

BETWEEN:

GORDON SAWYER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN BROADCASTING CORPORATION

Respondent

REASONS FOR DECISION

Decision No. 1

2001/07/3

PANEL: Roger Doyon, Chairperson

TRANSLATION

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I. INTRODUCTION

[1] Gordon Sawyer was employed by the Canadian Broadcasting Corporation (CBC) for twelve (12) years as a sports reporter, host of sports events and sportscaster.

II. THE COMPLAINT

[2] On March 20, 1998, Gordon Sawyer filed a complaint with the Canadian Human Rights Commission ("the Commission") against his employer, the Canadian Broadcasting Corporation. He alleges that his employer discriminated against him by reducing his assignments and refusing to continue to employ him owing to his disabilities (alcoholism and nervous breakdown), the whole in violation of the provisions of section 7 of the *Canadian Human Rights Act* ("the Act").

III. PRELIMINARY OBJECTION

[3] The CBC and the Commission each submitted to the Tribunal a written preliminary objection, together with arguments and relevant authorities. They have asked that a decision be rendered without a hearing.

A. Preliminary Objection of the CBC

[4] The CBC considers that the Canadian Human Rights Tribunal ("the Tribunal") does not have the independence and judicial institutional impartiality it should and that, consequently, it cannot hear this case. Its preliminary objection is based essentially on the concept of independence and judicial institutional impartiality, which entails three (3) characteristics: security of tenure, financial security, and institutional independence of the members of a tribunal. It believes that the members of the Tribunal fail to fulfil two of these characteristics, namely, institutional and administrative independence, and security of tenure.

1. Institutional and administrative independence

The CBC refers to subsections 27(2) and 27(3) of the Act.

Subsection 27(2)

[Guidelines] The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

Subsection 27(3)

[Guideline binding] A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

[5] For the CBC, not only do these provisions of the Act allow the Commission to issue guidelines concerning the interpretation and application of the provisions of the Act, but these guidelines must also be followed by the Tribunal.

[6] The Commission therefore has the legislative power to impose on the Tribunal a line of conduct in the exercise of its powers under subsection 50(2) of the Act.

[7] The CBC also argues that the mere fact that the Commission is a party appearing before the Tribunal and has such a power, constitutes a major impediment to the rules of institutional independence and impartiality even in the absence of formally issued guidelines concerning one or more provisions of the Act in a particular dispute.

[8] For the CBC, the Commission's power to issue guidelines and its interaction with the Tribunal's adjudicative role come into direct conflict with one of the fundamental principles of our constitutional system, namely, the separation of powers between the executive and legislative branches of the state and the judicial branch.

[9] Finally, in applying the provisions of section 51 of the Act, the Commission defends before the Tribunal evidence gathered in the course of its inquiry, and at the same time indicates the interpretation of the Act it deems correct and the application of this Act to the facts shown by the evidence.

[10] The CBC concludes that such a situation shows that the Tribunal is institutionally subordinated to the Commission and leads to only one conclusion: a sensible and reasonable person cannot but apprehend bias on the ground that the Tribunal lacks institutional independence.

2. Security of tenure of the members

[11] The CBC submits that the Tribunal is not institutionally independent and impartial since the Chairperson of the Tribunal must approve the extension of the appointments of members to allow them to conclude matters before them.

[12] The CBC bases the validity of all its claims on the following decisions:

Valente v. The Queen, [1985] 2 S.C.R. 673

Bell Canada v. C.T.E.A. et al., Federal Court (Trial Division) 23 March 1998

MacKeigan v. Hickman, [1989] 2 S.C.R. 786

Committee for Justice and Liberty v. National Energy Board

The Queen v. Lippé, [1991] 2 S.C.R. 114

[13] For its part, the Commission argues that the Federal Court of Appeal, by a unanimous decision rendered May 24, 2001 (*Canadian Telephone Employees Association v. Bell Canada*, [2001] A.C.F. no. 1747, Docket T890-99, recognized the independence and institutional impartiality of the Tribunal.

[14] The Commission also considers that the Bell Canada decision dispensed with the question raised by the CBC in its objection based on section 27 of the Act.

[15] As for the power of the Chairperson to approve the extension of the appointments of members of the Tribunal to allow them to conclude matters before them, the Commission believes that the Federal Court of Appeal also dispensed of this question of irremovability from the Tribunal in the *Bell Canada* case.

[16] Finally, the Commission refers the Tribunal to the following case law:

Valente v. The Queen, [1985] 2 S.C.R. 673

Bell Canada v. C.T.E.A. et al., Federal Court (Trial Division) 23 March 1998

Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3

The Queen v. Gagné, [1992] 1 S.C.R. 259.

B. Preliminary Objection of the Commission

[17] The Commission alleges that the CBC cannot dispute the independence and impartiality of the Tribunal, which has been created pursuant to a federal statute.

[18] It bases its allegation on the fact that the Crown in right of Canada cannot dispute the validity of a federal statute by virtue of the *Canadian Bill of Rights*. Now, the CBC exercises its powers pursuant to the *Broadcasting Act* and is a federal agent of the Crown.

[19] This claim of the Commission was based on the decision of the Federal Court, Trial Division, in *Government of the Northwest Territories v. P.S.A.C.*, T2411-98.

