Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 6
Date: March 27, 2015
File No(s).: T1658/1311, T1659/1411

Between:

Stacy Lee Tabor

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Millbrook First Nation

Respondent

Ruling

Member: Sophie Marchildon

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I. Complaint & Motion

[1] Ms. Tabor claims Millbrook First Nation has refused to consider her as a captain for its fishery because she is a woman. According to her this decision is part of a larger practice on the part of the First Nation to exclude women from participating in its fishery. Ms. Tabor also claims her exclusion from captaining a boat is based on her marital status, because Millbrook First Nation previously had issues with her husband when he was a captain. Ms. Tabor alleges Millbrook's actions are discriminatory practices pursuant to sections 7 and 10 of the *Canadian Human Rights Act* [the *CHRA*].

[2] Following the filing of her complaint, Ms. Tabor also contends Millbrook First Nation retaliated against her pursuant to section 14.1 of the *CHRA*. Among various allegations, she claims it delayed issuing a possession certificate, and subsequently took improper action against her and her family, with regard to her late father's residence on Millbrook First Nation.

[3] Prior to the hearing of Ms. Tabor's complaints, Millbrook First Nation filed a motion challenging the Tribunal's jurisdiction to deal with those complaints.

[4] Millbrook claims section 67 of the *CHRA* is applicable in the circumstances of this case:

> 67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

It submits sections 61(1), 73(1)(a) and 81(1)(o) of the *Indian Act* shield its decision vis-a-vis the fishery from scrutiny under the *CHRA*. It also claims section 20(1) of the *Indian Act* applies to Ms. Tabor's allegation of retaliation regarding the possession certificate for her late father's residence.

[5] In addition, Millbrook's motion argues that section 18(1) of the *Indian Act* confirms Aboriginal treaty rights, such as commercial fishing; and, section 35(1) of the *Constitution Act, 1982* confirms an inherent Aboriginal right to self-governance with respect to those rights. As such, Millbrook claims decisions regarding the management of its fishing

resources, including personnel choices, are also excluded from the application of the *CHRA*.

[6] Ms. Tabor opposes Millbrook's motion. In her view, section 67 is a narrow exception to the application of the *CHRA* and, as such, there must be explicit authority under the *Indian Act* for its application. Ms. Tabor submits there is no such authorization under the *Indian Act* for the actions giving rise to her complaints.

[7] Although the Commission did not participate in arguing the merits of Ms. Tabor's complaints, it provided submissions on Millbrook's motion in order to represent the public interest in the apppropriate interpretation and application of section 67 of the *CHRA*. It agrees with Ms. Tabor that section 67 is a narrow exception to the application of the *CHRA* and that there is no authorization under the *Indian Act* for the actions giving rise to her complaints. Furthermore, with regard to section 35(1) of the *Constitution Act, 1982*, the Commission submits Millbrook has not established that the actions or decision in issue constitute an Aboriginal and/or treaty right, let alone that those rights have been infringed in any way.

[8] In advance of the hearing, I ruled there was insufficient information to make a determination on the motion. In order to properly rule on the motion, I thought it important to hear evidence on the issues raised in the motion and the merits of the complaint as a whole. I informed the parties that I would render a ruling on the motion following the hearing of this matter (see *Tabor v. Millbrook First Nation*, 2014 CHRT 21).

[9] Having now heard evidence and argument on Millbrook's motion, I dismiss it for the following reasons.

II. Analysis

A. Section 67 of the *CHRA*

(i) Interpretation

[10] As an exception to the *CHRA*, section 67 has been interpreted narrowly (*Canada (Human Rights Commission) v. Gordon Band Council*, 2000 CanLII 17153 (FCA) at para. 22 [*Laslo*]; and, *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321 (QL), at para. 18). It does not shield all decisions made by a First Nation that might have some connection to the *Indian Act* (*Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (QL) at para. 31). Rather, it immunizes decisions that are an exercise of authority expressly granted by a provision of the *Indian Act* from scrutiny under the *CHRA* (see *Laslo* at para. 26).

