T492/0998

Ruling no. 2

CANADIAN HUMAN RIGHTS ACT

R.S.C. 1985, c. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

SHIV CHOPRA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

INTERIM DECISION - ELECTION

TRIBUNAL:

Athanasios D. Hadjis

APPEARANCES BY:

Peter Engelmann
Counsel for the Canadian Human Rights Commission

Dr. Shiv Chopra
On his own behalf

David A. Migicovsky
Counsel for the Respondent

DATES AND LOCATION OF HEARING:

May 17-18, 1999
June 17-18, 1999
July 5-7, 1999
September 13-16, 1999
Ottawa, Ontario

INTERIM DECISION

On September 16, 1999, at the close of the Human Rights Commission's evidence, counsel for the Respondent declared that he would be making a motion to dismiss the complaint on the grounds that a *prima facie* case had not been established by the Commission and the Complainant. The question then arose as to whether the Respondent is required to elect to not call evidence in order to proceed with its motion.

The Complainant as well as counsel for the Commission and the Respondent made submissions verbally. I have reviewed and considered the authorities to which they referred as well as the arguments which they advanced.

The election rule

The rule requiring that a respondent or defendant be put to an election before making a motion for dismissal or non-suit is derived from the common law in matters relating to civil proceedings. Sopinka, Lederman and Bryant describe this practice in their text, *The Law of Evidence in Civil Cases*[(1)]*:*

When the plaintiff's case is completed, defence counsel, if so disposed, may move for a non-suit on the ground that there is no evidence to give rise to a reasonable inference in the plaintiff's favour. The trial judge then must put defence counsel to his election as to whether the defendant wishes to call evidence. If the defendant elects to call no further evidence, the trial judge must then exercise his judicial function to determine if there is any evidence to satisfy a reasonable person of the plaintiff's case. It is rare that a defendant's counsel will elect to call no evidence if he or she has evidence to call because if the trial judge dismisses the motion for a non-suit, then the defendant is precluded from leading evidence for the purpose of raising a defence to the plaintiff's case. Therefore, defendant's counsel must be sure of his or her success on the motion for a non-suit before making such an election.

Some jurisdictions in Canada have adopted rules which derogate from this principle. For instance, Rule 30.08 of the *Nova Scotia Civil Procedure Rules*, as cited in *McCara* v. *Nova Scotia (Dept. Of Fisheries),*[(2)] stipulates:

At the close of the plaintiff's case the defendant may, without being called upon to elect whether he will call evidence, move for the dismissal of the proceeding on the ground that upon the facts and the law no case has been made out.

There is no similar provision in the *Canadian Human Rights Act*, the *Draft Rules of Procedure of the Canadian Human Rights Tribunal* nor in the *Federal Court Rules* of the Federal Court of Canada. In his arguments, Counsel for the Respondent submitted that the common law rule of election does not apply to the Canadian Human Rights Tribunal and subsidiarily, if it does apply, that I have the discretion to exempt the Respondent from its application.

Does the election rule apply to the Canadian Human Rights Tribunal?

The case law arising from the Canadian Human Rights Tribunal is not particularly helpful regarding this question. Under similar circumstances, some Tribunals have required that the respondent make its election(3), while others either have not(4) or have simply proceeded directly to the hearing of the motion of non-suit or dismissal because the complainant and the Commission did not raise the issue of election.(5)

Several decisions from provincial human rights adjudicative bodies have dealt with this matter in greater depth. In the case of *Nimako* v. *CN Hotels*,(6) an interim decision was rendered by the Ontario Board of Inquiry, in circumstances similar to those before me in the present case. The Board, after characterising proceedings under the Ontario Human Rights Code as being essentially civil in nature, concluded that the practice of putting a respondent to his election prior to his making a motion to dismiss ought to be followed by a Board of Inquiry, unless the particular circumstances of the case before it would make it unfair or inconvenient to do so. The adjudicator went on to hold that the respondent in the case before him was required to elect to call no evidence if it wished to proceed with its motion of non-suit.

