CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GLENN BAHR

- and -

WESTERN CANADA FOR US

Responden

RULING

MEMBER: Karen A Jensen

2006 CHRT 23
2006/05/08

[1] This is a ruling on a motion presented by Mr. Glenn Bahr for an adjournment of the hearing in this matter which is scheduled to begin on May 23, 2006. The complaint involves allegations that Mr. Bahr and Western Canada for Us communicated hate messages by means of the Internet, in violation of s. 13 of the *Canadian Human Rights Act*.

[2] Mr. Bahr has also been charged under s. 319(2) of the *Criminal Code*, which is the provision dealing with the willful promotion of hatred. The preliminary hearing in this matter began in January 2006 and is due to resume in October 2006 in Edmonton, Alberta. A publication ban has been issued in those proceedings.

[3] Mr. Bahr's representative argues that if the present inquiry is not adjourned pending the resolution of the criminal proceedings against him, his right to a fair criminal trial will be infringed. The publicity surrounding the Tribunal hearings will subvert the purpose of the publication ban in the criminal proceedings which is to ensure that potential jurors will not be biased by what they have read about the case in the media. Also, it is argued that the testimony that Mr. Bahr might give during the hearing into the present complaint could be used against him in the criminal trial.

[4] In addition, it is argued that Mr. Bahr's right to a fair hearing in the present proceedings will be infringed. Mr. Bahr initially stated his intention to testify on his own behalf in his Statement of Particulars. He has subsequently amended that Statement to indicate that, in order to preserve his right to remain silent, he has no choice but to refuse to testify during the human rights proceedings. As a result, he states that he will be unable to properly defend himself against the s. 13 complaint. This, he argues, is a clear breach of the rules of natural justice.

[5] The Complainant, Mr. Richard Warman, argues that the Tribunal has the power, under s. 52(1) of the *Act* to issue a confidentiality order if needed to ensure that the goals of the publication ban issued in the criminal proceedings are not undermined. Moreover, the Complainant argues that Mr. Bahr is not required to testify or to incriminate himself during the hearing into the s. 13 complaint. He is free to choose the manner in which he will participate in the hearing and the fairness of the process will not be affected by this choice. According to the Complainant, an adjournment of the present proceedings would result in an indefinite delay of the hearing. This would be contrary to the goal of providing for the most expeditious and informal resolution of complaints as the requirements of fairness and natural justice will allow.

[6] The Canadian Human Rights Commission echoes the submissions of the Complainant and adds that Mr. Bahr has failed to show that the safeguards and protections that may be utilized to ensure that his right to a fair criminal trial and a fair hearing before this Tribunal will be insufficient or ineffective.

[7] In *Baltruweit v. CSIS*, this Tribunal stated that it does not have the authority to stay its own proceedings (*Baltruweit v. CSIS* 2004 CHRT 14, at para 12). However, as master of its own process, the Tribunal has the discretionary power to grant an adjournment. In exercising its discretion to grant an adjournment, the Tribunal must determine whether an adjournment is necessary in order to respect the principles of natural justice (*Baltruweit, supra*, at para. 17). In other words, the question is whether it would be fair to the parties to proceed with the hearing as scheduled.

[8] It is by no means unusual for the same factual circumstances to give rise to both administrative proceedings before a tribunal such as this one, as well as criminal or quasi-criminal proceedings involving the same parties and similar factual and legal issues. (See, for example: *Seth v. Canada (Minister of Employment and Immigration)* [1993] 3 F.C. 348 (F.C.A.); *Spagucci's Ltd. v. Alberta (Gaming Commission)* (1997), 55 Alta. L.R. (3d) 173 (Alta. Q.B.); and *Willock v. British Columbia (Superintendant of Motor Vehicles)* 2000 BCSC 772 (B.S.S.C.)). Frequently, in situations like this, one of the parties will express the concern, as Mr. Bahr has done in the present case, that the protection against self-incrimination and the fairness of the proceedings will be violated by allowing both proceedings to take place at the same time.

