Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 16
Date: June 23, 2015
File Nos.: T2055/5614, T2056/5714 & T2057/5814

Between:

Bruce Beattie

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(representing Aboriginal Affairs and Development Canada)

Respondent

Ruling

Member: Edward P. Lustig

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I. Background

[1] This is a ruling on a motion by the Complainant dated March 9, 2015 for an Order to strike paragraphs 10, 11, 12, 14, 16, 17, 27, 29, 32, 37 and 41 of the Respondent's Statement of Particulars, dated February 13, 2015, on the basis that "...those paragraphs pertain to matters which fall outside the Canadian Human Rights Tribunal's (the "Tribunal") jurisdiction or are entirely irrelevant to the present inquiry."

[2] The Complainant's motion also requested a similar Order with respect to the Canadian Human Rights Commission's (the "Commission") Statement of Particulars, dated January 23, 2015, but that request is now moot as the Commission withdrew its Statement of Particulars and advised it was no longer fully participating in the case by way of a letter dated May 8, 2105. The Commission is not responding to the motion and will not appear at a hearing of this matter.

[3] The Complaints in this matter, dated March 30, 2012, were filed with the Commission on April 4, 2012. The Commission requested the Tribunal to institute an inquiry into the Complaints on a consolidated basis on October 1, 2013 pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act* (the "*CHRA*").

[4] The Complainant brought the Complaints on behalf of three named victims (one of whom is his spouse), who have given him consent to bring the Complaints forward and act as their representative. The three named victims are each registered Indians under the *Indian Act* (the "*Act*").

[5] In his Complaints and in his Statement of Particulars dated January 4, 2015 the Complainant alleges that contrary to section 21 of the *Act*, the Respondent refused to register (enter) in the Indian Reserve Land Register, which is administered on behalf of the Respondent under the *Act* by the Registrar of Indian Lands, certain documents involving transactions between the three Indian victims - namely leases of Lots 170-1 and 175 on the Okanagan Indian Reserve No. 1 in British Columbia and a lease assignment of Lot 175. The Complainant contends that the registering (entering) of these documents in the Indian Reserve Land Register is a service to be provided by the Respondent mandatorily and in a non-discriminatory manner, upon the submission of the documents to

the Registrar of Indian Lands. The Complainant says that the wording of section 21 of the *Act*, as part of the Indian Lands Registry System (ILRS) of administrative policies and practices published by the Respondent in its Indian Lands Registration Manual, did not authorise or permit the Registrar of Indian Lands to refuse to register (enter) the documents submitted to him in this case in the Indian Reserve Land Register.

> Register
>
> **21**. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

[6] The Complainant alleges that the refusal by the Respondent between July 29, 2011 and September 30, 2013 to register (enter) these documents in the Indian Reserve Land Register, is an infringement of section 5 of the *CHRA*, in that it constitutes a denial of service and adverse differentiation by the Respondent in the provision of a service customarily available to the general public, on the basis of a prohibited ground under section 3 of the *CHRA* - namely on the basis of racial, national or ethnic origin.

[7] In its Statement of Particulars, the Respondent denies the Complainant's allegations. The Respondent points out that, subject to surrender (which is not an issue in this case), legal title to the lands on a reserve at all times remains with the Crown, pursuant to subsections 2(1) and 18(1) of the *Act*. The Respondent contends that for the lands in this case to be leased, the Minister of the Respondent, on behalf of the Crown, must be the Lessor pursuant to subsection 58(3) of the *Act*. The leases in question did not include the Minister and, as such, according to the Respondent, are not legally valid documents and therefore cannot be registered by the Registrar in as much as they are not "transactions respecting land in a reserve" as required by section 21 of the *Act*.

> **58(3).** Lease at the request of occupant - The Minister may lease for the benefit of any Indian, on the application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

[8] The Respondent argues that the Complaint in this case is a challenge to legislation, in as much as section 21 of the *Act* must be read as being informed, as part of the statutory scheme of the *Act*, by subsection 58(3) and its requirement that the Minister be named as lessor. The Respondent says that, absent amending legislation, it cannot ignore subsection 58(3) and is mandated to refuse to register the documents that it says are invalid without the Minister as lessor. In taking this position in its defence of the Complaint, the Respondent says that it is following the Federal Court of Appeal as "... stated in *Murphy* that a challenge directed at specific provisions of legislation falls outside of the scope of the *CHRA* if it is aimed at legislation *per se* and nothing else.": See *Public Service Alliance of Canada v Canada (Revenue Agency),* 2012 FCA 7 ("*Murphy*").

[9] In his Reply dated February 19, 2015 the Complainant denies that the Complaints directly challenge the *Act*. Rather, he argues that the Complaints seek i) "...nothing more than the enforcement of the existing wording of s. 21 of the *Indian Act*."; and that ii) the "...plain and ordinary meaning and the entirely obvious intent of the wording of s. 21 is not affected in any manner whatsoever by any other provisions of the *Indian Act...*". It is the defence position "... taken by the Respondent which raises a jurisdictional question pursuant to *Murphy*. In refusing to apply section 21 as it is drafted, it is the Respondent who challenges the legislation. This raises the question of whether the Complainant is himself entitled to rely on the principles established by the Federal Court of Appeal in *Murphy* and applied by the Tribunal to the *Indian Act* in *Matson* and *Andrews*" in order to prevent the Respondent from challenging the existing wording of section 21 (See *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13, *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21, aff'd *Canadian Human Rights Commission v. Canada (Attorney General)*, 2015 FC 398).

