Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 29
Date: September 28, 2020
File No.: T2180/0217

Between:

The Estate of Annie Oleson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Wagmatcook First Nation

Respondent

Ruling

Member: Colleen Harrington

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I. Complaint History

[1] The Complainant in this matter, Annie Oleson, was a member of the Respondent Wagmatcook First Nation. In 2014, at the age of 85, she made a complaint to the Canadian Human Rights Commission (Commission) in which she alleged that the Respondent discriminated against her on the basis of disability when it failed to provide her with accessible, barrier-free housing contrary to sections 3, 5 and 6 of the *Canadian Human Rights Act*[1] (*CHRA* or the *Act*).

[2] In December of 2016 the Commission referred the complaint to the Canadian Human Rights Tribunal (Tribunal or CHRT) for an inquiry. Before the Tribunal's Chairperson appointed me to conduct the inquiry into the complaint, the Respondent applied to the Federal Court to judicially review the Commission's referral decision.

[3] Sadly, on February 8, 2017, Ms. Oleson passed away. In August of 2017 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*.[2] Since that time Mr. Oleson has been acting as the representative of his mother's estate (Complainant's Estate) before the Tribunal.

The Federal Court denied the Respondent's judicial review application in January of 2018, after which I began managing the case towards a hearing. The parties have filed Statements of Particulars and the Tribunal has held many Case Management Conference Calls with the parties. In 2019 Mr. Oleson filed a Motion to clarify the scope of the complaint before the Tribunal. I decided this issue in the ruling *Oleson v. Wagmatcook First Nation*, 2019 CHRT 35.

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[1] RSC 1985, c.H-6.

[2] Paragraph 43(a) of the *Indian Act*, R.S.C., 1985, c.I-5 reads: "43. Without restricting the generality of section 42, the Minister may (a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead".

II. The Motion

[4] This Motion was filed after the Commission and Respondent signed Minutes of Settlement with regard to the public interest remedies that the Commission was seeking in respect of this complaint. By signing the Minutes of Settlement, the Respondent has agreed to review and revise its Housing Policy in consultation with the Commission with the aim of ensuring the Policy complies with the Respondent's obligations under the *CHRA* in relation to individuals with disabilities. In addition, the Respondent agrees to retain an independent consultant with human rights expertise to provide training to the Chief and Council members, as well as all employees who apply the Housing Policy and make decisions around the allocation of housing.

[5] The Respondent does not admit liability with respect to the allegations in the complaint, and the Complainant's Estate is not a party to the Minutes of Settlement.

[6] The basis for the Respondent's Motion is its argument that the public interest component of the complaint has been satisfied through the Minutes of Settlement. It says that, as the only remaining remedies that have been requested are personal in nature, the complaint should be dismissed because the estate of a deceased complainant cannot claim personal remedies.

[7] The Commission opposes the Motion, while the Complainant's Estate has not provided submissions with respect to the Motion.

III. Issues

[8] In its Motion, the Respondent framed the question for the Tribunal to determine as follows: In a case such as this, where the complainant has died after the complaint is referred to a CHRT inquiry, can the estate of a complainant maintain a claim for personal remedies on behalf of the deceased complainant?

[9] However, the Respondent's position expanded somewhat in its subsequent submissions. In its final submission, the Respondent's position was as follows:

a. Personal remedies are not applicable or available in this particular complaint, and where the public interest remedies have been satisfied by Minutes of Settlement, the complaint should be dismissed;

b. There is a lack of direct, reliable, or creditable evidence to put before the Tribunal, which deprives the Respondent of the ability to challenge the evidence appropriately and so prejudicially impairs its ability to mount its defense;

c. If the Tribunal is unwilling to dismiss the complaint, then the Respondent respectfully requests that the Tribunal narrow the scope of the remedies requested, removing those that are clearly inappropriate (for example a house and an apology), to help focus the hearing and the expectations of the parties.

[10] Also, although the Respondent did not actually pose the question of whether the complaint survives the death of the Complainant, a considerable portion of the Commission's submissions addressed this issue.

