

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 41

Date: September 11, 2023

File Nos.: HR-DP-2818-22, HR-DP-2819-22 & HR-DP-2820-22

Between:

Cheryl Maloney

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

**Mi'kmaq Nova Scotia Tripartite Forum, Assembly of First Nations and Crown-
Indigenous Relations and Northern Affairs Canada**

Respondents

Ruling

Member: Athanasios Hadjis

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I. Introduction

[1] The Complainant, Cheryl Maloney, filed three human rights complaints with the Canadian Human Rights Commission (the “Commission”) in which she alleged that Morley Googoo harassed her based on several prohibited grounds of discrimination, while they were both taking part in the Mi’kmaq-Nova Scotia-Canada Tripartite Forum (the “Forum”).

[2] Mr. Googoo was the Forum’s Executive Chair, and Ms. Maloney served on one of the Forum’s committees as the representative of the Native Women’s Association of Nova Scotia (NWANS). The Forum is the respondent in the first complaint. The Assembly of First Nations (AFN) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) are respondents in the other complaints. Mr. Googoo was not named as an individual respondent in any of the complaints.

[3] The Commission requested that the Chairperson of the Canadian Human Rights Tribunal (the “Tribunal”) institute an inquiry into the complaints. The Tribunal directed the Commission to provide the parties its disclosure package, which it had no difficulty sending to Ms. Maloney, the AFN and CIRNAC.

[4] However, the Commission asked the Tribunal for direction before sending the disclosure package to the Forum. The Commission said that there is ambiguity concerning the Forum’s legal status.

[5] I convened a Case Management Conference Call (CMCC) to address the issue. Ms. Maloney and the lawyers for the Commission, the AFN, and CIRNAC attended. The lawyer for the Confederacy of Mainland Mi’kmaq (CMM) was also present. The CMM is not a respondent or interested party in these complaints, but I allowed it to participate at the CMCC and make submissions on the Commission’s motion. The CMM provided administrative support to the Forum, and the Commission was apparently sending all communications intended for the Forum to the CMM throughout the pre-referral period.

[6] The lawyer for CMM stressed that it is not a responding party to these complaints and that it seeks a declaration from the Tribunal that it is not required to participate in this

case. The AFN submitted that it was not a member of the Forum and should not have been named as a respondent. CIRNAC also argued that it is not a proper respondent.

[7] I established a timeline for submissions to address these issues. The Commission's submissions included a motion record of almost 400 pages, which consisted of relevant exhibits downloaded from public websites. The other parties and the CMM referred to these exhibits in their submissions, while also providing some additional documents of their own. The Commission noted, in its reply to the others' submissions, that no one filed any updated or current copies of the Commission's exhibits. It submits that its documents should therefore be treated as authoritative for the purposes of this motion. I rely on these and the other documents in this ruling.

II. Decision

[8] For the following reasons, I find that with the information available at this stage, it was not established that the Forum is not a legal entity capable of being a respondent in the complaint filed against it. The Commission can provide its disclosure package to the Forum by delivering it to a member of its Executive Committee. Service of documents intended for the Forum cannot be carried out on the CMM.

[9] I also declare that the AFN may present a motion to remove itself as a respondent in the complaint filed against it.

[10] Finally, I deny at this stage CIRNAC's request that it be deemed not a proper respondent in the complaint filed against it.

III. Issues

[11] The issues are the following:

1) Regarding the Forum:

- a) Has the clearest of cases been made out that the Forum is not a legal entity against which a complaint can be filed?
- b) If this has not been established and the case continues to proceed against the Forum, how may the Commission send its disclosure package to the Forum?
- c) Can documents intended for the Forum be served on the CMM?

2) Regarding the AFN: Should the AFN be allowed to make a motion to remove itself as respondent?

3) Regarding CIRNAC: Should CIRNAC be removed as a respondent?