(ii) Nature of the complaints

[11] Before getting into the provisions of the *Indian Act* relied upon by Millbrook, I note the nature of the allegations raised in this complaint are much broader than the decision to choose another candidate over Ms. Tabor for a captain's role. While Millbrook attempted to limit the scope of the complaint at the hearing to a 2008 decision to choose another candidate over Ms. Tabor for a captain's job, I find no basis for doing so.

[12] The entire complaint, including the 2008 captain's decision, was referred to the Tribunal by the Commission. Millbrook did not judicially review the Commission's decision. Pursuant to section 10 of the *CHRA*, Ms. Tabor's complaint also alleges a systemic practice of denying employment opportunities to women in the Millbrook First Nation fishery (see the *Complaint Form* at paras. 9-12, 14-17 and 19-20). No provisions of the *Indian Act* were raised to address this larger context of the complaint, only the 2008 captain's decision.

[13] Also, Millbrook argues the Tribunal's jurisdiction to decide Ms. Tabor's retaliation complaint is ousted by a finding that it does not have jurisdiction over the principal

complaint. In the Commission's view, whether or not Ms. Tabor's employment complaint is shielded from scrutiny by section 67 of the *CHRA*, the retaliation allegations have an independent status.

[14] Retaliation under section 14.1 of the *CHRA* is an independent discriminatory practice, separate and apart from the complaint that gives rise to the alleged retaliation (see *Nkwazi v. Canada (Correctional Service)*, 2001 CanLII 6296 (CHRT) at para. 233; *Chopra v. Canada (Department of National Health and Welfare)*, 2001 CanLII 8492 (CHRT) at para. 292; and, *Gainer v. Export Development Canada*, 2006 FC 814 at para. 36).

[15] The wording of section 14.1 explicitly states that retaliation is a discriminatory practice ("It is a discriminatory practice…"); and, section 4 of the *CHRA* specifies that a discriminatory practice, "…as described in sections 5 to 14.1…", can be the subject of **a** complaint (see also s. 40(1) of the *CHRA*) and **an** order (see also s. 53(2) of the *CHRA*). Furthermore, a "discriminatory practice" is defined at section 39 of the *CHRA* as "…any practice that is a discriminatory practice within the meaning of sections 5 to 14.1".

[16] Nothing in the *CHRA* binds a retaliation complaint to the jurisdiction or substantiation of the complaint giving rise to the allegations of retaliation. Therefore, even if the provisions of the *Indian Act* submitted by Millbrook were to affect the Tribunal's jurisdiction over the main complaint, this does not affect the Tribunal's jurisdiction over the retaliation complaints.

(iii) Timing of the complaints

[17] Section 67 was repealed on June 18, 2008, by section 1 of *An Act to Amend the Canadian Human Rights Act*, S.C. 2008, c. 30. Millbrook claims that during the grace period set out in section 3 of *An Act to Amend the Canadian Human Rights Act* it benefited from an exception equal to, if not broader than, the exception created under section 67:

> 3. Despite section 1, an act or omission by any First Nation government, including a band council, tribal council or governing authority operating or administering programs or services under the Indian Act, that was made in the exercise of powers or the performance of duties and functions

> conferred or imposed by or under that Act shall not constitute the basis for a complaint under Part III of the Canadian Human Rights Act if it occurs within 36 months after the day on which this Act receives royal assent.

[18] In Millbrook's view, section 3 of *An Act to Amend the Canadian Human Rights Act* potentiality exempted all acts or decisions made by a First Nation operating any program or service pursuant to the *Indian Act* from liability under the *CHRA*.

