Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 5
Date: February 6, 2018
File No(s).: T2230/5217

Between:

[ENGLISH TRANSLATION]

Laurent Duverger

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

2553-4330 Québec Inc.

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] This decision deals with the respondent's motion to stay the proceedings pending the Federal Court's disposition of an application for judicial review in a related matter. First, I believe it is necessary to review the case history in order to fully understand the respondent's request and the essence of the Canadian Human Rights Tribunal (the Tribunal)'s decision.

[2] On November 28, 2013, Laurent Duverger (the complainant) filed a complaint with the Canadian Human Rights Commission (the Commission) under sections 7 and 14 of the *Canadian Human Rights Act*, RSC (1985), c. H-6 (the *Act* or *CHRA*), alleging that he suffered adverse differential treatment in the course of his employment and was subjected to harassment by his employer, the respondent company, identified by the enterprise number 2553-4330 Québec Inc. (also known as Aéropro). More specifically, the complainant alleges (1) that he suffered differences in wages because of his national or ethnic origin and his disability; and (2) based on the same prohibited grounds of discrimination, that he was subjected to harassment following the termination of his employment at the respondent company.

[3] The Tribunal understands that the Commission dealt with Mr. Duverger's complaint and rendered an initial decision on October 29, 2014: at the time, it decided not to treat the complaint filed by the complainant, regarding it to be vexatious. Mr. Duverger filed an application for judicial review with the Federal Court challenging the merits of the Commission's decision not to deal with the complaint. The Federal Court allowed the complainant's application for judicial review, set aside the Commission's decision and referred the file back to the Commission so that it could re-examine the complaint anew (see *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2015 FC 1071 (CanLII).

[4] On March 30, 2016, the Commission decided Mr. Duverger's complaint again. The respondent filed an application with the Federal Court for the judicial review of the Commission's decision to consider the differences in wages issue based on the aforementioned prohibited grounds of discrimination, and the admissibility of such allegations, given that more than three years had elapsed between the date on which Mr.

Duverger filed his complaint and the end of his employment. This judicial review did not concern the Commission's decision to deal with the allegations of harassment. On February 2, 2017, the Federal Court dismissed the respondent's application for judicial review (see *2553-4330 Québec inc. v. Duverger*, 2017 FC 128 (CanLII)).

[5] On September 14, 2017, the Tribunal received a request from the Commission asking it to institute an inquiry into Laurent Duverger's complaint under paragraph 44(3)(*a*) of the *Act*. On September 25, 2017, the Commission sent another letter to the Tribunal stating that an administrative error had been made in the correspondence dated September 12, 2017, and clarified that the investigation of the complaint referred to the Tribunal only concerned the allegation of harassment under section 14 of the *Act*. The Commission indicated that it was not requesting an inquiry into the complaint under section 7 of the *Act*.

[6] Following the Commission's decision to refer the harassment part of the complaint under section 14 of the *Act* for an inquiry before the Tribunal, the respondent filed an application for judicial review with the Federal Court on September 19, 2017. In this application, the respondent challenges the merits of the Commission's decision to refer this portion of the complaint to the Tribunal and requests that the Commission's decision be set aside.

[7] On October 31, 2017, the respondent filed a motion for a stay of proceedings with the Tribunal. This is what is at issue in this decision. In short, Aéropro is asking the Tribunal to stay its own proceedings pending the Federal Court's disposition of the application for judicial review. The Commission and the complainant have also filed written submissions with the Tribunal and oppose the respondent's motion. On January 8, 2017, David L. Thomas, the Chairperson of the Tribunal, assigned this case file to the undersigned so that I may institute an inquiry into the complaint. It is in this context that I must decide the stay of proceedings.

[8] At issue is whether I should stay the Tribunal proceedings pending the Federal Court's disposition of the application for judicial review filed by the respondent. I have had an opportunity to review the written submissions of the parties as well as the

documentation and case law attached to those submissions. For the reasons that follow, I am dismissing the respondent's motion to stay the proceedings.

II. Position of the Parties

[9] For the sake of brevity, the position of the parties can be summarized as follows.

A. The Respondent's Motion

[10] The respondent presented several arguments in support of its motion filed with the Tribunal. On the one hand, the respondent submits that staying the proceedings would avoid the possibility of having conflicting judgments delivered by the Tribunal and the Federal Court. For example, a contradiction may arise if the Tribunal determines that there was discrimination, but the Federal Court subsequently determines, on the contrary, that the complaint should never have been referred by the Commission.