[9] The constitutionally enshrined protection against self-incrimination is based on the principle that the state is not permitted to conscript individuals against themselves. Rather, the state is subject to a positive obligation to establish a case against the accused through other sources or only with the informed and voluntary cooperation of the accused (*Phillips et al v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* ([1995] 2 S.C.R. 97 at para. 80). Therefore, when an accused person is compelled to testify outside of the criminal court, the extent to which these principles may be jeopardized by that testimony must be ascertained.

[10] However, the courts have clearly stated that the fact that an individual is involved in contemporaneous civil and criminal proceedings does not necessarily compromise the fairness of either proceeding or the right to protection from self-incrimination (*Phillips et al, supra,* at para. 165). For that reason, it is not sufficient for the party requesting an adjournment of the civil proceedings to simply allege that the concurrency of the proceedings will violate the right to a fair hearing and the protection against self-incrimination. Rather, the onus is on the party requesting the adjournment to demonstrate the following: (1) the civil proceedings will compel the party to break his or her silence and, (2) the compulsion to testify will result in a specific prejudice, the degree of which renders the circumstances so extraordinary or exceptional that an adjournment is warranted (*Nash v. Ontario* (1995), 27 O.R. (3d) 1 (O.C.A.); *C.B. v. Caughell* (1995), 22 O.R. (3d) 741 (On. Div. Ct.); *Spagucci, supra,* at para. 10; *Seth v. Canada (Minister of Employment and Immigration), supra,* at paragraphs 17 and 18).

[11] I see no reason why the test set out above should not be followed in the context of proceedings before this Tribunal.

I. WILL THE TRIBUNAL HEARING COMPEL MR. BAHR TO BREAK HIS SILENCE?

[12] Mr. Bahr has stated that he has no choice but to refuse to testify at the Tribunal hearings in order to preserve his right to silence. However, the rights to silence and the protection against self-incrimination are threatened only when one is compelled or coerced to disclose incriminating information. These rights are not violated by "voluntary disclosure": (*R. v. Van Haarlem* (1991), 135 N.R. 379 (B.C.C.A.), at p. 386: aff'd [1992] 1 S.C.R. 982.) Is one compelled or coerced to testify at an administrative proceeding when it appears to be the only way to successfully defend oneself?

[13] The courts have drawn a distinction between situations where an individual believes that it is strategically necessary for him or her to testify and where an individual is compelled by law to testify. Generally speaking, the courts have held that where one has a choice about electing to come forward to provide information at an administrative hearing, and one does so in order to present information necessary to establish one's case, this does not amount to being "compelled" or "coerced" to give information (see, e.g.: *Spagucci's Ltd, supra,* at para. 8; *Willock v. British Columbia (Superintendant of Motor Vehicles) supra,* at para. 14; *White v. Nova Scotia (Registrar of Motor Vehicles)* (1996) 20 M.V.R. (3d) 192 (N.S.S.C.) at para. 35; *contra*: *Williams v. Superintendent of Insurance (N.S.)* (1993), 125 N.S.R. (2d) 323)). Thus, the weight of judicial authority suggests that when an individual is not required by law to testify at an administrative proceeding, but rather is able to make an informed choice about whether to testify, the rights to silence and to protection against self-incrimination are not violated.

[14] In the present case, although he may not perceive that he has a choice about whether to testify at the Tribunal hearing, Mr. Bahr does, in fact, have a choice; there is no legal requirement that Mr. Bahr testify. Moreover, he has the benefit of legal counsel representing him during the criminal proceedings and someone assisting him during the pre-hearing matters in the Tribunal proceedings. Mr. Bahr is, therefore, in a position to make an informed choice regarding his participation in the Tribunal proceedings. As a result, his right to silence and to protection from self-incrimination will not be violated by proceeding with the Tribunal's inquiry into the complaint.