[19] Ms. Tabor filed her complaint on May 21, 2008 and alleges discriminatory practices under sections 7 and 10 of the *CHRA* that occurred prior to this date. Seeing as these events occurred before the repeal of section 67 on June 18, 2008, section 3 of *An Act to Amend the Canadian Human Rights Act* was not in force and is not applicable to the allegations under sections 7 and 10 in this case. As specified in section 3, it applies to the 36 months after the day on which *An Act to Amend the Canadian Human Rights Act* received royal assent.

[20] That said, the allegations of retaliation regarding the possession certificate for Ms. Tabor's late father's residence fall within the 36 month grace period. However, I do not interpret section 3 of *An Act to Amend the Canadian Human Rights Act* as creating an exception broader than the exception under section 67. While more detailed than section 67, section 3 still requires that the act or omission of the First Nation government be made in "...the exercise of powers or the performance of duties and functions conferred or imposed by or under [the *Indian Act*]". This remains consistent with the Tribunal's previous jurisprudence that interpreted and applied section 67. That is, there must still be an exercise of authority expressly granted by a provision of the *Indian Act* to avoid scrutiny under the *CHRA*.

(iv) Section 61(1) of the *Indian Act*

[21] I now turn to the provisions of the *Indian Act* relied upon by Millbrook. As stated above, Millbrook claims it exercised authority granted under sections 61(1), 73(1)(a), and 81(1)(o) of the *Indian Act* in its decision to hire a fishing boat captain in this case. However, in my view, Millbrook's hiring decision was not an exercise of authority under these provisions.

[22] Beginning first with section 61(1) of the *Indian Act*, it provides:

> 61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

[23] I fail to see how section 61(1) is relevant to hiring a fishing boat captain. Section 61(1) deals with the expenditure of money. It does not authorize, expressly or by implication, the hiring of a fishing boat captain or hiring within the Millbrook fishery generally. While every staffing decision involves the control, management or expenditure of money, this alone does not bring it beyond the jurisdiction of the Tribunal. The consequence would be that any First Nation staffing decision would be beyond the jurisdiction of the Tribunal, which goes well beyond a narrow interpretation of section 67 (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2003 CHRT 41 at para. 30 [*Bressette*]).

[24] Millbrook's argument under section 61(1) of the *Indian Act* also points out that the section is subject to treaty rights ("…and subject to this Act and to the terms of any treaty or surrender…"). As mentioned above, it also claims section 18(1) of the *Indian Act* confirms Aboriginal treaty rights, such as commercial fishing; and, section 35(1) of the *Constitution Act, 1982* confirms an inherent Aboriginal right to self-governance with respect to those rights. Therefore, it argues the reference to treaty rights in section 61(1) of the *Indian Act* also immunizes decisions related to spending for hiring in its fishery.

[25] To the extent Millbrook's argument tries to assert a treaty right in relation to section 61(1) of the *Indian Act* and, consequently, that its decision regarding Ms. Tabor was an exercise of authority expressly granted by the *Indian Act* for the purposes of section 67 of the *CHRA*, I dismiss this argument for the same reasons as stated below at paragraph 66 of this ruling. In sum, a treaty right to manage fishing resources, including personnel choices, was not established before me.

(v) Sections 73(1)(a) and 81(1)(o) of the *Indian Act*

[26] Sections 73(1)(a) and 81(1)(o) of the *Indian Act* state:

> 73. (1) The Governor in Council may make regulations
>
> (a) for the protection and preservation of fur-bearing animals, fish and other game on reserves;
>
> […]
>
> 81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

[27] Millbrook concedes the *CHRA* would apply to the hiring decision of a boat captain as it pertains to the control and navigation of a boat, as there is no authority under the *Indian Act* providing for waterway navigation. However, the captain does not simply steer the boat; he or she manages the catch and is the conservation officer on the water, exercising the express authority and corresponding discretion as provided by sections 73(1) and 81(1) of the *Indian Act*. Therefore, Millbrook argues the Tribunal should consider the function of the captain's position in question and determine if that function derives, in whole or in part, from authority under the *Indian Act*.

