

Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

BETWEEN:

PHYLLIS McAVINN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STRAIT CROSSING BRIDGE LIMITED

Respondent

**MOTION FOR AN ORDER
TO ALLOW THE RESPONDENT
TO INTERVIEW FOUR COMMISSION EMPLOYEES**

Ruling No. 1
2000/11/23

PANEL: Pierre Deschamps, Chairperson

[1] On November 21, 2000, the Tribunal dismissed the Respondent's motion for an order allowing it to interview prior to the hearing certain individuals employed by the Commission with reasons to follow. The following are the reasons for the decision.

I. FINDINGS

[2] At the outset, it must be noted that the presentation of the Respondent's motion was preceded by a lengthy exchange of correspondence between the Respondent and the Commission.

[3] The correspondence reveals that the Respondent considered in July 2000 having the investigator in the present complaint as well as the Commission's Director of Complaints Investigations (sic) and Director of Compliance give evidence with respect to their report which recommended that the present complaint be dismissed as unfounded.

[4] At the time, the Respondent asked the Commission when it could interview these individuals to determine what evidence they might give upon being called by the Respondent at the Tribunal hearing. The Respondent argued that these interviews were necessary in order for it to prepare the will-say statements of its potential witnesses.

[5] The Commission's answer to the Respondent's request was that it would not agree to the Respondent interviewing some of its employees prior to the hearing since there was no process of discovery provided for in proceedings before the Canadian Human Rights Tribunal. Over the following months, the Commission maintained this position.

[6] By motion dated October 17, 2000, the Respondent sought an order directing that the Commission permit counsel for the Respondent to interview the Commission's investigators in relation to the present complaint, as well as the Director of Complaints and Investigations and the Acting Director of Compliance, without interference from the Commission, arguing that this was necessary to prepare its case.

[7] The Respondent further sought an order directing the Commission to advise the interviewees that they were not prohibited from speaking with counsel for the Respondent freely and could do so without any repercussions.

[8] On November 2nd, 2000, the Commission submitted his response to the Respondent's motion by way of a memorandum of fact and law. The Commission argued that the Tribunal has no jurisdiction to make the order sought by the Respondent and that the latter has failed to demonstrate how an examination for discovery would be relevant or in any way helpful to the present proceedings. Furthermore, it argued that, under the Tribunal's present Draft Rules of procedure, there is no process of discovery prior to the hearing of a case. Finally, the Commission stated that three of the individuals that the Respondent sought to interview were no longer employed by the Commission.

[9] On November 3rd, 2000, the Complainant responded to the Respondent's motion by way of letter. The Complainant made it known that she objected to the motion being granted, arguing that the opinions of the investigator were not relevant to the proceedings and that what the Respondent was attempting to do was to challenge the quality of the Commission's investigation.

[10] On November 9th, 2000, the Respondent, in reply to the submissions made by the Commission and by the Complainant, asked that its motion be amended to add a request for an order requiring the Commission to disclose to the Respondent the current addresses and telephone numbers of the proposed interviewees.

[11] Finally, on November 14th, 2000, in response to the Respondent's reply, the Commission made the argument that the Tribunal had no authority under section 48.9 (2) of the Act to make orders with respect to discovery but only rules, which the Tribunal has not made.

II. DECISION

[12] In support of its motion, the Respondent referred to the case of Nelson . In that case, the Ontario Board of Inquiry determined that Respondent's counsel was entitled to interview Commission witnesses. After having analyzed that decision, the Tribunal finds that the facts of the present case are clearly distinguishable from those of Nelson (1).

[13] In Nelson, not only was the Board empowered under the Statutory Powers Procedure Act (2) of Ontario to make rules regarding its practice, but the Board had in fact adopted Rules of Practice which contained a specific provision dealing with discovery prior to a hearing. At the present time, the Tribunal's Draft Rules of Procedure contain no provision concerning discovery proceedings.

[14] The record, as it stands, shows that the Commission has provided the Respondent with the investigator's reports, review notes and memos. The Respondent is thus well apprised of the Commission's case. Nothing prevents the Respondent from calling the individuals it sought to interview as witnesses in the present case.

[15] As to the preparation of the will-say statements, the Respondent, with the information it has been provided with by the Commission, is surely in a position to anticipate, at this point in time, the gist of the testimony of the witnesses it would call. The purpose of a will-say statement is to prevent the other parties from being taken by surprise when the hearing starts. Since the individuals the Respondent seeks to interview worked for or are still working for the Commission, surely the latter would have no reason to claim surprise with regard to their anticipated testimony.

[16] Finally, given that the record shows that three of the four employees that the Respondent seeks to interview, notably the two investigators, are not employed by the Commission anymore, the Tribunal fails to see how it could compel the Commission to make them available to the Respondent for an interview before the hearing. This said, it is still open to the Respondent to have the Tribunal subpoena these four individuals if it wants to have them called as witnesses. If this were to occur, the Commission would have to provide the Respondent with the information it has so as to allow the Respondent to contact them.

[17] For these reasons, the Respondent's motion is dismissed.

2. R.S.O. 1990, c. S.22.

Pierre Deschamps, Chairperson

Ottawa, Ontario
November 23, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

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APPEARANCES:

Lisa Goulden For Phyllis McAvinn

Janice Cheney For the Canadian Human Rights Commission

Eugene Rossiter For Strait Crossing Bridge Limited