

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2019 CHRT 35

Date: August 20, 2019

File No.: T2180/0217

Between:

Annie Oleson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Wagmatcook First Nation

Respondent

Ruling

Member: Colleen Harrington

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I. Background

[1] In 2014 Annie Oleson filed a complaint with the Canadian Human Rights Commission (the “Commission”) against the Respondent Wagmatcook First Nation (“Wagmatcook”), of which she was a member. At the time of her complaint, she was 85 years old and used a wheelchair. Her complaint relates to her request to be provided with barrier-free housing. She alleged that Wagmatcook discriminated against her in the provision of goods, services, facilities or accommodations contrary to section 5 of the *Canadian Human Rights Act* (the “Act”). In 2015, her complaint was amended to include section 6 of the *Act*, which prohibits discrimination in the provision of rental accommodation. Her complaint alleges that she experienced discrimination on the basis of her disability, age, family status and sex, which are prohibited grounds of discrimination under section 3 of the *Act*.

[2] The allegations of discrimination on the basis of disability relate to her need for accessible housing. The allegations relating to the prohibited ground of age detail what she felt was elder neglect by Wagmatcook, saying they were warehousing her and other elders in “old and inadequate housing till we die. While the young are allotted new housing units.” She said she was told the band does not provide new housing to elders because they do not have children and because they will die soon.

[3] Ms. Oleson’s allegations of sex and family status discrimination relate to women like her who lost both their own Indian status and their ability to pass on this status to their offspring because they married men who were not indigenous, and then regained this status following the passage of Bill C-31 (*A Bill to Amend the Indian Act*) in 1985. She said in her complaint that, in providing housing to its citizens, Wagmatcook “seems to treat bill c-31 natives different than others who have never lost their status for marrying a non-native.”

[4] On December 28, 2016, the Commission sent a letter to the Chair of the Canadian Human Rights Tribunal (the “Tribunal”), indicating that it had reviewed Ms. Oleson’s complaint and made the following decision:

The Commission has decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that you institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

[5] Along with this letter to the Tribunal's Chairperson, the Commission attached a copy of Ms. Oleson's human rights complaint, which set out all of the allegations relating to discrimination on the basis of disability, age, sex and family status.

[6] On January 20, 2017, Wagmatcook filed an application for judicial review with the Federal Court of Canada, asking the Court to set aside the Commission's decision to refer the complaint to the Tribunal. Sadly, Ms. Oleson passed away on February 8, 2017. In order to ensure that Wagmatcook's application did not proceed unopposed, the Commission sought and was granted intervener status, for the purposes of making limited submissions to the Court.

[7] On August 15, 2017, while the matter was still before the Federal Court, Indigenous and Northern Affairs Canada appointed Ms. Oleson's son, Joseph Oleson, to administer her estate in accordance with paragraph 43(a) of the *Indian Act*. Since then, Mr. Oleson has been acting as the representative for his mother's estate in respect of her human rights complaint. Although he sought leave to appear at the judicial review hearing to present evidence and make submissions, the Federal Court denied his request on the basis that all the relevant evidence was already contained in Wagmatcook's and the Commission's application records. On January 25, 2018, the Court dismissed the application for judicial review.

[8] Since early 2018, the Tribunal has been dealing with the complaint through its case management process. During this time, the parties exchanged Statements of Particulars ("SOPs") and documents in their possession that are relevant to the complaint. All of their SOPs have focussed on the allegations of discrimination on the prohibited ground of disability alone, and not on the grounds of age, sex or family status.

[9] The first paragraph of the Commission's SOP, filed in February of 2018, says that the Commission had "decided that the aspect of the complaint dealing with the

ground of disability warranted further inquiry by the Tribunal.” In a footnote, the Commission expands on this:

The Commission’s letter of decision to the parties, dated December 28, 2016, stated that the Commission accepted the conclusions of the Investigation Report, which included a finding that *‘the evidence does not support the allegation that the respondent First Nation’s housing decisions were based on her sex, family status or age. However, its denial of an accessible home had an adverse effect on the complainant due to her disability.’* This letter is in possession of the parties.