[28] At the hearing of this matter, Mr. Allan Tobey, a fisheries training consultant and technical advisor on training and marine safety to the Canadian fishing industry, was qualified as an expert to give evidence on a list of specific items agreed upon by the parties regarding a lobster captain's role in stock management and conservation, amongst other things. In sum, he testified about the use of appropriately sized lobster traps to avoid "ghost fishing". That is, traps equipped with a minimum amount and size of escape mechanisms that allow for small lobsters to escape and for other lobsters to break free should the trap be lost at sea. He also spoke about the need, at the beginning of the lobster season, to avoid fishing female lobsters, especially those bearing eggs. If caught,

those lobsters are to be returned, carefully, back to the sea to avoid stress and/or death. Mr. Tobey also testified about a captain's need to know the quota of fish and/or lobster they can fish per license, along with the sizes and types of species of marine life that cannot be fished, called bycatch, and which must be released upon capture. According to Mr. Tobey, the Department of Fisheries and Oceans regulates these conservation requirements.

[29] While I accept Mr. Tobey's evidence regarding a fishing boat captain's role in conservation, I do not accept that conservation, or sections 73(1)(a) and 81(1)(o) of the *Indian Act*, were the predominant purpose behind Millbrook's decision to hire a fishing boat captain, whether it be Ms. Tabor or otherwise. Along with conservation, the testimony of Mr. and Ms. Tabor, Mr. Alex Cope and Mr. Adrian Gloade all indicated that fishing boat captains have various other responsibilities aside from conservation, including navigating the boat, maintaining the boat and its fishing gear in good repair, and managing the crew. In choosing one candidate over another for the captain's role, the evidence did not leave me with the impression that any of these requirements took precedence over another; or, that Millbrook's decision was predominantly based on the preservation, protection and management of fish.

[30] In *Bressette*, the Tribunal had to make a similar finding regarding the "predominant purpose" behind a First Nation's decision to staff a Family Caseworker position:

> [27] In my view, the decision of the respondent involves both a staffing aspect and a financial aspect. But, in my opinion, the predominant purpose behind the decision of the Band Council was to staff the Family Caseworker position. The fact that a small financial benefit resulted does not detract from this conclusion.

[31] Likewise, in this case, the decision to hire a fishing boat captain involves a conservation aspect, along with a navigation, maintenance and management aspect. The predominant purpose behind Millbrook's hiring decision was to staff a fishing boat captain with all these qualifications. While conservation may have been one consideration for Millbrook's hiring decision, it was not the only consideration, nor did the evidence indicate it was the predominant consideration. Therefore, upon my review of the evidence, I fail to

see how sections 73(1)(a) and 81(1)(o) of the *Indian Act* authorized Millbrook's decision to hire a fishing boat captain in this case.

[32] As a result, there is no provision of the *Indian Act* that expressly or by implication authorizes Millbrook's hiring decisions in this case. This conclusion is similar to those of the Tribunal in other hiring/staffing cases where section 67 was raised (see for example *Bressette*; *Deschambeault v. Cumberland House Cree Nation*, 2008 CHRT 48; *Bernard v. Waycobah Board of Education*, 1999 CanLII 1914 (CHRT); and, *Desjarlais v. Piapot Band No. 75*, [1989] 3 FC 605 (C.A.) (QL)).

(vi) Section 20(1) of the *Indian Act*

[33] Millbrook also claims section 20(1) of the *Indian Act* applies to Ms. Tabor's allegation of retaliation regarding the possession certificate for her late father's residence.

