

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

BETWEEN:

SUZANNE LEE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL DEFENCE

- and -

BARRY MACLACHLAN

Respondents

RULING ON JURISDICTION

Ruling No. 1

2001/03/08

PANEL: Anne Mactavish, Chairperson

[1] This case involves two complaints brought by Suzanne Lee, the first against her employer, the Department of National Defence, and a second complaint brought against Barry Maclachlan, one of Ms. Lee's co-workers. Ms. Lee alleges that Mr. Maclachlan sexually harassed her, contrary to Section 14 of the *Canadian Human Rights Act*. Ms. Lee further alleges that DND treated her in a differential fashion by failing to provide her with a harassment-free work environment, and by refusing to continue to employ her, on the grounds of her sex and disability, contrary to Sections 7 and 14 of the *Act*.

[2] I understand Mr. Maclachlan, who is self-represented, to be objecting to this matter proceeding on the basis that a reasonable apprehension of institutional bias exists with respect to the Canadian Human Rights Tribunal.

[3] In this regard, Mr. Maclachlan relies upon the recent decision of the Federal Court in *Bell Canada v. CTEA, Femmes Action and Canadian Human Rights Commission* ("*Bell Canada*").⁽¹⁾ In *Bell Canada*, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court of Canada found that the Canadian Human Rights Tribunal was not an institutionally independent and impartial body as a result of the Canadian Human Rights Commission having the power to issue guidelines binding upon the Tribunal.⁽²⁾ Tremblay-Lamer J. also concluded that the independence of the Tribunal was compromised by requiring the Chairperson of the Tribunal's approval for members of the Tribunal to complete cases after the expiry of their appointments.⁽³⁾ As a consequence, Tremblay-Lamer J. ordered that there be no further proceedings in the *Bell Canada* matter until such time as the problems that she identified with the statutory regime were corrected.

[4] Mr. Maclachlan submits that the statutory scheme identified by Tremblay-Lamer J. as being inadequate to ensure the independence of the Canadian Human Rights Tribunal is engaged in this proceeding, and that, as a result, this case should not proceed until the problems identified by Tremblay-Lamer J. have been corrected.

[5] DND does not object to the jurisdiction of the Tribunal.

[6] Ms. Lee has not made any submissions with respect to the applicability of the *Bell Canada* decision to this proceeding. The Canadian Human Rights Commission submits that the allegations against Mr. Maclachlan giving rise to Ms. Lee's complaint relate to a period during which Mr. Maclachlan was a DND employee. As an employee of the Crown, Mr. Maclachlan cannot challenge the validity of a scheme established under a

federal statute, and thus has no standing to object to the jurisdiction of the Tribunal. In this regard, the Commission relies upon the decision of the Federal Court in *Northwest Territories v. Public Service Alliance of Canada*.⁽⁴⁾ In the alternative, the Commission submits that there is no merit to Mr. Maclachlan's objection, and that this case should proceed to a hearing.

I. Does *Northwest Territories v. P.S.A.C.* Apply to the Present Case?

[7] *Northwest Territories v. Public Service Alliance of Canada* involved a consideration of the constitutional status of the Northwest Territories. In particular, the question for the Federal Court was whether the status of the Territory had evolved to the point that it was now on the same footing as the provinces, as a Crown separate from the federal Crown. Having concluded that the Territory was still part of the federal Crown, the Court concluded that the Territory had neither the standing nor the authority to challenge federal legislation. The issue in this case is quite different.

[8] Ms. Lee has filed one complaint against her federal employer, and a second, discrete complaint against Mr. Maclachlan, not as an agent of the Crown, but in his personal capacity. Under the *Canadian Human Rights Act*, Mr. Maclachlan is a separate party, with all of the rights that attach to a party to litigation.⁽⁵⁾ Counsel for DND has made it clear that she does not represent Mr. Maclachlan in this proceeding.

[9] As a respondent in a human rights complaint, Mr. Maclachlan faces potential personal liability in the event Ms. Lee's complaint is ultimately upheld.⁽⁶⁾

[10] As a result, I am not persuaded that the reasoning of the Federal Court in *G.N.W.T.* has any application to Mr. Maclachlan's standing to object to the jurisdiction of the Canadian Human Rights Tribunal in this case.

II. Applicability of the *Bell Canada* Decision to the Present Case

[11] Neither the Canadian Human Rights Commission nor Ms. Lee have made any submissions with respect to the application of *Bell Canada* to this case, apart from the Commission's general assertion that there is no merit to Mr. Maclachlan's objection. They have not, however, conceded that the decision in *Bell Canada* applies to the facts of this case, and thus I will deal firstly with that issue.

[12] There is no suggestion that the Commission has issued guidelines in relation to the issues that arise in these complaints. I am of the view, however, that the reach of the decision in *Bell Canada* is not limited to cases in which guidelines have actually been issued by the Commission pursuant to Section 27 (2) of the *Canadian Human Rights Act*. According to Tremblay-Lamer J., the problem relating to the guidelines stems from the

provisions of the *Canadian Human Rights Act* giving the Commission *the power* to make guidelines, and not from the existence of the guidelines themselves.⁽⁷⁾ This view is reaffirmed in the dispositive portion of Tremblay-Lamer J.'s decision where she states:

I conclude that the Tribunal's Vice-Chairperson erred in law and was not correct in determining that it was an independent and impartial body with respect to *the power of the Commission to issue guidelines binding on the Tribunal* ...⁽⁸⁾ (emphasis added)

[13] The power of the Commission to issue guidelines is derived from the statute. This power is not limited to pay equity cases. The *Canadian Human Rights Act* governs all proceedings before the Tribunal. As a consequence, I am of the view that the decision in *Bell Canada* applies to cases where no guidelines may actually be in existence.