[10] Mr. Oleson filed the SOP on behalf of the Complainant’s estate in March of 2018. In it he goes through the Commission’s SOP paragraph by paragraph and adds some further particulars, although none are related to discrimination on the basis of age, sex or family status. He states that he agrees with the Commission’s SOP, including the paragraph and footnote mentioned above that indicate the scope of the complaint referred for hearing was limited to the ground of disability.

[11] The parties have held four Case Management Conference Calls (“CMCCs”) with the Tribunal since July of 2018, with the goal of moving the matter to hearing as expeditiously as possible. At the fourth CMCC on January 11, 2019, Mr. Oleson raised for the first time his view that the scope of the complaint for the Tribunal’s consideration is broader than discrimination on the basis of disability alone. He suggested that the Tribunal should also consider discrimination based on age, family status and sex, as alleged by his mother in her human rights complaint. Mr. Oleson said that documents he had requested during the Commission’s investigation were not produced by the Respondent, which resulted in the Commission limiting the scope of the complaint to the ground of disability alone.

[12] During the CMCC, I noted that the Commission’s letter to the Tribunal’s Chairperson seemed to indicate that it had referred the whole of Ms. Oleson’s human rights complaint for an inquiry by the Tribunal. The Commission’s counsel advised that, in fact, a different letter had been sent to the parties than to the Tribunal, which limited the scope of the complaint to the allegations of discrimination on the basis of disability. As I was unable to determine the scope of the complaint referred to the Tribunal for hearing based upon the limited information contained in the Tribunal’s file, I agreed to

accept submissions from the parties about the proper scope of the Tribunal's inquiry. I requested to hear from the Commission first, then from Mr. Oleson, and then from the Respondent. Timelines were set for the filing of these submissions.

[13] The Commission provided its submissions on February 1, 2019, expressing its view that the complaint that was referred to the Tribunal was indeed limited to allegations of discrimination on the prohibited ground of disability alone. There was then a rather lengthy delay before Mr. Oleson provided his submissions, on July 14, 2019. He argues the complaint before the Tribunal is broader and includes "age and gender based discrimination". The Respondent agrees with the analysis and conclusions set out in the Commission's submissions, and argues that the Tribunal does not have the jurisdiction to review a decision made by the Commission about the scope of the inquiry.

II. Issues

- i. What is the scope of the complaint referred by the Commission to the Tribunal for an inquiry?
- ii. If I find that the Complaint referred by the Commission relates to allegations of discrimination on the basis of disability alone, can the Tribunal broaden the scope of the complaint in order to hear evidence about allegations of discrimination on the grounds of age, family status and sex?

III. Positions of the Parties

A. Complainant

[14] Mr. Oleson argues that the scope of the complaint should be widened to include "age discrimination and gender based discrimination".

[15] I note that section 3 of the *Act* prohibits discrimination on the basis of "sex", not "gender", and I accept that the allegations in Ms. Oleson's human rights complaint, of discrimination against what she calls "Bill C-31 natives", encompass both the grounds of

sex and family status, as they relate to women who lost their Indian status as a result of marrying non-indigenous men. In his submissions, Mr. Oleson argues that the Respondent discriminates against “Bill C-31 people” by not providing them with adequate housing, which means they “either linger in limbo or end up in substandard housing or overcrowded conditions. But they are never allotted or built new housing as are regular band members.” He says the reason for this is that, “if a bill C-31 or outsider is given a new house the lifetime voters would get angry.”