[34] Section 20(1) provides:

> 20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

[35] Ms. Tabor's claim is that, when her father died, he asked Millbrook that his home be held in trust by Ms. Tabor for his eldest grandson, Ms. Tabor's son, until he came of age. Millbrook agreed to the request and made an arrangement with Ms. Tabor whereby it would give her a certificate of possession under which she would hold the property in trust for her son. Until her son came of age, Ms. Tabor was to rent out the house and place the money in a trust fund for him. Implicit in this agreement was that Ms. Tabor would only rent out the home to rent-paying members of Millbrook First Nation; otherwise, she would not receive any rent to put in trust.

[36] Millbrook did not issue a certificate of possession for the property for approximately two years. However, Ms. Tabor allowed some members of Millbrook, who were on social assistance, to live in the house in the meantime. These occupants did not have a set rent and only paid what they could. Given that social assistance recipients receive a housing allowance, Millbrook required Ms. Tabor to pay back portions of those tenants' social

assistance benefits. Also, prior to the certificate of possession being issued, Millbrook required Ms. Tabor to maintain the yard of the property.

[37] Ms. Tabor claims she was not responsible for rentals or maintenance at the property until the certificate of possession was issued. By requiring her to pay back social assistance benefits, maintain the yard and, in the meantime, delaying issuance of the certificate of possession, Ms. Tabor claims Millbrook retaliated against her.

[38] Section 20(1) of the *Indian Act* grants a First Nation authority over housing allocation decisions (*Laslo* at para. 27). However, the allegations of retaliation made by Ms. Tabor in relation to her late father's home do not challenge Millbrook's authority to grant or refuse housing. There seems to be no dispute that Ms. Tabor was, or was to be given, possession of the home. In any event, it is clear that she made use of the home despite there being no official certificate of possession. Millbrook did not take issue with Ms. Tabor's use of the home, except where doing so, in their view, violated their agreement with her.

[39] While the delay in issuing the certificate of possession could arguably fall under section 20(1), in my view, this is not the crux of Ms. Tabor's retaliation allegation here. Rather, it is the rent and maintenance issues that arose before the issuance of the certificate that cause concern for Ms. Tabor. These actions do not involve the grant or refusal of housing under section 20(1) of the *Indian Act*. Therefore, the Tribunal has jurisdiction to deal with these allegations.

B. Sections 18(1) of the *Indian Act* and 35(1) of the *Constitution Act, 1982*

[40] As mentioned above, Millbrook's motion also claims that a decision about managing its fishing resources, including personnel choices, is a constitutionally protected Aboriginal or treaty right under section 35(1) of the *Constitution Act, 1982*. It claims section 18(1) of the *Indian Act* confirms Aboriginal treaty rights, such as commercial fishing; and, section 35(1) of the *Constitution Act, 1982* confirms an inherent Aboriginal right to self-governance with respect to those rights. Therefore, according to Millbrook, decisions regarding those rights are excluded from the application of the *CHRA*.

[41] Section 18(1) of the *Indian Act* states (emphasis added):

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

[42] Section 35(1) of the *Constitution Act, 1982* provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[43] In support of its argument that managing its fishing resources, including personnel choices, emanates from a constitutionally protected Aboriginal or treaty right, Millbrook relies on the Supreme Court of Canada's decision in *R. v. Marshall*, 1999 CanLII 665 (SCC) [*Marshall 1*]. Ironically, that decision deals with Ms. Tabor's uncle. In that case, Mr. Marshall was charged with three offences under federal fishery regulations: the selling of eels without a licence; fishing without a licence; and, fishing during the closed season with illegal nets. Mr. Marshall argued he possessed treaty rights to catch and sell fish that exempted him from compliance with the regulations.

[44] The treaties in issue in that case were negotiated between the British and Mi'kmaq following much militray and political turmoil between the parties. In 1760-1761, when the treaties were negotiated, there was motivation for reconciliation between the parties and a mutual interest in establishing stable peace (see *Marshall* 1 at paras. 3 and 17). Treaties were entrered into whereby the Mi'kmaq could bring the products of their hunting, fishing and gathering to a truckhouse to trade.