[11] In an effort to ensure that this complaint can continue to proceed without any further delays or argument amongst the parties, I will address all of the issues raised by the Respondent and the Commission in this Ruling.

IV. Decision

[12] I decline to dismiss the complaint at this stage. Despite the fact that she is deceased, I find that the complaint of Ms. Oleson, as represented by her Estate, may proceed to an inquiry.

[13] I do not agree with the Respondent that the public interest aspect of the complaint has been finally dealt with by way of the Minutes of Settlement between the Commission and Respondent. Although the Commission has agreed not to seek further public interest remedies, the Complainant's Estate may do so, subject to the evidence and submissions provided by the parties at a hearing.

[14] I am of the view that the Complainant's Estate can be awarded damages for pain and suffering and for wilful and reckless discrimination in the event that discrimination is proven on a balance of probabilities, and if the evidence supports such a remedy.

[15] I will not rule on the evidentiary issues raised by the Respondent at this time. The appropriate time for the Respondent to raise such issues is during the hearing, and not at this preliminary stage when the Tribunal is not in possession of any of the evidence.

[16] With respect to the Respondent's request that the Tribunal narrow the scope of the remedies available to help focus the hearing and expectations of the parties, the Tribunal has no record of the Complainant or her Estate requesting that the Tribunal order the Respondent to provide either an apology or a house.[3] As such, I decline to address this request.

[17] Going forward, the style of cause should reflect that the Complainant is "the Estate of Annie Oleson".

V. Analysis

A. The Tribunal's jurisdiction to consider Ms. Oleson's human rights complaint has not been terminated as a result of her death.

[18] The Tribunal first considered whether a complaint can survive the death of a complainant in 2001 in the case of *Stevenson v. Canadian National Railway Company*.[4] In that case, the Respondent brought a motion to stay the Tribunal's proceedings following the Complainant's death. The Respondent took the position that the common law principle of *actio personalis moritur cum persona* (personal rights of action die with the person) applies to human rights complaints. It argued that neither the *CHRA* nor any other legislation could be interpreted to allow for an Estate to continue a complaint before the Tribunal.

[19] The Tribunal decided that the common law principle did not apply to complaints under the *CHRA*. It determined that the starting point for its analysis is the *Act*, "which must be

[3] The Respondent says that Ms. Oleson's "last damages-related submissions before she passed away" advanced a claim for remedies that included a fully accessible home, an apology, monetary damages, and CHRT-mandated sensitivity training for the Respondent. I reviewed Ms. Oleson's human rights complaint, and it does not identify any remedies that she was seeking at the time it was filed with the Commission. The only document filed with the Tribunal thus far that sets out the remedies being requested is the Complainant's Statement of Particulars, filed by her Estate, which makes no mention of an apology or a house.
[4] 2001 CanLII 38288 (CHRT) [*Stevenson*]

read in light of its nature and purpose."[5] The Supreme Court of Canada has concluded that the *Act* is to be given a large and liberal interpretation that will best obtain the objectives of the *Act*, as opposed to a narrow, literal interpretation.[6]

[20] The Tribunal in *Stevenson* reviewed the purpose of the *Act* as set out in section 2, as well as the remedies in section 53 and concluded that the *Act* extends beyond individual rights to engage the broader public interest of freedom from discrimination: "The *Act* is aimed at the removal of discrimination in Canada, not redressing a grievance between two private individuals."[7]

[21] The Tribunal stated that, if the Respondent had its way, the death of a complainant would extinguish not only the interests of that complainant but also all the other interests involved in the complaint, including the very significant public interest.[8]

[22] For many years *Stevenson* was the Tribunal's only reported decision dealing with the issue of the survival of a complaint following the death of a complainant, although the issue has been considered by human rights tribunals in other Canadian jurisdictions with varying results. In its initial submission in the present matter, the Commission argued that I should follow the Tribunal's ruling in *Stevenson*. However, it also advised that a ruling was pending in the case of *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada*,[9] which the Commission viewed as applicable to the present Motion. The ruling in *Caring Society* was issued by the Tribunal following the parties' submissions in this Motion and so they were given additional time to make submissions about the issues decided in that case.