IV. Analysis

A. The Forum's status

- (i) **It has not been established that the Forum is not a legal entity capable of being a respondent in this case**

[12] Ms. Maloney alleges that Mr. Googoo harassed her in breach of s. 14 of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the "Act"), and that the Forum should be held liable for his acts. Her claim against the Forum is based on s. 65 of the Act, which states that a "person, association, or organization" is deemed to have committed the acts of its officers, directors, employees, or agents made in the course of their employment. Is the Forum a person, association, or organization?

[13] The Forum is not a corporation or agency like those that are often named as respondents to human rights complaints. Its structure is unique, which the Commission recognized in its decision of March 24, 2022, referring the complaint to the Tribunal for inquiry. The Commission noted that although it accepted that there was sufficient information to support Ms. Maloney's allegations, further inquiry was necessary to determine

whether the Forum is an entity, and if so, whether it took appropriate action to deal with the alleged harassment.

[14] In its present motion for direction, the Commission presented an initial position on the question. It submitted that the Forum is in fact not a legal entity in its own right but rather a vehicle through which certain founding entities meet to pursue a common purpose. Consequently, a complaint cannot be filed against the Forum and must be dismissed, in which case the Commission would not be required to provide a disclosure package regarding this complaint.

[15] However, the Commission also acknowledged that the Tribunal could rule that the Forum is an unincorporated entity that could be named as a respondent, in which case the Commission sought guidance as to how and to whom it must transmit the disclosure package. As I explain below, I am not persuaded, with the available information at this stage of the process, that the Forum is not a legal entity. The case will therefore proceed, for now at least, with the Forum as a respondent.

[16] To determine the Forum's status, I must review the history of its development and the circumstances that gave rise to the complaints.

[17] According to the Forum's former website, the Forum was established in 1997 as a "partnership between the Nova Scotia Mi'kmaq, the Province of Nova Scotia and the Government of Canada, to strengthen relationships and to resolve issues of mutual concern affecting Mi'kmaw communities." The website is no longer operational, but the Commission was able to access an older version, which was last updated in 2017. The CMM was the website's host.

[18] The website of another Mi'kmaq organization, the Union of Nova Scotia Mi'kmaq (UNSM), describes the Forum as a "venue for the three levels of government to meet and resolve issues that are impacting our communities in the areas of health, social, education, economic development, justice, culture and heritage, and sports and recreation."

[19] The Forum was formed through a Memorandum of Understanding (MOU) that was signed on July 2, 1997. The parties to the MOU are Her Majesty the Queen in Right of

Canada, Her Majesty the Queen in Right of Nova Scotia, and the thirteen Mi'kmaq Saqmaq (or the Mi'kmaq of Nova Scotia). There are signature lines for the Chiefs of the thirteen Mi'kmaq Nations and for the mandated Federal and Nova Scotia cabinet ministers.

[20] The preamble of the MOU mentions that the parties have recognized the value of formal tripartite discussions between them to deal with outstanding issues, including the inherent right to self-government and treaty issues, and to jointly discuss, investigate, and negotiate measures to resolve them.

[21] The MOU's terms state that it is intended as an expression of the signatories' goodwill and political commitment to enter discussions. The MOU is not intended to either create, define, or effect legal rights or to be construed as an interpretive aid in the determination of any legal right.

[22] The MOU also states that the Canadian and Nova Scotian governments agree to share the costs associated with the participation of representatives of the Mi'kmaq of Nova Scotia. The parties agreed to adopt Terms of Reference for the Forum as well.

[23] An addendum to amend the MOU was signed on June 19, 1998, which provides that the parties agree that the MOU is a statement of political intent and is not a legally binding or enforceable document. It also highlights that all discussions in their meetings are "without prejudice."

[24] Terms of Reference were adopted, as contemplated in the MOU, though they bear no specific date. They stipulate that the Forum's objective is to discuss, investigate, negotiate, and implement solutions to substantive issues of mutual concern and jurisdictional conflict between the parties, including the inherent right to self-government.

