

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

MARGARET KELLY (STACEY)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MOHAWK COUNCIL OF KAHNAWAKE

- and -

COUNCIL OF ELDERS

- and -

DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondents

RULING

MEMBER: Athanasios D. Hadjis 2008 CHRT 18
2008/05/27

[1] The Department of Indian and Northern Affairs Canada (the Department), has made a motion requesting that the Tribunal exercise its discretion to refuse to hear the Complainant's current complaint on the basis that the same matter has already been disposed of and conclusively determined by the parties in 2003, when they signed a negotiated settlement in a case that involved the same parties and raised identical issues (Tribunal Number T683/7101).

Background

[2] In 1999, the Complainant filed human rights complaints against the Mohawk Council of Kahnawake ("MCK") and the Department (then known as the Department of Indian and Northern Development). She alleged that the MCK refused to accept her as a Band member based on her family status, and that this refusal resulted in her being denied services from the MCK. She claimed that this denial of services constituted a discriminatory practice within the meaning of s. 5 of the *Canadian Human Right Act*. Furthermore, she alleged that the Department also discriminated against her by continuing to fund the MCK for the provision of these services that were allegedly being denied to her.

[3] In 2003, the Complainant settled her complaints with the MCK and the Department. According to the Minutes of Settlement ("Settlement Agreement"), the Complainant agreed to release and forever discharge the Department from "all manner of actions, claims or demands, of whatsoever kind or nature" in any way connected with the matters alleged in the complaint against the Department.

[4] The Settlement Agreement was later approved by the Commission, pursuant to s. 48(1) of the *Act* and, at the Commission's application, it was made an Order of the Federal Court, pursuant to s. 48(3) of the *Act*.

[5] In 2005, the Complainant filed new complaints against the MCK and the Department. She also filed a complaint against the "Council of Elders" alleging that it had discriminated against her under s. 5 of the *Act*, in its determination on July 25, 2005, that she did not satisfy the "membership criteria" to be recognized as a member of the Band. In the 2005 complaint against the Department, the Complainant alleges that the discrimination "against" her by the Council of Elders was a "direct result" of the Department's "allowance" of this type of discrimination and its "lack of intervention" to prevent it. The Complainant also holds the Department responsible for the denial to her of services by the MCK.

The *res judicata* issue

[6] The Department contends that pursuant to the doctrine of *res judicata*, the Tribunal cannot revive or relitigate her claims against the Department as those issues were already raised in the 1999 complaint against the Department and were validly and conclusively settled in the Settlement Agreement.

[7] For the doctrine of *res judicata* to apply:

- The same issues or cause of action must be decided in both proceedings;
- The decision which is said to create the estoppel must be a final decision; and
- The parties or their privies must be the same.

(See *O'Connor v. Canadian National Railways Co.*, 2006 CHRT 5 at para. 27.)

[8] In the present case, the Department alleges that the Complainant has raised the same issues or causes of action in both complaints, centring on the Department's power and duty to intervene and prevent the MCK's discriminatory practices in the delivery or provision of services and benefits.

[9] The Department asserts that its role has not changed since the first complaint was filed in 1999. There is no evidence before the Tribunal, however, at this stage of the case, to support this assertion. The parties have yet to even file their Statements of Particulars pursuant to the Tribunal's *Rules of Procedure*.

[10] Furthermore, the Complainant has stated in the 2005 complaint that the Department's alleged discriminatory practice is linked to the decision by the Council of Elders to refuse her Band membership. The Department contends that the activities of the Council of Elders can be subsumed with those of the MCK and that thus, the parties and issues in both the 1999 and 2005 complaints are identical. There is no evidence before the Tribunal at this stage, however, to confirm this contention.

[11] In addition, the Complainant refers, in the 2005 complaint, to a "Membership Law" that the MCK adopted in 2004 (after the Settlement Agreement), which has contributed to the discrimination that she has experienced, by failing to recognize her as a Band member. The Department responds that this "new" fact is not material, as the basic issues in the 1999 and 2005 complaints are the same, i.e., is it within the power of the Department or the Minister of Indian and Northern Affairs, under the *Indian Act*, to address the recognition of the Complainant as a member of the MCK Band? This question was resolved through the settlement, it is argued, and the doctrine of *res judicata* bars us from reconsidering it. In my view, however, the question regarding the

"Membership Act" and its implications for this case is one that should be determined on the basis of an evidentiary record.

[12] I therefore find that the preliminary exception raised by the Department is premature at this stage. I make a similar finding with respect to the Department's subsidiary submission that to continue with this matter would constitute an abuse of process. I am not ruling that the Department's allegations are without any merit, but the determination thereof requires a more complete record.

[13] Therefore, while I am dismissing the Department's motion at this time, I reserve the Department's right to present a similar motion at a later stage in the hearing process.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario

May

27,

2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1268/8007, T1269/8107 and T1270/8207
STYLE OF CAUSE:	Margaret Kelly (Stacey) v. Mohawk Council of Kahnawake, Council of Elders and Department of Indian and Northern Affairs Canada
RULING OF THE TRIBUNAL DATED:	May 27, 2008
APPEARANCES:	
Julius H. Grey / Isabelle Turgeon	For the Complainant
Daniel Poulin	For the Canadian Human Rights Commission
Mary Lee Armstrong	For the Respondent (Mohawk Council of Kahnawake)
No one appearing	For the Respondent (Council of Elders)
Virginie Cantave	For the Respondent (Department of Indian and Northern Affairs Canada)