[11] Moreover, the respondent alleges that my hearing of the case prior to the Federal Court's disposition of the judicial review would result in a denial of natural justice and procedural fairness. Notably, the respondent argues that:

- It may be found guilty by the Tribunal, resulting in an award of compensation to the complainant, which, if the Federal Court allows the judicial review, should not have been awarded. The respondent would therefore run the risk of having to institute further legal proceedings to recover the amounts paid to the complainant;

- It would incur substantial legal fees if the proceeding before the Tribunal continues, which, if the Federal Court allows the judicial review, it would not have been required to spend;

- It would not subsequently be compensated for the time, energy, stress and costs related to its defence before the Tribunal;

- It plans on calling several witnesses to testify during the Tribunal hearing, necessitating the disbursement of costs, in addition to inconveniences caused to the respondent and the witnesses;

- The case before the Federal Court is at an advanced stage and the complainant will therefore not suffer any harm other than having to wait another few months before an inquiry into his complaint is instituted. According to the respondent, having to wait a few additional months does not constitute harm, in of itself;

- It would suffer the most harm if the proceedings in this case are not stayed.

[12] Aéropro relies on the tripartite test applied in *Pankiw v. Canada (Canadian Human Rights Commission)*, 2006 FC 601 (CanLII) [*Pankiw*] to determine whether it is appropriate for a tribunal to stay proceedings pending judicial review. To ensure a proper understanding of the respondent's arguments, the Tribunal will take the opportunity, at this point, to quote paragraphs 8 and 9 of the *Pankiw* decision :

> [8] The general framework for determining whether or not to stay a proceeding pending judicial review is a tripartite one. (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311)
>
> [9] The test is composed of three branches:
> (a) A serious issue of fact and/or law to be tried;
> (b) Irreparable harm; and
> (c) A balance of convenience.

[13] One branch of this test is that a serious issue of fact and/or law needs to be tried. With respect to this branch, the respondent claims that the Federal Court has to decide a serious question, namely, [translation] ". . . to determine if there is harassment 'in matters related to employment' when the harassment occurred over two years after the termination of the complainant's employment". It therefore maintains that the motion is neither frivolous nor abusive.

[14] With respect to the second branch of the test established in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 [*Metropolitan Stores*] and *RJR-MacDonald*

Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 [*RJR-MacDonald*], the respondent also claims that it would suffer irreparable harm if the Tribunal did not stay the proceedings. In support of this allegation, the respondent contends, among other things, that if the proceedings are not stayed, it would be required to defend itself before the Tribunal, whereas if the application for judicial review is allowed by the Federal Court, it would not be required to do so. This situation would cause it to suffer a great deal of harm related to the time, energy, stress and costs associated with its defence. The respondent alleges that it could never be compensated for all these harms, even if the Federal Court rules in its favour.

[15] The respondent also submits that it runs the risk of having the Tribunal render a decision against it for allegations that should never have been referred to the Tribunal. Moreover, these allegations would become public and could damage its reputation. It also reiterates that it could be required to compensate the complainant. In that case, and if the Federal Court allows the application for judicial review, it would have to initiate further legal action in order to recover the amounts disbursed, not to mention the time and costs related to those proceedings. It also submits that having to unnecessarily resort to a myriad of judicial resources is counter to the public interest.

[16] Lastly, Aéropro believes that the balance of convenience is in its favour: it would suffer the most harm if the Tribunal does not stay the proceedings. It submits that the only harm suffered by the complainant would be a few months delay of the current proceeding.

B. Complainant's Response

[17] The complainant opposes the motion for the stay of proceedings filed by the respondent. Without going into too much detail, the Tribunal can summarize his position as follows:

- According to the complainant, the question raised by the respondent regarding the interpretation of the expression "in matters related to employment" in section 14 of the *Act* has already been settled in the past. Consequently, he argues that Aéropro's application for judicial review is unnecessary;
- The complainant alleges that he might suffer harm if the motion for the stay of proceedings is allowed, most notably with respect to the possible deterioration of evidence. He mentions two specific elements:
    - The complainant is not sure that he will be able to testify at the hearing after April 1, 2018;
    - Raymond Dallaire, a potentially key witness, is elderly;
- The complainant asserts that his complaint was filed in August 2013 and that a hearing after April 1, 2018, would be excessively late and prejudicial;
- The complainant argues that the motion to stay the proceedings is contrary to the purpose set out in subsection 1(1) of the *Tribunal Rules of Procedure* (03-05-04) (*Rules*);
- The complainant indicates that he agrees with the Commission's submissions concerning the motion for a stay of proceedings;
- The complainant submits that contrary to the respondent's claims, the application for judicial review before the Federal Court is not at a very advanced stage;
- The complainant argues that Aéropro has filed several unnecessary applications for judicial review, leading to a waste of judicial resources.

[18] Lastly, the complainant ends his written submissions by making a request of the Tribunal in the event that the respondent's motion for a stay of proceedings, pending the Federal Court's decision on the application for judicial review, is allowed. He specifically requests [translation] "that the Tribunal base all its decisions solely on the written evidence, without holding a hearing, in order to be fair to all parties".

