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

BETWEEN:

NORA BEDNARSKI

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

BANK OF MONTREAL

Respondent

RULING ON JURISDICTION

2003 CHRT 8

2003/02/14

MEMBER: Athanasios D. Hadjis

[1] The Complainant has a disability that obliges her to use a wheelchair. She alleges that the Respondent's bank branches near her home are inaccessible by wheelchair and that she has therefore been discriminated against, contrary to s. 5 of the *Canadian Human Rights Act* ("***Act***").

[2] The Respondent has filed a preliminary motion seeking the dismissal of the complaint. The Respondent contends that the Canadian Human Rights Tribunal lacks the jurisdiction to inquire into the complaint for lack of institutional impartiality and independence.

[3] The Respondent takes the position that it has the right, as declared in s. 2(e) of the *Canadian Bill of Rights*[(1)] not to be deprived of a fair hearing in accordance with the principles of fundamental justice. This right, it is argued, is effectively a constitutional standard that extends to all Canadian tribunals and not merely to superior courts of inherent jurisdiction.[(2)] The Respondent contends that the function and structure of the Canadian Human Rights Tribunal, as articulated in the *Act*, vary little from that which is associated with courts.

[4] The Respondent further suggests that the *Act* is an instrument through which the equality rights provided for in s. 15 of the *Canadian Charter of Rights and Freedoms* ("***Charter***") have been preserved. As such, the Tribunal's jurisdiction to deal with human rights under the *Act* serves as an extension to the protection of constitutional rights that is guaranteed under the *Charter*. The Tribunal's proceedings must therefore be conducted in accordance with the highest standards of institutional independence and impartiality.

[5] The Respondent acknowledges that in *Ocean Port Hotel* v. *British Columbia*, the Supreme Court of Canada recognized that while some administrative tribunals may be required to make quasi-judicial decisions, the degree of independence that is called for of a particular tribunal "is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected". [(3)] The Respondent adds, however, that the Tribunal's function and role within the realm of rights that are themselves derived from the *Charter*, impose precisely the type of "constitutional constraints" referred to in *Ocean Port*. Thus, in assessing the degree of independence required of the Tribunal, one should not merely defer to the intention of the legislator. Instead, the Tribunal should be adjudged against the same constitutional standard that is applied to superior courts. This constitutional imperative has already been extended to provincial courts.[(4)]

[6] The Respondent argues that when assessed against this standard, at least two elements within the legislative framework of the *Act* bring into question the independence and impartiality of the Tribunal. The first concern relates to the power of the Canadian Human Rights Commission ("**Commission**"), by virtue of s. 27 of the *Act*, to issue binding guidelines setting out the extent to which and the manner in which, in its opinion, any provision of the *Act* applies in a class of cases. The Respondent points out that the Commission's mandate under the *Act* is to represent the public interest on matters relating to equality, a duty that is ultimately incumbent upon the State. As such, the authority to pass the guidelines effectively empowers the State, that is to say, an arm of the executive branch, to appear before and, at the same time, instruct the Tribunal with respect to the interpretation of an act of the legislative branch. The binding nature of these guidelines would have the effect of compelling the Tribunal to abdicate its role as interpreter of the *Act*'s provisions.

[7] The second issue raised by the Respondent relates to the provisions of s. 48.2(2) of the *Act* that render a Tribunal member's ability to conclude an inquiry after his or her appointment expires conditional upon the approval of the Chairperson. In effect, contends the Respondent, a Tribunal member's security of tenure is subject to the Chairperson's discretion. The Respondent argues that in the face of such a discretionary power, it is illusory to expect the Tribunal to be reasonably perceived as possessing the necessary institutional independence.

[8] For these reasons, the Respondent submits that a reasonable apprehension of institutional bias exists and that the Tribunal should therefore decline to conduct an inquiry into the complaint.

[9] The Commission is of the view that it need not directly reply to the arguments raised by the Respondent regarding the Tribunal's institutional independence and impartiality. The Commission submits that the Federal Court of Appeal adjudicated these very questions, in *Bell Canada* v. *Canada (Human Rights Commission)*,[(5)] a case that relates to a wage discrimination complaint that was filed against Bell Canada, and which the Commission eventually referred to the Tribunal for inquiry.