[14] With respect to the power conferred on the Chairperson of the Tribunal to approve members completing cases after the expiry of their appointments, I note that this type of provision is by no means unique to the *Canadian Human Rights Act*. Comparable provisions exist in the enabling legislation governing many administrative tribunals.⁽⁹⁾ Nevertheless, Tremblay-Lamer J. has concluded that Section 48.2 (2) of the *Canadian Human Rights Act* interferes with the security of tenure of members of the Tribunal in such a way that the independence and impartiality of the Tribunal is compromised.

[15] The problem that Tremblay-Lamer J. identified with the statute relates not to the way that the Chairperson's discretion may be exercised in a particular case, but rather to the existence of the discretion itself.⁽¹⁰⁾ Her conclusion in this regard is binding upon me.

[16] For these reasons I am satisfied that the decision in *Bell Canada* applies to this case. I am also satisfied that Mr. Maclachlan's objection to the jurisdiction of the Tribunal was raised at the earliest practicable opportunity, and that, therefore, the principle of waiver does not operate against Mr. Maclachlan.⁽¹¹⁾

III. Conclusion Regarding the Complaint against Mr. Maclachlan

[17] In light of the foregoing findings, I am of the view that I have no alternative but to adjourn Ms. Lee's complaint against Mr. Maclachlan *sine die*, until such time as the problems with the *Canadian Human Rights Act* identified by Tremblay-Lamer J. are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial. It is with great reluctance that I come to this conclusion. It is well established that there is a public interest in having complaints of discrimination dealt with expeditiously.⁽¹²⁾ The effect of my decision to adjourn the complaint against Mr. Maclachlan *sine die* does not serve this public interest. It does not serve the interest of Ms. Lee, who, five years after filing her complaint regarding Mr. Maclachlan with the Commission, remains unable to have her 'day in court'. It also leaves Mr. Maclachlan with the Sword of Damocles of unproven allegations of discrimination hanging over his head for an indefinite period of time, with no opportunity for vindication.

[18] However, the public interest extends beyond speedy justice: Canadians involved in the human rights process are entitled to hearings before a fair and impartial Tribunal. According to the Federal Court, the Canadian Human Rights Tribunal is not such a Tribunal.

IV. The Complaint against DND

[19] Ms. Lee has filed a separate and distinct complaint against DND. DND has indicated that it has no objection to the jurisdiction of the Tribunal. Accordingly, I am not making any order with respect to the complaint against DND at this time.

[20] In the event that any of the parties wish to make submissions with respect to whether Ms. Lee's complaint against DND can or should proceed in light of my conclusion regarding the complaint against Mr. Maclachlan, such submissions may be made in writing, and should be filed with the Tribunal no later than April 1, 2001.

V. Order

[21] For the foregoing reasons, Mr. Maclachlan's objection is sustained, and Ms. Lee's complaint against Mr. Maclachlan is adjourned *sine die*, until such time as the problems with the *Canadian Human Rights Act* identified by Tremblay-Lamer J. in *Bell Canada* are corrected, or until the Canadian Human Rights Tribunal is found to be institutionally independent and impartial.

Anne L. Mactavish

OTTAWA, Ontario

March 8, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NOS.: T629/1701 & T630/1801

STYLE OF CAUSE: Suzanne Lee v. Department of National Defence and Barry Maclachlan

RULING OF THE TRIBUNAL DATED: March 8, 2001

APPEARANCES:

Suzanne Lee On her own behalf

Daniel Pagowski For the Canadian Human Rights Commission

Adrienne Mahaffey For the Department of National Defence

Barry Maclachlan On his own behalf

1. Docket T-890-99, November 2, 2000.
2. See Section 27 (2) and (3) of the *Canadian Human Rights Act*.
3. Section 48.2 (2) of the *Canadian Human Rights Act*.
4. [1999] F.C.J. No. 1970
5. Section 50 (1), *Canadian Human Rights Act*
6. Section 4, *Canadian Human Rights Act*
7. *Bell Canada*, at para. 86.
8. *Bell Canada*, at para. 128.
9. See, by way of example: Section 63 of the *Immigration Act*, R.S.C. 1985, c- I-2, with respect to members of the Immigration and Refugee Board; Section 9 (1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th supp.), Section 12 (2) of the *Canada Labour Code* governing members of the Canada Industrial Relations Board; Section 14 (3) of the *Status of the Artist Act*, 1992, c. 33 with respect to members of the Canadian Artists and Producers Professional Relations Tribunal; and Section 7 (1) of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18. See also Section 45 (1) of the *Federal Court Act* and Section 16 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.
10. *Bell Canada*, at para. 109.

11. See *Ziindel v. Canadian Human Rights Commission et al.*, Docket A-215-99, November 10, 2000, *In Re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 at p. 112.

12. Coincidentally, this principle was restated by Mr. Justice Richard, then of the Federal Court (Trial Division) in an earlier decision in the *Bell Canada* case. (See *Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.*, [1997] F.C.J. No. 207)