C. The Commission's Response

[19] The Commission's submissions can be summarized as follows:

- The Commission finds that the respondent has not discharged its burden of proof of establishing that it would be subjected to a denial of natural justice if the Tribunal does not stay the proceedings;
- The Commission indicates that a stay of the Tribunal's proceedings constitutes an exceptional circumstance and that the Tribunal has an obligation to proceed informally and expeditiously (subsection 48.9(1) of the *Act*);
- It affirms that the Tribunal is the master of its own procedure, that it has the discretionary power to grant an adjournment, and that this power should be exercised in accordance with the principles of natural justice, procedural fairness, and the scheme of the *Act*;
- The Commission alleges that, generally speaking, the Tribunal only grants requests for adjournments in cases where the principles of natural justice and procedural fairness have been breached, which, in and of itself, is an exceptional circumstance. Examples include the unavailability of evidence, the need to obtain legal counsel or late disclosure by the opposing party;
- The Commission also contends that in many situations similar to the circumstances in this case, the Tribunal has always decided to still hold a hearing despite the existence of related proceedings; it cites a number of examples;

- The Commission submits that the test in *RJR-MacDonald Inc.* does not apply in this case. Indeed, it notes that in *Léger v. Canadian National Railways Company,* 1999 CanLII 19862 (CHRT) [*Léger*], the Tribunal refused to apply the test formulated in *Metropolitan Stores* and *RJR-MacDonald Inc.*, in establishing a distinction between the powers of an administrative tribunal and the powers of a supervisory court. The Tribunal, in *Malec et al v. Conseil des Montagnais de Natashquan*, 2012 CHRT 8 (CanLII) [*Malec*], applied the same reasoning as in *Léger*.

- Finally, it concludes that considering the purpose of the *Act* and the fact that it does not contain an explicit power to adjourn, the Tribunal should only be guided by the principles of natural justice and procedural fairness.

D. The Respondent's Reply

[20] The respondent filed a reply in which it essentially reiterates most of the arguments it previously made in its initial motion. The Tribunal will not go over all the elements discussed earlier, and will only go over a few elements it deems important.

[21] The respondent reiterates that the Tribunal could refer to the test set out in *RJR-MacDonald Inc.* In this regard, it cites paragraph 33 of the decision rendered in *Malec*. It affirms that the circumstances surrounding the motion justify the motion for a stay of proceedings and that the complainant would not suffer any harm if such a motion is allowed. Moreover, it claims that the complainant does not allege any harm in his written submissions.

[22] The respondent notes that the main principle that should guide the Tribunal is the balance of convenience between the various interests, as set out in *Pankiw*. It cites the decision rendered in *Bailie et al v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 (CanLII) [*Bailie*], in which the Tribunal attentively considered the parties' various interests in order to determine whether or not it was appropriate to stay its proceedings. Finally, the respondent claims that this case is similar to that of *Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30

(CanLII), a case in which the Tribunal granted a stay of proceedings because it found that a number of similar questions were the subject of a judicial review at the Federal Court.

III. Law and Analysis

A. Preliminary Remarks

[23] Following a review of the parties' written submissions, the Tribunal notes that they do not use the same language in the context of this motion. I therefore believe it necessary to clarify this aspect of the file first.

[24] Under Rule 3 of the *Rules*, the respondent filed a [translation] "motion to stay the proceedings". In its written submissions, the respondent sometimes uses the term [translation] "stay", and sometimes, [translation] "stay/adjourn". In its reply, the respondent slightly changed the title of its motion to [translation] "motion to stay/adjourn the proceedings".

[25] The Commission filed [translation] "The Canadian Human Rights Commission's response to the respondent's motion for a stay of proceedings". However, in its written submissions, the Commission uses the term [translation] "adjournment" rather than [translation] "stay". The complainant uses the term [translation] "stay" in both his submissions dated October 25, 2017, and his submissions dated November 5, 2017.

[26] Generally, an adjournment is an order by the Tribunal to postpone a hearing to a later date (see *Halsbury's Laws of Canada - Civil Procedure*, 2017 Reissue, LexisNexis, HCV-224 Nature of adjournment) [*Halsbury*]. However, a stay of proceedings generally leads to the temporary suspension of the inquiry (*Halsbury*, HCV-288 Meaning and purpose of stays).

[27] Despite their using different terms, it appears clear to me that the parties are all referring to the same concept, that of temporarily interrupting or suspending the Tribunal proceedings, pending the Federal Court's decision on the application for judicial review. In this specific context and while analyzing the parties' submissions, the use of the terms "stay" and "adjournment" must therefore be given the same literal interpretation.

[28] In this case, since the inquiry into the complaint has not yet started and because no date has been set for the hearing, I will use the term “stay” of proceedings.

[29] That said, regardless of whether we are speaking of a stay of proceedings or an adjournment of the proceedings pending a decision by the Federal Court on the application for judicial review, the outcome would be exactly the same, that is, the inquiry would temporarily stop pending the Federal Court’s decision. Consequently, it is my opinion that when the Tribunal “stays” or “adjourns” its own proceedings pending a decision by the Federal Court, the applicable test should remain the same.

