Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Richarm Warman

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Glenn Bahr

- and –

Western Canada For Us

Respondents

Ruling

Member: Julie Lloyd
Date: May 25, 2006
Citation: 2006 CHRT 46

Excerpt

The Chairperson: Good morning, everybody. Afternoon now.

The Registrar: Be seated.

The Chairperson: I am going to address the motion that was put before us this morning. And I have got it written out, so I will just read it.

In the within complaint, the complainant alleged that the respondents violated Section 13.1 of the *Canadian Human Rights Act* on numerous grounds: religion, race, national or ethnic origin, sexual orientation.

The respondent's representative has brought a motion this morning seeking an order that this member recuse herself by reason of a reasonable apprehension of bias.

First, I will note that there is no evidence tendered in support of this motion. The respondent's representative includes in his motion numerous extracts of what purports to be media clippings taken from the internet. The evidence was not tendered or put forward in proper form.

The law is clear that the threshold is high because there is a presumption of neutrality.

The onus of demonstrating bias lies with the person alleging its existence, and an allegation must be supported by material evidence.

Here, the respondent's representative elected not to tender such evidence. The respondent's application must fail for that reason, and I so find.

Further, however, and in the alternative, even if the material included in the respondent's statement of facts is taken at face value, I find that an allegation of bias has not been made out.

First, there's been no suggestion made by the respondent's representative that this member has demonstrated any bias in the present hearing, two-and-a-half days of which have now concluded.

Further, there's been no suggestion of any direct interest or connection between this member and this case or the parties before the tribunal.

The respondent's representative instead relies on the media articles, which would suggest a number of things:

> First, that this member has represented clients who are members of minority groups enumerated in the *Canadian Human Rights Act*, including gay and lesbian clients; that this member has made public comments in support of minority groups enumerated in the *Canadian Human Rights Act*, including the rights of gays and lesbians; third, that the member herself may be a member of the minority group enumerated in the *Canadian Human Rights Act* and in particular, may be a lesbian; finally, that this member made a comment in relation to a private member's Bill considered by the Alberta Legislative Assembly.

The respondent's representative identified that, in particular, the following comment is particularly indicative of bias, and that is, "People are allowed to have their private opinions, but they are not allowed to discriminate in a public sphere."

So first with respect to the law, and we've canvassed that this morning. The law with respect to an apprehension of bias addresses a concern that's central. It is central to the administration of justice that parties to an adjudication are entitled to a hearing by an adjudicator who is fair and who is impartial.

The tests for assessing allegations of bias or apprehension thereof have been set out clearly by the Courts.

But first, there's an important distinction to be drawn, and that is drawn in the cases between judicial neutrality and judicial impartiality. The former, judicial neutrality, is simply not

possible. The latter, judicial impartiality, is critical to the fair administration of administrative process.

Justices L'Heureux-Dubé and McLachlin in the decision of *R v. RDS*, 1997, 3 SCR, 484, discuss at length a very important, critical distinction between these two concepts, and I am turning to page 34 of that decision.

I am going to read some of it, because it is particularly critical to this determination.

Madam Justice L'Heureux-Dubé and McLachlin identifies as follows: In order to apply the test -- and this is the test for an apprehension of bias -- it is necessary to distinguish between the impartiality which is required of all judges and the concept of judicial neutrality. The distinction which would draw that is reflected in the insightful words of Benjamin N. Cardozo in the *Nature of the Judicial Process*, at page 12 and 13 and 167, where he affirmed the importance of impartiality while at the same time recognizing the fallacy of judicial neutrality.

Mr. Cardozo is quoted as follows:

> "There is in each of us the stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which do not recognize and cannot name have been tugging at them – inherited instincts, traditional beliefs, acquired convictions -- and the resultant is an outlook on life, a conception of social needs. In this mental background, every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the person, whether he or she be litigant or judge.

Cardozo recognised that objectivity was an impossibility, because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Counsel noted in commentaries on judicial conduct, there is no human being who is not the product of every social experience, every process of education, and every human contact. What is possible and desirable is impartiality. And it is impartiality that is requirement of this proceeding. That this member has

engaged in advocacy for human rights may lead one to conclude that she, like others, is not neutral. It does not, however, lead to the conclusion that she is impartial.

