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

BETWEEN:

BOB BROWN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NATIONAL CAPITAL COMMISSION

Respondent

RULING ON THE APPLICATION OF THE CANADIAN HUMAN RIGHTS COMMISSION TO ADD PARTIES

MEMBER: Dr. Paul Groarke 2003 CHRT 43

2003/12/09

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I. INTRODUCTION

[1] This is a motion by the Canadian Human Rights Commission (the Commission) to add the Department of Public Works and Government Services and the Canada Customs and Revenue Agency as Respondents to the proceedings. The motion arises out of a complaint under the *Canadian Human Rights Act* regarding the York Street Steps, which are found in the market area of downtown Ottawa, to the east of Parliament Hill and the Château Laurier. These Steps come within the responsibility of the National Capital Commission (NCC), the Respondent in the proceedings, and were recently reconstructed to accommodate the new American embassy. The NCC is responsible for the development, conservation and improvement of the nature and character of the National Capital.

[2] It is accepted on all sides that York Street is one of the major promenades in the market area. It runs west to Sussex Drive, where there is a T intersection. Along the bar of the T, there is a steep upward slope between Sussex Drive and Mackenzie Street.

Immediately across the street, at the same intersection, there are the York Street Steps, which climb this acclivity to Mackenzie Street. On the other side of Mackenzie Street, there is an entrance to Major Hill Park. The Park boasts a view of the back of Parliament Hill and the Ottawa River and is frequently used for outdoor festivals.

[3] The Complainant uses a wheelchair. He alleges that the National Capital Commission has discriminated against him on the basis of disability by failing to provide him with access to Mackenzie Street at the York Street Steps. The Complainant and the Commission want this situation rectified. They complain that the Steps are not accessible to those in wheelchairs or indeed, to anyone who is physically unable to traverse the stairs. The Complainant and the Commission have argued that the case raises important issues with respect to universal access.

[4] The hearing in the case has already commenced. The Complainant has finished his evidence. The Commission has begun its examination-in-chief of David Lloyd Rapson, an expert in universal access. The problem giving rise to the present motion arose when Mr. Rapson testified that there was an obvious solution to the lack of access at the York Street Steps. This solution was to be found next door.

[5] The Steps are owned by the National Capital Commission, also in the name of the Crown. There is a large historic building immediately south of the steps, known as the Connaught Building. This building is owned by Public Works, also in the name of the Crown. Mr. Rapson felt that those who cannot use the York Street Steps could be provided with an alternative means of access to Mackenzie Street through the Connaught Building.

[6] The Connaught Building is a large stone building, oblong in shape, that runs north and south between Sussex Drive and Mackenzie Street. It has a rather stern medieval look, with crenellated turrets and external stone buttresses. Since the building is built into the hill, and Mackenzie Street is three floors higher than Sussex Drive, its front and back entrances open on different floors.

[7] When Mr. Rapson studied the York Street site, he discovered a disused entrance at the north end of the building, off Sussex Drive, adjacent to the York Street Steps. He also discovered that there was an elevator shaft at the same end of the building. There is a major exit onto Mackenzie Street, three floors up. Mr. Rapson suggested that this shaft could be used to provide elevator access between the two streets. This would presumably be less expensive than the construction of an elevator or lift at the Steps themselves.

[8] The Commission has filed an affidavit with its Notice of Motion, containing copies of correspondence with both the NCC and Public Works concerning the Connaught Building. It is apparent from this correspondence, and the testimony that has already been heard, that some preliminary inquiries were made. The investigator's supplementary report, which is before me, states that the Respondent 'should consult with the appropriate persons to secure the use of the building. At some point, however, it appears that the negotiations between the various parties fell through..

[9] During Mr. Rapson's evidence in chief, I asked the Commission if it was asking the Tribunal to consider the use of the Connaught Building as an alternate means of access to Mackenzie Street. It is evident that this would require an order that the owners of the Connaught Building make its premises available to the public. It might also require an order that modifications be made to the building. When the Commission confirmed that it was seeking this kind of relief, I expressed concern over the fact that the owner of the Connaught Building was not before the Tribunal.

[10] The hearing was then adjourned, so that counsel for the Commission could receive instructions. The Commission then brought the present motion, which seeks to add Public Works and the Canada Customs and Revenue Agency as respondents to the proceedings. Public Works is the landlord of the building, which is leased to the Revenue Agency. At the hearing of the motion, the Department of Justice acted on behalf of both of these parties. It was agreed on all sides that there was no need to seek an order adding the Revenue Agency as a party.