[30] Moreover, for the following reasons, it is the Tribunal’s opinion that the principles that will guide the Tribunal are those which apply when a party requests the temporary suspension of proceedings before the Tribunal pending the Federal Court’s decision on an application for judicial review (see notably, *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd*., 1994 CanLII 3152 (CT), reasons rendered by the Honourable Justice Marshall E. Rothstein when he was serving as a member of the Competition Tribunal).

[31] However, I recognize that there may be circumstances in which, the terms “stay” and “adjournment” may have different meanings and may give rise to other principles or relevant factors for consideration.

[32] Finally, it is important to note that the parties do not agree on the test applicable in this case. I will analyze this issue in a later section.

B. Jurisdiction

[33] The parties recognize that the Tribunal is the master of its own procedure and has the authority to determine a motion to stay or adjourn its own proceedings. The Supreme Court, in 1989, explained this principle in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 [*Prassad*], in writing as follows:

> […] We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by

> statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
>
> [Emphasis added]

[34] I will take this opportunity to reiterate that the Tribunal is a quasi-judicial, specialized and statutory administrative tribunal: the Tribunal, its jurisdiction and its powers are derived from the *CHRA*. Consequently, the Tribunal is notably guided by the parameters contained in its enabling legislation.

Subsection 48.9(1) of the *Act* reads as follows:

> Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
>
> [Emphasis added]

Subsection 50(2) and paragraph 50(3)(*e*) of the *Act* provide as follows:

> 50 (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.
> . . .
>
> 50(3) In relation to a hearing of the inquiry, the member or panel may
> . . .
>
> (*e*) decide any procedural or evidentiary question arising during the hearing.

Moreover, Rules 1(1) and 1(6) of the *Rules* provide as follows:

> **1 (1)** These Rules are enacted to ensure that
>
> > (*a*) all parties to an inquiry have the full and ample opportunity to be heard;
> > (*b*) arguments and evidence be disclosed and presented in a timely and efficient manner; and

> (*c*) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.
>
> [Emphasis added]
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> . . .
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> **1 (6)** The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules.

[35] It goes without saying that the Tribunal will be guided by the general principles of common law as expressed in *Prassad*.

[36] Previously, a certain line of authority in the Tribunal's case law suggested that the appropriate forum for presenting a motion to stay the Tribunal's proceedings was the Federal Court (see for example *Baltruweit v. Canada (Canadian Security Intelligence Service)*, 2004 CHRT 14 (CanLII) [*Baltruweit*]). Indeed, the Federal Court has the power to stay proceedings before our Tribunal in virtue of its broad powers of supervision conferred to it by the *Federal Courts Act*, R.S.C. (1985), c. F-7, and the *Federal Courts Rules*, SOR/98-106.

[37] However, the Federal Court of Appeal recently stated, in the context of a motion to stay proceedings before the Canadian Transportation Agency (CTA), that the use of this power should only be pursued in extraordinary circumstances or in the case of unusual urgency justifying its intervention. More specifically, the Honourable Justice Stratas wrote the following in his decision rendered in *Canadian National Railway Company v. BNSF Railway Company*, 2016 FCA 284 (CanLII):

> [8] Section 50 of the *Federal Courts Act* sets out circumstances where stays can be granted. Relevant here is paragraph 50(1)(*b*) of the *Federal Courts Act*. It allows the Court to grant stays of "proceedings in any cause or matter…where for any other reason it is in the interests of justice that the proceedings be stayed." In my view, this wording, read literally, is broad enough to include stays of administrative proceedings.
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> [9] That literal reading is supported by other sections in the *Federal Courts Act* and its overall purposes. The Act vests in the Federal Courts broad powers of supervision of the actions of federal boards, commissions and other tribunals: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385; *Canada*

> *(National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 (CanLII), 443 N.R. 378. The power to stay administrative proceedings is one that a supervisory court would need on occasion to discharge its mandate. The literal wording of paragraph 50(1)(*b*) sets out exactly that power.
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> […]
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> [14] [. . .] Where, as here, a party is seeking to stay an administrative decision-maker's proceedings, the party is actually seeking prohibition of those proceedings. It is requesting an order that the administrative decision-maker stop its proceedings. In circumstances such as these, the standards governing the grant of a section 50 stay of an administrative decision-maker's proceedings must mirror those for the grant of prohibition.
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> [15] Just as prohibition is an administrative law remedy that should not be pursued where there is adequate alternative recourse or a lack of extraordinary circumstances or unusual urgency (see *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII), [2011] 2 F.C.R. 332), the same is true for an application for a stay of the sort brought here. The rationales preventing early or premature access to a reviewing court canvassed in *C.B. Powell* at para. 32 apply equally here too.
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> [16] This is not just judge-made doctrine. It falls out of the scheme of the *Canada Transportation Act*, a law binding upon this Court. Under the *Canada Transportation Act* Parliament has given the Agency full power over proceedings before it, including determining whether the Agency should adjourn or suspend proceedings before it. Allowing parties to bypass the Agency and go directly to court to suspend the Agency's proceedings would offend that statutory scheme. It would not be in accordance with or pursuant to the *Canada Transportation Act*.
>
> [Emphasis added]

Even though this decision concerns the CTA, the Federal Court of Appeal specifies, in paragraph 9, that its broad powers of supervision extends to federal boards, commissions and other tribunals, which inevitably includes our Tribunal. In paragraph 16, the Federal Court of Appeal notes that Parliament has given the CTA full power over proceedings before it, which necessarily includes the power to determine whether the CTA should suspend or adjourn proceedings before it. The Federal Court of Appeal further adds that allowing parties to go directly to court and bypass the CTA would offend the statutory scheme put in place.