And now we need to turn to the test, and the test for an apprehension of bias and the manner in which that is to be analysed, I am going to start, again, with the decision of .*R v. RDS*, and this is at page 12. And the test is that of an informed reasonable person. So the test is:

> "What would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude? Would he or she think that it is more likely than not that the decision-maker, consciously or unconsciously, would not decide fairly?"

I am also instructed by the reasons of the Federal Court of Appeal in *Zündel* at Paragraph 36 that:

> "The reasonable person must bean informed person with knowledge of all relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The threshold is high."
>
> The onus of establishing an apprehension of bias is on the one alleging.

And further in the *Zündel* decision is they have referenced to an Ontario Court of Appeal decision in *E.A. Manning Limited*, and it is identified there that it must be presumed in the absence of any evidence to the contrary that the commissions will act fairly and impartially in discharging their adjudicative responsibilities and will consider particular facts and circumstances of each case.

Before we turn to the facts, the allegations in this particular application, we need to ask ourselves, "Would these facts in each of them make a reasonable person believe that this member will not fairly and impartially consider all of the evidence and will not fairly and impartially apply the relevant law to the evidence as it is found?"

And we must consider the instructions from the Supreme Court of Canada in *R. v. RDS* about the nature of that reasonable person. And at Paragraph 48, the reasonable person is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case.

The reasonable person is cognisant of the social dynamics -- and I am paraphrasing with the word "social" -- social dynamics in a local community and is a member of the Canadian community and supportive of the principles of equality.

That having been said, let us turn to the facts alleged by the respondent's representative and ask whether this reasonable person, the reasonable person that Madam Justice L'Heureux-Dubé and McLachlin identified for us.

Would this reasonable person think that the member would not, for reason of bias, be able to decide fairly and impartially the matter before the tribunal?

First, there was a suggestion that this member may be a member of one of the five grounds upon which this complaint is brought. Is that a fact that would lead a reasonable person, our reasonable 1 person, to decide that there be an apprehension of bias?

In my view, this reasonable person would not conclude that a person's identity compromises their ability to consider this matter fairly and impartially. And, frankly, to find otherwise would be profoundly contrary to the principles of the quality paramount under this act, the *Canadian Human Rights Act* and, according to Madam Justices L'Heureux-Dubé and McLachlin, the very fabric of Canadian society.

Second, that the member may have represented clients who are members of minority groups protected under the *Canadian Human Rights Act* including gays and lesbians, would our reasonable person conclude bias from that fact?

And it is hard -- I cannot see how that could possibly give rise to an apprehension of bias as adjudicators who either are or have been lawyers represent clients. The identity of those clients cannot reasonably be found to dictate, compromise, or express an adjudicator's ability to be impartial with respect to the facts in front of them.

And I was particularly struck by Mr. Vigna's observation that criminal lawyers would have a very difficult time becoming judges at all if they were identified with their clients.

Thirdly, that the member made public comment in support of human rights, support of the rights of gays and lesbians in particular. And, again, this may go to neutrality. Again, there's an important distinction: This may go to neutrality, not to impartiality.

And, further, the laws in this country, including the *Canadian Human Rights Act* itself, are expressly intended to foster the rights of minority groups. Comments consonant with this fundamental principle of Canadian society cannot, in my view, amount to a reasonable apprehension of bias.

And, finally, with respect to the particular comment, "People are allowed to have their private opinions, but they are not allowed to discriminate in a public sphere," that is a correct articulation of the laws of Canada as articulated in the *Canadian Human Rights Act* and in the *Human Rights Act* of other provinces in this country. And so, again, such a statement cannot give rise to an apprehension of bias.

For those reasons, the motion is denied.

Signed by

Julie Lloyd
Tribunal Member

Edmonton, Alberta
May 25, 2006

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1087/6805 et T1088/6905

Style of Cause: Richard Warman v. Glenn Bahr and Western Canada for Us

Ruling of the Tribunal Dated: May 25, 2006

Date and Place of Hearing: May 25, 2006

(Oral decision given to the parties on May 25, 2006)

Edmonton, Alberta

Appearances:

Richard Warman, for himself

Giacomo Vigna, for the Canadian Human Rights Commission

Paul Fromm, for the Respondent Glenn Bahr

No one apperaing, for the Respondent Western Canada For Us