Although certain other Ontario Board of Inquiry rulings given subsequent to *Nimako* have held that the respondents in those cases need not be compelled to elect to not call evidence, they did agree that the decision will vary depending on the circumstances of each case.(7)

The Board of Inquiry in *Nimako* set out what are probably the most persuasive reasons for maintaining the practice of putting respondents to their election in matters relating to human rights legislation, in the following passage(8):

In approaching this question it is important to bear in mind that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of the defendant (or an accused) tips the scales against him or her. Having regard to the difficulties complainants face in getting access to all the information relevant to establishing discrimination, this may well be more likely to be the case in hearings under the *Human Rights Code* than in

civil actions generally. Unlike the criminal process, which pits the state against an individual who risks criminal sanction, and who must be found guilty beyond a reasonable doubt, a civil action involves the resolution of conflicting individual interests on a balance of probabilities. In that context, it seems only fair that the defendant must make up his or her mind whether to close the case after the plaintiff's evidence is in, thus thwarting the plaintiff's access to evidence that might have made the latter's case, or to proceed to call witnesses at the risk of assisting the plaintiff's case. Otherwise, the defendant would appear to be saying to the tribunal: "I want you to decide this case without hearing all the evidence, some of which might be helpful to the plaintiff, but only if you decide it in my favour, the effect of which is to dismiss the action; if you are unprepared to decide in my favour on the basis of the evidence adduced by the plaintiff, then I want you to postpone deciding the case until my evidence is in as well, even though some of it may prove of assistance to the plaintiff." If such a "heads I win, tails I don't lose" suggestion appears unseemly in relation to an action before a civil court, it would seem even less acceptable in a hearing before a Board of Inquiry such as this.

I find this argument compelling particularly in the context of alleged discrimination in the workplace as in the present case. Quite often in such matters, the complainant may be the victim of discriminatory conduct by representatives of the employer which conduct he may not be able to prove directly. Dr. Chopra, in his submissions before the Tribunal, described this type of behaviour in his case as "boardroom discrimination". The complainant and the Commission in such situations must therefore frequently resort to proving their case by circumstantial evidence. Some of that circumstantial evidence may in fact be established through the testimony of some of the respondent's witnesses. It would be inappropriate therefore in a case where there may in fact been a breach of the *Canadian Human Rights Act*, for the complainant to be denied the relief to which he is entitled because he has not been able to establish his case by this stage in the proceedings, when the tribunal has not had the benefit of hearing all of the evidence, especially when some of that evidence was not available to the Commission or the complainant.

Counsel for the Respondent argued that considering the degree of disclosure required by the *Draft Rules of Procedure of the Canadian Human Rights Tribunal* as well as the extensive investigative powers of the Commission, it is unlikely that any helpful evidence could emerge during the presentation of the respondent's case, of which the complainant and the Commission were unaware and which they were unable to put forth prior to closing their respective cases. However, irrespective of how much information the complainant or the Commission may be able to gather going into a hearing, some facts may nevertheless only be accessible and/or proven through the cross-examination of the respondent's witnesses. To submit that a complainant or the Commission could opt to call those individuals who are adverse in interest to testify in chief is not an appropriate resolution to this problem for it would in effect compel those

parties to introduce what is essentially the respondent's evidence while at the same time denying them the opportunity to cross-examine on this evidence.

The Respondent also argued that the decision in *Nimako* failed to consider the distinction between the burden of proof required in human rights cases and that which is required in civil matters where the common law practice of putting the defendant to an election is applied. Ordinarily, a complainant who alleges discrimination in the hiring practices of his employer must adduce evidence that he was qualified for the particular employment, that he was not hired and that someone no better qualified but lacking the complainant's distinguishing feature subsequently obtained the position.[(9)] At this point, the onus shifts to the respondent to provide an explanation after which it falls to the complainant to demonstrate that the explanation is pretextual.

