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

BETWEEN:

MELANIE-LYNN MARIE MCKAY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ROYAL CANADIAN MOUNTED POLICE

Respondent

AND BETWEEN:

RONALD J. HOWELL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

RULING ON OPENING STATEMENTS

PANEL: J. Grant Sinclair

Dr. Paul Groarke

2003 CHRT 40

2003/11/25

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I. INTRODUCTION

[1] In December 2001, Melanie-Lynn McKay filed a human rights complaint against the Royal Canadian Mounted Police alleging that the RCMP refused to employ her because of her previous drug dependency, contrary to section 7 of the *Canadian Human Rights Act*. Ronald Howell filed a complaint against the Canadian Armed Forces in July 1998, in which he alleged that the CAF discriminated against him under section 7 of the *Canadian Human Rights Act* by requiring that he participate in drill without a knee brace.

[2] The Canadian Human Rights Commission has referred both cases to the Canadian Human Rights Tribunal for hearing. Hearings have been scheduled for February 2004, in the case of the *Howell* complaint, and for April 2004, in the *McKay* matter. Both respondents are represented by the Department of Justice in Winnipeg. In each case, the Commission initially advised the other parties that it would limit its participation in the hearing to the delivery of an opening statement. The respondents then filed motions, objecting to the Commission's proposed method of participation in these cases.

[3] The Commission later advised the parties that it would participate fully in each case. However, the respondents still seek an order from the Tribunal on the motions. Their position is simple. Having abandoned its intention to participate on a limited basis in these cases, the Commission has tacitly admitted that its original approach was improper. The respondents accordingly feel that they are entitled to an order to this effect.

[4] The Commission objects to the respondents' request, stating that the issues raised in the respondents' motions are moot since the Commission will be fully participating in the hearing. Further, the Commission says the Tribunal does not have the authority to deal with the motions. Because the issues in the two cases are identical, the motions were heard together.

II. FACTUAL HISTORY

[5] The *McKay* and *Howell* complaints were referred to the Tribunal for hearing on May 15, 2003. Approximately two weeks later, Ian Fine, the Acting General Counsel of the Commission advised the parties in each case that:

Commission counsel will be present at the hearing to provide an opening submission detailing the public interest in the complaint. The submission will set out the Commission's view of the legal and factual issues in the case and will provide a detailed statement of the law relevant to your complaint. Commission counsel will not be present for the full duration of the hearing.

[6] These letters were followed by an exchange of correspondence between the parties, as counsel for the respondents sought clarification of the contents of the opening submissions.

[7] Counsel for the respondents objected to the Commission's proposed manner of procedure. The respondents took the position that the Commission should participate fully in the hearing in each case, as the respondents say it is statutorily obligated to do, or absent itself from the entire proceeding. They contend that it would be prejudicial to allow the Commission to make an opening statement in those cases in which it does not intend to call evidence.

[8] On September 26, 2003, Ceilidh Snider of the Commission wrote to the parties in each case. In the *McKay* case, she wrote:

Please be advised that the Commission will be fully participating in the hearing of the above matter. Would the Tribunal please contact the Commission and the parties to set disclosure and hearing dates.

[9] Ms. Snider's letter in the *Howell* matter was even more terse. The letter reads, in its entirety:

Please be advised that the Commission will be fully participating in the hearing of the above matter.

[10] The Commission gave no reason for the reversal in its initial stance regarding its participation in either the *McKay* or *Howell* cases.

[11] The situation remains the same. The Commission has not identified any change in its view of the issues raised by the two cases that would explain the change in its position. However, counsel for the Commission candidly acknowledged during argument that the reason that the Commission changed its position was to avoid litigating the challenges brought by the respondents.

III. THRESHOLD ISSUE

[12] The Commission argues that it has an unfettered right to appear at a hearing. It says that the Respondent is now asking the Tribunal to review the manner in which it has chosen to represent the public interest. This, it says, is beyond the authority of the Tribunal and is only reviewable by the Federal Court.

[13] We accept that the decision of the Commission whether or not to participate in a given case is properly reviewable in the Federal Court and not by this Tribunal. It is up to the Commission to decide how best to carry out the public interest mandate conferred upon it by section 51 of the *Canadian Human Rights Act*. That said, it does not mean that the Commission can operate without constraint in appearing before the Tribunal, without regard for the requirements of procedural fairness, the Tribunal's Rules of Procedure and the rights of the other parties to a proceeding.

