Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 39
Date: December 21, 2017
File No.: T1912/14212

Between:

Vivian M. Wirth

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Saddle Lake Cree Nation

Respondent

Ruling

Member: George E. Ulyatt

[1] The Saddle Lake Cree Nation ("SLCN" or "the Respondent") has brought a Motion to adjourn this matter currently before the Canadian Human Rights Tribunal ("Tribunal"), pending a decision from the Federal Court of Canada in related Federal Court Action T-364-14, as to whether SLCN's 2010 Election is a "service" as the term is used in section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*Act*").

[2] In support of the Motion for Adjournment the Respondent has filed and is relying on the following:

1. Pleadings, affidavits, and orders from Federal Court File T-364-14, and the predecessor file, T-504-13.
2. Motion for Summary Judgment filed in Federal Court File T-364-14.
3. The Affidavit of Finlay Moses, sworn November 22, 2016, and filed in Federal Court File T-364-14.

[3] The Respondent is one of two constituent First Nations that compose the Saddle Lake Band, a Band that is defined by the *Indian Act* R.S.C., 1985, c. I-5. The Respondent holds elections every three years, and the process is governed by both written and oral customs, which have been referred to as "the Election Custom". The submission was that the Election Custom was established by past practices.

[4] The Respondent submits that elections have never been held under the *Indian Act's* election process, and thus, section 74 of the *Indian Act* does not apply, nor has the Respondent "…reverted to customs under the requirements of any federal policy."

[5] In June, 2010, the Respondent held an election under its Election Custom, and after the election the Complainant filed a complaint under the *CHRA* on the basis that the Respondent's electoral officers had removed the Complainant's name from the official candidate list or ballot.

[6] The Complainant did not file an application for judicial review seeking the Court's opinion as to whether the removal was lawful under the *Election Custom* but did file a complaint under the *Act*.

[7] The Complainant alleged that this was discriminatory under section 5 of the *Act* on the basis of marital or family status, due to the Complainant being barred from participating in the 2010 council election because she had been married to a white man.

[8] The Canadian Human Rights Commission ("Commission") referred the matter to the Tribunal for inquiry. In response to the said referral to the Tribunal, on March 22, 2013 the Respondent filed an Application for Judicial Review in the Federal Court. The basis of the Judicial Review Application is set forth in paragraph 17 of the Respondent's submission:

> "17. In the Judicial Review, SLCN alleges, *inter alia*, that the *Act* does not apply to the Complaint as SLCN's 2010 custom election was not a "service" as that term is used in section 5 of the *Act*.[16] The application also alleges that the decision to refer the Complaint infringes upon existing Aboriginal rights of SLCN, which rights are protected under section 35 of the *Constitution Act, 1982*."

[9] Subsequent to the Application for Judicial Review, the Federal Court granted on January 22, 2014 a stay in favour of proceeding by way of a Statement of Claim. The Respondent in their Brief stated as follows:

> "18. Pursuant to an order of the Federal court granted January 22, 2014, the Judicial Review was stayed in favour of proceeding by way of statement of claim. In granting the Order the Court noted that:
>
> > [C]onversion is appropriate because the facts, including those of oral history, cannot be satisfactorily established by affidavits alone; that *viva voce* evidence will permit to better grasp the facts and weigh evidence; that the production, discovery and exchange of expert evidence inherent in a trial are necessary for a full and fair hearing of the issues;…the constitutional issues appear beyond the scope of the complaint and impact a substantial number of third parties."

[10] SLCN filed a Statement of Claim in Federal Court, wherein it seeks the following relief:

> "21. In the FC Action, SLCN seeks a declaration that the *Act* does not apply to, and the Commission does not have jurisdiction over, SLCN's custom elections. The Statement of Claim states, that the *Act* doesn't apply to the Complaint because, *inter alia:*

(a) SLCN's custom election is not authorized by Parliament and therefore the Complaint does not fall under section 2 of the *Act* which provides that the *Act* only applies to laws "within the purview of matters coming within the legislative authority of Parliament"; and

(b) that the *Act* does not apply as the SLCN's custom election is not a "service" as that term is used in section 5 of the *Act.*"

[11] On November 4, 2016, the SLCN was granted leave to bring a Summary Judgment Motion, which was filed on November 30th, 2016, seeking an order from the court declaring that SLCN's Custom an election for Chief in Council is "not a service" within the meaning of section 5 of the *Act*.

[12] The Complainant did not file an Appearance in response to the original Application for Judicial Review. The Respondent states that, due to her lack of participation in those proceedings, she was not named as a party to the subsequent Action. The Commission was not named as a party to the Action either.

[13] The submissions of the Commission at page 4, paragraph 10 of their Brief set forth the status of the Federal Court proceedings at the time the Motion materials were filed.

