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

BETWEEN:

PATRICK J. EYERLEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SEASPAN INTERNATIONAL LIMITED

Respondent

RULING ON JURISDICTION

Ruling No. 4

2000/12/19

PANEL: Anne Mactavish, Chairperson

[1] This case involves a complaint brought by Patrick Eyerley against his former employer, Seaspan International Limited. Mr. Eyerley alleges that Seaspan failed to accommodate his disability, and terminated his employment, all in contravention of Section 7 of the *Canadian Human Rights Act*.

[2] Seaspan seeks an adjournment of these proceedings. Seaspan objects to the matter proceeding on the basis that a reasonable apprehension of institutional bias exists with respect to the Canadian Human Rights Tribunal. Specifically, Seaspan asserts that the Tribunal lacks sufficient institutional independence so as to allow it to provide Seaspan with a fair and impartial hearing.

[3] In support of this contention, Seaspan relies upon the recent decision of the Federal Court in *Bell Canada v. CTEA, CEP, Femmes Action and Canadian Human Rights Commission* ("*Bell Canada*").[(1)] According to Seaspan, as a decision of a superior court, the decision in *Bell Canada* is binding on the Canadian Human Rights Tribunal, based upon principles of *stare decisis*. Seaspan further submits that, in pronouncing on the status of the Canadian Human Rights Tribunal's enabling legislation, the decision of Tremblay-Lamer J. is a decision *in rem*, and is thus conclusive against all persons appearing before the Tribunal, and not merely those involved in the *Bell Canada* matter.

[4] In *Bell Canada*, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court of Canada found that the Canadian Human Rights 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 the Chairperson of the Tribunal having the power to approve members of the Tribunal completing cases to which they may be assigned 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.

[5] The Canadian Human Rights Commission contends that the decision in *Bell Canada* 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 further 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.[(4)]

[6] In any event, the Commission submits that Seaspan did not raise the independence issue at the first reasonable opportunity, and thus has waived its right to object.

[7] Mr. Eyerley did not provide any written submissions on these issues. He did advise the Tribunal Registry by telephone that he wants the matter to proceed. He says that he and his family are living on social assistance and are having a very difficult time financially.

[8] I do not find it necessary to make any findings with respect to the application of Tremblay-Lamer J.'s decision in *Bell Canada* to this case. Assuming that the reasoning in *Bell Canada* does apply to the circumstances of this case, I believe that the matter can be disposed of on the basis of waiver.

I. Law Concerning Waiver

[9] The jurisprudence suggests 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.[(5)]

[10] Seaspan contends that, to the extent that the decision in *Zündel v. Canadian Human Rights Commission et al.* is applicable to the circumstances of this case, the Federal Court of Appeal's application of the doctrine of implied waiver is incorrect. According to Seaspan, the issue of bias, institutional or otherwise, goes to the jurisdiction of the Tribunal. Once a determination is made that the Tribunal's statutory framework creates a reasonable apprehension of bias, the Tribunal ceases to have jurisdiction until the situation is remedied.

[11] In any event, Seaspan submits that the facts of this case are distinguishable from those in *Zündel*: in *Zündel*, the issue of institutional bias was not raised until mid-way through the hearing. In this case, Seaspan says that it has always objected to the jurisdiction of the Tribunal. Seaspan contends that it has alleged repeated violations of the principles of natural justice and procedural fairness from the start of the Commission investigation of Mr. Eyerley's complaint. According to Seaspan, its allegations of misconduct on the part of the Canadian Human Rights Commission go to the jurisdiction of the Tribunal. Seaspan states that what is 'the earliest practicable opportunity' depends on all of the circumstances. In this case, Seaspan points out that the hearing has not yet commenced, and that Seaspan raised its objection with respect to the independence of the Tribunal as soon as the *Bell Canada* decision came to its attention. Seaspan maintains that the Tribunal is bound to follow the decision of Tremblay-Lamer J. in *Bell Canada*. Finally, Seaspan submits that it would be a violation of section 2 (e) of the *Canadian Bill of Rights* to proceed with a hearing before a Tribunal which lacks institutional independence.