[11] The Complainant has made it clear that he is seeking some form of access to Mackenzie Street at the same location as the steps. He nevertheless supports the motion and feels that the Tribunal should consider the possibility of an alternate access through the Connaught Building. Public Works is objecting to the Motion. NCC has taken no position and indicates that it is content to leave the matter with the Tribunal.

II. THE POSITIONS OF THE PARTIES

[12] The Commission's position is that Public Works should be named as a Respondent to the Complaint for the purposes of remedy. Although the Commission submits that Public Works may have directly discriminated against the Complainant, it is not relying on such a submission for the purposes of the motion. I think the suggestion is that a refusal to assist in rectifying a discriminatory situation may constitute a direct form of discrimination in itself.

[13] The Commission's immediate concern is that the Tribunal may not be able to order the appropriate remedy without the participation of Public Works. This would implicitly defeat the purposes of the *Act*. The Complainant has joined in the submissions of the Commission.

[14] There is no explanation for the Commission's failure to add Public Works as a Respondent before referring the matter to the Tribunal. This must simply be put down to an error on the part of the Commission. Although the Commission recognizes that Public Works should have been added earlier, it argues that any prejudice can be addressed by an adjournment and the production of documents.

[15] Public Works objects to the motion, primarily on jurisdictional grounds. It argues that the Tribunal has no jurisdiction to add a party as a Respondent without an allegation

that the party has discriminated against the Complainant. I think this must be read, for reasons that will become apparent, as a submission that Public Works cannot be added as a Respondent without an allegation that it has directly discriminated against the Complainant as the principal in the discrimination.

[16] Public Works has also argued that the Commission is out of time, but that argument is answered by the fact that the complaint is a continuing complaint. There is a third line of argument that the addition of Public Works as a Respondent at this stage of the process is prejudicial.

III. THE TRIBUNAL'S POWER TO ADD PARTIES

[17] The jurisprudence of the Canadian Human Rights Tribunal dealing with the addition of parties is of recent origin. In an oral ruling, in *Desormeaux v. Ottawa-Carleton Regional Transit Commissio*n, T701/0602; October 2, 2002; vol. 1, at p. 46, Chairperson Mactavish observed that "section 48.9(2) of the *[Canadian Human Right*s] *Act* specifically contemplates the addition of both parties and interested parties to inquiries before the Tribunal." The provision in question gives the Tribunal the power to make rules governing the addition of parties to the proceedings.

[18] Although the Tribunal is in the process of revising its rules, the current rules of the Tribunal are silent on the matter. The matter has been considered in a number of cases however and there is no arguing with the *Ac*t. In my view, the *Canadian Human Rights Act* contemplates that the Tribunal may add a party to a complaint after it has been referred to the Tribunal. The fact that a hearing before a Tribunal is an "inquiry" would support such a conclusion, since it suggests that there is an exploratory aspect to such a process that may not be present in other litigation.

[19] I have reviewed the *Rules of Court* from a variety of superior courts, which generally state that the Courts may add a party where the addition of the party is necessary to decide all of the matters in dispute or provide a complete and effective solution of the matter. Other members have held that the Tribunal's power to add parties should only be invoked in a situation where it is necessary for the proper airing of a complaint. There are many reasons for this. It goes without saying, for example, that a party that is added to a proceeding in the circumstances before me will not have had the benefits of the investigative process at the Commission.

[20] The most recent decision from the Tribunal is *Syndicat des employés d'exécution de Québec-téléphone v. Telus Comunications, 2003* CHRT *31,* where Member Deschamps held at para. 30 as follows :

[Translation] The Tribunal is of the opinion that the forced addition of a new respondent once the Tribunal has been requested to inquire into a complaint is appropriate, in the absence of formal rules to this effect, if it is established that the presence of this new

party is necessary to dispose of the complaint before the Tribunal and that it was not reasonably foreseable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.

I accept this as a general statement of the current law.

[21] The facts were substantially different in the *Telus* case, however, which was more in the nature of a motion to add a third party. This is an important distinction: the motion to add a party in that case was based on a submission that the union was directly and fundamentally liable. The remedy that was sought by the Complainant was also an employment remedy, which was never imperiled by the failure to add the union as a Respondent. It follows that the addition of the union was not required, in any strict sense, to resolve the issues in the case.