[16] He also says that First Nations were given money by the federal government to provide housing for Bill C-31 people because there were concerns that these new citizens would “flood” the reserves demanding housing. Mr. Oleson says he asked the Respondent’s CEO about the Bill C-31 fund, but he claimed not to know about it. He also says he asked how many Bill C-31 people have been allocated new housing by the Respondent, but he received no answer. Mr. Oleson says that he was not able to give evidence of this “gender based discrimination” to the Commission because the Respondent refused to give him the documentation to prove this allegation, or even the opportunity to review the documents. He says, “This type of prevention by hiding documents [should] not be tolerated or be rewarded with non culpability.”

[17] With respect to age discrimination, Mr. Oleson notes that he has observed over many years that elderly people in Wagmatcook “are never allotted new housing instead they are relegated to used small dirty shacks this leaves them if they have family in overcrowded conditions in small houses or shacks.” He says these small shacks usually have mold which can cause health issues that may last until the elderly person dies. He says he has heard the reason that housing is given to younger people is because young people can have children, and that they will live longer. Mr. Oleson says the reason he was unable to prove this to the Human Rights Commission is that Wagmatcook’s CEO denied him the documents “which would clearly show the discrimination as put forth”. He says he was promised documentation that would list how many elders have been given new housing in the last twenty years, but the list was never provided to him.

B. Commission and Respondent

[18] The Respondent says the bulk of Mr. Oleson's submissions about age and gender discrimination are bare allegations, and that they rely on the premise that he would have uncovered evidence of age and gender based discrimination had the Respondent provided him with certain documents or information. The Respondent denies this, saying that it provided the Commission with all of the documents it requested in the course of its investigation.

[19] The Respondent also says the Complainant has provided nothing in the way of submissions or evidence that was not already provided to the Commission's investigator, and so these allegations were considered by the Commission in making its decision to refer the complaint to the Tribunal.

[20] The Commission says that, on December 28, 2016, it sent identical letters to the Complainant and Respondent, notifying them of the Commission's decision to refer the complaint to the Tribunal for an inquiry. These letters say:

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(a) of the ... Act, to request that the Chairperson of the ... Tribunal institute an inquiry into the complaint (see attached).

[21] Importantly, what was attached to these letters was a "Decision of the Commission", as opposed to Ms. Oleson's human rights complaint, which was the only document that accompanied the letter to the Tribunal's Chairperson of the same date.

[22] The Decision of the Commission says that the Commission rendered its decision on December 21, 2016 and, in doing so, considered "the Conciliation Report, the Investigation Report, the Complaint Form, and the submissions from the parties". The Decision says the Commission accepts the conclusions in the Investigation Report, including the following excerpt from the Report:

The evidence does not support the allegation that the respondent First Nation's housing decisions were based on her sex, family status or age.

However, its denial of an accessible home had an adverse effect on the complainant due to her disability.

[23] The Commission confirms that it did not provide a copy of the Decision of the Commission to the Tribunal's Chairperson.

[24] The Commission also acknowledges that it could have stated more explicitly that the scope of the complaint was limited to the ground of disability, but that, when read as a whole, the letters to the parties and the accompanying Decision of the Commission clearly indicate this intention.

[25] Both the Commission and Respondent argue that the case law is clear that the letter sent by the Commission to the Tribunal's Chairperson cannot be considered in isolation from the letters sent to the parties on the same date. Both parties submit that it is obvious that the Commission intended to limit the scope of the complaint to the allegations of discrimination on the ground of disability, and that the Federal Court's decision on judicial review confirms this. In *Wagmatcook First Nation v. Oleson*,¹ the Court stated at paragraph 25:

In its Decision, the Commission expressly accepted the conclusions of the investigation report [Report], but otherwise provided limited reasons. The Commission concluded that although the evidence did not support Ms. Oleson's allegations of sex, family status, or age-based discrimination, Ms. Oleson's evidence indicated (i) her need for accessible, barrier-free housing, (ii) that she cooperated in the search for such housing, and (iii) that Wagmatcook did not provide it. [Emphasis added]

[26] The Commission states that it would be inconsistent with its screening role to refer the grounds of age, sex and family status to the Tribunal, when it expressly stated in its Decision that the evidence did not support the allegations of discrimination on these grounds.