[23] As in *Stevenson*, the Tribunal in *Caring Society* started from the position that the *CHRA* is remedial legislation which is not to be limited or read down in any but the clearest cases of express legislative intent.[10] At paragraph 107 the Tribunal adopted the reasoning

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[5] *Ibid* at para.24.
[6] See, for example, *Canadian National Railway Co. v. Canada*, [1987] 1 S.C.R. 1114.
[7] *Supra* note 4 at para.31.
[8] *Ibid* at para.32.
[9] *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada*, 2020 CHRT 7 [*Caring Society*]
[10] *Ibid* at para.108.

of the Federal Court of Appeal in *Canada (Attorney General) v. Morgan* where Marceau J.A. wrote: "a strict tort or contract analogy should not be employed in human rights law, since what is in question is not a common law action but a statutory remedy of a unique nature".[11]

[24] The Tribunal in *Caring Society* agreed with the reasoning in *Stevenson* and found it applicable to the matter it was considering. It also found the Human Rights Tribunal of Ontario's (HRTO) decision in *Clark v Toshack Brothers (Prescott) Ltd*.[12] to be persuasive. In that case the HRTO ruled that the dual purposes of serving public and private interests mitigated in favour of allowing the proceedings to continue after the death of a complainant. The HRTO relied on earlier Ontario Board of Inquiry decisions to support its position.[13]

[25] The Commission argues that I should follow *Stevenson* and *Caring Society,* and also adopt the reasons of human rights tribunals in Ontario and Alberta that have made similar findings. For example, in *Eheler v. L.L. Enterprises Ltd.*[14] the Human Rights Tribunal of Alberta accepted that its jurisdiction over human rights complaints can survive the complainant's death, stating:

> [5] Alberta's legislation does not prohibit complaints from proceeding in the absence of the complainant. Consistent with a broad and purposive interpretation of the *Act*, I am reluctant to read in such restrictions. Further, remedies can be provided which are not personal to the complainant but which are clearly within the Tribunal's jurisdiction (e.g. educational remedies, etc.). As noted in *The Law of Human Rights in Canada: Practice and Procedure* …:
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> > *There have been numerous cases in which the death of the complainant has not affected the hearing, and the matter has been permitted to proceed despite the fact that the complainant would not be available to give evidence.*

[26] The Respondent does not take the position that a human rights complaint terminates upon a Complainant's death *per se*. Rather, its position is that, if there is no public interest

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[11] [1992] 2 FC 401 (FCA) at para.49.
[12] 2010 HRTO 27 at paras.13-14.
[13] *Ibid* at para.13, citing *Barber v. Sears Canada Inc. (No.2),* [1993] O.H.R.B.I.D. No.64*; Ontario Human Rights Commission v. Vogue Shoes (*1991), 14 C.H.R.R. D/425*; Baptiste v. Napanee and District Rod and Gun Club* (1993) 19 C.H.R.R. D/246*; and Anonuevo v. General Motors of Canada Ltd.,* [1998] O.H.R.B.I.D. No.7.
[14] 2013 AHRC 5 [*Eheler*]

in continuing to deal with the complaint (because the only remaining remedies are personal in nature) the complaint should not proceed because the Tribunal does not have the power to award purely personal remedies to the estate of a deceased complainant. The Respondent acknowledges that "there are authorities on each side of this question, ultimately with different outcomes."

[27] I agree with the Tribunal in *Caring Society* that, "in the event that a question arises concerning the *CHRA*, the best reference is the *Act* itself, case law interpreting the *Act* and case law that is similar to the case at hand."[15]

[28] Although I am not bound by the Tribunal's decisions in other matters, I do agree with the conclusions in both *Stevenson* and *Caring Society* that a broad and remedial interpretation of the *Act* supports a finding that a Complainant's death does not terminate the Tribunal's authority to inquire into the complaint.