[20] The CBC, for its part, argues that it is not an agent of the Crown since the staff it employs and its relations with its employees are governed by the *Canada Labour Code* and not by the statutes governing the federal public service.

IV. DECISION

[21] It should be pointed out that the preliminary objections raised by the CBC and the Commission were submitted to the Tribunal before the Federal Court of Appeal decisions were handed down in the *Bell Canada* and *Government of the Northwest Territories* cases.

[22] Notwithstanding the decisions handed down by the Federal Court of Appeal on May 24, 2001, the parties have asked the Tribunal to render its decision on the preliminary objections formulated.

(A) Judicial Independence and Institutional Impartiality

[23] The first matter in dispute is the determination of whether the powers vested in the Commission by subsection 27 (2) of the Act and binding on the Tribunal are apt to give rise to a reasonable apprehension of institutional bias.

[24] The Federal Court of Appeal, in the *Bell Canada* case, in the hand of the Honourable Mr. Justice Létourneau, dispensed with the matter thus:

[39] ". . . [A]ny guideline adopted pursuant to its provisions [subsection 27(2)] is no longer to be binding on the Tribunal in a "particular case" but only in a "class of cases", e.g. a section 11 type case. The apparent intent is that any such guideline is to be applied across the board to all cases falling within a class. It seems to me, therefore, that the opportunity formerly possessed by the Commission to inject itself into the determination of a particular case has been largely eliminated. This represents a significant change. Under the earlier version of subsection 27(2), the Commission could, pursuant to its guideline-making power, influence the outcome of a particular complaint, theoretically even to the extent of adopting a tailor made guideline. This is no longer possible. It seems to me that guidelines governing a "class of cases", with general and impersonal application, are considerably less likely to give rise to a reasonable apprehension of institutional bias."

[25] The Federal Court of Appeal is of the view that:

[41] ". . . [A] fully informed person viewing the matter realistically and practically - and having thought the matter through - would not have a reasonable apprehension of bias in a substantial number of cases".

[26] The Federal Court of Appeal concludes from this that the power vested in the Commission by subsection 27(2) of the Act is not a threat to the application of the rule of institutional impartiality.

[27] The second matter in dispute concerns subsection 48.2(2) of the Act, which gives the Chairperson of the Tribunal the power to allow a member whose term has expired to conclude matters before him. Is this power of the Chairperson fatal to the independence of the Tribunal?

[28] The Federal Court of Appeal, again in the *Bell Canada* case, answers this question.

[44] ... "I am not persuaded that the Chairperson's power under subsection 48.2(2) is fatal to the independence of the Tribunal. The Chairperson is, after all, the chief executive of the Tribunal with responsibility under subsection 48.4(2) of the 1998 for the supervision and direction of its work "including the allocation of work among the members and the management of the Tribunal's internal affairs". By subsection 48.1(3) of the Act, the Chairperson must be a member in good standing of a provincial bar for at least ten years. Moreover, by subsection 48.2(1), the Chairperson is to be appointed by the Governor in Council for a term of not more than seven years "to hold office during good behaviour" and removable only "for cause". Thus the Chairperson may not be capriciously removed from office because of decisions made by him in the administration and operation of the Tribunal including the exercise of the subsection 48.2(2) power.

[45] It is also to be noted that if the Chairperson were to abuse his power in extending or refusing to extend the appointment of a Tribunal member for reasons wholly extraneous to the proper administration of the Tribunal, his decision would be reviewable pursuant to section 18.1 of the *Federal Court Act*. I would add that, as a practical matter, the Chairperson would appear to have a strong disincentive for refusing to extend a Tribunal member's appointment in appropriate circumstances since to do so would require starting the case afresh. Given that many cases before the Tribunal take many years to litigate, frustrating the process in this manner would inevitably discredit the Tribunal and, by implication, the Chairperson himself".

[29] The Federal Court of Appeal concluded that "the subsection 45.2(2) power does not compromise the Tribunal's independence or impartiality in the circumstances".

(B) CBC Without Standing

[30] The Commission claims that the CBC, in its capacity as agent of the Crown, has no standing to challenge the incompetence of the Tribunal.

[31] It based its preliminary objection essentially on the Federal Court ruling in *Government of the Northwest Territories v. P.S.A.C.*, T2411-98 (appeal A-13-00).

[32] The Federal Court of Appeal ruled, however, that the Government of the Northwest Territories had been granted broad powers and that, in exercising its powers, it "has standing before the courts to seek recognizance and enforcement of these powers".

[33] The CBC is neither a government nor an agent of the Crown for matters arising from its labour relations with its employees (ss. 44 and 47, *Broadcasting Act*, R.S.C. (1985) and B-901).

[34] The CBC has standing to exercise before the courts all rights with respect to its relations with its employees. It can demand the right to be heard before an independent and impartial tribunal.

V. CONCLUSION

[35] Therefore, the preliminary objections of the Canadian Broadcasting Corporation and of the Commission are dismissed.

Roger Doyon, Chairperson

July 3, 2001

OTTAWA, Ontario

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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Thierry Bériault For the Canadian Broadcasting Corporation