[38] In another decision by the Federal Court, *Canada (Attorney General) v. Sam Lévy et Associés Inc.*, 2005 FC 208, affirmed on appeal (2005 FCA 318), the Honourable Justice Beaudry expressed the opinion that the parameters of paragraph 14.02(2)(*c*) of the *Bankruptcy and Insolvability Act* gave the delegate of the Superintendent of Bankruptcy the necessary authority to stay the proceedings. This paragraph reads as follows:

> At a hearing referred to in subsection (1), the Superintendent […] shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit.

[39] It is therefore clear to me that our Tribunal is vested with the necessary powers to determine a motion to stay our own proceedings pursuant to subsection 50(2) and paragraph 50(3)(*e*) of the *Act*, our *Rules*, and the common law rule according to which administrative tribunals are masters of their own procedures.

C. Applicable Test: "the interest of justice"

[40] As I mentioned earlier, the parties do not agree on the test applicable to motions to stay proceedings when an application for judicial review is pending before the Federal Court. I will address this issue in the following paragraphs.

[41] The respondent advocates for the approach used in *Pankiw,* which ultimately reiterates the principles established in *RJR-MacDonald and Metropolitan Stores*. In these decisions, the test established by the Supreme Court is composed of three branches: (a) a serious issue of fact and/or law to be tried; b) irreparable harm; and c) a balance of convenience. The respondent believes that the Tribunal should use these criteria as a guide in order to decide the present motion.

[42] The Commission, for its part, refers to the principles previously articulated by the Tribunal and bases its position on a number of decisions, including the decisions rendered in *Léger*, *Baltruweit* and *Malec*. In these decisions, the Tribunal elaborates on *RJR-MacDonald* and *Metropolitan Stores* and distanced itself from the criteria established in those decisions. The Tribunal based its position on the fact that the Federal Court has broad supervisory powers over federal boards, commissions and tribunals. Therefore,

since the criteria are used in the context of court supervision of federal boards, commissions or tribunals, they would not apply to our Tribunal, which is required to decide if it should stay its own proceedings. Consequently, the Tribunal relied on the parameters provided in its enabling legislation.

[43] The test generally applied by our Tribunal is explained in the *Léger* decision, in which Member Sinclair wrote the following:

> The R.J.R. MacDonald tests apply to a different situation, namely, where a supervisory court is asked, pursuant to its statutory authority or its inherent jurisdiction, for interim injunctive relief. In my opinion, the exercise of the Tribunal's discretion is subject to the rules of procedural fairness and natural justice, and the regime of the Act.
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> The Act requires the Tribunal to institute an inquiry into the complaint when requested by the Commission. The Act also requires that the Tribunal give the parties a full and ample opportunity to present their case and make representations. Section 2 of the Act expresses an overriding public interest in the elimination of discrimination. As a response to section 2, numerous court decisions have established that allegations of discrimination are to be dealt with expeditiously and in a timely fashion. It is against this backdrop that CN's adjournment request must be measured.

[44] In *Marshall v. Cerescop Co*., 2011 CHRT 5 (CanLII) [*Marshall*], Member Lustig again succinctly summarized the test the Tribunal tends to apply in matters involving a motion to stay or adjourn its proceedings:

> [11] According to section 48.9 (1) of the *Canadian Human Rights Act*, proceedings before the Tribunal are to be conducted as informally and, of particular relevance to this motion, as expeditiously as the requirements of natural justice and the rules of procedure allow. However, as master of its own procedure, the Tribunal may, nonetheless, adjourn its proceedings where appropriate in its discretion (See *Léger v. Canadian National Railways* [1999] C.H.R.D. No. 6 (CHRT), at para. 4; *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 at para. 15. The Tribunal must exercise this discretion having regard to principles of natural justice (*Baltruweit*, at para 17). Some examples of natural justice concerns to which the Tribunal could respond would include the unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party.

[45] The Tribunal generally seems to follow this interpretation (see *Blain v. Royal Canadian Mounted Police*, 2012 CHRT 13 (CanLII) at para. 15, *Brooks v. Canada*

(Fisheries and Oceans), 2007 CHRT 4 (CanLII) at para. 6, *Emmett v. Canada Revenue Agency*, 2012 CHRT 3 (CanLII) at para. 3; *Malec* at para. 34, to name but a few).

[46] Now that I have outlined the position expressed by the Commission and the respondent, I must determine the test that is applicable when the Tribunal is seized with a motion to stay its own proceedings.