B. The Complainant's Estate may request both personal and public interest remedies during the inquiry into the complaint

(i) Personal remedies

[29] The Respondent argues that the Tribunal should distinguish *Caring Society*, as that case was decided on its own unique facts. It suggests that the present case is more similar to the *Gregoire*[16] case from British Columbia. In that case, the British Columbia Human Rights Tribunal had found that it had jurisdiction to proceed to deal with a complaint filed by Ms. Gregoire on behalf of her son, who died before the hearing could be held. This decision was reversed by the Superior Court, and that reversal was upheld by the British Columbia Court of Appeal. The Court relied on a number of *Charter*[17] cases to conclude that a human rights complaint dies with the complainant because the personal interest that is protected under the British Columbia *Human Rights Code* expires upon the complainant's death.

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[15] *Supra* note 9, at para.117.
[16] *British Columbia v. Gregoire*, 2005 BCCA 585 [*Gregoire*].
[17] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK*), 1982, c.11.

[30] The Court found that Ms. Gregoire's son's estate was not a "person" under the meaning of the *Code*. The Respondent in the present case says that similarly Ms. Oleson's Estate is not a "victim" under s.53 of the *CHRA.*

[31] The Commission argues that the Tribunal is not bound by the *Gregoire* decision, and that a human rights complaint should not be subjected to a strict *Charter* claim analysis, which was the basis for the Court's decision in *Gregoire*. The Commission states that, although the *Charter* and human rights laws are both inspired by the same philosophy when it comes to the grounds of discrimination and the equality analysis, there is a difference between them, notably in the remedies that flow from a liability finding.

[32] The Tribunal in *Caring Society* stated that, "while s.15(1) *Charter* jurisprudence may be of assistance when interpreting analogous human rights statutes such as the *CHRA*, the two regimes are separate and distinct."[18] The Tribunal concluded that the wording of section 53 of the *CHRA* is "more prescriptive than the very general remedial language used in s.24(1) of the *Charter*" and that it "arguably creates a stronger presumption that meaningful remedies will flow where it has been found that a victim has experienced a discriminatory practice in his or her lifetime."[19]

[33] Another case that the Respondent relies on to argue that the Complainant's Estate is not entitled to claim personal remedies is *Canada (Attorney General) v. Hislop.*[20] At paragraph 73 of *Hislop*, the Supreme Court states:

> In our opinion, the Government's submissions had merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term 'individual' in Section 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence Section 15.1 *Charter* claims. In this sense, it may be said that Section 15 rights die with the individual.

[34] The Tribunal in *Caring Society* considered the Supreme Court's analysis in *Hislop*, noting that the Court had reiterated "a paramount principle to be used in every case: the

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[18] *Supra* note 9 at para.125.
[19] *Ibid.*
[20] 2007 SCC 10 [*Hislop*].

importance of the specific context of the case."[21] The Tribunal determined that the Supreme Court's statements were made in a context where the deceased survivors whose estates sought to pursue equality claims had died before the passage of the remedial legislation from which they were being excluded. Consequently the claims were not based on alleged infringements that took place while the survivors were still alive. It was in this context that the Court held that estates do not have standing to "commence" s.15(1) *Charter* claims.

[35] The Tribunal in *Caring Society* observed that the context of the claim analysed in *Hislop* was considerably different from a human rights complaint.[22] The Tribunal also agreed with the Manitoba Court of Appeal, which has stressed the importance of context when considering the Supreme Court's decision in *Hislop*. In *Grant v. Winnipeg Regional Health Authority et al.,* Mainella J.A. stated on behalf of a unanimous Court:

> I do not read such careful language [from *Hislop*] as endorsement for the broad proposition that redress for a violation of a *Charter* right ends on death, regardless of the context. The court could have easily made such a broad declaration, but chose instead to keep its remarks tailored to the context of claims on behalf of persons who were already deceased at the time the change to the CPP occurred.[23]