[27] Finally, the Commission acknowledges that, while there have been other cases where its administrative processes have resulted in different letters being sent to the Tribunal and the parties, since this complaint was referred to the Tribunal in 2016, "the

¹ 2018 FC 77

Commission has taken steps to ensure the content of such letters communicates the same message.”

IV. Legal Framework

[28] In determining the scope of the complaint before the Tribunal, it is useful to consider the relationship between the Commission and the Tribunal, and their respective roles under the *Act*.

A. Roles of Commission and Tribunal under the Act

[29] The *Act* “sets out a complete mechanism for dealing with human rights complaints” in the federal sphere.² The *Act* establishes two separate institutions, the Commission and the Tribunal, each with a particular role under the *Act*. The Federal Court has described the Commission’s role as central to the complaint mechanism:

Under the scheme of the *Act*, the Commission is the body empowered to accept, manage and process complaints of discriminatory practices. The Tribunal has no statutory mandate under the *Act* with respect to its administration, except as set out in s 50 which provides that ‘it shall inquire into the complaint’ when a request is made by the Commission that it do so.³

[30] As the Commission notes in its submissions, an investigator appointed pursuant to section 43 of the *Act* has the power to conduct interviews with relevant witnesses, search for relevant evidence, and require the production of relevant documents. In fulfilling its statutory responsibility to investigate human rights complaints, the Commission’s investigations must be both thorough and neutral.⁴ However, the Courts have concluded that Commission investigations need not be perfect, and its investigators are not obliged to interview every witness suggested by the parties.⁵

² *Canadian Human Rights Commission v. Lemire and al*, 2012 FC 1162, also cited as *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (CanLII) [“*Warman*”] at para.55.

³ *Ibid*

⁴ *Majdigoruh v. Jazz Aviation LP*, 2017 FC 295 at para.26.

⁵ *Ibid* at paras 27-29.

[31] At the conclusion of the investigation, the investigator submits a report to the Commission. Pursuant to subsection 44(3) of the *Act*, when the Commission receives an investigation report, it may either dismiss the complaint or refer it to the Tribunal for further inquiry if it is satisfied that, “having regard to all the circumstances of the complaint”, either course of action is warranted.

[32] The Commission carries out an administrative screening role that has been described as “somewhat analogous to that by a judge at a preliminary inquiry in that it must decide if an inquiry by the Tribunal is warranted having regard to all the facts before it.”⁶ The Commission’s role is to assess the sufficiency of the evidence before it and decide whether there is a reasonable basis to refer the complaint to the Tribunal for an inquiry.⁷

[33] The Commission may adopt the recommendations of an investigation report, rather than providing full reasons for its decision. Where it does so, however, the investigation report will be viewed as constituting the Commission’s reasons.⁸

[34] The Tribunal acquires its jurisdiction over human rights complaints when the Commission asks the Tribunal’s Chairperson to institute an inquiry into a complaint. Once the Commission has made this request, the role of the Tribunal is to adjudicate the complaint, not to collaterally review the Commission’s decision-making process:

... the Tribunal has no jurisdiction over the exercise of the Commission’s discretion under CHRA s 44(3) (rejecting or referring a complaint) ... The proper way to challenge a Commission decision in respect of such matters is through judicial review by the Federal Court.⁹

B. Defining the Scope of the Complaint

[35] Both the Commission and Respondent stress that the broader context of the complaint history is important to consider when determining the scope of the complaint

⁶ *Keith v. Canada (Correctional Service)*, 2012 FCA 117 at para. 43.

⁷ *Ibid*

⁸ *Ibid* at para.31.

