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

BETWEEN:

KEVIN HOULIHAN,
DANIEL A. SIMMS,
BILL DARRINGTON,
CARL P. HALEY,
PERRY D. MERCER

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HALIFAX EMPLOYER'S ASSOCIATION,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 269

Respondents

RULING ON JURISDICTION

PANEL: Anne Mactavish, Chairperson

Ruling No. 1
2000/12/08

[1] Between October, 1997 and February of 1998, five individuals filed complaints against the Halifax Employer's Association and the International Longshoremen's Association, Local 269. The complaints allege that the complainants were denied employment with the HEA by reason of a perceived drug dependency, contrary to Section 7 of the Canadian Human Rights Act. They further allege that the HEA has a policy or practice that tends to deprive people of employment on the basis of disability, in

contravention of Section 10 of the Act. The complainants also say that the Union has entered into an agreement that tends to deprive people of employment opportunities on the basis of a proscribed ground, contrary to Section 9 of the Act.

[2] The respondents object to this matter proceeding on the basis that a reasonable apprehension of institutional bias exists with respect to the Canadian Human Rights Tribunal. Specifically, the HEA and the Union assert that the Tribunal lacks sufficient institutional independence so as to allow it to provide the parties with a fair and impartial hearing.

[3] In this regard, the respondents rely upon the recent decision of the Federal Court in Bell Canada v. CTEA, Femmes Action and Canadian Human Rights Commission ("Bell Canada") (1). In Bell Canada, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court of Canada found that the Tribunal was not an institutionally independent and impartial body as a result of the Canadian Human Rights Commission having the power to issue guidelines binding upon the Tribunal (2). Tremblay-Lamer J. also concluded that the independence of the Tribunal was compromised by requiring the Chairperson of the Tribunal's approval for members of the Tribunal to complete cases after the expiry of their appointments (3). As a consequence, Tremblay-Lamer J. ordered that there be no further proceedings in the Bell Canada matter until such time as the problems that she identified with the statutory regime were corrected.

[4] The respondents submit that the statutory scheme identified by Tremblay-Lamer J. as being inadequate to ensure the independence of the Tribunal is engaged in this proceeding, and that, as a result, this case should not proceed until such time as the Tribunal can provide the parties with a fair and impartial hearing.

[5] The Canadian Human Rights Commission contends that Tremblay-Lamer J.'s decision applies only to the Bell Canada proceeding, and is not directed to the world at large. The Commission notes that the decision in Bell Canada is under appeal, and thus is not a final decision. The Commission further submits that the Bell Canada decision is distinguishable from the present case. Unlike Bell Canada, this is not a pay equity case. There are no guidelines in effect that could fetter the discretion of a Tribunal member or members hearing this matter. The Commission contends that it is unlikely that the term of a member hearing this case will expire before the hearing is completed, and thus the issue of extending members' terms is not likely to arise. Finally, the Commission raises the issue of implied waiver, and submits that the balance of convenience favours the case proceeding.

[6] The complainants have not provided any submissions on these issues.

[7] I will deal with each of the issues in turn.

I. Implications of the Bell Canada Appeal

[8] The fact that Tremblay-Lamer J.'s decision in Bell Canada is under appeal is irrelevant. At this point, it is a valid judicial pronouncement, and is binding upon this Tribunal to the extent that the facts in Bell Canada cannot be distinguished from those of the present case.

II. Can Bell Canada be distinguished from this case?

[9] The Commission says that Bell Canada has no application to these proceedings, as there are no guidelines issued by the Commission with respect to the subject matter of these complaints.

[10] I do not agree that the reach of the decision in Bell Canada is limited to cases in which guidelines have actually been issued by the Commission pursuant to Section 27 (2) of the Canadian Human Rights Act. According to Tremblay-Lamer J., the problem relating to the guidelines stems from the provisions of the Canadian Human Rights Act giving the Commission the power to make guidelines, and not from the existence of the guidelines themselves (4). This view is reaffirmed in the dispositive portion of Tremblay-Lamer J.'s decision where she states:

I conclude that the Tribunal's Vice-Chairperson erred in law and was not correct in determining that it was an independent and impartial body with respect to the power of the Commission to issue guidelines binding on the Tribunal ... (emphasis added) (5)

[11] The power of the Commission to issue guidelines is derived from the statute. This power is not limited to pay equity cases. The Canadian Human Rights Act governs all proceedings before the Canadian Human Rights Tribunal. As a consequence, I am of the view that the decision in Bell Canada applies to cases where no guidelines may actually be in existence.