[22] In my view, there is an additional factor in the immediate case, which is more significant than the question of foreseability. The purpose of the *Canadian Human Rights Act* is to remedy discrimination and the Tribunal's power to add parties must be subordinated to that purpose. This goes to the nature of the process. Although the Tribunal deals with the private rights and obligations of the parties that come before it, insofar as they engage the rights protected by the *Act*, human rights hearings have a constitutional component that is often missing in the civil law.

[23] This brings in public policy concerns that do not arise in private litigation. In my view, litigation before the tribunal is public interest litigation, even when it concerns the private interests of the parties. The civil rules regarding the addition of parties must be tailored to the mandate of the Tribunal, which is to provide an effective remedy for discrimination. If it is necessary to add Public Works as a Respondent in order to provide the kind of remedy contemplated by the *Act*, it seems to me that this must take precedence over the lack of foresight of the Commission.

IV. SECTION 53 OF THE *ACT*

[24] The jurisdictional argument raised by Public Works is based on the wording of Section53(2) of the *Canadian Human Rights Act*. That subsection contemplates an order 'against the person found to be engaging . . . in the discriminatory practice.' Public Works accordingly submits that it cannot be added as a party without some reliable evidence on which the Tribunal could make a finding that it was the "person" engaging in the discriminatory conduct.

[25] As I understand it, the Commission has no immediate intention of asking for a finding that Public Works is directly liable, as the principal in the discrimination, and is rather seeking an ancillary order of some kind, which would allow it to execute any decision against NCC in the most appropriate manner. I should say, in passing, that I do

not believe it is fair for the Commission to reserve its position on the question whether Public Works is liable as a principal until a later date.

[26] Public Works has argued that it should not be added as a party merely because it is 'part of the apparatus of the Crown'. The Commission's response to this submission appears to be twofold. Its first argument is that NCC and Public Works can be considered as one person for the purposes of remedy under Section 53 of the *Canadian Human Rights Act*. Its second argument is that the Tribunal has the power to make whatever ancillary orders are necessary to facilitate the orders contemplated under section 53.

A. The "person" of Public Works

[27] I initially expressed some misgivings about the Commission's first line of reasoning. NCC and Public Works are discrete persons in law. The separation of the budgets and responsibilities of these agencies is an important attribute of their legal identity. It would be a mistake to think that the Tribunal can somehow merge their identities for the purposes of the hearing.

[28] There is nevertheless something to the argument advanced by the Commission. The *Canadian Human Rights Act* is remedial and the word 'person' must be given a large and liberal interpretation. Although Public Works and NCC are separate in law, they are both creatures of the Federal Crown. It is accepted on all sides that the underlying title in both properties vests in the Federal Crown. It is simply not enough in law to say that the two properties are owned by different legal persons.

[29] The situation might be different if the NCC and Public Works were private parties. Even in such a case, however, one can imagine a situation in which the adjoining properties were owned by different companies, A and B, each of which was owned by a third company, C. Although A and B would be separate in law, they would both be subservient to the interests of C and one can think of situations where a court or tribunal might feel it necessary to pierce the corporate veil that separates them.

[30] Here it is the indivisibility of the Crown that requires consideration. This is an idea with many limits. In *Liability of the Crown* (Toronto: Carswell, 1989), for example, at page 10, Professor Hogg writes:

There is only one individual at any time who is the Queen (or King). The Crown accordingly has a monolithic connotation, which has sometimes been articulated in dicta such as that the Crown is "one and indivisible". For nearly all purposes the idea of the Crown as one and indivisible is thoroughly misleading. ...

The immediate case may nevertheless present one of those unusual situations where the unity of the Crown is significant.

[31] The Crown has a specific interest in remedying discrimination. One would accordingly think that any devolution of the Crown's authority would carry some element

of the public interest with it. If the Crown has an interest in rectifying discrimination, there is accordingly room for an argument that its servants share that interest. The point is that this interest does not stop arbitrarily at the doorstep of its agents. This might be sufficient to bridge the identities of NCC and the Department of Public Works for the purposes of Section 53.

[32] The legal question maybe whether some aspect of the Crown's interest in remedying discrimination infuses the responsibilities and purposes of its agents. The Commission apparently feels that there is enough of a nexus to join the persons of the NCC and Public Works for the purpose of remedy under Section 53 of the *Act*. There is a sense in which the NCC, as an agent of the Crown and owner of the York Street Steps, shares the identity of the agent of the Crown that owns the adjacent property.

