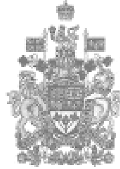
Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

EVELYNE MALEC, SYLVIE MALEC, MARCELLINE KALTUSH, MONIQUE ISHPATAO, ANNE B. TETTAUT, ANNA MALEC, GERMAINE MESTÉNAPÉO, ESTELLE KALTUSH

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CONSEIL DES MONTAGNAIS DE NATASHQUAN

Respondent

DECISION ON REQUEST

MEMBER: Shirish P. Chotalia, Q.C.
Tribunal Chairperson

2011 CHRT 15
2011/09/29

[1] The issue in this case arises from the decision in *Conseil des montagnais de Natashquan v. Malec*, 2010 FC 1325, rendered on December 23, 2010, in which the Honourable Madam Justice Tremblay-Lamer found that the Tribunal erred when it determined that there was no evidence on the record justifying the *prima facie* discriminatory policy of the Conseil des montagnais de Natashquan (the Conseil). For that reason, the judge allowed the application for judicial review and referred the file back to the Tribunal for a new hearing. Her judgment reads as follows:

> THE COURT ORDERS that the application for judicial review be allowed, that the decision be set aside and the matter be referred back to a member or panel of the Canadian Human Rights Tribunal for redetermination in accordance with these reasons. With costs. (Emphasis added)

[2] The judge therefore did not specify whether the same panel or a differently constituted panel should have the burden of redetermining the matter. Thus, I must determine whether it is appropriate, in light of the objections made by the respondents, to assign the file to member Doucet again so that he may decide on the matter in accordance with the reasons of Madam Justice Tremblay-Lamer.

[3] The respondents maintain that the impartiality rule as well as the *nemo judex in sua causa* rule dictate that a different member must be assigned to this case, failing which, member Doucet may create a reasonable apprehension of bias. In fact, according to the respondents, by reviewing his own decision, he would probably be led to confirm it. If I were to reject this motion, the respondents alternatively submit that member Doucet should recuse himself.

[4] The issue of apprehension of bias raised when a judge is called on to redetermine a matter that he or she already decided on has been widely examined by the courts. The case law on this subject is unequivocal: a judge who has already made a ruling on certain aspects of a case may again make a ruling in a proceeding arising from the same case, provided that the situation does not as such create bias or the appearance of bias: *R. v. Perciballi*, [2001] O.J. No. 1712 at para. 2. (See *Barthe v. The Queen*, [1964] 41 C.R. 47; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1114 at para. 7; *Nord-Deutsche Versicherungs Gesellschaft et al.*

v. The Queen et al., [1968] 1 Ex.C.R. 443 (*Nord-deutsche Versicherungs Gesellschaft*); *Charkaoui (re)*, 2004 FC 624 at paras. 5 to 8 (C*harkaoui*) and *Ianvarashvili c. Canada (Minister of Citizenship and Immigration)*, 2004 FC 695 at para. 9.

[5] The application of this principle in the administrative context was examined by Donald J. M. Brown and John M. Evans in their work "Judicial Review of Administrative Action in Canada" loose-leaf edition (Toronto, Canvasback, 2003). The Honourable Mr. Justice Rothstein cited paragraph 12:6320 of this work in *Gale v. Canada (Treasury Board)*, 2004 FCA 13. It reads as follows:

> When the tribunal reconsiders a matter either on its own motion or following judicial review it must, of course, comply with the duty of fairness. . . . And unless a court orders otherwise, while the same persons who decided the matter on the first occasion may normally also rehear it, they should not do so where they were earlier disqualified for bias, or if for any reason, there is a reasonable apprehension that the original decision-maker is not likely to determine the matter objectively.