II. HAS MR. BAHR DISCHARGED THE BURDEN OF PROVING THAT THERE ARE EXTRAORDINARY CIRCUMSTANCES IN THIS CASE THAT WARRANT THE GRANTING OF AN ADJOURNMENT?

[15] In *Canada (Minister of Employment and Immigration) v. Lundgren* [1993] 1 F.C. 187 (T.D.) at para. 14, Mr. Justice Dubé stated: "I know of no general principle in Canada that the existence of civil and criminal proceedings in court at the same time involving the same persons and the same facts is automatically a valid reason justifying the adjournment of the civil proceedings." Rather, he stated, it is only under extraordinary circumstances, in which the civil proceedings might cause some damage to the accused's defence to the criminal charge, that adjourning the civil action would be justified.

[16] The burden of proof is on the party applying for the adjournment to conclusively demonstrate the existence of such harm: a mere allegation will not suffice. Moreover, even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self-incriminating evidence does not necessarily constitute extraordinary circumstances that warrant the adjournment of civil proceedings (*Nash, Falloncrest Financial Corporation et al v. Ontario* (1995), 27 O.R. (3d) 1 (O.C.A.).

[17] For the following reasons, I find that Mr. Bahr has not succeeded in establishing that there are extraordinary circumstances in the present case that warrant adjourning the Tribunal's proceedings.

[18] As I have previously stated, Mr. Bahr has a choice as to whether to testify during the Tribunal hearing. Should he choose to testify, there are a number of protections at law that may well be available to him during the criminal proceedings to ensure that his rights to a fair trial and to protection against self-incrimination will be protected. If Mr. Bahr finds himself in a situation where, having decided to testify at the Tribunal hearing, he is asked a question that has the potential to incriminate him, he may well be able to claim the protection of s. 13 of the *Charter* and s. 5(2) of the *Canada Evidence Act* in the criminal proceedings.

[19] Section 5 of the *Canada Evidence Act* allows any witness to object to a question if he or she believes that the answer will tend to incriminate him or her. The witness will still be required to answer the question, but in turn for the giving of potentially incriminating evidence, the statute prohibits the use of the answers in any other proceedings against the witness (*R. v. Noël* 2002 SCC 67, at para. 25).

[20] Section 13 of the *Canadian Charter of Rights and Freedoms* also protects a witness from the use of incriminating testimony in any other proceedings against the witness. Under s. 13, unlike under s. 5 of the *Canada Evidence Act*, the witness need not object at the time that the original evidence is given. The protection is automatically afforded to an accused regardless of whether the evidence was - or was believed to be - incriminating at the time it was given (*R. v. Noël, supra*, at para. 32).

[21] The protection offered by s. 13 of the Charter and s. 5(2) of the *Canada Evidence* Act is available to a witness whether he or she chooses to testify or is compelled to testify (*R. v. Noël, supra,* at para. 25). It is, of course, a matter for the criminal court to decide whether testimony given during the Tribunal proceedings should be excluded on the basis of s. 13 of the *Charter* or s. 5(2) of the *Canada Evidence Act*. Mr. Bahr has not shown why these protections will be insufficient or unsatisfactory.

[22] Mr. Bahr has also argued that proceeding with the Tribunal Inquiry will subvert the publication ban that has been ordered in the criminal proceedings since the Tribunal

proceedings will engender the publicity that the publication ban is designed to eliminate. Given the similarity in the nature of the alleged offenses under the *Criminal Code* and the *Canadian Human Rights Act*, it is argued that the publicity surrounding the Tribunal proceedings may well threaten the impartiality of potential jurors in his criminal trial. This, in turn, will jeopardize Mr. Bahr's right to a fair criminal trial.