[47] In my view, the Commission and the respondent are neither completely wrong nor completely right about the principles that apply in this situation. I believe that it is necessary to clarify the situation.

[48] Despite the trend in the case law and opinions previously held by the Tribunal, I believe that the Federal Court of Appeal has clarified the situation in the past few years. In *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc*., 2011 FCA 312 (CanLII) [*Mylan*], the Honourable Justice Stratas made the following distinction between a court enjoining another body from exercising its jurisdiction on the one hand and a court deciding not to hear a case before it until a later date. He wrote as follows:

> [5] […] *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in *RJR-MacDonald Inc.*, this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: *Stoney First Nation v. Shotclose*,2011 FCA 232 (CanLII) at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 (CanLII) at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: *RJR-MacDonald Inc.*, *supra* at pages 343-347.
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> *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a

> result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.
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> [6] The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354 (CanLII); *Epicept Corporation v. Minister of Health*, 2011 FCA 209 (CanLII).
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> [Emphasis added]

[49] More recently, the Federal Court of Appeal applied the same reasoning in *Clayton v. Canada (Attorney General)*, 2018 FCA 1 [*Clayton*]. Once again, it clearly differentiated between two situations: (1) a court staying another body's proceedings pending an appeal or other matter, or for an injunction and (2), as in the case before us, a court which must decide a motion to stay its own proceedings, which is in fact analogous to a request for a long-term adjournment. In this decision, the Federal Court of Appeal stated as follows:

> [24] To begin, it is important to distinguish between "a court staying other bodies' proceedings pending an appeal or other matter, or for an injunction" and a stay that is, in reality, "a long-term adjournment": *Epicept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 at para. 14, 425 N.R. 353. Building on this distinction, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167 (*Mylan*), this Court set out an "interest of justice" test governing whether the Court should stay its own proceedings.
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> […]
>
> [26] In considering "the interest of justice", courts may take into account some of the same considerations as in *RJR–MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests. Here, while the prothonotary did not use the precise nomenclature of the "interest of justice" test, he directed himself to considerations relevant to the exercise of discretion under the test.
>
> [Emphasis added]

[50] As expressed by our Tribunal in various decisions, deciding a motion to stay proceedings falls within the Tribunal's discretion. It goes without saying that this discretionary power must be applied in accordance with the principles of natural justice and procedural fairness. As explained in paragraph 11 of *Marshall*, in order to dispose of a motion to stay proceedings, the Tribunal may consider certain natural justice concerns such as the unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party. Indeed, this list is not exhaustive (see *Bailie* at para. 21).

[51] However, it is my view that the Tribunal should not limit its analysis solely to questions related to principles of natural justice and procedural fairness. In my opinion, the assessment should be broader, more flexible and most importantly, the decision itself must be reasonable (*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 28). In other words, the Tribunal cannot ignore relevant factors when deciding matters before it: *Conway (Re)*, 2016 ONCA 918 (CanLII) at para. 25).

[52] To that end, I am adopting the principles developed by the Federal Court of Appeal in *Mylan*, *Clayton* and *Epicept Corp* (above). In my view, the "interest of justice" test is more appropriate when deciding motions to stay proceedings.

[53] Notably, the Court of Appeal for Ontario adopted the same approach in *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc*., 2012 ONCA 756 [*Korea Data Systems*]:

> [16] What the appellants request here is not a stay of an order or judgment under appeal, pending the disposition of the appeal. Nor is it a stay of another body's proceedings (e.g. an arbitration proceeding or a trial) pending some other matter, or an injunction. In those types of situations it is clear that the three-step exercise set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, applies. That is, the court must ask itself (i) whether there is a serious issue to be determined, (ii) whether the applicant will suffer irreparable harm if the stay is not granted, and (iii) whether the balance of convenience favours the applicant or the respondent, and exercise its discretion based upon the answers to those questions.
>
> [17] Instead, the appellants ask this Court *to stay the appeal itself*, pending the decision of another body (the trial court). In effect, they wish to have the Court adjourn the exercise of its own jurisdiction to proceed with the appeal

> until sometime later, pending the other body's decision. In those circumstances, the Federal Court has adopted a policy that the principles of *RJR-Macdonald* do not apply; rather, it is a matter of the court exercising its discretion and determining "whether, in all the circumstances, the interests of justice support the appeal being delayed": *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., 2011 FCA 312 (CanLII), 426 N.R. 167, at paras. 3, 5, 6 and 14, per Stratas J.A.; see also *EpiCept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 (CanLII), 425 N.R. 353.
>
> [18] The Federal Court's rationale is rooted in the wording of s. 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 – its statutory power to grant a stay – which empowers the court to stay proceedings where "it is in the interest of justice that the proceedings be stayed." That is the core tenet underlying any court's power to impose a stay of proceedings, in my view, and applies equally to the exercise of this Court's jurisdiction to stay an appeal pending the disposition of another body.
>
> [Emphasis added]

[54] Even though, as explained by the Court of Appeal for Ontario in *Korea Data Systems*, at paragraph 18, section 50 of the *Federal Courts Act* specifically provides for the interest of justice test, the interest of justice is the core tenet underlying any court's power to impose a stay of proceedings.