[10] Bell Canada argued before the Court that due to the institutional bias and lack of independence of the Tribunal, its right to natural justice was being denied. Bell Canada specifically called into question the same sections of the *Act* that the Respondent has referred to in its submissions (s. 27(2) and s. 48.2(2)). The Federal Court of Appeal ruled, however, that a reasonable apprehension of bias does not arise with regard to either of these provisions. Bell Canada appealed from this judgment to the Supreme Court of Canada. Oral arguments on the appeal were presented just a few weeks ago, on January 23, 2003. A decision from the Court is not expected for several months to come.

[11] The Commission contends that the Tribunal remains bound by the Federal Court of Appeal decision with respect to these issues, irrespective of the pending appeal. Obviously, this is not a matter of *res judicata* or "chose jugée", if only because the parties to the *Bell Canada* case and the present one are not the same. Yet, by virtue of the

principle of *stare decisis*, a precedent or decision of a court is binding on courts and tribunals that are lower in the judicial hierarchy.[(6)] I am satisfied that the Federal Court of Appeal decision in *Bell Canada* concerns the identical statutory provisions as are under consideration before me and that essentially the same legal issues are discussed regarding these provisions.

[12] Counsel for the Respondent suggested, nonetheless, that I am not necessarily bound by the determination of the Federal Court of Appeal. This judgment was rendered prior to the release of the decision by the Supreme Court of Canada in *Mackin* v. *New Brunswick (Ministry of Finance)*.[(7)] It is therefore suggested that the Federal Court of Appeal reached its findings without the benefit of this more recent pronouncement by the Supreme Court regarding the issue of institutional independence and impartiality.

[13] The *Mackin* case dealt with legislation that abolished the system of supernumerary judges that had been in place at the Provincial Court of New Brunswick, and replaced it with a panel of retired judges who were paid on a *per diem* basis. The Court held that the manner in which this law imposed change on the conditions of remuneration of judges affected their financial security and constituted a violation of the institutional guarantees of judicial independence contained in s. 11(d) of the *Charter*. The statute was declared unconstitutional.

[14] In setting out the law regarding judicial independence and impartiality, the Supreme Court, in *Mackin*, relied on principles articulated in decisions that pre-dated the Federal Court of Appeal judgment in *Bell Canada*, namely *Valente v. R.*[(8)] and *Re: Provincial Court Judges*[(9)]. Respondent counsel did not explain how *Mackin*'s discussion on the law would have further enlightened the Federal Court of Appeal. It is also worth mentioning that the Supreme Court focussed its attention on the *judicial* independence and impartiality of *courts*, not administrative tribunals. Moreover, the Court's conclusions regarding the issue of security of tenure are of questionable assistance to the Respondent's submissions in the present case. The Supreme Court determined in *Mackin* that the abolition of the supernumerary system did *not* affect the Provincial Court judges' security of tenure. For all these reasons, I am not persuaded that the subsequent release of the Supreme Court decision in *Mackin* affects the impact of the findings in *Bell Canada* on the issues before me.

[15] Counsel for the Respondent suggests that there is no reference in the *Bell Canada* decision to the relationship between s.15 of the *Charter* and the *Act*. Evidence was not introduced before me to indicate which arguments may or may not have been led before the Court. In any event, I do not believe that this facet of the Respondent's submissions adds significantly to its arguments overall. One cannot lose sight of the fact that at the core of the Respondent's submissions is its assertion that the Commission's guideline power, under s. 27(2) of the *Act*, and the Chairperson's "discretionary" authority pursuant to s. 48.2(2), create a reasonable apprehension of institutional bias. The Federal Court of Appeal turned its mind to these specific points and decided that the Tribunal's institutional independence and impartiality are not undermined thereby.

[16] It is entirely possible that the Federal Court of Appeal considered the constitutional implications, if any, related to the Tribunal's jurisdiction, in reaching its findings. It would be highly presumptuous of me to attempt to distance myself from the conclusions of a Federal Court of Appeal judgment that deals directly with the specific questions before me, merely because no mention is made therein of a certain legal argument, especially where I have no evidence to suggest that this issue was not in fact raised by counsel in their submissions to the Court.