[25] The Terms of Reference also established the "organizational structure" of the Forum, consisting of the Executive Committee, the Officials Committee, and the Working Committees. A Steering Committee was later created as well.

[26] The Executive Committee mandates the Forum's agenda, issues, parameters, and direction. It has the final decision-making authority for the Forum and must approve all decisions reached by any other committee. The Executive Committee is comprised of the

representatives of the Mi'kmaq of Nova Scotia (i.e., the Kji Saqmaq (Grand Chief) of the Mi'kmaq Grand Council and the 13 Mi'kmaq Chiefs of Nova Scotia), the Federal Minister of Indian Affairs and Northern Development or their delegate, and the Minister responsible for Aboriginal Affairs of Nova Scotia or another authorized minister. Although not expressly mentioned in the Terms of Reference, it appears from the Forum's annual reports and other documents in the Commission's motion record that the Executive Committee was also comprised of an Executive Chair and the AFN's National Chief, who was a member *ex officio*.

[27] The Officials Committee consists of representatives from Mi'kmaq organizations as designated by the Mi'kmaq of Nova Scotia. Three eligible organizations are listed: the UNSM, the CMM and the NWANS. The Officials Committee coordinates, directs, and assigns activities based on decisions made by the Executive Committee regarding the Forum's agenda, issues, parameters, and direction.

[28] Mr. Googoo was first elected AFN Regional Chief for Nova-Scotia-Newfoundland in 2011. At some point in 2011 or 2012, the Executive Committee appointed him to be the Forum's Executive Chair. He signed his greetings in the Forum's annual reports as Forum Executive Chair and AFN Regional Chief NS/NFLD. None of the available documentation indicates that the Executive Committee always selects the AFN Regional Chief as Executive Chair, but Mr. Googoo's immediate predecessor was the person who preceded him as AFN Regional Chief.

[29] In her complaint, Ms. Maloney alleges that, sometime before 2009, she competed and won a paid position with the NWANS as its tripartite liaison (i.e., the NWANS' representative on the Officials Committee). Around 2009, she was elected president of the NWANS. She held that political position while continuing to work with the NWANS as its tripartite liaison.

[30] The MOU and the Terms of Reference do not make mention of a Tripartite Secretariat. However, a working group report from 2000 documents a meeting of the three MOU parties where the formation of a Tripartite Secretariat was recommended to provide logistical, communication and other support to the Forum and administer its budget. The

Forum's Steering Committee would provide direction to the Tripartite Secretariat. It would be hosted on an interim basis by a participating Mi'kmaq organization. Specific employer/employee matters would be the internal responsibility of the host organization.

[31] The "Contact Us" page on the Forum's former website states that the Tripartite Secretariat could be contacted care of the CMM's address and phone numbers. A list of Tripartite Secretariat staff follows, such as administrator, communications officer, and project manager, all of whom have "tripartiteforum" email addresses. The CMM's current webpage states that, since 2021, the Tripartite Secretariat is split between the CMM and the UNSM. The working committees are administered by both organizations, while each tribal council takes turns administering the Officials and Executive Committees.

[32] According to Ms. Maloney's complaint, concerns about Mr. Googoo's conduct began around May or June 2017. She brought her concerns to various officials and her lawyer sent a letter detailing them. In February 2018, the Forum's Executive Committee ordered an independent investigation into the matter, which was conducted by Krista K. Smith. A summary of her report was issued on September 18, 2018, finding that Mr. Googoo had engaged in bullying, harassment, and gender discrimination. The summary is marked as confidential and not to be shared, distributed, or copied without the Forum's authorization.

[33] On October 30, 2019, Ms. Maloney filed the three human rights complaints with the Commission. The Commission apparently sent the Forum complaint to the CMM. As the Commission acknowledges in its submissions, the CMM never accepted service of the Forum complaint. The CMM filed copies of letters it sent to the Commission in which it stated that it only provided secretariat services to the Forum and did not have the agency or authority to accept service on behalf of it. In its letters, the CMM also maintained that the Forum is a process and not a legal entity.