[55] In *Commissioner of Competition v. Toronto Real Estate Board*, 2014 CACT 10, the Competition Tribunal, under the pen of the Honourable Justice Simpson, wrote that the tribunal can apply the interest of justice test in deciding a stay of its own proceedings:

> [19] In my view, although the Federal Court of Appeal indicated in *Mylan* that the Tribunal has the discretion to handle adjournments/stays of its own proceedings pending appeal using whatever test or factors it considers appropriate, including the tripartite test, it also appears that it is open to the Tribunal to follow the Court's lead and consider the interests of justice.
>
> [Emphasis added]

[56] Moreover, just as was recently mentioned by the Supreme Court of Canada, in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (CanLII), I believe that the Tribunal, when exercising the discretionary powers conferred onto it by its enabling legislation and the common law, may apply and adapt tests developed in civil proceedings, while respecting its legislative scheme.

[57] This discretionary power can be applied in several different ways. As such, it is my opinion that several factors can be analyzed by the Tribunal.

[58] In my opinion, the interest of justice allows for a broader assessment of factors relevant to a motion to stay proceedings, which would **include** the principles of natural justice, procedural fairness and expeditiousness provided under subsection 48.9(1) of the *Act*. Moreover, as articulated by the Federal Court of Appeal at paragraph 26 of *Clayton*, the Tribunal may also consider certain factors developed in *RJR-MacDonald* (a serious issue of fact and/or law to be tried, irreparable harm and a balance of convenience).

[59] It goes without saying that the interest of justice includes the interest of all the parties. It also includes the public interest. It is important to recall that complaints filed before the Tribunal concern individuals who believe that their human rights have been violated. These allegations are serious and require the Tribunal to act expeditiously. Every time allegations of discrimination are made under the *CHRA* the public interest is obviously involved (see *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)* (Ont. Div. Ct.), 1988 CanLII 4794 (ON SC)). There is no question that public interest notably demands that complaints related to discrimination be dealt with expeditiously (see *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 FTR 44, 1997 CanLII 4851 (FC), [*Bell Canada*], see also subsection 48.9(1) of the *CHRA*).

[60] In short, I recognize that the factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances. For example, considerations to be analyzed in the context of a motion for adjournment to retain the services of a lawyer that is filed a few days before a previously scheduled hearing may differ from the factors to be considered in the context of a motion to stay proceedings filed at the very beginning of a quasi-judicial process, when an application for judicial review is pending before the Federal Court.

D. Application of the Test in This Case

[61] I have reviewed the parties' submissions and the considerations included therein, as well as the case law submitted to me. My decision will be based on the interest of justice.

[62] I note that when a request or motion is made before the Tribunal, the burden of proof rests on the moving party. I am sensitive to the respondent's position; however, I do not believe that the respondent demonstrated that it is in the interest of justice for the Tribunal's proceedings to be stayed pending the Federal Court's decision on the application for judicial review.

[63] First of all, I recognize that the question which the respondent referred to the Federal Court can be described as serious. I recall that the threshold for this element is not very high. That said, and without wishing to interfere with the application for judicial review filed before the Federal Court and the powers vested in that court, it is my view that the serious question raised by the respondent appears to be premature and that it is well established that the Tribunal is best placed to interpret its own enabling legislation (see, for example, *Halifax Regional Municipality v. Nova Scotia,* 2012 SCC 10 at paras. 23-41).

[64] Second, several factors submitted by the respondent are hypothetical or speculative. The respondent seems to be basing its position on the premise that the Federal Court will allow its application for judicial review, however, nothing is certain at this time. If I stay the proceedings and the Federal Court dismisses the application, the proceedings will have to be resumed at an unknown point in time and a lot of time will have elapsed in vain. Moreover, no hearing dates have been set by the Tribunal, and it is not clear whether the Federal Court has scheduled a hearing date for the application for judicial review. It is therefore highly possible that the file before the Federal Court will proceed before ours. If the Tribunal's hearings were to take place before the Federal Court renders its decision, I do not believe that anything precludes me from reserving my decision concerning whether or not there was discrimination and the appropriate remedies pending the Federal Court's decision.

[65] Third, I do not believe that a waste of financial resources, including, most notably, legal fees, witness expenses and other costs related to the preparation of the file, and the

impossibly of recovering these costs, would constitute irreparable harm for the parties in all cases. As reiterated by the Federal Court in the decision rendered in *Bell Canada*:

> [40] . . . I do not stay [sic] that the inability to recover costs may never constitute irreparable harm, but only that such inability has not been considered sufficient to meet the irreparable harm test where costs are incurred in the ordinary course of litigation.
>
> (see also *Brocklebank v. Canada (Minister of National Defence)* (1994), 86 FTR 23 at para. 11)
>
> [Emphasis added]

[66] I would say that this would also be true about the argument that it would be impossible to compensate time, energy, stress and anxiety. These factors may be taken into consideration by the Tribunal, depending on the particular circumstances of the case. That said, since the respondent did not file any evidence to support its claims, I do not find that it has discharged its burden of proof in this regard. It is not enough, in my opinion, to simply allege such factors in order to have a motion to stay proceedings granted by the Tribunal. The party arguing such factors must still discharge its burden on a balance of probabilities.