[14] The Tribunal has the power to control the hearing process, and to take action where the conduct of a party would result in unfairness to another party. As an adjudicative body dealing with quasi-constitutional rights, the Tribunal has the authority and the duty to ensure the fairness of the process. For example, the Tribunal has the jurisdiction to preclude the Commission from calling evidence that is irrelevant, or from making closing submissions that refer to facts not in evidence. So too does the Tribunal have the power to ensure that any opening submissions by the Commission are in keeping with the basic principles of fairness.

IV. ANALYSIS

[13] The Commission submits that the issues raised by the respondents in *Howell* and *McKay* are now moot, since the Commission has now agreed to participate fully in the hearing. As a result, the Commission says, the Tribunal should decline to deal with the respondents' requests.

[14] The respondents submit that the doctrine of mootness has no application to matters of practice, which are entirely within the discretion of the Tribunal. Even if the Tribunal were to conclude that the motions are moot, the respondents say that the Tribunal should decide the motions. For the respondents, the motions raise important issues with respect to the practice before the Tribunal. All of the parties that come before the Tribunal would benefit from the guidance of the Tribunal in the area.

[15] The Respondent's counsel goes further, however, and suggests that the Commission's actions in these cases are evasive. The Commission should not be allowed to side-step the issue that the respondents have raised without some formal recognition that it is obligated to participate fully in the cases. The Tribunal should not condone the Commission's tactics in these cases and should decide the motions.

[16] The Commission acknowledged that the public interest issues raised by the *Howell* and *McKay* cases did not change between its initial decision and the point at which it reversed this decision. As previously noted, Commission counsel candidly admitted that the Commission changed its position in order to avoid having to litigate the respondents' challenges to the Commission's new approach to participation in Tribunal hearings. In our view, this raises serious concerns as to the way in which the Commission exercises it public interest mandate. It creates the impression that the Commission's actions were dictated by expediency, rather than the substantive issues raised by the *Howell* and *McKay* complaints.

[17] The respondents have expressed concern as to the resources that they were forced to expend as a result of having had to bring motions that ultimately proved unnecessary. This is a legitimate concern. In the civil litigation context, the courts would compensate a moving party for its costs thrown away, when an opposing party 'backs down' in the face of a pending motion. In our view, such an award of costs in favor of the respondents would have been appropriate here. There is nothing, however, that the Tribunal can do to provide the respondent with such a remedy.

[18] We have considered the jurisprudence cited by the parties with respect to the question of mootness and the policy considerations that militate in favor of an adjudicative body deciding on an issue that may have otherwise become moot. Having considered the principles set out in these cases, we have concluded that there is no need for the Tribunal to exercise its discretion and decide the respondents' motions.

[19] There is no doubt that the motions raise an issue of fundamental importance to the practice before the Tribunal, namely the fairness or appropriateness of the new approach taken by the Commission in many of the cases coming before the Tribunal. However, in the same week that this panel heard the motions in *Howell* and *McKay*, the same issues were vigorously argued in two other cases before the Tribunal. In our view, the decision issued in *Mowat v. Canadian Armed Forces*, 2003 CHRT 39 should be sufficient to address the issues and concerns raised in the respondent's motion and provide the guidance sought by the respondents.

VI. ORDER

[21] For the foregoing reasons, the respondents' motions are hereby dismissed.

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J. Grant Sinclair

Dr. Paul Groarke

OTTAWA, Ontario

November 25, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILES:	T813/6303
	T817/6703
STYLE OF CAUSE:	Melanie-Lynn Marie McKay v. Royal Canadian Mounted Police
	Ronald J. Howell v. Canadian Armed Forces
DATE & PLACE OF HEARING:	November 12, 2003
	Winnipeg, Manitoba
RULING OF THE TRIBUNAL DATED:	November 25, 2003

APPEARANCES:

Gloria Mendelson	For the Complainant, Melanie-Lynn Marie McKay
David Swayze	For the Complainant, Ronald J. Howell
Dan Pagowski	For the Canadian Human Rights Commission
Sid Restall	For the Respondents
Kevin Staska	