[45] The Supreme Court confirmed that these Mi'kmaq treaty rights were protected by section 35(1) of the *Constitution Act, 1982* (see *Marshall 1* at paras. 7 and 48). In interpreting the trade arrangement in modern times, in a manner which gave meaning and substance to the promises made by the Crown, the Supreme Court found the treaty rights provided for the ability to obtain a moderate livelihood through hunting and fishing by trading the products of those traditional activities (see *Marshall 1* at paras. 52, 56, and 59). According to the Supreme Court, a moderate livelihood includes such basics as food,

clothing, housing and a few amentities, but not the accumulation of wealth which would exceed a sustenance lifestyle (*Marshall 1* at paras. 59-60).

[46] The Supreme Court determined Mr. Marshall was entitled to an acquittal, because "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people…" (*Marshall 1* at para. 4). It found the imposition of a discretionary licensing system interfered with Mr. Marshall's treaty right to fish for trading purposes; and, the ban on sales infringed on his right to trade for sustenance. As these rights were exercisable only at the absolute discretion of the Crown, there was a *prima facie* infringement of the treaty rights and the regulations were inoperative against Mr. Marshall unless justified. With regard to the charge for fishing during the closed season, the Supreme Court found another *prima facie* infringement of the treaty rights because there could be no limitation on the method, timing and extent of a treaty right to fish apart from a treaty limitation to that effect (see *Marshall 1* at paras. 64-66).

[47] Millbrook also relies on the decision in *R. v. Simon*, 1985 CanLII 11 (SCC) [*Simon*]. In that case, Mr. Simon, a Mi'kmaq person, was convicted under section 150(1) of Nova Scotia's *Lands and Forests Act* for possession of a rifle and shotgun cartridges. Pursuant to the terms of a 1752 treaty, Mr. Simon argued he had a right to hunt, and in combination with section 88 of the *Indian Act*, this provided him with immunity from prosecution under the provincial act. Article 4 of the 1752 treaty stated that "the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province" have "free liberty of Hunting & Fishing as usual"; and, section 88 of the *Indian Act* states that provincial laws of general application apply to Indians, subject to the terms of any treaty (see *Simon* at paras. 2-6).

[48] The Supreme Court determined the 1752 treaty continued to be in force and effect and to constitute a positive source of protection against infringements on hunting rights (see *Simon* at paras. 26 and 36). Mr. Simon was covered by the treaty because he was a Mi'kmaq person living in the same area as the original Mi'kmaq community which was a party to the treaty (see *Simon* at paras. 42-45). The Supreme Court found Mr. Simon's possession of a rifle and ammunition was referable to his treaty right to hunt. Therefore, section 88 of the *Indian Act* operated to exempt him from provincial legislation restricting or contravening the terms of the 1752 treaty and his convinction was quashed (see *Simon* at

para. 62). Given section 88 of the *Indian Act* covered Mr. Simon's situation, the Supreme Court did not find it necessary to consider section 35(1) of the *Constitution Act, 1982* (see *Simon* at para. 66).

[49] I recognize the importance of protecting Aboriginal and treaty rights in our society and their significance to Aboriginal peoples. The significance and protection for these rights is affirmed in section 35(1) of the *Constitution Act, 1982*. Aboriginal and treaty rights are important collective rights that deserve to be interpreted in a large and liberal manner. Any ambiguity should be resolved in favor of the Aboriginal group claiming the right. However, in most cases, argument and evidence, pursuant to established case law, is required to establish an Aboriginal or treaty right. To claim, based on *Marshall 1* or *Simon*, that a decision about managing fishing resources, including personnel choices, is a constitutionally protected Aboriginal or treaty right under section 35(1) of the *Constitution Act, 1982* is not sufficient.