[23] There are a number of responses to this argument. First of all, Mr. Bahr's arguments at this point are speculative. It is unclear whether Mr. Bahr will testify at the Tribunal hearing or whether he will be electing to be heard by judge and jury at his criminal trial. Nor do we know what the nature of the publicity surrounding the Tribunal proceedings will be. It is precisely this sort of uncertainty that was found by the minority of the Supreme Court in *Phillips* to be inadequate to justify a conclusion that the fair trial rights of all of the accused in that case were in jeopardy.

[24] Secondly, the *Canadian Human Rights Act* provides the authority to order a publication ban or confidentiality orders in the appropriate circumstances. Section 52(1)(c) of the *Act* stipulates that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if the Tribunal is satisfied that there is a real and substantial risk that the disclosure of matters will cause undue hardship to the persons involved and that this outweighs the societal interest in a public hearing. Section 52(1)(d) provides for confidentiality orders where the life, liberty or security of a person will be endangered. The Tribunal has ordered a publication ban pursuant to s. 52 of the *Act* under the appropriate circumstances: *Day v. DND and M. Hortie* 2003 CHRT 12.

[25] Mr. Bahr, through his representative, has stated that he would strongly oppose a publication ban in the present case. It is argued that the Canadian public should not be denied access to information regarding the potential restriction of freedom of speech through section 13(1) of the *Act*. Although it is not entirely clear from the Commission's submissions, it would appear that the Commission is suggesting that a publication ban should be ordered in this case. This point was not clearly argued. Therefore, I leave it to the parties to determine whether to request an order under s. 52(1) of the *Act*. It is sufficient for the purposes of this Ruling to note that, should it be necessary to do so, this Tribunal has the authority to issue a confidentiality order which could include a publication ban.

[26] In *Seth*, Mr. Justice Décary stated that extraordinary or exceptional circumstances justifying a stay of the civil proceedings would include situations where it was clear that the sole aim and purpose of the civil proceedings was to obtain evidence to support a charge or to assist the criminal prosecution of the witness. Where the proceedings are so devoid of any legitimate public purpose, and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice, then an adjournment would be clearly justified (*Seth, supra*, at para. 18).

[27] That is clearly not the case in the present proceedings. Section 2 of the *Canadian Human Rights Act* establishes the overriding public interest in the elimination of discrimination. Pursuant to s. 48.9 of the *Act*, the Tribunal is charged with the mandate of inquiring into complaints of discrimination as expeditiously and informally as the requirements of natural justice and the rules of procedure will allow. The purpose of the hearing, which is due to commence on May 23, 2006, is to fulfill the Tribunal's legislative mandate. It is not designed to assist in the prosecution of Mr. Bahr.

[28] Moreover, this is not a case like *Pearson v. R* [1999] F.C.J. No. 1298 (Q.L.), wherein the Federal Court upheld a decision by a prothonotary to stay a civil matter where there were pending criminal proceedings. The plaintiff in that case was the accused in the criminal trial. The civil action involved a claim for damages by the Plaintiff for the alleged deprivation by the Crown of the Plaintiff's right to a fair trial in the criminal matter. The Crown requested a stay of the civil proceedings arguing that the question of whether the trial was fair was first raised in the criminal court and therefore, should first be determined there. The Federal Court agreed and stated that the civil action was essentially the reciprocal of the plaintiff's defence in the criminal prosecution.

[29] That is not the case in the present matter. The human rights complaint is clearly not an action against the Crown, nor is it the reciprocal of Mr. Bahr's defence in the criminal matter. Moreover, despite the fact that the Tribunal and criminal proceedings may involve similar factual issues, there is no legal connection between the two proceedings. In the criminal proceedings the Crown is required to prove, beyond a reasonable doubt, that Mr. Bahr willfully and publicly promoted hatred against an identifiable group. In the Tribunal proceedings, it must be established, on a balance of probabilities, that Mr. Bahr and Western Canada for Us exposed a group that is identifiable on the basis of a prohibited ground of discrimination, to hatred or contempt. These are very different legal questions that must be determined on the basis of different burdens of proof. Moreover, the proof of one does not necessarily lead to the proof of the other. For example, an acquittal in the criminal proceedings would not necessarily lead to a successful defense against the s. 13 complaint. Similarly, a finding that the s. 13 complaint had been made out would not necessarily lead to a guilty verdict in the criminal proceedings. Finally, other than Mr. Bahr, the parties to the two proceedings are different. For these reasons I am of the view that the *Pearson* case is not applicable in the present circumstances.

