Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

YUL F. HILL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

RULING ON TAKING A VIEW

2003 CHRT 4

2003/02/05

MEMBER: Paul Groarke

[1] In the course of the hearing into the complaints before me, I expressed an interest in seeing the shop where Mr. Hill worked and was given a tour of the workplace where most of the relevant events took place. I was accompanied by the Complainant and counsel for all the parties. Since there was some discussion as to the effect of the view during the course of the hearing, it seems best to clarify the matter.

[2] The law on taking a view is unclear. In Sopinka's Law of Evidence in Canada, the authors state that there is an issue "as to whether a view is evidence which can form the basis of inferences by the trier of fact or is simply clarification of the witness' testimony". [(1)] The Tribunal has not dealt explicitly with the issue. In *Bye v. International Longshoremen's and Warehousemen's Union, Local 502*, C.H.R.T. T391/0794, a Tribunal nevertheless took a view of a union hall in order to see "job boards" before hearing testimony in the case. It appeared to treat this as an original source of evidence, which could be consulted in following the rest of the evidence in the case.

[3] The decisions of the Tribunal run counter to the idea that a view is something less than evidence. This is evident in *Forseille v. United Grain Growers Ltd.* [1985] C.H.R.T. 7, where the Tribunal relied on what it observed during the view as evidence but did not discuss the legal issue. There were also views in *Gauthier v. Canada (Canadian Armed Forces)* (1989), 10 C.H.R.R. 6014 and *Martin v. Canada (National Defence)* (1992) 17 C.H.R.R. 435 (C.H.R.T.), which present similar situations. There is a way, at least, in which a view is direct evidence in the fullest sense of the word, since it is not filtered through the senses of a witness. As a result, it is often more compelling than testimony, which is always second-hand.

[4] The leading case in the Federal Court appears to be *Jaworski v. The Attorney General of Canada* [1998], 4 F.C. 154 (T.D.), where a disciplinary Board took a viewing of the area where the Applicant had allegedly exposed himself. [(2)] The Applicant denied the allegation and had another explanation for his presence in the area. On his account, he had been sitting on his back porch and he saw a man looking at his car. After yelling at the man, he followed him into the alleyway, where he was approached by the investigating officers. Although the Board gave the Applicant the opportunity to "add to the record with respect to the view", it did not express any misgivings with respect to the observations that it had made during the view.

[5] The Adjudication Board later held that the Applicant would not have been able to see the stranger well enough to provide the description that he gave in testimony. This was

one of the factors that it considered in rejecting the Applicant's testimony. The decision of the Board eventually made its way through an External Review Committee to the Commissioner of the R.C.M.P., who dismissed the Applicant's appeal. The matter was then taken to the Federal Court, where two questions were raised with respect to the view. The first was whether a trier of fact can rely on a view, in rejecting the evidence of the witnesses in the case. This would essentially treat a view as evidence, which is probative in its own right. The second question was whether the Board had an obligation to divulge its misgivings to the parties.

[6] On the first question, Justice Rothstein surveyed two competing positions. The first derives from the decision of the English Court of Appeal in *London General Omnibus Company v. Lavell,* [1901] 1 Ch. 135, where Lord Alverstone states, at page 139:

A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence.

The Ontario courts have apparently followed this line of authority and held that a view may be taken for the purpose of understanding the evidence but does not itself constitute evidence.

[7] I do not think I am exaggerating when I say that the second position treats the distinction in *London Omnibus* as a cavil: evidence is evidence, and in most cases at least, it is artificial and even disingenuous to pretend that it does not have probative effect. As a result, a judge is entitled to rely on the observations made during a view in rejecting the factual assertions of the witnesses. This position derives from *Meyers v. Government of Manitoba & Dobrowski* (1960), 26 D.L.R. (2d) 550 (Man. C.A.) and *Calgary & Edmonton Railway Co. v. MacKinnon* (1910) 43 S.C.R. 379. It can also be found in the English law.

[8] The concerns in the case law come from the need to separate the roles in a hearing. It is difficult for a trier of fact to consider its own observations in marshlling the evidence without entering the domain reserved for the parties. The decision of the Quebec Court of Appeal in *Technologie Labtronix c. Technologie micro contrôle*, REJB 1998-07742, among others, holds that a judge should not use a view for an investigative purpose. It is not the role of a trier of fact to gather evidence. There is also a concern that a trier of fact may have adopted the role of a witness in such a situation, whose silent testimony cannot be countered by the parties. This raises an issue of natural justice.

[9] There is a third position. In *Jaworski*, Justice Rothstein appears to accept the fundamental principle that the purpose of taking a view is to better understand the evidence in the case. He nevertheless rejects the idea that the view has no independent evidentiary weight:

… it would be going too far to state that where a tribunal conducts a view, not for the purpose of gathering its own evidence but to better understand the evidence being

submitted, that the tribunal can never rely upon its own observations made at that viewing. It would be highly artificial to require that the tribunal ignore its observations and decide the issue based on evidence that it considers to be untrue.

It follows that a view is evidence, albeit evidence of an explanatory nature, which can be considered along with the other evidence in the case. It would seem to follow that the significant issue is whether the parties have had an opportunity to respond to any issues that it may have been raised such an idea.

[10] The second question in *Jaworski* was whether the Board had an obligation to share its concerns with the parties, Justice Rothstein rejected this idea and held that the Applicant had a full opportunity to respond to the view. I think this opinion can be restricted, however, to the facts of the case. There may be other cases where the situation is different. As a matter of fairness, there may well come a point where a Tribunal has some obligation to share its concerns with the parties. It all depends on the circumstances of the case. I do not see how a tribunal can respect the rules of natural justice and essentially hide decisive issues from the parties.

[11] The decision in *Jawoski* at least establishes that a tribunal has no obligation to raise factual issues that are in the open and properly before the parties. The critical factor at the end of the hearing is whether the parties have had a "full and ample" opportunity, in the words of the *Act*, to address the material issues in the case. If the parties choose not to canvass issues that are openly before the Tribunal, that is their prerogative and they cannot complain that they were taken by surprise. I believe this was the real finding in *Jaworski*, which seems to give a tribunal some authority to take notice of what it observes during a view.

[12] The view in the present case was taken relatively early in the hearing, for the purpose of helping me understand the rest of the evidence in the case. All of the parties agreed to the process and there was ample opportunity to offer evidence controverting what was seen. If there is any difficulty, it is that we saw the premises years after the material events occurred. As a result, I have exercised a certain degree of caution in relying on what I observed during the tour of the shop. I do not believe, however, that it raised any issues that were not already before the parties.

[13] I have accordingly concluded that my observations during the view can be consulted, along with the rest of the evidence, in deciding the main issue in the case. I do not believe that the matter requires further comment.

"Original signed by"

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Paul Groarke

OTTAWA, Ontario

February 5, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T677/6501

STYLE OF CAUSE: Yul F. Hill v. Air Canada

RULING OF THE TRIBUNAL DATED: February 5, 2003

APPEARANCES:

Cecil F. Ash For the Complainant

Salim Fakirani For the Canadian Human Rights Commission

Paul Fairweather and Lisa Steiman For the Respondent

1. [1] The Law of Evidence in Canada (2d; 1999), p. 20

2. Affd. (2000), 255 N.R. 167 (C.A.), leave to appeal to S.C.C. refused (2001), 267 N.R. 195n (S.C.C.)