[33] The Commission has provided me with authorities, principally *Canadian Pacific v. Canada (Human Rights Commission)* [1991] 1 F.C. 571 (C.A.) and *Canada (AG) v. Rosin* [1991] 1 F.C. 391 (C.A.), which demonstrate that human rights legislation should be interpreted in a manner that takes a Tribunal beyond the more specific prescriptions of the *Act*. The question at this stage of the process, however, is merely whether the Commission has raised a triable issue. I am dealing with a preliminary motion, and it would be premature to enter into an analysis of the law.

[34] This observation is reinforced by the fact that I have yet to decide the facts in the case. There may be many reasons why the Connaught Building cannot be used as an alternative means of access. This is a subject for the hearing however, and the only question before me is whether the Tribunal should inquire into the matter. This is not possible without the participation of Public Works in the hearing.

B. The jurisdiction of the Tribunal to add a party for the purposes of remedy

[35] The second response of the Commission to the arguments of Public Works under Section53 of the *Act* is that the Tribunal has the authority to make supplementary orders, in aid of any finding of liability. This would give the Tribunal the power to make an order against a party solely for the purposes of remedy. The Commission's position is that an order against the NCC may be of no assistance in the immediate case without a supplementary order against the Department of Public Works.

[36] It is important to be careful with the wording of the proposition put forward by the Commission. This is because there is a logical sense, at least, in which there is no remedy without some form of liability. The argument before me is rather that the liabilities under the *Act* extend beyond those who are directly responsible for the acts that have given rise to the complaint. The Commission is arguing that Public Works is liable under section 53 in some less direct and secondary sense, almost as if it was an accessory rather than a principal in the discrimination.

[37] Under the *Canadian Human Rights Act*, Mr. Brown has a right to the enjoyment of the usual liberties and rights, without discrimination. The argument is that this gives rise

to positive duties under the *Act*, which require that Public Works co-operate with the other parties in attempting to redress the alleged discrimination at the York Street Steps. This may give rise to a duty to assist the NCC in its accommodation of people with disabilities. The public policy reasons for this are obvious: without such assistance, the NCC may not be able to provide the natural remedy for the alleged discrimination.

[38] The failure of an agent of the Crown to provide the disabled with the same physical access to public places as other people is a matter of general concern. This raises a different set of considerations than employment matters, which generally arise out of a dispute between opposing parties. If it is a matter of giving Mr. Brown the opportunity to exercise rights, which stand, in some conceptual sense, *in re*m, against the world, the issues in the case cannot be restricted to the parties in the immediate dispute.

[39] On the Commission's view, the owner of the Connaught Building has obligations that go beyond the obvious prohibitions in the *Act*, in remedying the alleged discrimination at the York Street Steps. It is evident that issues like fault are less important in this context than the overriding need to find a viable solution to the problem that has arisen with respect to the Steps. This is in keeping with much of the earlier jurisprudence, such as *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, for example, at para.11 in particular. Like other people who are disabled, Mr. Brown is not that interested in the ownership of the two adjoining properties. His position is very simple. He wants the same access to Mackenzie Street as other people.

[40] This requires a physical remedy and cannot be solved by compensation. There are situations in the law, such as expropriation, where public rights take precedence over the interests of a private or a public owner of land. If a bus stop needs to be enlarged, to accommodate those who use wheelchairs, this may inevitably infringe on the rights of an adjacent property owner. I suppose the Commission has no answer for those who say otherwise: the argument is simply that there are situations where the *Canadian Human Rights Act* requires that our private interests be subordinated to the common good.

[41] The problem with the position adopted by Public Works is that it may leave persons who are discriminated against without an effective remedy. If I have to choose between the right of Public Works to stay out of the dispute and the rights of the disabled, I would think that any reading of the purpose and preamble of the *Act* leaves little doubt as to where my responsibilities lie. The Commission is entitled to follow discrimination to its logical remedy, in accordance with the larger public interest, wherever that remedy might lead.

[42] If the Commission or another party is of the view that it is necessary to add a party, in order to provide a remedy for discrimination, I think it is entitled to make the kind of motion that has been made before me. The question of fairness will always be an issue on such a motion. But that goes to the question of prejudice and not to the jurisdiction of the Tribunal. I think the *Act* gives the Tribunal discretion, and a relatively informal discretion, to add a party if that meets the needs of justice and the purposes of the *Act*. It is interesting that Mr. Hadjis added a complainant in *Groupe d'aide et d'information sur*

*le harcèlement sexuel au travail v. Barb*e, T736/4102, May 6, 2003, Vol. 2, pp. 205-288, for the purposes of remedy.