Counsel for the Respondent relied upon the position adopted by the Nova Scotia Board of Inquiry in *McCara* v. *Nova Scotia Department of Fisheries et al.*,[(10)] in order to make a distinction between civil actions and human rights cases with respect to the question of election:

In the civil action, the burden of proof, that being the balance of probabilities, rests with the plaintiff throughout the duration of the action. However, in human rights cases, as already discussed, where the overall burden of proof is always upon the complainant, once the *prima facie* case has been established, the evidentiary burden shifts to the respondent. It would seem unfair to deprive the respondent of an opportunity to present his or her case if it was determined a *prima facie* case had been met following a motion for non-suit. As earlier stated, the threshold of establishing a *prima facie* case is extremely low and it would only be in the rare and exceptional case where this threshold was not met. Not only would an election be unfair to the respondent, it would also effectively mean that a motion for non-suit would not be made as the risk would be too high.

However, this does not address the concern raised in *Nimako*[(11)]. Although the complainant must establish a *prima facie* case in the manner set out in *Shakes* v. *Rex Pak Limited*,[(12)] it must be proven on the balance of probabilities based on all the evidence before the tribunal. This means that some element of the *prima facie* case which the complainant must establish may be proven by way of the evidence adduced by the respondent.

Counsel for the Respondent however argued in addition that the *prima facie* case which must be shown to have not been made by the applicant in a motion of non-suit is not one which is established on the balance of probabilities but rather on a much lower standard. This point is canvassed extensively in the Nova Scotia Board of Inquiry decision in *Gerin et al* v. *I.M.P. Group Limited et al*[(13)], at page D/452:

Specifically, I do not think it necessary or desirable on a motion for non-suit for the board to assess or weigh the evidence. If there is some evidence that a reasonable finder of fact could believe and accept to establish the complaint alleged, then a *prima facie* case has been made out and the motion should be dismissed. Because no final assessment of the evidence has been made out at this stage, one cannot conclude that the complainants will win if the evidence stops at this point, ie., the respondents lead no evidence. The final assessment on the complainants' evidence must await the conclusion of all of the evidence. This means that if the motion for non-suit fails, the respondents must decide whether to lead evidence, and, if so, what evidence, without the benefit of the views of the Board on the quality of the evidence led by the complainants.

Consequently, any concerns with respect to a respondent's "testing the waters" and ascertaining how well it has addressed the complaint against it thus far, are avoided because the Tribunal hearing the case is not required to assess the complainant's evidence. As described by Sara Blake in *Administrative Law in Canada*[(14)] :

If there is some evidence (however weak) in support of the case, a *prima facie* case has been made out. Credibility of witnesses and weight of evidence is not considered at this stage.

To further buttress this argument, counsel for the Respondent suggested that if I do not require an election and thereafter reject the Respondent's motion to dismiss the complaint, I should not give any reasons. Thus, the Respondent would not have the advantage of my thoughts on the evidence of the other party. [(15)]

However, this reasoning fails to consider some important factors. First of all, the lower standard of proof has apparently been taken into account in the establishment of the common law principle of election as Sopinka, Lederman and Bryant explain:

The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it. [(16)]

Furthermore, it may be illusory to believe that an adjudicator will be able to avoid assessing the evidence in any manner whatsoever while reviewing it for the motion. This may in turn influence the manner in which he receives the respondent's evidence if the motion of non-suit is rejected. Moreover, parties to

any litigation are expected to make strategic decisions regarding the presentation of their cases and it may be unfair to allow one party, the respondent, to benefit from even the slightest indication from the adjudicator of how the case is going.