[34] On March 24, 2022, the Commission rendered separate decisions with respect to each of the complaints, deciding in all three to deal with the complaints and to refer them to the Tribunal for inquiry. As I mentioned earlier, in its decision about the Forum complaint, the Commission noted that further inquiry is necessary to determine whether the Forum is

an entity, and if so, whether it took appropriate action to deal with the alleged harassment. No one sought to judicially review any of the Commission's decisions.

[35] I mentioned earlier that the basic issue that the Commission has put before me at this stage is to determine whether the evidence shows that the Forum is not a legal entity that could be a respondent and held vicariously liable for the acts of Mr. Googoo, under s. 65 of the Act. The complaints allege that he engaged in a discriminatory practice under s. 14 of the Act by harassing Ms. Maloney. If the Forum is not such an entity, then logically the complaint cannot proceed, it must be dismissed, and the Commission would be relieved of any obligation to transmit to the Forum the disclosure package about this complaint.

[36] As the Commission highlights in its submissions, the Tribunal's power to dismiss a complaint in advance of a full hearing on the merits "should be exercised cautiously, and then only in the clearest of cases" (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, at para. 140). Has the Commission established clearly that the Forum is not a legal entity against which a human rights complaint can be made? I am not persuaded at this stage.

[37] Is the Forum a person, association or organization, within the meaning of s. 65(1) of the Act? The Act does not provide any formal definition, but Rule 1 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules of Procedure"), defines a "person" as including "an employee organization, employer organization and unincorporated entity," or in the French version, "l'organisation patronale, l'organisation syndicale et l'entité sans personnalité morale."

[38] The Forum is not a legal person incorporated under a statute, in contrast to some of the organizations involved in this matter, like the CMM or the UNSM, which are incorporated as non-for-profit organizations under the *Societies Act* of Nova Scotia, RSNS 1989, c 435. But is it an unincorporated entity or an "entité sans personnalité morale?"

[39] There are certainly many indications that the Forum is not an unincorporated entity and that it is just a "process," as the CMM submits. The Forum's MOU states explicitly that the parties signed it as an expression of goodwill and commitment to discuss outstanding issues. The Terms of Reference reiterate that the Forum's objective is to discuss,

investigate, negotiate, and implement solutions. Do these facts preclude the possibility that the Forum is an unincorporated entity?

[40] There are other facts in this matter that are unclear and prevent me from drawing this conclusion. The Forum's activities are funded by the Canadian and Nova Scotian governments, but I have no evidence as to whom the funding is actually given. The CMM administered the distribution of the funds at the time of the complaint, but there is no evidence as to whom held them nor if the Forum had its own accounts.

[41] Ms. Smith's investigation leaves open questions as well, which Ms. Maloney highlighted in her submissions. In what capacity did the Forum retain Ms. Smith's services? Who instructed her and paid for those services, and how was this done? These questions remain unanswered at this stage.

[42] In her submissions, Ms. Maloney also contends that although she was remunerated for her Forum work by the NWANS, her remuneration was subject to the Forum Executive Committee's approval and provided to the NWANS for payment to her. She points out that at present, the Forum, the Executive Committee members, and the Tripartite Secretariat have possession and control of the records evidencing her remuneration structure, which places her at an informational disadvantage in addressing these types of questions.

[43] Ms. Maloney's general position is that the Forum exists as an entity inextricably tied to its composite parts.

[44] The Act and the Rules of Procedure do not provide any further guidance about what the characteristics of an unincorporated entity are. However, the Commission pointed out that the *Federal Courts Rules*, SOR/98-106, refer to a similar term, "unincorporated association." Under Rule 2 of the *Federal Courts Rules*, an unincorporated association means an organization of two or more persons, other than a partnership, that operates under a common name for a common purpose or undertaking. Rule 111 further provides that a proceeding may be brought by or against an unincorporated association in the name of the association.