[12] Just as principles of *stare decisis* apply with respect to the decision in *Bell Canada*, so too am I bound to follow the decisions of the Federal Court of Appeal in *Zündel* and *AECL*. In both cases, the Federal Court of Appeal was very clear: an objection to the jurisdiction of an administrative tribunal, based upon an apprehension of institutional bias, must be raised at the earliest practicable opportunity, failing which a party may be deemed to have waived its right to object.

II. What is the Earliest Practicable Opportunity?

[13] Although it is clear that an objection to the jurisdiction of an administrative tribunal, based upon an apprehension of institutional bias, must be raised at the earliest practicable opportunity, what is less clear is what will be deemed to be the earliest such opportunity. Is it always sufficient to raise an objection at the commencement of the formal hearing on the merits, or, in some circumstances should such an objection be raised at the commencement of, or during, the pre-hearing process? A review of the case law discloses very little guidance on the subject.

[14] The Supreme Court of Canada looked at the question in the context of a challenge to the institutional independence of a human rights tribunal in *Taylor v. Canada (Human Rights Commission)*.[(6)] In *Taylor*, McLachlin J. referred to the decision in *MacBain v. Lederman*[(7)], noting that in *MacBain*, the objection to the jurisdiction of the Tribunal was made *at the outset of the process, before the hearing began*. McLachlin J. did observe that there may be circumstances in which the failure to raise bias *from the outset* may not amount to implied waiver, citing the example of a situation where a party is not represented by counsel. She concluded, however, that it was not necessary to delineate a precise time at which bias must be raised, being satisfied that the applicant in the case under consideration had not raised the issue at the earliest practicable opportunity.

[15] In *Geneen v. Toronto*,[(8)] the Divisional Court of Ontario found that the failure to raise an allegation of bias until after several pre-hearing steps had been taken, and a number of procedural orders had been made, precluded a party from then claiming bias, when the facts giving rise to the allegation of bias were known from the outset.

[16] In *Mitchell v. Institute of Chartered Accountants*,[(9)] the Manitoba Court of Queen's Bench observed that, where a party has concerns with respect to the impartiality of an adjudicative body, the concerns should be raised soon after the party becomes aware of the facts relied upon, or ought reasonably to have been aware of the information in question.

[17] The Canadian Human Rights Tribunal recently considered this issue in *McAvinn v. Strait Crossing Bridge Limited*,[(10)] where it noted that it is necessary that allegations of institutional bias be raised at the earliest practicable opportunity so as to allow proceedings to unfold in an orderly manner. In *McAvinn*, the objection to the jurisdiction of the Tribunal was raised several months into the pre-hearing process, and shortly before the hearing was to begin. The Tribunal reviewed the history of the case, noting that in the

course of the pre-hearing process, the respondent had sought relief from the Tribunal without questioning the institutional independence and impartiality of the Tribunal. The Tribunal found that the respondent had waived its right to object, and directed that the case proceed to hearing.

[18] Perhaps the most helpful commentary is found in Jones and de Villars' *Principles of Administrative Law*:

Allegations of institutional bias are different than allegations of personal bias. By their nature, they are allegations about the tribunal as an institution, not about individual members. The party making an allegation of institutional bias does not need to worry so much about tiptoeing around the members' feelings.

This kind of allegation should be raised as far in advance of the hearing as the evidence permits. They should certainly be raised during any pre-hearing conference. [(11)] (emphasis added)

[19] There are several reasons favouring such a policy: a timely objection allows for the early determination of the issue. Parties are not put to the unnecessary expense of preparing for a hearing that may not proceed at the last minute. Early determination of the objection also allows the Tribunal to manage its process, the scheduling of its members, and the allocation of its taxpayer-funded resources in the most efficient manner possible.

III. Chronology of Events

[20] In order to determine whether or not Seaspan should be deemed to have waived its right to object to the jurisdiction of the Tribunal on the ground of lack of independence, it is necessary to consider the chronology of events surrounding this case.

