

File No.: T503/2098
Ruling No.: 2

CANADIAN HUMAN RIGHTS TRIBUNAL

R.S.C., 1985, c. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

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

**RULING ON BELL'S REQUEST FOR ISSUANCE
OF A SUBPOENA *DUCES TECUM***

TRIBUNAL:

J. Grant Sinclair, Q.C. Chairperson
Shirish Chotalia Member
Pierre Deschamps Member

By letter dated January 19, 2000, Bell Canada requested that the Tribunal issue additional subpoenas *duces tecum* to Linda Wu and Paul Durber. In its letter, Bell set out a description of the productions to be included in the subpoenas.

The Tribunal had previously issued subpoenas to Ms. Wu and Mr. Durber returnable at the hearing on Motion #5 to resume on Monday, January 24, 2000. Bell's request was prompted by the will-say statements of Mr. Durber and Ms. Wu which it received from the Canadian Human Rights Commission.

The Commission and the Complainants, C.E.T.A. and C.E.P., objected to the issuance by the Tribunal of these subpoenas and the Tribunal directed that the matter be dealt with when the hearing resumed on Monday, January 24, 2000. The hearing, however, was adjourned and the Tribunal subsequently directed the parties to make written submissions on this question.

Initially, we note that it appears that the productions, requested by Bell, if they exist, are likely to be in the possession of the Commission, the C.E.T.A. or C.E.P., all parties to this Motion. This being so, it is curious as to why Bell did not seek disclosure from these parties, if the productions are relevant to the confidentiality issue. However, Bell did not do so. We will not speculate further.

Bell argues that the issuance of a subpoena by this Tribunal is an administrative act and upon request by a party, the Tribunal has no discretion but to issue the subpoena. A subpoena requisition goes as of right and only after it has issued, can it be challenged.

Bell's argument is founded on section 50(3)(a) of the *Canadian Human Rights Act*, the Rules of the superior courts and certain legal authorities. We do not agree that the issuance of a subpoena by the Tribunal is a purely administrative act over which the Tribunal has no discretion.

Under section 50(3)(a) of the *Act*, a member or panel *may*, issue a subpoena if the member or panel *considers* it necessary for the full hearing and consideration of the complaint. There is nothing in this section which says that the issuance of a subpoena is administrative, not discretionary. We agree that the issuance of a subpoena by the Federal Court or the provincial courts is administrative. But this is so because the rules of procedure of these courts clearly provide this. The rules of procedure of this Tribunal do not so provide.

We have reviewed the authorities submitted by the parties on this issue. We consider the decision of the Federal Court of Appeal in *Restrictive Trade Practices Commission and*

Stoner v. Director of Investigation in Research, Combines Investigation Act, to be the most apposite.

In this case, the Restrictive Trade Practices Commission was given subpoena powers under the *Inquiries Act*, similar to the power of the Tribunal under section 50(3)(a) of the *Act*. The relevant issue was whether the issuance of a subpoena by the Commission was a purely administrative act or whether there was a discretion. The Court of Appeal pointed out that it is the rules of the courts which make the issuance of subpoenas an administrative act. No such rules had been adopted by the Commission. Similarly, no such rules have been adopted by this Tribunal. For this reason, the Tribunal rejects the proposition that the issuance of a subpoena is as of right and the Tribunal has no discretion in the matter.

The article "Subpoena *Duces Tecum*" provided by Bell in its authorities (Tab-18) makes it clear that the purpose of the *duces tecum* part of the subpoena is to compel the production of documents in the possession of third parties, who are not parties to the litigation. Presumably, Ms. Wu and Mr. Durber are within this category.

There are other principles set out in the authorities of the parties that we consider relevant in deciding this matter. First and most importantly, there should be a rational link between the documents requested and the issues in this motion; that is, the information sought should be arguably relevant.

The request should not be speculative or amount to a "fishing expedition". The description of the documents should not be too broad or general, and should be identified with reasonable particularity.

Finally, the request should not be oppressive, that is, should not subject a stranger to the litigation to an onerous and far ranging search for the documents.

With respect to the first paragraph of the subpoena for Ms. Wu, Bell seeks production of document relating to any of 74 documents on which the Commission intends to rely. But all 74 documents are not in dispute. This must be narrowed to any correspondence or documents between the Commission and C.E.T.A. relating to those of the 74 documents that are in dispute. In addition, only the correspondence or document or notes in which there is a specific reference to or a discussion of confidentiality of Joint Study documents are to be produced.

Bell's application with respect to the first paragraph in the subpoena from Ms. Wu is granted in part. Ms. Wu must bring and produce at her cross-examination only the documents referenced in the preceding paragraph that are within her possession as a third party.

As to the second and third paragraphs of the subpoena requested for Ms. Wu, we are unable to see the nexus between these productions and the issue of confidentiality. The second and third paragraphs of the subpoena request relate to passages in Ms. Wu's will-

say statement, which passages relate to facts surrounding the origins of C.E.T.A.'s complaints. These facts, according to Bell, "will shed light on the confidential nature of the 74 documents to be relied upon by the Tribunal and thus meet the test of arguable relevance". Unfortunately, this explanation does not shed any more light for us on the relevance of these documents. Accordingly, the Tribunal declines to direct that Ms. Wu brings and produces the documents referred to in the second and third paragraphs of the subpoena requested.

Turning now to the subpoena for Mr. Durber, it is not apparent how the documentation referred to in the first paragraph is relevant to the confidentiality question. Rather, in our view, this request relates to Motion #6, which is to be argued after Motion #5. These documents need not be produced for this Motion.

The second paragraph of the subpoena for Mr. Durber is almost the same as the first paragraph of the subpoena for Linda Wu and Bell's application with respect to this paragraph is granted in part. The Tribunal directs that Mr. Durber bring and produce at his cross-examination, any correspondence or any documentation between the Commission and C.E.T.A. & C.E.P. relating to those of the 74 documents that are in dispute and in which there is a specific reference to or a discussion of the confidentiality of Joint Study documents. Only those documents within the possession of Mr. Durber as a third party are to be produced.

The subject matter of the third and fifth paragraphs of the subpoena for Paul Durber, appears to the Tribunal to relate to the merits of the complaints, not to the issues on this Motion. Bell's submission on the third paragraph is that these requests refer to striking omissions in Mr. Durber's will-say statement relating to C.E.T.A. & C.E.P. complaints which do not make use of specific job comparisons. According to Bell, "it is self-evident that Bell is entitled to explore these areas on cross-examination since they are apt to shed light on the issue of the confidentiality of the Commission's 74 documents". Further, argues Bell, natural justice requires that Bell have these documents. These are conclusions without explanations. Try as we may, we are not, either on the face of the third and fifth paragraphs or from Bell's submission, able to discern their relevance to the confidentiality question.

Finally, the fourth paragraph of the subpoena for Mr. Durber, requests documents exchanged between the Commission and HRC one of the consultants for the Joint Study. Bell's explanation is that Mr. Durber's will-say statement is silent on the relationship between the Commission and HRC, and these documents are apt to shed light on the confidentiality issues. We have tried to understand how the Commission's relationship with HRC, if one existed, is relevant to the issue of confidentiality. Without more explanation, we are unable to see a connection. Mr. Durber is not required to produce the documents referred to in the third, fourth or fifth paragraphs.

DATED at Ottawa, Ontario, this 9th day of February, 2000.

J. GRANT SINCLAIR,
Chair

Shirish Chotalia,
Member

Pierre Deschamps,
Member