[12] With respect to the power conferred on the Chairperson of the Tribunal to approve members completing cases after the expiry of their appointments, I note that this type of provision is by no means unique to the Canadian Human Rights Act. Comparable provisions exist in the enabling legislation governing many administrative tribunals (6). Nevertheless, Tremblay-Lamer J. has concluded that Section 48.2 (2) of the Canadian Human Rights Act interferes with the security of tenure of members of the Tribunal in such a way that the independence and impartiality of the Tribunal is compromised. Her conclusion in this regard is binding upon me.

[13] I do not accept the Commission's submission that it is unlikely that the term of a member hearing this case will expire before the hearing is completed, and thus the issue of extending members' terms is not likely to arise. The problem that Tremblay-Lamer J. identified with the statute relates not to the way that the Chairperson's discretion may be exercised in a particular case, but rather to the existence of the discretion itself (7).

[14] Tremblay-Lamer J. notes that there is no objective guarantee that the continuance of a member's duties after the expiry of the member's term would not be adversely affected

by decisions past or present made by that member. Using Madam Justice Tremblay-Lamer's analysis, decisions made by members during the course of their mandates could thus presumably be affected by the knowledge that the member might, at some future date, require leave of the Chairperson to complete a proceeding.

[15] Even if I were to conclude that it is the exercise of the Chairperson's power that creates the concern with respect to the independence of Tribunal members, there is no evidence before me as to when the terms of members of the Tribunal will expire, and thus no evidentiary basis on which I could conclude that the problem is unlikely to arise. If I were to take official notice of the mandates of the members of the Tribunal, I would find that, in fact, the terms of the majority of the members of the Tribunal are scheduled to expire within the next year, some as early as June of 2001. While no Tribunal member has yet been assigned to hear this case on its merits, given the exigencies of the litigation process, it is by no means clear that the expiry issue will not arise.

III. Have the Respondents Impliedly Waived Their Right to Object to the Jurisdiction of the Tribunal?

[16] The Commission submits that the respondents did not raise the independence issue at the first reasonable opportunity, and thus have waived their right to object.

[17] It is apparent from the jurisprudence that, where a party has a concern with respect to the independence of a decision maker, that party must raise that concern at the earliest practicable opportunity (8). In order to determine whether or not the respondents should be deemed to have waived their right to object to the jurisdiction of the Tribunal on the ground of lack of independence, it is helpful to consider the chronology of events surrounding this case.

[18] These complaints were referred to the Tribunal by letter dated October 6, 2000. On October 31, as part of its case management process, the Tribunal sent a questionnaire to the parties, seeking information to assist the Tribunal in planning the hearing. The first item in the questionnaire dealt with preliminary matters, and asked "Will there be any questions of law, jurisdiction or procedural matters that you intend to raise at the commencement of the hearing?" Because the decision in Bell Canada goes to jurisdiction, and calls into question the institutional integrity of the Tribunal, on November 15, the Tribunal sought submissions from the parties with respect to the implications of the Bell Canada decision as it may relate to these proceedings. Also on November 15, the Union returned its questionnaire to the Tribunal. The Union's questionnaire did not identify any questions of law, procedural or jurisdictional matters to be raised by the Union. On November 22 the HEA returned its questionnaire, wherein it raised an objection to the jurisdiction of the Tribunal based upon the Bell Canada decision. On November 23, the Union raised its challenge to the jurisdiction of the Tribunal based on the Bell Canada decision.

[19] It should be noted that, according to Tremblay-Lamer J., it is the provisions of the Canadian Human Rights Act that give rise to the concerns regarding the independence

and impartiality of the Tribunal. That is, it is the wording of the statute, and not the decision in the Bell Canada matter that creates the concern, although it may well be that it was the decision of Tremblay-Lamer J. that alerted the respondents to the problem. The respondents are deemed to have had notice of the law of Canada, and thus to have been in possession of all of the information necessary to challenge the jurisdiction of the Tribunal, from the time at which the complaints were referred to the Tribunal.