[45] If I were to apply the *Federal Courts Rules* criteria by analogy to the term “unincorporated entity,” the Forum clearly was formed by two or more persons and operates under a common name. Does it have a common purpose? The MOU at the very least suggests a common purpose in facilitating discussions between the parties. In fact, the former website even described the Forum as a “partnership” between the parties. Applying the *Federal Courts Rules* criteria, one could conclude that the Forum is an unincorporated association. However, I am not convinced that I can apply the same criteria to the differently worded notion of “unincorporated entity,” which I also note is a term that is only used in the *Rules of Procedure*, not in the Act itself.

[46] In any event, for the purposes of the Commission’s motion, I do not need to resolve this question. All I need to determine is whether the Forum is clearly NOT a person that can be found liable under s. 65 of the Act. I am unable to make that finding at this time. There are too many questions suggesting the contrary that remain unanswered at this stage of the proceedings. The clearest of cases has not been made that the Forum is not a legal entity against which a human rights complaint can be filed.

[47] That said, the fact that the Forum is at best an unincorporated entity does raise uncertainty about the viability of any enforcement tools that Ms. Maloney may choose to exercise if her complaint is substantiated. But that is a matter for another day.

(ii) The Commission may send documents intended for the Forum to Executive Committee members

[48] This then raises the next issue that the Commission advanced. If the complaint against the Forum can proceed, to whom must it send its disclosure package?

[49] The Rules of Procedure provide no answer other than outlining the general principle set out in Rule 7 that they are not exhaustive and that a Tribunal panel may decide any procedural matter that is not provided for in the Rules of Procedure. Rule 132 of the *Federal Courts Rules* addresses this question with respect to unincorporated associations. It provides that the personal service of a document on unincorporated associations is carried out by leaving it with an officer of the association or the person who has control or

management of the affairs of the association at any office or premises occupied by the association. While, as I stated earlier, I am not prepared to apply the *Federal Courts Rules* by analogy to determine whether the Forum is an unincorporated entity, I find that the procedure in Rule 132 makes abundant sense in determining how to notify unincorporated entities of proceedings.

[50] Applying this procedure to this case begs the question, who are the Forum's officers? The parties to the MOU that formed it are all represented by individuals who sit on the Executive Committee, which, according to the Terms of Reference, has the final decision-making authority. As such, those individuals can be considered the officers of the Forum for the purposes of service of documents. The Commission may send its disclosure package to them.

(iii) Service on the Forum cannot be carried out on the CMM

[51] Could service by the second means mentioned in Rule 132 be carried out on the CMM? The CMM explicitly refused service of documents in the past. It could be argued that in housing the Tripartite Secretariat, providing logistical and other services to the Forum, and giving its address as the Forum's point of contact, its offices could be considered an office occupied by the Forum. However, it is clear from the evidence filed that the CMM did not control or manage the Forum's affairs. Furthermore, the CMM is not even a party to the MOU. As such, it has no involvement in this case.

[52] Accordingly, I grant the declaratory order that the CMM seeks by confirming that it is not a respondent and has no further role in these proceedings. Service of documents intended for the Forum in the context of these proceedings cannot be made on the CMM.

B. The AFN may file a motion to remove itself as a party

[53] The AFN's submissions focussed mainly on its contention that it should not be a respondent in Ms. Maloney's second complaint. It points out that the AFN is not a signatory to the MOU and did not participate in any Forum meetings or events. It has no power or control over the Forum's activities. It submits that just because Mr. Googoo happened to be

the AFN Regional Chief for Nova Scotia, he did not serve on the Executive Committee as a representative of the AFN. He was appointed Executive Chair because he was a prominent First Nations leader in Nova Scotia, who had been involved with the Forum since its inception.

[54] The AFN also submits that although it ordered an investigation into Mr. Googoo's conduct after it learned through the media about Ms. Maloney's allegations, it was solely for the purpose of determining whether he should be removed from the AFN's board of directors, in accordance with the AFN's bylaws. Mr. Googoo had already resigned as Executive Chair of the Forum by then. The AFN did not investigate him in any capacity as a participant or member of the Forum. Before the AFN could take action against Mr. Googoo, the regional chiefs removed him from the position of Regional Chief, and he ceased being a director of the AFN.