Although adjudicators may attempt to prevent themselves from assessing the credibility of the evidence when deciding upon motions of non-suit, in fact they could find themselves unknowingly providing substantial guidance to the respondent concerning his approach to the case. For instance, in *Gerin*[(17)] and in *Tomen*[(18)] although the Boards of Inquiry hearing these cases clearly accepted that the standard of proof at this stage is very limited, they nonetheless made what can only be described as assessments in an extensive analysis of the complainant's evidence. Such detailed discussions cannot but serve to assist respondents in tackling the case being made against them by, for instance, enabling them to reset their sights on the strongest elements of a complainant's proof. This would be unfair to the complainant and the Commission.

An additional consideration, and one which is of particular concern to the Commission according to its counsel, is the effect of establishing as a rule that a respondent is entitled to make its non-suit motion, without any risk to its right to adduce evidence in the event the motion is rejected. This may lead to an increase in the number of non-suit motions resulting in a suspension of the hearing of the evidence while the motion is argued, to be likely followed by an adjournment of the case while the Tribunal examines the evidence and prepares its decision on the motion. This could create an additional delay in what has typically been a very long process from the date of the filing of the complaint to the hearing on the merits.

Counsel for the Respondent countered that non-suit motions have always been available to respondents and there are no indications of abuse thereof in the past. However, to date, there has not been any decision of the Canadian Human Rights Tribunal setting out in a definitive manner that a respondent is not required to elect. In fact, although limited in their reasons, the relatively recent decisions of *Dokis*[(19)] and *Parker*[(20)] have put the respondent to its election. A decision in the present case setting out a rule to the contrary may therefore lead to an increased interest by respondents in opting for a "no-risk" non-suit motion.

I therefore conclude that the common law rule of election does apply to this Tribunal but that the parties may, on the one hand, waive its application, which is not the case here, and on the other hand, where the appropriate circumstances warrant, a respondent may be exempted from the rule's application by the Tribunal.

Balancing the prejudice to each party

Rulings from both lines of the jurisprudence submitted to me by the parties have stated that a tribunal may determine if the circumstances of the case before it warrant a departure from the usual common law rule compelling a respondent to elect to not call any evidence before its motion to dismiss is heard.

As is stated by the Ontario Board of Inquiry in *Potocnik*, a decision which ultimately held that the respondent should not be put to an election:

The issue here is how to strike a balance between, on the one hand, the possible prejudice to the complainant and the Commission from my hearing and deciding a motion to dismiss at this point in the proceedings; and, on the other hand, the unfairness of continuing with a hearing if, in fact, the City [respondent] can make the case that there is not enough evidence to continue.[21]

The foremost concern of the Complainant and the Commission in the present case revolves around my going ahead and deciding whether the complaint is well-founded before I have had the benefit of hearing all of the evidence, including the Respondent's. As I have indicated earlier, I consider this to be an important consideration in human rights cases. The Commission is also worried that if I declare that an election is not required, "the floodgates will be opened" and non-suit motions will become a normal occurrence in most cases before the Canadian Human Rights Tribunal. However, if derogations from the general common law rule are to be limited to exceptional situations where the circumstances so warrant, then this latter concern is of limited importance.

Turning to the Respondent, what will be the unfairness if it is obliged to continue with the hearing when it could perhaps have made the case that there is insufficient evidence to continue?

The Respondent argues that significant time will be saved if its motion of non-suit is successful. While it is difficult to predict accurately the duration of a hearing, it would seem that the examination of the Respondent's witnesses will run for at least five more hearing days although the Respondent argued that the hearing could go on for a significantly longer time if as many as ten additional witnesses to testify.

Although this may at first glance appear to be a considerable period, one must keep the context of this case in mind. The initial hearings in this case commenced on September 5, 1995, and apparently continued for a total duration of nine days. The decision of the first Tribunal was reviewed by the Federal Court which ordered on April 6, 1998, that the hearings be re-opened to hear additional statistical evidence from the Commission. Consequently, the hearing process in this case has extended over a long period of time, ie. over four years, although the actual number of hearing days before the Tribunal, in the first phase or as it is presently constituted, has been about twenty-three (23). Some of those days involved discussions of procedural issues, without any introduction of evidence.