"10. At the same time that the Tribunal proceeding has been underway, SLCN has started various proceedings seeking different forms of relief in the Federal Court. As mentioned in the Affidavit of Finlay Moses, steps taken in the Federal Court have included the following:

a. SLCN filed an application for judicial review of the Commission's decision to refer (T-504-13, the "Application). Ms. Wirth did not file a Notice of Appearance. The Commission sought and obtained leave to intervene in the Application. SLCN delivered a notice of constitutional question. The Federal Court eventually ordered that the Application be stayed, pending the resolution of matters to be pleaded by SLCN in a fresh action.

b. SLCN started an action, naming the Attorney General of Canada ("AGC") as the sole defendant (T-364-14, the "Action"). In the Action, SLCN seeks various forms of declaratory relief, including declarations that Ms. Wirth's Complaint does not relate to the provision of services within the meaning of s. 5 of the *CHRA*, and that applying the *CHRA* to SLCN's custom election would infringe constitutionally-protected rights of aboriginal self-government. Neither Ms. Wirth nor the Commission is named as a party.

c. The AGC filed a Statement of Defence, in which it takes no position on some of the issues raised in the Action, including whether Ms. Wirth's complaint relates to the provision of services under s.5 of the *CHRA*.

d. The Federal Court dismissed a request by the Commission for leave to intervene in the Action, but left it open to the Commission to re-apply at a future date. The Federal Court of Appeal dismissed an appeal from this order.

e. The Federal Court granted SLCN leave to bring a motion for summary judgment on the "services" question, and set deadlines for (i) SLCN to deliver a notice of motion and affidavit to the AGC (November 30, 2016), (ii) the AGC to advise whether it would take a position on the motion (December 15, 2016), and (iii) SLCN to deliver its motion record for summary judgment (January 31, 2017).

f. SLCN delivered a Notice of Motion for summary judgment, seeking a declaration that SLCN's custom election for Chief and Council is not a "service" within the meaning of s. 5 of the *CHRA*."

Respondent's Position

[14] The Respondent submits that the issues before the Tribunal are best resolved by the Federal Court, in order to properly determine the applicability of the *Act* and the definition of service. Also, the issue of electoral customs and the inherent right of self-government is important to be considered.

[15] The Respondent submits that the Complainant will not be prejudiced, and if there is prejudice, that such prejudice could be satisfied by an order of compensation. The Respondent further submits that it should not be put to a substantial cost for a full hearing on aboriginal rights of self-government, and that the matter before the Tribunal is not ready for hearing.

[16] The Respondent relies upon the decision of *Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada,* 2013 CHRT 30 *("Renaud")*, wherein the Tribunal adjourned the matter before it.

Commission's Position

[17] The Commission submits that the Tribunal should proceed to a hearing, as Section 48.9(1) states as follows:

> "48.9(1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

[18] The Commission argues that only in exceptional circumstances should a matter be adjourned, that the Tribunal's policies and procedures are a better fit for an individual, and that no exceptional circumstances have been substantiated by the Respondent in the present circumstances.

[19] The Commission further takes issue with the adjournment on the services question, in that neither the Complainant nor the Commission were parties before the Federal Court and the Attorney General of Canada was not taking a position on this question.

[20] The Commission relies heavily on the case of *Canada (Border Services Agency) v. C.B. Powell Limited,* 2010 FCA at paragraph. 33.

> "Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the 'exceptional circumstances' exception… Suffice to say, the authorities show that very few circumstances qualify as 'exceptional' and the threshold for exceptionality is high…Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted…As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts."

Furthermore at page 19 of the Commission's Submissions, it relies upon the Federal Court's judgment in *Nipisihkopahk Education Authority of the Samson Cree Nation and Ermineskin Tribe v. Canada (A.G.),* 2004 FC 1314, at paragraphs. 4-6, 8-10:

> "[4]… there is no evidence in these files that the Applicants have suffered or will suffer any harm whatever from the proceedings before the Commission or the tribunal. Notably, the Applicants have not to date been ordered to do

> anything, let alone anything that they don't want to do, and they have not been ordered or restrained from doing anything that they think they have a right to do.
>
> [5] They argue that they are not subject to the *Human Rights Act* and of the Tribunal [*sic*]. But that question has not yet been determined one way or the other. The Applicants have simply been given the opportunity to defend themselves and to argue their constitutional position before the tribunal which is a body competent to decide the question.
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> [6] That is no harm of any sort. If the Tribunal agrees with the Applicants the matter will end there. Even if the Tribunal disagrees and decides against them they still will not have suffered any harm whatever, unless and until, the tribunal after full enquiry issues an Order against the Applicants. That in my view will be time enough to decide if the Applicants' constitutional position and argument justifies seeking a stay of the Tribunal's final Order.
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> …..
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> [8]…to date, the Applicants have suffered and will suffer no more inconvenience than the relatively minor one of having an opportunity to litigate their position before a competent body…
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> [9] On the other hand the complainants have already been forced to see their complaints delayed for that same five-year period and time is moving on. Any enquiry by the Tribunal will become less effective as the time between the events complained of and the holding of the enquiry lengthens. That's a truism. Justice delayed is justice denied. And the complaints have had a serious inconvenience imposed on them by having their hearing postponed almost indefinitely.
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> [10] There is also, and this is an aspect of what I have just said, an important public interest to be served and to be protected in having complaints before the Tribunal dealt with expeditiously."

