



to examine whether gender bias existed in the Museum's job evaluation plan. In her report, Dr. Haignere concluded that the plan was likely gender-biased. The Commission investigator adopted Dr. Haignere's conclusions and recommended that a Tribunal inquiry into the complaint be requested. The Museum and PSAC were provided with an opportunity to respond to the Investigator's report.

[4] On the basis of all the material before it, including the Investigator's report and Dr. Haignere's Report, the Commission decided to refer the complaint to the Tribunal for further inquiry. The referral was made on April 1, 2004.

[5] In May, 2005, after the Tribunal had instituted an inquiry and heard preliminary motions on the matter, the Commission advised the Tribunal and the other parties that it would not be calling Dr. Haignere as a witness. At that time, the Commission also informed the parties that it was looking into retaining another expert.

[6] The Commission subsequently informed the parties and the Tribunal that it had retained Dr. Nan Weiner to prepare a report. A copy of this report was provided to the parties. In it, Dr. Weiner stated that while there was some gender bias in the Museum's job evaluation plan and process, it was likely not significant.

[7] The Museum contends that the Commission's decision not to call Dr. Haignere as a witness during the hearing means that it has effectively withdrawn the Haignere report. Since the basis of the decision to refer the complaint to the Tribunal was the Haignere report, the withdrawal of that report constitutes the effective withdrawal of the complaint. The Museum asserts that the Commission has the authority and indeed, an obligation to withdraw a complaint in circumstances such as the present ones. Therefore, the Museum urges this Tribunal to find that when the Commission decided not to call Dr. Haignere to testify it effectively exercised its authority to withdraw the complaint.

[8] In the alternative, the Museum argues that the referral of the complaint to the Tribunal is invalid. The Weiner report does not conclusively determine that gender bias existed in the Museum's job evaluation plan. Therefore, the foundation for the Commission's decision to refer the complaint to this Tribunal has been removed. Without this foundation, it is argued, the Commission's decision to refer the complaint is invalid and therefore, by extension, the Tribunal's jurisdiction to inquire into the complaint is invalidated.

## **I. THE ISSUES**

[9] The issues in this motion are as follows:

- A. Did the Commission withdraw the Haignere report and thereby effectively withdraw the complaint?
- B. Do the Commission's actions and decisions with regard to the reports affect the Tribunal's jurisdiction to inquire into the complaint?

[10] For the reasons that follow, I find that the answer to both questions is 'no'. Therefore, I must dismiss the Museum's motion.

## II. ANALYSIS

### A. *Did the Commission withdraw the Haignere report and thereby effectively withdraw the complaint?*

[11] The cornerstone of the Museum's motion to dismiss the complaint is the contention that the Commission has withdrawn the Haignere Report. However, an examination of the record reveals no indication that the Haignere Report has been withdrawn. During a case conference on this matter on May 11, 2005, counsel for the Commission stated that "the Commission will not be calling Lois Haignere". Commission counsel also indicated that he would be looking at calling another expert to testify at the hearing.

[12] The Commission subsequently retained Dr. Nan Weiner to produce a Report and to testify at the hearing. Dr. Weiner's Report was disclosed. The Commission then indicated that it intended to call Dr. Weiner to testify instead of Dr. Haignere.

[13] In my view, the Commission's decision not to call Dr. Haignere as a witness during the hearing does not constitute a withdrawal of the Haignere Report. It is simply a decision by the Commission about the witnesses it will and will not be calling to testify at the hearing.

[14] As a party to the inquiry, the Commission is entitled to make decisions and take positions during the hearing which, in its opinion, are in the public interest (*Canadian Human Rights Act*, s. 51). Such decisions regarding the public interest are left to the discretion of the Commission. This includes decisions about the evidence it will or will not lead, the arguments it will make and even whether it will participate in the hearing.

[15] There is nothing in the *Act* that compels the Commission, as a party to the Tribunal proceedings, to make decisions and take positions which are consistent with the investigator's findings or other pre-referral reports. The Tribunal's inquiry is a *de novo* process during which the parties are free to take positions and make decisions based on their interests provided these positions have been disclosed in advance in accordance with the Tribunal's Rules of Procedure. Thus, the Commission's decision to call Dr. Weiner to testify instead of Dr. Haignere cannot be interpreted as a constructive withdrawal of the Haignere Report.