[50] First, it was incumbent upon Millbrook to actually establish the Aboriginal or treaty rights it claims are applicable in this case. A treaty right to manage fishing resources was not established before me. There was insufficient evidence and argument made to establish that the right to manage fishing resources, including personnel choices, was contemplated by the treaties examined in *Marshall 1* or *Simon*; or, that it is a logical evolution of any of those treaty rights. In fact, no specific treaty terms were put in evidence before me. As the Supreme Court stated in *R. v. Marshall*, 1999 CanLII 666 (SCC) [*Marshall 2*] at paragraph 20 (emphasis added):

> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. <u>It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised</u>

> on proper historical evidence, as was done in this case in relation to fish and wildlife.

[51] Millbrook also states it has an inherent right of self-governance. I recognize that self-governance is of paramount importance for Aboriginal peoples. In fact, self-determination is recognized in the Annex and Article 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) [*UN Declaration*] (which Canada endorsed on November 12, 2010). That said, the *UN Declaration* was not argued before me .

[52] Furthermore, I note the practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society (see *R. v. Van der Peet*, [1996] 2 SCR 507). To establish the Aboriginal right, there must be some evidence of the existence of a pre-contact practice, tradition or custom, and that this was integral to the distinctive pre-contact Aboriginal society (see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 46). With specific regard to an asserted right to self-government, the Supreme Court stated in *R. v. Pamajewon*, [1996] 2 SCR 821 at paragraph 27:

> Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

[53] This exemplifies that a principle as significant as a right to self-governance should not be analyzed summarily, based solely on a statement of its existence. A more in depth analysis needs to take place, with evidence and argument to support it. This type of evidence and argument was also lacking on Millbrook's part.

[54] Second, even if Millbrook has an Aboriginal or treaty right to manage its fishing resources, including personnel choices, that does not necessarily shield all actions related to Millbrook's fishery from regulation under the law, including under the *CHRA*. An infringement of the right must first be established. The test for infringement under section 35(1) of the *Constitution Act, 1982* was set out in *R. v. Sparrow*, [1990] 1 SCR 1075 at page 1112 [*Sparrow*]:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

[55] The same test applies to determine whether an aboriginal or a treaty right has been infringed. The wording of section 35(1) of the *Constitution Act, 1982* supports a common approach to infringements of Aboriginal and treaty rights (see *R. v. Badger*, [1996] 1 SCR 771 at para. 79 [*Badger*]).

[56] In raising the application of section 35(1) of the *Constitution Act, 1982* to the circumstances of this case, Millbrook had the onus of establishing an infringement to any of its Aboriginal or treaty rights pursuant to the *Sparrow* test. Insufficient evidence was brought forward to demonstrate interference with an Aboriginal or treaty right. In this regard, I also note section 35(4) of the *Constitution Act, 1982*, which provides "aboriginal and treaty rights […] are guaranteed equally to male and female persons" (emphasis added).

[57] Third, if a *prima facie* infringement is found, the analysis moves to the issue of justification. The test for justification asks whether there is a valid legislative objective for the infringement; examines the special trust relationship and the responsibility of the government vis-à-vis Aboriginal peoples; and, asks such further questions as may arise in the particular circumstances of the case. Given recognition and affirmation requires sensitivity to and respect for the rights of Aboriginal peoples, these further questions may include whether there has been as little infringement as possible; fair compensation

provided; and/or, whether Aboriginal people were consulted (see *Sparrow* at pp. 1113-1119; and, *Badger* at para. 97).

[58] In *Marshall 2*, the Supreme Court affirmed the government's general regulatory power over the exercise of treaty rights, subject to justification for valid objectives. In the context of the 1760-1761 treaties, the Supreme Court stated that valid regulatory objectives could include conservation, economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.

[59] Even if Millbrook had succeeded in establishing an Aboriginal or treaty right and an infringement of that right, the Crown was not put on notice that section 35(1) of the *Constitution Act, 1982* was at issue in this case or that it could potentially have to provide a justification for the application of the *CHRA* to the circumstances of this case. A notice of constitutional question, pursuant to Rule 9(7) of the Tribunal's *Rules of Procedure (03-05-04)*, was not served.