[67] The respondent also alleges that if the Tribunal's findings reveal discrimination and the Tribunal orders remedies, including financial compensation for the complainant, but the Federal Court concludes that the file should not have been referred by the Commission, it will have to institute legal proceedings to recover the abovementioned sums. Once again, the respondent's position is based on assumptions. At this point, it is impossible to determine what the Federal Court will decide. By the same token, we cannot predict the Tribunal's decision. In order for remedies to be ordered, the complainant must first discharge its burden of proof on a balance of probabilities. The respondent will also be entitled to present a defence. The outcome of the complaint remains uncertain, and if the Tribunal makes a finding of discrimination, a case must also be made for the requested remedies. These remedies are not automatically financial or monetary in nature: it would be premature to conclude that the Tribunal will order compensation. Thus, the respondent has failed to persuade me on this aspect of its argument.

[68] Aéropro asserts that the complainant would not suffer any harm other than having to wait a few more months for the Tribunal to institute an inquiry into the complaint, if this is the case. I find that this argument is without merit. The complaints that are referred to us concern individuals who believe that their human rights have been violated. The complaints are sensitive and involve issues of human dignity. Time is an important factor for these individuals, who have sometimes filed their complaints several years earlier. In Mr. Duverger's case, his complaint was filed with the Commission on November 28, 2013; that is already over four years ago. As I mentioned earlier, public interest considerations must also be taken into account. It is necessarily in the public interest that discrimination complaints are dealt with expeditiously. It is important to remember that when " . . . the Tribunal finds that a party has violated the CHRA and engaged in a discriminatory practice, the Act provides for remedies that may be ordered to correct the situation. Without relief, the purpose of the Act cannot be achieved" (*Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 (CanLII) at para. 37). Given the foregoing, the *Act* is also remedial in nature. The complainant is also waiting for his case to be dealt with by the Tribunal and, if the Tribunal rules in his favour, he is also waiting to receive reparations for harm suffered as a result of discrimination. Lastly, it is my view that it is not only in the public interest but also in the interest of the parties to avoid unnecessarily delaying the inquiry in order to ensure the preservation of evidence, including the memories and recollections of witnesses.

[69] I also cannot subscribe to the respondent's argument concerning the potential damage to its reputation if the Tribunal's findings revealed discrimination and that these allegations become public. The outcome of the complaint is uncertain and the Tribunal may, on the contrary, determine that the respondent acted appropriately and that its actions were not discriminatory. It is not enough to allege potential damage to reputation: once again, the respondent did not provide any evidence in this regard.

[70] When balancing the conveniences against the various interests (of the complainant, the respondent and the public), I do not find, as claimed by the respondent, that the respondent would suffer the most inconvenience if the proceedings are not stayed. Stress, anxiety, costs, time, energy, etc., are factors borne by all parties. I recognize that these

inconveniences are inherent to the participation in judicial and quasi-judicial proceedings. Nevertheless, these inconveniences do not automatically cause irreparable harm. With respect to the question of the balance of convenience, given the lack of evidence I cannot conclude that the respondent would suffer the most. I do not believe that a stay of proceedings is in anyone's interest in this case.

[71] Finally, I agree with Member Garfield's comments at paragraph 22 of the *Bailie* decision that motions to stay proceedings should only be allowed in exceptional circumstances. It is not rare for the Federal Court to be called upon to consider an application for judicial review of the Commission's decision to refer a complaint to the Tribunal. I do not believe that it is in the interest of justice for motions of stay of proceedings to be regularly allowed in this type of situation. Doing so would frustrate our legislative scheme and our Tribunal's quasi-judicial process.

IV. Decision

[72] Considering that I find that the respondent, who bears the burden of proof, has failed to demonstrate on a balance of probabilities that it is in the interest of justice that I the Tribunal's proceedings be stayed, I am dismissing this motion. As such, the Tribunal's proceedings shall follow their due course. The Registrar will contact the parties shortly in order to inform them of the next steps.

Signed by

Gabriel Gaudreault
Member of the Tribunal

Ottawa, Ontario
February 6, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2230/5217

Style of Cause: Laurent Duverger v. 2553-4330 Québec Inc. (Aéropro)

Ruling of the Tribunal Dated: February 6, 2018

Motion dealt with in writing without appearance of parties

Written submissions by:

Laurent Duverger, for himself

Daniel Poulin, for the Canadian Human Rights Commission

Steven Côté, for the Respondent