[16] Moreover, even if it could be said that the Haignere report was effectively withdrawn when the Commission decided to call Dr. Weiner as a witness instead of Dr. Haignere, this could not be taken to mean that the Commission has withdrawn the complaint.

[17] The Commission does not have the authority to unilaterally withdraw a complaint once a referral to the Tribunal has been made. There are a number of reasons for this. Firstly, the complainant has an independent right to proceed with the complaint regardless of the actions taken by the Commission (See: *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 17 at para. 27 (CHRT); and *McKenzie Forest Products Inc. v. Ontario (Human Rights Commission)* (2000) 48 O.R. (3d) 150 at para. 34 (C.A.)).

[18] As this Tribunal stated in *Ct v. Attorney General of Canada (Representing R.C.M.P.)*, 2003 CHRT 32 at para. 12, the complaint belongs to the complainant, not the Commission. Thus, even if the Commission decides to withdraw from the proceedings, the complainant is entitled to proceed with the hearing and the Tribunal's jurisdiction is unaffected. This ensures that complainants retain control over the enforcement of their statutory rights.

[19] In the present case, the complainant, PSAC, is clearly prepared to proceed with the case regardless of the actions and decisions taken by the Commission. PSAC states that it has retained an expert who has analyzed the Museum's job evaluation plan and has found evidence of gender bias. Therefore, PSAC is insisting that the Tribunal fulfill its obligation under s. 50(1) of the *Act* to provide it with a full and ample opportunity to present evidence and make representations.

[20] The Museum's response to this is that the Commission's authority to withdraw the complaint is subject to PSAC's right to bring a separate motion to establish its private interest in proceeding with the complaint. According to the Museum, if the complainant can resist the withdrawal of the complaint by bringing a motion for the Tribunal's permission to proceed, then there is no inconsistency between the Commission's ongoing obligation to screen complaints throughout the inquiry and the complainant's right to be heard.

[21] However, in my view, it is clearly not consistent with the goals of the *Act* to require complainants to bring a motion to defend their right to be heard by the Tribunal. Such a requirement would place an additional burden on complainants and might well have the effect of discouraging them from pursuing their rights under the *Act*. Therefore, the Museum's arguments in that regard must be rejected.

[22] The second reason that the Commission does not in fact, have an ongoing obligation to screen complaints and to withdraw them in the appropriate circumstances after the referral is that at that point, it becomes the responsibility of the Tribunal, not the Commission, to decide whether the complaint has any merit. Like the Tribunal in *Premakumar*, I find the Ontario Court of Appeal's analysis in *McKenzie Forest Products Inc.*, regarding the handling of human rights complaints in the Ontario context to be applicable in the federal jurisdiction (*Premakumar, supra*, at para. 27).

[23] Once the Commission has decided to refer the matter to the Tribunal for further inquiry, its decision-making role is over. The Tribunal then assumes the exclusive authority for determining whether the evidence supports the complainant's position or not. Thus, after the referral has been made, the Commission can neither reconsider its decision nor unilaterally withdraw the complaint because to do so would usurp the Tribunal's function as the adjudicative body in the human rights process.

[24] For these reasons, I decline to follow the *obiter dicta* of the Tribunal in *Kamani v. Canada Post Corporation* (1993), 23 C.H.R.R. D/98 at para's. 30 and 33, and *Sehmi v. Canada (VIA Rail)*, [1995] C.H.R.D. No. 9 as was suggested to me by counsel for the Museum. Moreover, I disagree that the *Grover* case constitutes an endorsement by the Federal Court of the Commission's authority to withdraw a complaint or to reconsider its decision to refer the complaint to Tribunal (*Canada (Attorney General) v. Grover* 2004 FC 704 at para. 45). It is clear from the context in that case that when the Federal Court quoted the Tribunal's comments in *Kamani*, it was to underscore the Commission's pre-referral obligation to complete a careful and thorough investigation.

[25] Moreover, I disagree with the Museum that the case of *British Columbia (Police Complaint Commissioner) v. Vancouver (City) Police* 2003 BCSC 279 is applicable to the present circumstances. The legislative context in the B.C. case is different. In that case, the Court found that pursuant to the *Police Act*, R.S.B.C. 1996, c. 367, the Police Complaint Commissioner was effectively the complainant and therefore, had the power to unilaterally withdraw the complaint. The same does not hold in the context of the

*Canadian Human Rights Act*. Under the *Act*, the role of the Commission is clearly distinct from that of the complainant. The complainant has the power to unilaterally withdraw a complaint. The Commission, however, does not have this power.