[20] Having said that, very little time has elapsed from the time that the complaints were referred to the Tribunal to the time that the objections to the jurisdiction of the Tribunal were raised by the respondents. No dates have yet been set for the hearing, nor has a timetable been established for pre-hearing disclosure.

[21] In my view, the principle of waiver should not operate here to deprive the respondents of their right to object to the jurisdiction of the Tribunal on the basis of the statutory institutional scheme. Nothing of any consequence has occurred with respect to the scheduling of this hearing. While the ILA did not initially identify any concern on its part with respect to the independence of the Tribunal, their position changed within a matter of days. In these circumstances, I do not think that the respondents can fairly be said to have impliedly submitted to the jurisdiction of the Tribunal by their conduct.

IV. Conclusion

[22] For these reasons I am satisfied that the decision in Bell Canada applies to this case. As a consequence, I am of the view that I have no alternative but to adjourn this matter sine die, until such time as the problems with the Canadian Human Rights Act identified by Tremblay-Lamer J. are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial. It is with great reluctance that I come to this conclusion. It is well established that there is a public interest in having complaints of discrimination dealt with expeditiously (9). The effect of my decision to adjourn this matter sine die does not serve this public interest. It does not serve the interest of the complainants, who, some three years after filing their complaints of discrimination with the Commission remain unable to have their 'day in court'. It also does not serve the interests of the individuals within the respondent organizations allegedly responsible for discriminatory conduct: they continue to have the Sword of Damocles of unproven allegations of discrimination hanging over their heads for an indefinite period of time, with no opportunity for vindication.

[23] However, the public interest extends beyond speedy justice: Canadians involved in the human rights process are entitled to hearings before a fair and impartial Tribunal. According to the Federal Court, the Canadian Human Rights Tribunal is not such a Tribunal.

V. Order

[24] The respondents' motions are granted. This matter is adjourned sine die until such time as the problems with the Canadian Human Rights Act identified by Tremblay-Lamer

J. in Bell Canada are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial.

1. Docket T-890-99, November 2, 2000.

2. See Section 27 (2) of the Canadian Human Rights Act.

3. Section 48.2 (2) of the Canadian Human Rights Act.

4. Bell Canada, at para. 86.

5. Bell Canada, at para. 128.

6. See, by way of example: Section 63 of the Immigration Act, R.S.C. 1985, c- I-2, with respect to members of the Immigration and Refugee Board; Section 9 (1) of the Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th supp.), Section 12 (2) of the Canada Labour Code governing members of the Canada Industrial Relations Board; Section 14 (3) of the Status of the Artist Act, 1992, c. 33 with respect to members of the Canadian Artists and Producers Professional Relations Tribunal; and Section 7 (1) of the Veterans Review and Appeal Board Act, S.C. 1995, c. 18. See also Section 45 (1) of the Federal Court Act and Section 16 of the Tax Court of Canada Act, R.S.C. 1985, c. T-2.

7. Bell Canada, at paras. 109-111. In this regard, I respectfully disagree with my colleague in Stevenson v. Canadian Security and Intelligence Service, Reasons for Decision, November 7, 2000 (C.H.R.T.).

8. See Zündel v. Canadian Human Rights Commission et al., Docket A-215-99, November 10, 2000, In Re Human Rights Tribunal and Atomic Energy of Canada Ltd., [1986] 1 F.C. 103 at p. 112 , and McAvinn v. Canadian Human Rights Commission and Strait Crossing Bridge Limited, Ruling No. 2. November 23, 2000 (C.H.R.T.).

9. Coincidentally, this principle was restated by Mr. Justice Richard, then of the Federal Court (Trial Division) in an earlier decision in the Bell Canada case. (See Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al., [1997] F.C.J. No. 207)

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Anne L. Mactavish

OTTAWA, Ontario
December 8, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T609/6700

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RULING OF THE TRIBUNAL DATED: December 8, 2000

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Bill Darrington
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