[55] The AFN urged Ms. Maloney to reconsider her position and withdraw her claims against the organization.

[56] In her submissions, Ms. Maloney did not change her position. She maintains that the AFN is a proper respondent. She claims that it clearly participated in the Forum and its Executive Committee and that there is a link between Mr. Googoo's role as AFN Regional Chief and his appointment as Forum Executive Chair.

[57] The information presented is sufficient to warrant hearing the AFN's motion to remove itself as a party as a preliminary matter. I caution, however, that any ambiguities in the evidence would need to be addressed by the parties to enable the Tribunal to properly deal with the question at the pre-hearing stage. As mentioned earlier, only in the clearest of cases can a complaint be dismissed.

C. CIRNAC's request that it be removed as a respondent is denied at this time

[58] CIRNAC's submissions are two-fold. It shares the view that the Forum is not a legal entity. That matter has been addressed above.

[59] CIRNAC also submits that it is not a proper respondent since there was no employment relationship between it and Ms. Maloney. It claims that it did not exercise control over the Forum and that Mr. Googoo was not a representative of CIRNAC, nor did it appoint him to the position of Executive Chair.

[60] CIRNAC contends that even if one must interpret “employment” broadly in human rights matters (see *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 (*Schrenk*)), there must nonetheless be a nexus to the employment context. *Schrenk* held that a victim of harassment could file a human rights complaint against someone else in the same workplace even though they were employed by different employers. Employment discrimination can occur even in such circumstances, provided it has a sufficient nexus to the employment context. This contextual analysis involves the consideration of factors like whether the respondent was an integral part of the complainant’s workplace. CIRNAC maintains that it did not employ Ms. Maloney or Mr. Googoo and that it was not an integral part of her employment.

[61] Ms. Maloney disagrees. She points to CIRNAC’s funding of her remuneration and disbursements and submits that her employment was inextricably tied to the components of the Forum, which include CIRNAC. As mentioned earlier, she contends that at this stage, she has no access to information in CIRNAC’s possession regarding her remuneration and employment, which puts her at an informational disadvantage.

[62] While I recognize that there is no obvious employment relationship between Ms. Maloney and CIRNAC, the way there appears to be with NWANS, we are still at an early stage in the hearing process, and I am again not persuaded that the clearest of cases has been made out that Ms. Maloney’s has no claim against CIRNAC. I therefore cannot conclude at this time that CIRNAC is not a proper respondent for the complaint filed against it.

[63] CIRNAC may choose to present its request again later in this process, but the parties are again cautioned that they must address any ambiguities in the evidence for me to deal with it properly.

V. Order

[64] I declare that:

- 1) It has not been established that the Forum is not a legal entity capable of being a respondent in the complaint filed against it;
- 2) The Commission may send its disclosure package to the Forum by delivering it to a member of the Forum's Executive Committee;
- 3) The CMM is not a respondent and has no further role in these proceedings;
- 4) The AFN may make a motion to remove itself as a respondent in the complaint filed against it.
- 5) CIRNAC's request that it be deemed not to be a proper respondent in the complaint filed against it is denied.

[65] A CMCC will be convened after this ruling is issued to set new deadlines in this case, including any relating to the AFN's possible motion.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
September 11, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: HR-DP-2818-22, HR-DP-2819-22 & HR-DP-2820-22

Style of Cause: Cheryl Maloney v. Mi'kmaq Nova Scotia Tripartite Forum, Assembly of First Nations and Crown-Indigenous Relations and Northern Affairs Canada

Ruling of the Tribunal Dated: September 11, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Alisa Lombard, for the Complainant

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Kelly Peck and Kim Duggan, for the Crown-Indigenous Relations and Northern Affairs Canada