⁹ *Warman*, *supra* note 2 at para. 56.

before the Tribunal. In *Murray v. Canada (Immigration and Refugee Board)*,¹⁰ the Federal Court considered a situation in which the Commission wrote a letter to the Tribunal Chairperson that did not contain the same level of detail about its decision as did the letters to the parties. In that case, the Court stated:

[67] I agree that, in principle, the letter that the Commission sends to the Tribunal defines the scope of “what” is being referred to the Tribunal for an inquiry. Furthermore, I agree that the letter sent to the Tribunal in this case did not specify that only portions of Mr. Murray’s complaint were referred for inquiry. However, the Commission’s letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray’s complaint. In the specific circumstances of this case, I find the authorities on which the applicant relied to be of little use.

The Tribunal considered a similar situation in *Canadian Postmasters and Assistants Association v. Canada Post Corporation*¹¹, where the Commission’s correspondence to the parties suggested that the scope of the complaint referred to the Tribunal was limited to a specified date range, while the letter to the Tribunal did not indicate any such limitation. Relying on *Murray*, the Tribunal held that the scope of the complaint was limited to the dates specified in the Commission’s correspondence to the parties.

V. Analysis

[36] I accept that the letters the Commission sent to the parties on December 28, 2016 indicate its intention to limit the scope of the complaint referred for an inquiry by the Tribunal. It seems clear that, based upon these letters, the parties proceeded with a common understanding that the complaint was limited to the allegations of discrimination on the ground of disability. Despite this, Mr. Oleson now takes the position that the Tribunal’s inquiry into his mother’s complaint should include all of the grounds of discrimination alleged in her 2014 human rights complaint, including age, sex and family status (although he refers to the sex and family status allegations as “gender based discrimination”).

¹⁰ 2014 FC 139

¹¹ 2018 CHRT 3

[37] The case law is clear that, in determining the scope of the complaint before it, the Tribunal need not rely solely on the Commission's letter requesting that the Chair institute an inquiry. Rather, the Tribunal can review the larger context of the complaint history. I am of the view that, in looking back to the complaint filed by Ms. Oleson in 2014, along with the information the Tribunal possesses about the Commission's consideration of this complaint, and its letters to the parties, it is clear that the scope of the complaint referred to the Tribunal for inquiry is limited to the ground of disability.

[38] Mr. Oleson's allegations relating to the prohibited grounds sex, family status and age are the same as those made by his mother in her human rights complaint in 2014, in which she stated that she was treated differently from others in the community, "because I'm elderly, considered an outsider."

[39] Mr. Oleson is essentially arguing that the Commission did not consider all of the relevant information in making its screening decision because the Respondent refused to give him certain documents that he believes would substantiate his claims about a lack of adequate housing for the elderly and for "Bill C-31 people". He says he asked Wagmatcook for copies of documents showing who it had provided housing to, and this was refused.

[40] The Respondent says it provided the Commission with all of the evidence it requested during the course of the investigation.

[41] The Tribunal is not privy to the details of the Commission's investigation into the complaint, including the investigation report, which is appropriate. As the Federal Court said in *Warman*, the Commission is a statutory human rights body separate from the Tribunal, with its own defined role in administering complaints. It is the Commission's job to screen complaints and then either dismiss them or refer them to the Tribunal for an inquiry, based upon its assessment of the sufficiency of the evidence. The Tribunal has no role in overseeing or reviewing the Commission's work. If a party disagrees with a Commission decision or believes an investigation was unfair, an application must be made to the Federal Court for a review.

[42] It is the Commission, and not the Complainant, that conducts the investigation. During the investigation into Ms. Oleson's complaint, the Respondent was not obliged to provide documents to the Complainant, but rather to the Commission's investigator. As master of its own proceedings, the Commission decides which documents to request in support of its investigation into a complaint. The Commission is not required to seek out every witness or every document identified by the parties so long as its investigation is thorough.