[21] The Respondent replies to the Commission's position, stating that the Attorney General of Canada is in fact the proper Respondent in this procedure before the Federal Court and that the Tribunal is not the proper forum, and that the Tribunal is not in a position to proceed with its hearing in the present circumstances. The Respondent submits that the Federal Court is the best situated forum to deal with this matter.

[22] Since the filing of the parties' submissions, the Honourable Mr. Justice Phelan of the Federal Court issued an Order on March 2, 2017 which ordered *inter alia* as follows:

"**UPON MOTION** in writing by the Canadian Human Rights Commission [Commission] for intervener status for purposes of a motion to stay and if not granted, to participate in this action without costs;

AND UPON the Defendant advising that it was taking no position on this motion;

AND the Plaintiff not opposing intervener status but opposing a stay and the "without costs" request of the Commission;

AND UPON the parties being in agreement that the Commission does not have jurisdiction over the matter in dispute but for different reasons;

AND the parties having attempted to find an efficient and effective process by which to resolve the legal issue in dispute, the Plaintiff having brought a Motion for Summary Judgment;

AND CONSIDERING that without the Commission's involvement there would be no effective opposition;

AND CONSIDERING that the Commission's role in this matter is more akin to a litigant intervener than a public policy intervener;

AND CONCLUDING that it is in the interests of justice to grant intervener status;

THIS COURT ORDERS that:

1. the style of cause is amended to add the Canadian Human Rights Commission as an Intervener;

2. the Commission is granted leave to intervene in these proceedings to respond to the Plaintiff's Motion for Summary Judgment as if it was a party including but not limited to the right to serve and be served with documents, to file memoranda, to file evidence, to cross-examine and be cross-examined, to argue and to appeal."

[…]

The Motion for Summary Judgment brought by SLCN was heard before the Federal Court on October 3, 4, 2017. The decision is still pending.

Analysis

[23] The Commission's position to dismiss the Respondent's motion would normally be persuasive. However, in the present circumstances, there are a number of issues that are counter balancing factors.

[24] Firstly, the Respondent's position is not merely contesting the question of whether its custom elections are a "service under section 5 of the *Act*". It also challenges the constitutionality of the applicability of the *Act*, asserting an Aboriginal right to self-govern protected under section 35 of the *Constitution Act, 1982*. Therefore, a finding of discrimination in the present circumstances assuming the Complaint is substantiated, would not resolve the present litigation. The Tribunal must be mindful that the *Act's* requirement for "expeditious" hearing must be tempered in the best interest of the parties, and in the present circumstances, a Tribunal hearing on the applicability of section 5 of the *Act* would fracture and exacerbate the proceedings.

[25] Secondly, the Order of Justice Phelan on March 2, 2017 arguably granted rights to the Commission to do more than simply contest the summary judgment motion on its merits.

> "2. the Commission is granted leave to intervene in these proceedings to respond to the Plaintiff's Motion for Summary Judgment as if it was a party including but not limited to the right to serve and be served with documents, to file memoranda, to file evidence, to cross-examine and be cross-examined, to argue and to appeal."

[26] The foregoing suggests that the Commission could also contest the propriety of bringing such a Motion in the circumstances, as such Motion could pre-empt the operation of the administrative scheme. Mr. Justice Phelan's March 2, 2017 Order, adding the Commission as a party to ensure that there was representation and argument to deal with the issue of service, had not been issued at the time submissions were made in the present adjournment motion.

[27] Thirdly, it is acknowledged that whilst Ms. Wirth is not a participant in the Federal Court proceedings, and the record indicates that she was involuntarily excluded from the Action, the Reply submissions by the Respondent suggest that the Complainant has

chosen not to participate due to lack of resources, lack of counsel and lack of comprehension of the constitutional issues raised in the Action. This does raise access to justice issues, but those issues are being addressed in court by the Commission in dealing with the issue of "service" before the Federal Court.

[28] Thus, the preamble and substantive parts of the Federal Court Order suggest that the Commission was granted intervener status specifically to allow for an effective opposition. All factors considered, the Respondent's Motion for an adjournment pending the decision of the Federal Court on its Motion for Summary Judgment does not appear to be unreasonable. Therefore the matter before this Tribunal is adjourned pending the outcome of the Federal Court Summary Judgment Motion on the question of "service" (s. 5), at which time the matter will be brought back before the Tribunal.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
December 21, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1912/14212

Style of Cause: Vivian M. Wirth v. Saddle Lake Cree Nation

Ruling of the Tribunal Dated: December 21, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Vivian M. Wirth, for herself
Brian Smith, for the Canadian Human Rights Commission
Brooke Barrett and Ken Staroszik, for the Respondent