Thus, it would seem that the number of future hearing days in this case will not exceed the time spent until now.

The issue of time is obviously also related to the question of expense. Counsel for the Respondent argued that the additional time which may in the end be unnecessarily spent hearing the rest of the case, will be costly and that one must keep in mind that the Commission and the Respondent draw their funding from the public purse. In *Potocnik*[(22)], the Ontario Board of Inquiry cited this as a significant factor in its decision to not compel the respondent, the City of Thunder Bay, to elect. However, the Respondent in that case pointed out that the public sector was under considerable financial strain at that time. Neither the Respondent nor the Commission argued before me that there is any substantial financial constraint in their funding which would cause any undue burden on them if the case continues.

In any event, I do not believe that expense should be considered as a significant factor in determining the election issue in the absence of special circumstances. As pointed out in the *Nimako* ruling:

There is always some expense which could otherwise be avoided. There is always some expense involved in mounting a defence, whether in actions before the civil courts or in hearings before a board such as this, and if that were the criterion for deciding whether fairness dictates that a respondent should be spared having to make an election, the invariable rule referred to would again emerge, carrying with it the implication that the practice in the civil courts is unfair.[(23)]

I find that there do not exist any special circumstances in the present case to justify treating cost avoidance as a factor in deciding the issue before me.

Similarly, I do not believe that the expected duration of the hearing warrants the Respondent being dispensed from having to elect. There is no evidence, in the context of the entire length of this process from the filing of the complaint to this day, that an additional few months will cause the Respondent any meaningful prejudice.

For these reasons, I therefore hold that the Respondent may proceed with its motion for the dismissal of the Complaint provided it elects to not call any evidence, failing which it may not argue its motion at this time and may only do so once its evidence has been adduced.

Signed at Montreal, this 7th day of October, 1999.

ATHANASIOS D. HADJIS

1. J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1991), at pp. 131-132.

2. Nova Scotia Board of Inquiry, November 9, 1993, 26 C.H.R.R. D/87

3. *Dokis* v. *Dokis Indian Band*, [1995] No. 15; *Parker* v. *Hudson Bay Mining Smelting Co. Ltd.*, (September 22, 1993) (C.H.R.T. interim decision, T-323-3792)

4. *Foucault* v. *Canadian National Railways* (July 30, 1981) (C.H.R.T., T.D.-8-81)

5. *Cassan* v. *Hudson Bay Mining and Smelting Co. Ltd.* (March 21, 1985) (C.H.R.T., T.D. 1/85); *Goyette* v. *Voyageur Colonial Limited* (May 21, 1997) (C.H.R.T.)

6. *Nimako* v. *C.N. Hotels*, (1985) 6 C.H.R.R. D/2894

7. *Potocnik* v. *Thunder Bay (City)*, [1996] O.H.R.B.I.D., No. 16; *Tomen* v. *Ontario Teacher's Federation (No.3)*, (1989) 11 C.H.R.R. D/23

8. *Supra*, note 6, at page D/2896

9. *Shakes* v. *Rex Pak Limited*, (1982) 3 C.H.R.R. D/1001; *Israeli* v. *Canadian Human Rights Commission*, (1983) 4. C.H.R.R. D/1616; *Basi* v *Canadian National Railway Company*, (1988) 9 C.H.R.R. D/5029

10. (1993) 26 C.H.R.R. D/87

11. *Supra*, note 6

12. *Supra*, note 9

13. (1994) 24 C.H.R.R. D/449

14. S. Blake, *Administrative Law of Canada*, (Toronto: Butterworth's, 1992), at pp. 42-43

15. *Potocnik*, *supra*, note 7

16. *Supra*, note 1

17. *Supra*, note 13

18. *Supra*, note 7

19. *Supra*, note 3

20. *Supra*, note 3

21. *Supra*, note 7

22. *Supra*, note 7

23. *Supra*, note 6, at page D/2897