B. Do the Commission's actions and decisions with regard to the Weiner and Haignere reports affect the Tribunal's jurisdiction to inquire into the complaint?

[26] In my view, the post-referral disclosure of the Weiner report has no effect whatsoever on the Tribunal's jurisdiction to inquire into the complaint.

[27] The Commission makes a decision to refer a complaint to the Tribunal based on the information available to it at the time. If a party is of the view that the Commission's decision is invalid, the only recourse is to apply for judicial review of the decision in the Federal Court of Canada. The Tribunal has no authority under the *Act* to question the validity of the Commission's decision to refer a complaint to it. This authority falls within the exclusive purview of the Federal Court. (*International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster*, 2001 FCT 1115 at para. 29; *Tweten v. RTL Robinson Enterprises Ltd.* 2004 CHRT 8 at para.17)

[28] Thus, even if it could be said that the Haignere Report was replaced by the Weiner Report, the Tribunal could not make a determination as to whether such action invalidated the referral. Rather, barring a successful application for judicial review of the Commission's decision, the Tribunal is required to proceed with an inquiry into the complaint.

[29] The Museum argues that the Commission's statutory authority to request an inquiry is limited to "the complaint to which the report relates" (s. 44 of the *Act*). Therefore, by extension, the Tribunal's jurisdiction is limited to the complaint "to which the report relates". Since "the report" in this case effectively means the Haignere report, and the Commission has decided not to call the author of this report, the Museum contends that the Tribunal is without jurisdiction to proceed any further.

[30] The Museum's arguments in this regard are not consistent with the Federal Court of Appeal's statements in *Bell Canada v. Communications, Energy and Paperworkers' Union of Canada*, [1999] 1 F.C. 113 at para. 37 (F.C.A.). In that case, the Court of Appeal held that in inquiring into the complaint, the Tribunal is in no way bound by the investigator's report even if the report is adopted by the Commission as the reasons for its decision to refer the complaint to the Tribunal. The Court declared that the Tribunal is an autonomous body that exercises its adjudicative functions independently of the Commission. It follows that even though the Haignere report was adopted by the investigator and relied upon by the Commission in reaching its decision, the Tribunal is not bound by it. Similarly, the Commission's decision not to call Dr. Haignere as a witness during the hearing does not affect the Tribunal's jurisdiction.

[31] I find the reasons of the Ontario Board of Inquiry in *Shepherd v. Ontario Corp.* 1110494 (2000), 38 C.H.R.R. D/284 regarding the effect of a potentially invalid referral upon the Board's jurisdiction to be illuminating. In that case, the Ontario Human Rights Commission argued that, as a result of a procedural error in the referral process, its decision to refer the complaint was a nullity. The Board refused to accept this argument stating that "the Commission's characterization of its defect as a nullity does not operate to nullify the Board's jurisdiction" (*Shepherd, supra*, at para. 13). The Board stated that if it terminated the inquiry and closed the file in that case, it would be abrogating its statutory duty to hold a hearing (*Shepherd, supra*, at para. 19).

[32] In my view, the same reasoning applies in the federal context. Once a referral has been made, in the absence of circumstances giving rise to an abuse of process, the *Act* requires that an inquiry be held into the complaint (See: s. 49(2), *Canadian Human Rights Act*, and *Tweten, supra*, at para. 16). There is no evidence of any circumstances giving rise to an abuse of process in the present case.

[33] Therefore, the inquiry into the complaint must proceed.

### III. ORDER

[34] For the foregoing reasons, the Museum's motion is dismissed.

*Signed by*  
Karen A. Jensen

OTTAWA, Ontario

January 13, 2006

#### PARTIES OF RECORD

TRIBUNAL FILE:	T915/3504
STYLE OF CAUSE:	Public Service Alliance of Canada (local 70396) v. Canadian Museum of Civilization
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DECISION OF THE TRIBUNAL DATED:	January 13, 2006
APPEARANCES:	
Andrew Raven	On behalf of the Complainant
Pam MacEachern	On behalf of the Canadian Human Rights Commission
David Sherriff-Scott Mandy Moore	On behalf of the Respondent