[30] Mr. Bahr has expressed concern that the lead police investigator in the criminal matter will be present and will be testifying on behalf of the Commission and the Complainant at the Tribunal hearing. This individual's presence at the hearing may serve to strengthen the Crown's case against Mr. Bahr. This, it is implied, constitutes an exceptional circumstance that warrants the adjournment of the proceedings.

[31] I cannot agree. As I have already indicated, the Tribunal has the power to ensure that its proceedings are confidential in the appropriate circumstances. The Tribunal may also order that witnesses be excluded during the hearing. Therefore, Mr. Bahr's concerns regarding the presence of witnesses who might hear his testimony may be alleviated by the appropriate exercise of the Tribunal's powers under the *Act*.

[32] Finally, it must be noted that Mr. Bahr's request is essentially a request for an indefinite adjournment of the Tribunal's proceedings since it is unknown when the criminal matter will be finally determined. Furthermore, as I have indicated, the result in the criminal trial will not necessarily be determinative of the result in the Tribunal proceedings. Therefore, after what might be a lengthy delay to finally dispose of the criminal matter, the parties would then be faced with the prospect of presenting and defending against a case potentially many years after the alleged violation of the *Act* took place. Not only would this frustrate the goal of providing an expeditious resolution of the complaint, it would not be in the interests of any of the parties to delay the resolution of this matter for an indefinite period of time.

III. CONCLUSION: THE PRINCIPLES OF NATURAL JUSTICE WILL NOT BE VIOLATED BY PROCEEDING WITH THE HEARING AS SCHEDULED.

[33] For the following reasons, I find that the principles of natural justice will not be violated by proceeding with the Tribunal hearing as scheduled:

1. Mr. Bahr is able to make an informed choice as to whether to testify during the Tribunal hearing into the s. 13 complaint against him. Therefore, his rights to silence and to protection against self-incrimination will not be violated by proceeding with the Tribunal hearing.

2. If he chooses to testify, he may be able to claim the protection of s. 13 of the *Charter* and s. 5(2) of the *Canada Evidence Act* in the subsequent criminal proceedings.

3. Any of the parties may apply to the Tribunal for an order under s. 52 of the *Act* to ensure the confidentiality of the hearing. A request may also be made that witnesses be excluded from the hearing.

4. The purpose of the Tribunal hearing is to provide an expeditious resolution of the s. 13 complaint against Mr. Bahr and Western Canada for Us. There is no indication that the purpose of the present proceedings is to obtain information from Mr. Bahr to secure a conviction in the criminal proceedings.

5. The proceedings are not connected or linked in any way such that it makes sense to adjourn one pending the resolution of the other.

6. Mr. Bahr has failed to establish that there are any circumstances in this case that are so extraordinary that an adjournment of the proceedings is necessary.

[34] Therefore, Mr. Bahr's request for an adjournment of the Tribunal's inquiry into the s. 13 complaint against Mr. Bahr and Western Canada for Us is denied.

"signed by"
Karen A. Jensen

OTTAWA Ontario
May 8, 2006

PARTIES OF RECORD

TRIBUNAL FILE:	T1087/6805 and T1088/6905
STYLE OF CAUSE:	Richard Warman v. Western Canada for Us and

	Glenn Bahr
RULING OF THE TRIBUNAL DATED:	May 8, 2006
APPEARANCES:	
Richard Warman	For himself
Giacomo Vigna / Ikram Warsame	For the Canadian Human Rights Commission
Paul Fromm Western Canada for Us	For the Respondent, Glenn Bahr No representations made