

Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

BETWEEN:

PHYLLIS McAVINN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STRAIT CROSSING BRIDGE LIMITED

Respondent

**SUBMISSIONS BY PARTIES
RE: BELL CANADA v. CTEA ET AL.
Decision of the Federal Court of Canada (Tremblay-Lamer J.)
dated November 2, 2000**

Ruling No. 2
2000/11/23

PANEL: Pierre Deschamps, Chairperson

[1] On November 8th, 2000, the Tribunal asked the parties to make submissions on the potential effect on the present proceedings of the recent decision (1) rendered by Madam Justice Tremblay-Lamer of the Federal Court in relation to the institutional independence and impartiality of the Tribunal.

[2] On November 21st, 2000, after having reviewed all of the parties' submissions, the Tribunal ordered that the hearing proceed as scheduled on November 27th, 2000 with detailed reasons to follow. The following are the reasons for the decision.

[3] On November 2nd, 2000, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court ordered that there be no further proceedings in the Bell Canada case until the problems she had identified with respect to the Canadian Human Rights Tribunal's independence and impartiality had been corrected.

[4] In her decision, Madam Justice Tremblay-Lamer found that the Canadian Human Rights Tribunal was not an institutionally independent and impartial body. Her findings were based, firstly, on the fact that the Canadian Human Rights Commission had the power to issue guidelines binding upon the Tribunal and, secondly, on the fact that a member whose appointment expires may not conclude any inquiry that the member has begun without the approval of the Chairperson.

[5] The Commission submits that the decision of the Federal Court in Bell Canada does not apply to the within proceeding. It argues that the Respondent has waived or should be deemed to have waived its right to bring a challenge to the Tribunal's institutional independence and impartiality at this stage of the proceedings. It invokes in support of its position the recent Federal Court of Appeal decision in *Zündel v. CHRC et al.* (2).

[6] The Respondent, for its part, submits that, in view of the Bell Canada decision, the Tribunal should stay the hearing until the Bell Canada decision is reversed or until the structural defects identified by the Court have been rectified by Parliament.

[7] Furthermore, the Respondent raises two additional objections with respect to the institutional independence of the Tribunal. Firstly, it argues that section 27 (1) of the Canadian Human Rights Act leaves the Commission in overall charge of the Tribunal. Secondly, it argues that section 53 (2) (a) of the Act gives the Commission a significant role to play in the remedies that the Tribunal can offer.

[8] Madam Justice Tremblay-Lamer's decision in the Bell Canada case must not be read in a vacuum but must be considered in light of the more recent decision of the Federal Court of Appeal in *Zündel* (3).

[9] In *Zündel*, the Federal Court of Appeal had to deal with the issue of waiver and the right of a respondent in a human rights case to object to the existence of a reasonable apprehension of bias.

[10] Relying primarily on the opinion of MacGuigan J. A. in *In Re Human Rights Tribunal and Atomic Energy of Canada Ltd* (4), the Court accepted the principle that "[t]he only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity".

[11] Looking at the facts of this case, it appears from the record, that it was not until the Federal Court handed down its decision in Bell Canada on November 2nd, 2000 that the Respondent raised the issue of the institutional independence and impartiality of the Tribunal.

[12] Paraphrasing what Stone J.A. said in Zündel (5), the Tribunal finds that it is the provisions of the Act itself which create the reasonable apprehension of bias and not the decision rendered by the Federal Court in the Bell Canada case.

[13] In any proceedings, a party who perceives a reasonable apprehension of bias on the part of a tribunal and who wishes to bring a challenge to the tribunal's institutional independence and impartiality, must do so at the earliest practicable opportunity. This is warranted in order to prevent hearings from being upset at any and every turn and to ensure that proceedings unfold in an orderly manner.

[14] Applying this rule to the facts of the case, the Tribunal finds that the issue of the Tribunal's institutional independence and impartiality should have been raised, at least at the time of the pre-hearing case conference call, held on June 9th 2000, if not shortly after the referral of the case in April 2000. This issue was most certainly a preliminary matter that went to the jurisdiction of the tribunal to proceed with a hearing and which formed part of the preliminary matters that the parties were asked to consider at the time.

[15] Furthermore, it must be noted that, on October 17th, 2000, the Respondent moved to have the Tribunal issue an order to be permitted to interview four of the Commission's employees. At that time, the Respondent did not in any way question the institutional independence and impartiality of the Tribunal with respect to the issuance of such an order.

[16] In view of these findings, the Tribunal is of the opinion that the Respondent has implicitly waived its right to challenge the Tribunal's institutional independence and impartiality.

[17] For these reasons, the Tribunal orders that the hearing in the present case proceed as scheduled on November 27th, 2000.

1. Bell Canada v. CTEA, CEP, Femmes Action and CHRC, Docket T-890-99, November 2nd, 2000.

2. Zündel v. CHRC et al., Docket A-215-99, November 10th, 2000.

3. Supra, note 2.

4. [1986] 1 F.C. 103, p. 112.

5. Supra, note 2.

Pierre Deschamps, Chairperson

Ottawa, Ontario
November 23, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T558/1600

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PLACE OF RULING: Ottawa, Ontario

RULING OF THE TRIBUNAL DATED: November 23, 2000

APPEARANCES:

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Janice Cheney For the Canadian Human Rights Commission

Eugene Rossiter For Strait Crossing Bridge Limited