[43] There is no escaping the fact that the Commission should have foreseen the present eventuality and added Public Works to the complaint before referring the matter to the Tribunal. Regrettable as this may be, the reality is that Public Works may have an indispensable part to play in resolving any question of discrimination that arises at the York Street Steps. All other matters aside, I find it difficult to understand why Public Works would force the NCC to solve the problem in a way that would impose a more expensive solution on the public.

[44] If the case before me raised private issues in the civil law, the matter might be different. This is not private litigation however and the public interest is paramount. The question of discrimination is simply too important to be defeated by such procedural irregularities. The public and constitutional concerns that raise themselves in the present context outweigh any fault that may accrue to the Commission.

[45] I realize that the Commission's position has many implications for the parties, both inside and outside the hearing. At the present time, however, the only issue before me is whether the Commission is entitled to raise these issues in the course of the hearing. I think the answer to such a question must be in the affirmative. I am making no findings on the merits of the case and the matter is still open to argument at the end of the hearing.

V. PREJUDICE

[46] The final argument raised by Public Works is prejudice. This rests primarily on the fact that the department has lost the benefits that generally accrue to a Respondent during the investigative process. This is an important consideration, which is offset by the fact that this will usually be the case, if a Respondent is added after a complaint has been referred to the Tribunal under the *Act*.

[47] The reality is that Mr. Brown could file a new complaint tomorrow, with Public Works as a Respondent. The Commission could then refer the matter to the Tribunal under section 49(1) of the *Act*, with or without an investigation. In my view it would be inappropriate to rely on this kind of formal maneuvering to bring Public Works before the Tribunal.

[48] The idea that the Complainant would have to file a second complaint to deal with the issues that might arise with Public Works runs against the spirit of the *Act*. This would merely delay the satisfaction of any rights to which the Complainant may be entitled and use up the scarce resources of the system of justice. If Public Works is a proper party in the matter, it should be brought in as expeditiously as possible, in a manner that deals naturally with all of the issues that arise out of the complaint before me. I see no reason

why any deficiencies in the process cannot be made up by giving Counsel for the Department of Public Works the necessary time to prepare her case.

VI. CONCLUSION AND DIRECTION

[49] The purpose of the *Canadian Human Rights Act* is to rectify discrimination. This consideration is paramount. In my view, it would be wrong to reject the Commission's motion and possibly deprive the Complainant and the public of their proper remedy, merely because a mistake was made by the Commission in pursuing the case. This is a public rather than a private matter and the public interest comes first.

[50] I am accordingly directing that the Department of Public Works and Government Services be added as a Co-respondent to the case before me. This will allow the hearing to resume. This is subject to the requirements of natural justice. In fairness to the other parties, the Commission is obliged to comply with the requirements of Rule 6 of the Tribunal's *Rules of Procedure* and provide the other parties with an amended statement of issues, in the style of the civil courts, with all of the changes conspicuously marked. The Respondent is entitled to know the case against it.

[51] Counsel for Public Works has already indicated that she would need three or four months to review the disclosure and prepare her case. I would ask the other parties to accommodate her in this regard. It will also be necessary to recall the Complainant, for the purposes of cross-examination. The testimony of Mr. Rapson can continue. I would ask the parties to confer among themselves as to the order in which witnesses should be called when we resume.

[52] There is one other aspect of the matter that deserves mention. It appears that there have been extensive negotiations to try and resolve the continuing issue at the Steps. Since this is the first time that Public Works has been brought into the case, it may be possible to revisit these negotiations and resolve some aspects of the matter without formal intervention. If the Tribunal may be of service in this regard, the parties should advise the Tribunal Registry Officer accordingly.

signed by

Dr. Paul Groarke

OTTAWA, Ontario

December 9, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL
PARTIES OF RECORD

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APPEARANCES:

Bob Brown On his own behalf

Ikram Warsame For the Canadian Human Rights Commission

Lynn Harnden For the Respondent, National Capital Commission

Elizabeth Kikuchi For the Respondents, On the Motion:

Public Works and Government Services Canada and

Canada Customs and Revenue Agency