[43] When making its decision with respect to Ms. Oleson's complaint, the Commission had the benefit of considering the Investigation Report, a conciliation report, the original human rights complaint, and the submissions of the parties. In judicially reviewing the Commission's decision, the Federal Court in *Wagmatcook* found that "the Commission did not fail to independently consider the material before it" and found no error in the Commission's adoption of the Investigation Report, which formed the bulk of its reasons.¹²

[44] The parties were aware of the investigator's conclusions about the allegations of age, sex and family status discrimination, having been provided with a copy of the Investigation Report prior to the Commission's decision. They were given the opportunity to provide submissions with respect to the Report, and the Federal Court on judicial review noted that the parties had made "multiple submissions" during the Commission's process. If, in her submissions, the Complainant expressed disagreement with the investigator's conclusion that there was no basis for proceeding with the allegations of discrimination on the basis of age, sex or family status (and the Tribunal has no information about this one way or the other) that position would have been considered by the Commission in making its decision. If the Complainant chose not to comment on the investigator's conclusion with respect to these grounds in her submissions to the Commission, it is not open for the Complainant to do so now before the Tribunal. At the very least, the Commission had the benefit of reviewing Ms. Oleson's complaint form, which articulated the same allegations of age, sex and family status discrimination that Mr. Oleson is making before the Tribunal.

¹² *Wagmatcook supra* note 1 at para.36.

[45] The *Act* is clear that, if the Commission determines there is not sufficient evidence to warrant further inquiry by the Tribunal, the Commission must dismiss the complaint, or that aspect of it. If the Commission were to request the Tribunal to institute an inquiry into a complaint after deciding there is not sufficient evidence to do so, the Commission would be acting contrary to its statutory screening role.

[46] If Mr. Oleson is suggesting that the Commission did not conduct a fair and thorough investigation into his mother's complaint, or that it made an error in its decision to limit the scope of the complaint, it is for the Federal Court to consider this, not the Tribunal. Indeed, the Commission's decision was judicially reviewed by the Federal Court, although at the request of the Respondent, not the Complainant.

[47] I appreciate that, in this case, the Complainant Ms. Oleson died shortly after the Respondent filed its application for judicial review of the Commission's decision, and that the Court did not permit Mr. Oleson to participate in the judicial review proceedings once he was made the administrator of his mother's estate several months later. Still, the Court considered the Commission's investigation report and Decision, and noted that the administrative process behind the Commission's Decision took three years and "included an investigation, lengthy investigation Report, conciliation efforts, and multiple submissions on both sides."¹³ In deciding that the Commission's decision was reasonable, the Court specifically referenced the conclusion with respect to the evidence not supporting Ms. Oleson's allegations of discrimination on the basis of her sex, family status or age.

[48] Having considered the history of the complaint, and especially the Decision of the Commission with regard to the grounds of age, sex and family status, I can only conclude that the scope of the complaint referred to the Tribunal for an inquiry is limited to discrimination on the ground of disability. The Tribunal cannot broaden the scope of the complaint to include grounds that have already been considered by the Commission. In this case, the grounds of age, sex and family status were included in the original complaint, they were evaluated by the investigator, and they were

¹³ *Ibid* at para.56

considered by the Commission, which concluded there was no reasonable basis in the evidence to refer these allegations to the Tribunal for an inquiry.

VI. Conclusion

[49] The scope of the complaint referred to the Tribunal for inquiry by the Commission is limited to allegations of discrimination on the basis of Ms. Oleson's disability, and not her age, sex or family status. The Tribunal has no jurisdiction to review either the Commission's investigation of Ms. Oleson's complaint, or its decision to ask the Tribunal to institute an inquiry into her complaint. Nor can the Tribunal broaden the scope of the complaint to include allegations that have already been specifically considered by the Commission in the course of its administrative screening role.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
August 20, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2180/0217

Style of Cause: Annie Oleson v. Wagmatcook First Nation

Ruling of the Tribunal Dated: August 20, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Joseph Oleson, for the Complainant

Sasha Hart and Giacomo Vigna, for the Canadian Human Rights Commission

Patrick O'Neil and Gary A. Richard, for the Respondent