[36] The Tribunal in *Caring Society* found that misapplying the Supreme Court's reasoning in *Hislop* to "victims" under the *CHRA* "may seriously thwart the victims' human rights. While estates may not have standing to commence *Charter* actions, this in no way abolishes the victims' rights to receive compensation for the discrimination found by this Panel."[24]

[37] The Tribunal in *Caring Society* noted that, while *Stevenson* did not decide the issue of whether the estates of complainants or victims could be awarded compensation payments for pain and suffering or wilful and reckless discrimination, it did rely on the Ontario Board of Inquiry decision in *Barber v. Sears Canada Inc. (No.2*)[25], which concluded that a human rights complaint should not be stayed because of the death of the complainant. The

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[21] *Supra* note 9 at para.120.0
[22] *Ibid* at para.121.
[23] 2015 MBCA 44 at para.66.
[24] *Supra* note 9 at para.126.
[25] *Supra* note 13.

Tribunal noted that the Board of Inquiry in *Barber* went on to decide the merits of the complaint, finding discrimination and ordering the respondent to pay general damages of $1,000 to the complainant's estate, "as compensation for the loss to Mrs. Barber's dignity arising out of the infringement."[26] The Tribunal in *Caring Society* agreed with the reasoning in *Barber*, which it found consistent with the objective and purpose of the *CHRA,* and also applicable to the case before it.[27]

[38] The Commission argues that there is an additional policy consideration weighing in favour of allowing complaints to proceed and payments to be made to the estates of victims who have died. Subsection 48.9(1) of the *CHRA* says that the Tribunal is to conduct hearings "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow". The Commission argues that, "If a victim's death was to prevent the Tribunal from continuing with a case, or awarding personal remedies to an estate, the goal of expeditious decision-making could be seriously jeopardized."

[39] The Commission's argument is in line with the Tribunal's decision in *Caring Society* which found that the respondent "should not benefit financially because children, youth and family members have died waiting for Canada's racial discrimination to end." The Tribunal should not "encourage incentives for respondents to delay resolution of discrimination complaints."[28] The Tribunal agreed that, "this would be of particular concern in the case of victims who were discriminated against in connection with a terminal illness or advanced old age, where it could be anticipated that death might occur before a hearing can be concluded."[29]

[40] The same could be said of the present matter. Ms. Oleson was 85 years old when she filed the complaint in which she described herself as "in pain, fighting Cancer, elderly and with crippling arthritis". Her complaint also refers to a heart condition and says that she was using a wheelchair because of mobility issues. Ms. Oleson filed her complaint on February 17, 2014 and it was not referred to the Tribunal by the Commission until nearly

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[26] *Barber v. Sears Inc. (No.3),* (1994), 22 C.H.R.R. D/415 at para.98.
[27] *Supra* note 9 at para.116.
[28] *Ibid* at para.137.
[29] *Ibid* at para.138.

three years later, on December 28, 2016. The Respondent should not benefit because an elderly Complainant with multiple health conditions died before her complaint could be heard.

[41] Among the remedies being sought by the Complainant's Estate in its Statement of Particulars (SOP) are damages for pain and suffering in the amount of $20,000, pursuant to s.53(2)(e) of the *CHRA*. A summary of the type of evidence that will be relied on to prove Ms. Oleson's pain and suffering is included, as are allegations relating to what she experienced as a result of not having an accessible home.

[42] The Complainant's Estate also seeks $20,000 as compensation for wilful and reckless discrimination under s.53(3) of the *Act*, arguing that the Respondent was aware of the Complainant's disability and need for barrier-free housing for many years, but failed to help her.

[43] The Tribunal in *Caring Society* decided that it would be unfair to the victims who have died to deny their estates the compensation they are entitled to, as the *CHRA* contains no explicit wording barring payment of compensation to estates for pain and suffering or wilful and reckless discrimination.[30] The Tribunal concluded that all of the victims of the respondent's discriminatory practices had suffered and so all should have their estates compensated.