[6] Thus, there is a presumption that a member, such as member Doucet in this case, will comply with the duty to act fairly and that he or she is able to rehear a matter unless there is a reasonable apprehension of bias (see *S.I.D.M. v. British Columbia Maritime Employers Association*, [1987] 81 N.R. 237, at para. 6 (F.C.A.); *Deigan v. Canada (Industry)*, [2000] 258 N.R. 103, at para. 3 (F.C.A.)). Based on that criterion, as it was established in *Committee for Justice and Liberty v. Canada (National Energy Office)*, [1978] 1 S.C.R. 369 at p. 394 (*Committee for Justice and Liberty*), it must be determined what . . . an informed person, viewing the matter realistically and practically – and having thought the matter through – [would] conclude. Would he think that it is more likely than not that the member Doucet, whether consciously or unconsciously, would not decide fairly?

[7] The burden to demonstrate bias is on the person who is relying on it: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 114 and *Miglin v. Miglin*, 2003 SCC 24 at para. 26. It is therefore for the respondents to demonstrate that member Doucet would not be impartial if he had to rehear this matter.

[8] The respondents claim that member Doucet would not be impartial because of the simple fact that he had already decided on the issue. However, the case law cited above is clear that there is a presumption of impartiality with regard to members, and, in my opinion, the respondents' argument is far from demonstrating that there is a serious and unequivocal apprehension of bias: *Arthur v. Canada (Minister of Employment and Immigration)* (C.A.), [1993] 1 F.C. 940 at para. 8 and *Committee for Justice and Liberty* at para. 41.

[9] In addition, the respondents are basing their position on the Supreme Court of Canada's decision in N*ewfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (*Newfoundland Telephone*). In that case, when a matter the hearing for which was still in progress was before a commissioner, he made some public statements, which, to a reasonable observer, would have seemed to indicate that he had already made his decision before the Board had even heard all of the evidence. The Supreme Court of Canada found in that context that there was sufficient evidence to raise a reasonable apprehension of bias and that any order of the Board had to become void.

[10] However, the facts of this case are nothing like those in *Newfoundland Telephone*. Indeed, none of the parties has alleged that member Doucet had said anything or acted in a way that would raise a reasonable apprehension of bias inside or outside the courtroom. Consequently, apart from the fact that it stresses one more time the importance of the impartiality rule, I do not believe that *Newfoundland Telephone* is useful to us in this case.

[11] In my view, the facts in *Gale* (cited above) are more similar to the facts of this case. In that case, the Federal Court of Appeal decided that not only did the fact that the adjudicator had failed to consider some of the evidence before making his decision not raise an apprehension of bias but, on the contrary, it put the adjudicator in a better position to assess the impact of the evidence at issue on his decision: *Gale* at paras. 18 and 19. Although in that case one of the parties had to but had not yet submitted a piece of evidence to the adjudicator, and in this case the evidence in question was before member Doucet, the main facts are the same: a failure of the adjudicator or

member to consider some of the evidence does not in itself create a reasonable apprehension of bias.

[12] In light of this analysis, I find that the respondents did not provide the evidence necessary to displace the presumption of integrity and impartiality enjoyed by member Doucet. In addition, judicial efficiency as well as the member's previous knowledge of the file (see *Nord-Deutsche Versicherungs Gesellschaft* at p. 458), militate in favour of the file being assigned to him so that he may redetermine it in light of the reasons of Madam Justice Tremblay-Lamer.

[13] For these reasons, I assign the file to member Doucet and give him the discretion to determine his own procedure. He will then be able to decide on other issues raised by the parties, namely, whether he should recuse himself, whether a new hearing is needed and whether the Canadian Human Rights Commission should participate.

Shirish P. Chotalia, Q.C.
Tribunal Chairperson

OTTAWA, Ontario
September 29, 2011

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1318/4808
STYLE OF CAUSE:	Evelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Germaine Mesténapéo, Estelle Kaltush v. Conseil des Montagnais de Natashquan
RULING OF THE TRIBUNAL DATED:	September 29, 2011

APPEARANCES:

Daniel Jouis	For the Complainants
François Lumbu	For the Canadian Human Rights Commission
John White	For the Respondent