Supreme Court of certain provisions in s.11 of the *Act*. Although Bell indicated that the Supreme Court decision may be given in March, the Court has not yet given a decision. The fact that these complaints have been outstanding for at least five years, and in some cases longer, should also be taken into account.

This matter has an extensive history of procedural motions and judicial review applications. Unfortunately, the end does not appear to be in sight. The hearing with these complaints should not be adjourned every time a motion is denied so that the Tribunal's decision can be reviewed by a higher court. Although Bell's argument is appealing, I do not agree that the hearing should not proceed until the leave application is decided.

As to the question of whether the judgement of the Federal Court of Appeal is stayed on the filing of the leave application, s. 40 of the *Supreme Court Act*[(19)] confers a right of appeal with leave to the Supreme Court. If leave is granted, a notice of appeal must be served and filed. It appears that s. 65 (1) of this *Act* provides for a stay of execution where a notice of appeal has been served and filed. This is not the case here.

If a party wishes to stay the judgement appealed from, and the leave application is pending, it must make this request under s. 65.1 of the *Supreme Court Act*. As I

understand it, Bell has not made such a request. Accordingly, the judgement of the Federal Court of Appeal has not been stayed.

**Conclusion**

I have concluded, for all of the preceding reasons, that the hearing by this Tribunal into the complaints filed should proceed. The Tribunal will contact the parties to set dates for the resumption of the hearing.

Dated at Ottawa this 26th day of April, 1999.

"Original signed by"

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J. Grant Sinclair

1. *R.S. 1985, c.H -6 as am.*

2. *Bell Canada v. CTEA et. al., (1998) 98 CLLC 230-004.*

3. *CTEA et al v. Bell Canada, [1999] 1 F.C. 113 (F.C.A.)*

4. *CTEA et al v. Bell Canada, June 4, 1997, (CHRT).*

5. B*ell Canada v. CTEA, [1998] 3 FC, 244.*

6. *SOR/86-1082*

7. *R.S., c. S-19, s.1.*

8. *[1985] 2 S.C.R. 673*

9. *See for example, Canadian Pacific Ltd. v. Matsqui Indian Band [1995] ¸1 S.C.R. 3; 2747-3174 Quebec Inc. v. Regis des permis d`alcool du Quebec, [1996] ¸3 S.C.R. 919; Reference re Public Sector Pay Reduction Act (P.E.I.), s. 10 (1988), 150 D.L.R. (4th) 577 (The Judges' Case).*

10. *(1995) 128 D.L.R. (4th) 424 (B.C.C.A.) aff'd (1996) 139 D.L.R. (4th) 575 (S.C.C.).*

11. *[1998] 232 N.R. 44.*

12. *Supra, p. 55.*

13. *R.S. c. J-1, s.1., SS. 63-65, and S. 69.*

14. *(1991) 48 F.T.R. 55, 58 (F.C.A.), Unreported Court File No. A-921-91.*

15. *1970, 71, 72, C. 38, s.1.*

16. *Supra, s.3*

17. *See Rules of the Senate of Canada, Part X, s. 86 (1) (d); and Standing Orders of the House of Commons, e. xiii, s. 104 (3) (c).*

18. *See First Report Standing Joint Committee for the Scrutiny of Regulations, November 6, 1997.*

19. *R.S., c. S-19, s.1.*