II. The Motion to Strike

[10] The submissions on the motion by both the Complainant and the Respondent centre on the principle enunciated in *Murphy, Matson* and *Andrews* that legislation cannot be directly challenged pursuant to the *CHRA*. According to the Complainant, section 21 of the *Act* is a service customarily available to the general public to be provided in a non-

discriminatory manner mandating the registration of documents covering land transactions between registered Indians of reserve land, without reference to other conditions or provisions of the *Act*. The Complainant argues that on a plain and ordinary reading of the words in section 21, the Indian Land Registrar was mandated to register the documents submitted to it in this case, without any reference to whether the transactions described in the documents were "legally valid" by virtue of other sections of the *Act* as interpreted by the Respondent that are not mentioned in section 21. For the Complainant, the engagement by the Respondent of the *Murphy, Matson and Andrews* principle as a defence to the Complaints is irrelevant and beyond the jurisdiction of the Tribunal as his case represents the enforcement of, not a challenge to, mandatory legislation - namely section 21. Hence, the Complainant requests the Tribunal to strike from the Respondent's Statement of Particulars the paragraphs that he says refer to this principle.

[11] According to the Respondent, section 21 of the *Act* is part of a statutory scheme that cannot be read alone without engaging other sections of the *Act*. Reading this section together with the other sections of the *Act*, including subsection 58(3), informs the proper interpretation of section 21. The service offered to the public is really the entire registration process which includes the step of registration detailed at section 21. The service is not limited to the step of registration alone. The Respondent argues that this process is provided for by mandatory legislation that the Registrar of Indian Lands cannot ignore. By registering documents pursuant to section 21 that are rendered invalid by other sections of the *Act*, the Registrar would act in violation of the legislation. As such, the Respondent takes the position that the Complaints seek to challenge mandatory legislation and nothing else, thereby invoking the *Murphy, Matson and Andrews* principle that is a legitimate and key defence to the Complaints. The Respondent's position that it is erroneous to interpret section 21 in the absence of other provisions of the *Indian Act* does not constitute a challenge to legislation and the Respondent submits that, contrary to the Complainant's argument, the *Murphy, Matson* and *Andrews* principle does not apply in this regard. The Respondent further submits that pursuant to the principle, if the Complainant wants to challenge the legislative process, on the basis that is discriminatory, he must do so in a court as a *Canadian Charter of Rights and Freedoms* challenge, as the current legislation

is mandatory and can only be changed by an amendment of the legislation, not by a decision of the Tribunal.

III. Issue

[12] Should the Tribunal strike the paragraphs from the Respondent's Statement of Particulars as requested by the Complainant?

IV. Legal framework governing motions to strike particulars

[13] As the moving party, it is incumbent upon the Complainant to persuade the Tribunal that it should grant the motion to strike and deprive the Respondent, on a preliminary basis, from bringing forward the argument that the Tribunal does not have the jurisdiction to adjudicate the Complaints as they constitute a direct challenge to legislation pursuant to the *Murphy*, *Matson* and *Andrews* decisions.

[14] The Tribunal is master of its own proceedings (Subsection 50(3)(e) of the *CHRA*) and has the ability to reject portions of a complaint where appropriate. However, when asked to do so on a preliminary basis in the absence of a hearing, the Tribunal must exercise this discretion cautiously and only in the clearest of cases: *Buffet v. Canadian Armed Forces*, 2005 CHRT 16 at para. 39. See also *Desmarais v. Correctional Services of Canada*, 2014 CHRT 5 at paras 82 - 84.

[15] The *CHRA* already includes a screening function, performed by the Commission, and the Tribunal has the statutory obligation to provide parties with a “full and ample opportunity” to present evidence and make legal representations on the matters raised in the complaint (Subsection 50(1) of the *CHRA*). The Tribunal must also render its decision in compliance with the rules of natural justice: See *Buffet* at paras. 38-40; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*FNCFCS*) aff'd in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paras. 125, 131-132,140.

[16] These are the considerations which the Tribunal must weigh in determining whether or not the Complainant's motion to strike ought to be granted.

V. Analysis

[17] It is clear that the Complainant and the Respondent take completely opposite positions in their submissions on this motion about a fundamental issue. The fact that both parties have argued the merits of this issue rather than the motion to strike, supports the need for oral argument on this point. I am not persuaded by the Complainant that it would be fair, on a preliminary basis, in the absence of a hearing, to strike the paragraphs requested in the motion from the Respondent's Statement of Particulars, as they constitute a primary defence in this case worthy of being heard. To do so, in my view, would deprive the Respondent of its right to a full and ample opportunity to present evidence and make legal representations on the matters raised in the Complaint.

VI. Order

[18] For the foregoing reasons the Complainant's motion is dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
June 23, 2015