CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RONALDO FILGUEIRA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GARFIELD CONTAINER TRANSPORT INC.

Respondent

RULING

MEMBER: Dr. Paul Groarke 2003 CHRT 30
2005/08/02

I. INTRODUCTION

[1] The Respondent has applied for a non-suit. After Mr. Capp had made the application, but before he had concluded his remarks, Ms. Rubio objected that the Respondent must elect whether it will call evidence before applying for a non-suit. I allowed her to raise the objection and advised the parties that I would deal with it before proceeding further.

II. THE CASE LAW

[2] Ms. Rubio relies on the decision of this Tribunal in *Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20 (QL), where Mr. Hadjis noted that a variety of Tribunals and Boards have gone different ways on the issue. He then applied the rule in the civil courts. This apparently requires that the defending party make an election before applying for a non-suit.

[3] The statement of principle in *Chopra* can be found at para. 22:

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.

I think there may be room for different views. I agree with Mr. Hadjis that the question should be decided in the circumstances of each case. The Tribunal enjoys more latitude in these matters than a court.

[4] The decision in *Chopra* relies heavily on the decision of an Ontario Board of Inquiry in *Nimako v. C.N. Hotels*, (1985) 6 C.H.R.R. D/2894. I feel obliged to say that the Board in *Nimako* seems to have misunderstood the nature of an application for a non-suit. It is wrong to suggest that a Tribunal that entertains a motion for a non-suit is in danger of deciding the case twice. A Tribunal that grants a motion has not "decided" the case in a legal sense. It has decided that there is no case to meet.

[5] Mr. Hadjis also refers, however, to the decision of a subsequent Board of Inquiry in *Potocnik v. Thunder Bay (City)*, [1996] O.H.R.B.I.D. No. 16. The situation in *Potocnik* was similar to the one before me. Counsel had advised the Board that the Respondent would call evidence if it was put to its election before applying for the non-suit. Mr. Capp has done the same thing. The Board in *Potocnik* did not ask the Respondent to make its election before applying for a non-suit.

III. COSTS

[6] I have not had the luxury of investigating the rationale behind the introduction of the civil rule. Mr. Capp says that the practice in the courts has changed over the last thirty-five years. There is nevertheless a fundamental difference between the civil process and the human rights process, which has a bearing on the operation of the rule.

[7] That difference is a practical one. A Respondent that calls evidence in the civil courts can recoup its costs at the end of the case. This is not possible under the *Canadian Human Rights Act*. Even if the Complainant has not raised any evidence against it, the Respondent will have to pay the expenses that it incurs in presenting its defence. These expenses are obviously substantial. Aside from legal costs, Mr. Capp has advised the Tribunal that some of his witnesses are from outside the city.

[8] This kind of concern goes beyond the Respondent. The Board in *Potocnik* considered the cost of continuing with the hearing in deciding to let the Respondent apply for a non-suit before making its election.

13. The City has also pointed to the cost of this hearing, and cites the case of Tomen v. O.T.F. (No. 3) (1989) 11 C.H.R.R. D/24.... In that case, the Board of Inquiry ... decided to depart from the normal civil court practice of ordering an election. One of the reasons cited by the Board was the substantial cost of the hearing ... The City points out that everyone's bills for the present hearing are being paid by a public sector that is currently under considerable financial strain, and argues simply that if this hearing can end, it should.

These costs are real. I would think that this helps to explain why the law permits an application for a non-suit in the first place.

[9] I agree with the Respondent's submission that the question of cost is more pressing in the instance of a private employer. It seems rather cavalier to say that these kinds of expenses are simply part of the cost of doing business. Mr. Capp has candidly said that his client has no interest in developing the law or contributing to the public record. The

employer's primary concern in the present case is financial, and justifiably so. There are no policy issues before me.

[10] I think the Board in *Potocnik* was merely acting responsibly. This is not the place to discuss the test for a non-suit. But the threshold is very low and the Respondent is submitting that there is no evidence against it. If this is the case, why should the Tribunal require that the parties and the public pay the substantial costs associated with continuing the process? There is a point below which the expense, aggravation and inconvenience that attend upon a hearing cannot be justified. The savings that accrue, if a case does not proceed, accrue to all sides. This includes the Complainant.

IV. TAKING THE TEMPERATURE

[11] Ms. Rubio has submitted that it would be unfair to let the Respondent "take the temperature" by applying for the non-suit. I believe the suggestion is that the Respondent gains an unfair advantage if it loses on the motion, since the Tribunal may somehow reveal its thinking on the case. This kind of concern is misplaced. The function of a Tribunal on an application for a non-suit is simply to decide whether there is evidence in support the Complainant's allegations. There is no weighing of the evidence and nothing to comment on, if the application fails. The Tribunal remains in a state of suspended judgement, its neutrality intact.

[12] The initial obligations on the Complainant are minimal. The Complainant should not be allowed to evade them. Nor is it any answer to say that the Complainant should be allowed to make up the deficiencies in its case when the Respondent presents its evidence. A Tribunal that grants an application for a non-suit has held that there is no case to make up. Many of the rationales that are cited in the caselaw do not apply unless the Complainant has called some evidence in support of his allegations. The Respondent has no obligation to answer gratuitous allegations.

[13] It is a serious matter to require that a party in an adjudicative process respond publicly to legal allegations. A party who prosecutes a case in a judicial or quasi-judicial arena has an obligation to lead evidence in support of its claims. I would have thought that this is one of the principles of fundamental justice. Where is the unfairness in finding that a Respondent has no obligation to enter a defence in a situation where there is no evidence against it?

V. MERIT

[14] There may be good reasons for requiring an election in some cases. I am sure that there are situations where an application for a non-suit is frivolous or obstructs the process. It is for the Tribunal hearing a particular case to decide what is appropriate in the circumstances before it.

[15] There are a variety of factors that can be considered in this context. Among other things, I think that a Tribunal is entitled to consider whether the motion is put forward in good faith. It was Ms. Rubio who raised this factor, in submitting that there is no real merit in the application before me. She did not want to call the application frivolous. She nevertheless submitted that it was tactical and abounding in opportunism.

[16] I do not accept these suggestions. I think the tactics are on the other side. It is the Complainant who is trying to stave off a legitimate motion, which may be fatal to his case. This is understandable, but it hardly provides a principled reason for depriving the Respondent of the opportunity to make the application.

[17] I take no position on the merits of the application for a non suit. It nevertheless raises issues that deserve serious consideration. I am satisfied in the circumstances of the case that there is no reason to put the Respondent to its election before hearing the application for a non-suit.

VI. RULING

[18] The objection is overruled.

_____*Signed by*_____
Dr. Paul Groarke

OTTAWA, Ontario
August 2, 2005

PARTIES OF RECORD

TRIBUNAL FILE:	T952/7204
STYLE OF CAUSE:	Ronaldo Filgueira v. Garfield Container Transport Inc.
DATE AND PLACE OF HEARING:	Toronto, Ontario July 27, 2005
RULING OF THE TRIBUNAL DATED:	August 2, 2005
APPEARANCES:	
Ronaldo Filgueira (himself)	
Consuelo Rubio	For the Complainant
Harvey Capp	For the Respondent