[21] Mr. Eyerley filed his human rights complaint with the Canadian Human Rights Commission on May 7, 1998. On May 9, 2000, Mr. Eyerley's complaint was referred to the Tribunal for hearing.

[22] On May 17, 2000, 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 asked the parties to identify any preliminary questions of law, jurisdiction or procedure.

[23] By letter dated June 8, 2000, Seaspan, through its counsel, returned the completed questionnaire to the Tribunal. In relation to the first question, Seaspan identified several preliminary issues, including matters relating to the jurisdiction of the Tribunal to deal with Mr. Eyerley's complaint. No mention was made of any concern that Seaspan might have with respect to the independence or impartiality of the Canadian Human Rights Tribunal.

[24] On June 15, 2000, a conference call was held between the parties and myself in order to set hearing dates, and to establish a mechanism for dealing with Seaspan's preliminary objections. Various issues relating to disclosure were also dealt with. The hearing on the merits was scheduled to commence on October 24, 2000, subject to the outcome of Seaspan's jurisdictional challenge.

[25] On June 27, 2000, Seaspan moved for an order compelling production of a legal opinion prepared for Mr. Eyerley's union, which opinion had been provided to the Canadian Human Rights Commission during the course of the Commission investigation. Submissions were received from the parties on the issue of privilege and a further conference call was held with the Tribunal on July 19 to deal with the matter, as well as with a request that had been received for interested party status from Mr. Eyerley's union. The interested party application was disposed of in the course of the conference call. On July 21, 2000, I issued a ruling on Seaspan's motion for production of the legal opinion. (12)

[26] Following receipt of submissions from the parties with respect to Seaspan's jurisdictional challenge, I issued a ruling on August 2, 2000 concluding that the Canadian Human Rights Tribunal did have jurisdiction to deal with Mr. Eyerley's complaint notwithstanding that Mr. Eyerley was a member of a union, and was thus subject to the grievance process under the collective agreement in force between Mr. Eyerley's union and Seaspan. I also concluded that the fact that Mr. Eyerley's disability resulted from a workplace accident, and was thus covered by provincial Workers' Compensation legislation, did not deprive the Tribunal of jurisdiction. Seaspan has sought judicial review of this ruling. Seaspan's Notice of Application for Judicial Review makes no mention of any concern with respect to the independence or impartiality of the Tribunal.

[27] By letter dated August 3, 2000 Seaspan made submissions with respect to a second request for interested party status. A ruling regarding this request was issued on August 9. (13)

[28] On August 8 the Commission and Mr. Eyerley delivered their disclosure package, as required by the Tribunal's Rules of Procedure.

[29] On September 12, the Commission asked for an adjournment of the hearing. Seaspan consented to the adjournment, and the case was rescheduled to the week of January 8, 2001. The week of March 19 was also set aside for this hearing, if required.

[30] On November 2, 2000 Madam Justice Tremblay-Lamer rendered her decision in the *Bell Canada* matter. On November 21, 2000 Seaspan raised its objection to the jurisdiction of the Tribunal based upon its lack of independence and impartiality.

IV. Does Waiver Operate Here?

[31] It is apparent from the submissions filed by Seaspan that it was the decision in *Bell Canada* that has alerted it to the deficiencies in the structure of the Tribunal: Seaspan's submissions noting that 'As soon as the *Bell Canada* decision came down, Seaspan voiced its complaint at the earliest practicable opportunity.'[(14)]

[32] It should be noted that, according to Tremblay-Lamer J. in *Bell Canada*, 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. Seaspan has been represented by counsel throughout this proceeding, and is deemed to have had notice of the law of Canada. Thus it has been in possession of all of the information necessary to challenge the jurisdiction of the Tribunal, from the time at which the complaint was referred to the Tribunal.

[33] Seaspan submits that the earliest practicable opportunity '... need not be, but can be, a time prior to the start of the hearing, or at the outset of the hearing.'[(15)] Given the extensive contact between adjudicative bodies and parties to litigation that occurs with modern case-management practices, it would, in my view, be artificial to attach some particular significance to the first day of the hearing on the merits as the appropriate time for raising an objection of this nature.