[17] Furthermore, I do not accept the suggestion that I am free to ignore the findings of the Federal Court of Appeal simply because the matter is now in front of the Supreme Court of Canada. In *Hujdic* v. *Air Canada*,[(10)] a motion was presented by Air Canada asserting that a reasonable apprehension of institutional bias existed with respect to the Tribunal. The motion was filed after the Federal Court of Appeal decision in *Bell Canada*. The Chairperson stated, in her ruling on the motion:

In my view, the fact that Bell Canada is seeking leave to appeal the recent decision of the Federal Court of Appeal is irrelevant. At this point, the decision of the Federal Court of Appeal is a valid judicial pronouncement, and represents the state of the law.[(11)]

[18] The Tribunal's ruling in *Hujdic* was issued prior to the Supreme Court's decision to grant Bell Canada leave to appeal the judgment. I am not convinced that it makes any difference that the appeal has now been heard by the Supreme Court and taken under advisement. The judgment of the Federal Court of Appeal continues to represent the state of the law until that Court or the Supreme Court declares otherwise.

[19] The Respondent's motion is therefore dismissed.

COSTS

[20] Commission counsel argued that, considering the binding nature of the Federal Court of Appeal decision in *Bell Canada*, the Respondent's motion was entirely without merit and consequently, the Commission should be awarded costs. The Commission alleges that "considerable public resources and costs" were expended to "prepare for, travel to and attend at" the motion. Commission counsel acknowledged that there is no mention of a specific power to award costs in favour of the Commission in any provision of the *Act*. She contends, however, that in the absence of an express prohibition of the awarding of such costs, the Tribunal may make such an order as master of its own proceedings.

[21] I am not convinced that the Respondent's conduct with respect to the filing of this motion was as egregious as the Commission suggests. The Tribunal generally affords all parties the opportunity to raise any preliminary matters, and where appropriate, these issues are dealt with well before the start of the hearing as to the merits of the complaint. I am satisfied that the Respondent was within its rights in presenting this motion. At the very least, raising its concern regarding the reasonable apprehension of bias in this manner provided the Respondent with some assurance that if the Supreme Court of

Canada reverses the Federal Court of Appeal decision in *Bell Canada*, the Respondent will not be deemed to have waived its right to bring this question forward again.[(12)]

[22] I leave for another day the issue of whether, in any case, the Tribunal has the authority to award costs to the Commission.

ORDER

[23] The Respondent's motion is dismissed. The Commission's request for costs is denied.

"Original signed by"

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Athanasios D. Hadjis

OTTAWA, Ontario

February 14, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T728/3302

STYLE OF CAUSE: Nora Bednarski v. Bank of Montreal

RULING OF THE TRIBUNAL DATED: February 14, 2003

APPEARANCES:

Andrea Wright For the Canadian Human Rights Commission

Lukasz Granosik For the Respondent

1. [1] S.C. 1960, c. 44.

2. [2] *Re Provincial Court Judges*, [1997] 3 S.C.R. 3.

3. [3] [2001] 2 S.C.R. 781, at para. 24.

4. [4] *Ibid*. at para. 23.

5. [5] *Bell Canada* v. *Canada (Human Rights Commission)*, [2001] 3 F.C. 481 (C.A.), rev'g [2001] 2 F.C. 392 (T.D.).

6. [6] A. Mayrand, *Dictionnaire de maxims et locutions latines utilisées en droit*, 3rd ed. (Cowansville, Que. : Yvon Blais, 1994) at 493-94.

7. [7] 2002 SCC 13; [2002] S.C.J. No. 13 (QL).

8. [8] [1985] 2 S.C.R. 673.

9. [9] *Supra*, note 2.

10. [10] *Hujdic* v. *Air Canada* (1 November, 2001), T658/4601 (C.H.R.T.).

11. [11] *Ibid*. at para. 7. See also *Larente* v. *Canadian Broadcasting Corp.*, [2001] C.H.R.D. No. 24 (C.H.R.T.) (QL).

12. [12] *Zundel* v. *Canada (Human Rights Commission)* [1999] 3 F.C. 58 (T.D.) at para. 12-16.