[44] I agree that I am not bound by the *Gregoire* decision. I prefer and agree with the Tribunal's reasoning in *Caring Society*, which distinguishes jurisprudence interpreting the *Charter* and rather focuses on the specific language and intent of the *CHRA* to conclude that a complainant's estate may pursue the damages remedies under subsections 53(2)(e) and 53(3).

[45] If the Complainant's Estate can prove its case, a meaningful remedy supported by the evidence should be awarded.

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[30] *Ibid*

(ii) Public interest remedies

[46] The Respondent's Motion is premised on its view that there is a clear distinction in section 53 of the *Act* between personal and public interest remedies. Once the Tribunal has found that a complaint has been substantiated, it may make an order against the person who discriminated that may include any of the terms set out in subsections 53(2)(a) to (e) that it considers appropriate. Under s.53(2)(a), a respondent can be ordered to cease the discriminatory practice and take measures, in consultation with the Commission, to redress the practice or prevent a similar practice from occurring in the future. The Respondent describes this as a public interest remedy because it does not limit the redress to a "victim".

[47] The Respondent argues that because the remaining remedies set out in subsections 53(2)(b) to (e) and 53(3) require a respondent to provide something – mainly compensation - to the victim of the discriminatory practice, these are necessarily personal remedies.

[48] I do not agree that the distinction between personal and public interest remedies is as clear as the Respondent suggests. A finding of liability and any order flowing from such a finding, including a monetary award, can serve to educate the public with respect to human rights law and can help prevent a similar act of discrimination from occurring in the future. Such awards, therefore, have a public interest component.

[49] Damages for wilful and reckless discrimination under subsection 53(3) of the *Act* are not awarded on the basis of a complainant's experience of the discrimination, but rather are based on the conduct of the respondent. In *Canada (Attorney General) v. Johnstone*, the Federal Court stated the following with regard to subsection 53(3): "This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate."[31]

[50] I agree with the Commission that the deterrent and educative functions could be lessened or erased if the Tribunal reads in limitations to the *CHRA* that prevent awards

[31] 2013 FC 113 at para.155.

under s.53(2)(e) and s.53(3) of the *CHRA* from being paid to the estates of victims of discrimination.

[51] I decline to dismiss the complaint based on the Respondent's position that the public interest remedies have been satisfied by the Minutes of Settlement. It would be premature for the Tribunal to determine that all public interest remedies have been satisfied based on an agreement made between the Commission and the Respondent prior to a hearing.

[52] I do not agree with the Respondent that the only public interest remedy being requested by the Complainant or her Estate is "sensitivity training" ordered by the Tribunal. In its SOP, the Estate has indicated that it "wishes to be involved in the formation of public interest remedies such as laws, guidelines and transparency."

[53] The Respondent has also agreed, by signing the Minutes of Settlement, that the Complainant's Estate has the right to pursue the complaint before the Tribunal and to seek public interest or other remedies from the Tribunal.

[54] The Complainant's Estate may request public interest remedies beyond those agreed to by the Commission and Respondent. The Tribunal's determination of such a request will be based on the evidence and the submissions of the parties.

C. The Respondent's argument that it will be prejudiced by the evidence because the Complainant is deceased is premature

[55] The Respondent has also raised the issue of unfairness and prejudice it says it will face by proceeding to a hearing in a case where the Complainant cannot provide evidence on her own behalf. It argues that there is a lack of direct, reliable, or creditable evidence to put before the Tribunal, which fails to provide the Respondent with the ability to challenge the evidence appropriately and so prejudicially impairs its ability to mount its defense.

[56] The Respondent argues that most of the documents relating to Ms. Oleson's complaint were prepared by her son, rather than by Ms. Oleson herself. The Respondent also says it has no ability to authenticate and challenge the information that was relied upon by the Commission in preparing its investigation report and so it will be prevented from

mounting a full defence. It further argues that, if Mr. Oleson is permitted to testify about the events he witnessed relating to his mother's complaint, his credibility will be impaired because, as the beneficiary of Ms. Oleson's estate, he is an interested party in the proceeding. The Respondent states that Mr. Oleson continues to seek a new three to four bedroom fully accessible home with a basement that would only stand to benefit him but, as I stated earlier in this decision, the Tribunal is not in possession of any document prepared by either Ms. Oleson or her son that indicates this is a remedy being sought in these proceedings.