[34] This case was referred to the Tribunal some seven months ago. On May 17, Seaspan was specifically invited to identify any preliminary or jurisdictional matters raised by Mr. Eyerley's complaint. Seaspan took advantage of that opportunity, identifying several matters that needed to be dealt with before the hearing could commence, including challenges to the jurisdiction of the Canadian Human Rights Tribunal. Having clearly turned its mind to the question of the jurisdiction of the Tribunal, Seaspan did not identify any concerns on its part with respect to the institutional independence or impartiality of the Tribunal.

[35] On the basis of the information received from the parties, the Tribunal proceeded to establish a timetable for this case, as well as a process for the determination of the numerous jurisdictional and procedural questions that have arisen in the course of this matter. Along the way, Seaspan has sought and obtained relief from the Tribunal in relation to the disclosure of documents,[(16)] again, never expressing any concern with respect to the institutional independence or impartiality of the Tribunal. The pre-hearing process is now largely complete, and the hearing is set to begin in less than a month.[(17)]

[36] It is true that Seaspan has objected to the jurisdiction of the Canadian Human Rights Tribunal from the time that this case was referred to the Tribunal. Seaspan's objections, however, are based upon the existence of a collective agreement governing the employment relationship between Mr. Eyerley and Seaspan, and provincial Worker's Compensation legislation dealing with workplace injuries. Seaspan's objections have nothing to do with any apprehension of institutional bias on the part of Seaspan with respect to the structure of the Tribunal.

[37] In other words, while Seaspan may have objected to the jurisdiction of the Canadian Human Rights Tribunal to deal with the subject-matter of Mr. Eyerley's complaint, a review of the history of the case discloses that Seaspan has, by its conduct, accepted the impartiality of the Tribunal to make decisions relating to that complaint.

[38] In all of the circumstances, I cannot conclude that Seaspan has raised its objection to the jurisdiction of the Tribunal at the earliest practicable opportunity. In my view, having failed to do so, Seaspan has impliedly waived its right to object to the jurisdiction of the Tribunal on the basis that a reasonable apprehension of institutional bias exists with respect to the Canadian Human Rights Tribunal.

V. Order:

[39] For the foregoing reasons, Seaspan's motion is dismissed. This matter shall proceed to hearing on January 8, 2001.

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Anne L. Mactavish

OTTAWA, Ontario

December 19, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T565/2300

STYLE OF CAUSE: Patrick J. Eyerley v. Seaspan International Limited

RULING OF THE TRIBUNAL DATED: December 19, 2000

APPEARANCES:

Patrick J. Eyerley For the complainant

William R. Holder For the Canadian Human Rights Commission

Michael Hunter Counsel for Seaspan International Limited

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

2. See Section 27 (2) and (3) of the *Canadian Human Rights Act*.

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

4. In this regard, the Commission relies upon the decision of Member Chicoine of the Canadian Human Rights Tribunal in *Stevenson v. Canadian Security Intelligence Service*, November 7, 2000.

5. See *Zündel v. Canadian Human Rights Commission et al.*, Docket A-215-99, November 10, 2000, and *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.).

6. [1990] 3 S.C.R. 892

7. [1985], 1 F.C. 856

8. (1999), 117 O.A.C. 305

9. (1994) 22 Admin. L.R. (2d) 182, aff'd on other grounds [1994] 10 W.W.R. 768 (Man. C.A.)

10. Supra., Footnote 5.

11. 3rd ed. (Scarborough: Carswell, 1999) at p. 391

12. Ruling No. 1.

13. Ruling No. 3.

14. Letter from Gavin Marshall, Counsel to Seaspan, dated December 11, 2000.

15. Ibid.

16. See Ruling No.1.

17. In this regard, this case may be distinguished from the situation in cases such as *Houlihan et al. v. Halifax Employer's Association et al.*, Ruling No. 1, December 8, 2000 (C.H.R.T.), and *Quigley v. Ocean Construction Supplies*, Ruling No. 1, December 18, 2000 (C.H.R.T.).