[60] The government's justification to an alleged infringement in this case would have been important given the characterization of the Aboriginal and treaty rights by Millbrook seem to be different than the rights confirmed in *Marshall 1*. As the Supreme Court stated in *Marshall 2* at paragraph 22: "The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time". The government's potential justification in this case was not contemplated by Millbrook.

[61] Therefore, in my view, Millbrook did not seriously consider the application of Aboriginal and/or treaty rights, nor section 35(1) of the *Constitution Act, 1982*, to the circumstances of this case. If it had, it would have brought sufficient evidence to establish the alleged Aboriginal or treaty rights it claims are applicable in this case; that those rights have been infringed; and, would have served a notice of constitutional question to allow the Crown to provide submissions on the issue. As that was not the case here, I dismiss Millbrook's argument under section 35(1) of the *Constitution Act, 1982*.

[62] To the extent Millbrook's argument also tries to assert a treaty right in relation to section 18(1) of the *Indian Act* and, consequently, that its decision regarding Ms. Tabor

was an exercise of authority expressly granted by the *Indian Act* for the purposes of section 67 of the *CHRA*, I dismiss this argument as well.

[63] Section 18(1) is in a part of the *Indian Act* entitled "RESERVES". It has been held to constitute a statutory acknowledgement of the Crown's fiduciary obligation to First Nation groups with respect to the uses to which reserve land may be put (see *Guerin v. The Queen*, [1984] 2 SCR 335 at pp. 348-350 per Ritchie, McIntyre and Wilson; and, at pp. 383-384 per Dickson, Beetz, Chouinard and Lamer). The marginal note for section 18(1) is consistent with the Supreme Court's interpretation of this section: "Reserves to be held for use and benefit of Indians".

[64] I wish to add that the Crown's fiduciary duty is a component of the principle of the honour of the Crown. In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paragraph 66, the Supreme Court described the principle of the honour of the Crown as follows:

> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, at para. 24:
>
> > The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

[65] Given the interpretation of section 18(1) of the *Indian Act* and the principles ennuciated above, I fail to see how a hiring decision is an exercise of authority in relation to the use of reserve lands. Millbrook's argument and evidence was insufficient to establish any connection between section 18(1) of the *Indian Act* and the circumstances of this case.

[66] Furthermore, Millbrook relies on a small portion of the wording of section 18(1) of the *Indian Act* ("…and subject to this Act and to the terms of any treaty or surrender…") for its proposition that the section confirms Aboriginal treaty rights, such as commercial fishing. A plain reading of the section suggests the use of the term "treaty" is in relation to treaty terms that may affect the use and benefit of reserve lands for First Nation groups; and, not necessarily the confirmation of treaty rights in general. In any event, given Millbrook's argument under section 18(1) relies on the establishement of a treaty right; and, given the treaty right to manage fishing resources, including personnel choices, was not established; Millbrook's argument under section 18(1) is also dismissed.

III. Ruling

[67] I find the Tribunal has jurisdiction to consider Ms. Tabor's complaints. Section 67 of the *CHRA* is inapplicable to the circumstances of this case. Nor is there evidence to indicate an infringement of an Aboriginal or treaty right pursuant to section 35(1) of the *Constitution Act, 1982*.

[68] For these reasons, Millbrook First Nation's motion is dismissed.

Signed by

Sophie Marchildon
Tribunal Member

Ottawa, Ontario
March 27, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1658/01311 & T1659/1411

Style of Cause: Stacy Lee Tabor v Millbrook First Nation

Ruling of the Tribunal Dated: March 27, 2015

Date and Place of Hearing: July 28 to 30, 2014
August 1, 2014
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September 16, 2014

Truro, Nova Scotia

Appearances:

Gary A. Richard, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Thomas J. Kayter, for the Respondent