[57] The Respondent also questions the value of the evidence other witnesses would provide at a hearing because it will mainly be hearsay information. It says that, as the matters they are being asked to recall happened six years ago, they will be unable to "refresh" with Ms. Oleson.

[58] I note that the Respondent in *Stevenson* had also argued that it would be prejudiced because it had been deprived of the opportunity to know the Complainant's case through his *viva voce* evidence and the opportunity to present evidence through cross-examination of the Complainant. However, at the outset of the motion, all parties agreed with the Tribunal that the question of prejudice would best be dealt with within the context of the facts and evidence presented at the hearing, should the matter proceed that far. I am of the view that that is the appropriate way to proceed in the present case as well.

[59] It would be premature for the Tribunal to make any determinations about the evidence at this preliminary stage. I cannot make any findings about the usefulness of the evidence that will be provided by the Complainant's witnesses, although I note that, even though Ms. Oleson was alive during the Commission's investigation, she was not interviewed by the Commission. The evidence of Mr. Oleson and others was obviously considered sufficient for the Commission's complaint screening purposes.

[60] The Commission states as part of its SOP that Mr. Oleson, "lived and continues to live in Ms. Oleson's home [and] witnessed firsthand the relevant facts. He was closely

involved with pursuing this matter before the Commission and assisting the Complainant with her requests for accessible housing from the Respondent."[32]

[61] The Complainant and Commission have listed several other witnesses aside from Mr. Oleson whom they intend to call during the inquiry. These include other family members who resided with Ms. Oleson at the relevant time and observed her experiences of living in the home and requesting accessible housing from the Respondent, as well as a Technician, a Housing Inspector, and an Occupational Therapist who visited Ms. Oleson's home in and around 2013 and prepared reports relating to the accessibility of her home. There is also reference to medical records and the possibility of one or more of Ms. Oleson's doctors providing evidence with respect to her alleged disability as well.

[62] I note that, in *Barber (No.2)*, arguments similar to those made by the Respondent in the present case were made by the respondent Sears Canada and were rejected by the Ontario Board of Inquiry. In that case, the Board decided that Ms. Barber's husband, who had accompanied her at the time of the alleged discrimination, could provide direct evidence with respect to the facts in the same way that Ms. Oleson's family members intend to do in the present case.

[63] I agree with the Alberta Human Rights Tribunal in *Eheler* that the relevant question is whether evidentiary thresholds can be met while balancing other considerations such as potential prejudice to the respondent in determining whether the complaint can be proven or not.[33] The Alberta Tribunal stated: "Accordingly, while it may be unusual for a complaint to continue to a full hearing in the absence of the complainant's direct evidence, there may be circumstances where the presence of other witnesses or documentary evidence, could result in the matter proceeding."[34]

[64] Whether the Complainant's Estate will be able to prove its case or not remains to be determined. At the inquiry into the complaint the Tribunal will be in a position to determine

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[32] November 27, 2019 document of the Commission entitled "Willsays of witnesses to be called by the Canadian Huma Rights Commission".
[33] *Supra* note 14 at para.7.
[34] *Ibid*.

the admissibility and the weight of the evidence, and consider any prejudice or unfairness to the Respondent relating to the nature of the evidence provided.

VI. Conclusion

[65] The Respondent's Motion to dismiss the complaint is denied. The Tribunal's jurisdiction to consider the complaint has not been terminated as a result of Ms. Oleson's death. Her Estate may proceed to bring her complaint to a hearing.

[66] I decline to impose any restrictions on the type of remedy that may be requested by the Estate at this time.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
September 28, 2020

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: September 28, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

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