Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 11
Date: May 5, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

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I. Motion for interested party status

[1] The Nishnawbe Aski Nation (the NAN), specifically the NAN Chiefs Committee, seeks leave to intervene in these proceedings, at the remedies stage, as an interested party. The NAN is a political territorial organization that represents the socioeconomic and political interests of 49 First Nation communities located in Northern Ontario.

[2] Granting interested party status falls within the Tribunal's discretion pursuant to section 50(1) of the *Canadian Human Rights Act* (the *CHRA*) and Rules 3 and 8(1) of the Tribunal's *Rules of Procedure (03-05-04)*. As such, and subject to the rules of natural justice, the Tribunal is the master of its own procedure (see *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at pp. 568-569; and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada*), 2013 CHRT 16 at para. 50).

[3] An application for interested party status is determined on a case-by-case basis, in light of the specific circumstances of the proceedings and the issues being considered. A person or organization may be granted interested party status if they are impacted by the proceedings and can provide assistance to the Tribunal in determining the issues before it. That assistance should add a different perspective to the positions taken by the other parties and further the Tribunal's determination of the matter. Furthermore, pursuant to section 48.9(1) of the *CHRA*, the extent of an interested party's participation must take into account the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (see *Nkwazi v. Correctional Service Canada*, 2000 CanLII 28883 (CHRT) at paras. 22-23; *Schnell v. Machiavelli and Associates Emprize Inc.*, 2001 CanLII 25862 (CHRT) at para. 6; *Warman v. Lemire*, 2008 CHRT 17 at paras. 6-8; and *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2011 CHRT 19 at paras. 22-23).

[4] None of the parties in this matter oppose the NAN's motion. However, as master of its own procedure and pursuant to the requirements of the *CHRA*, the Panel must be satisfied that the NAN can bring a meaningful contribution to these proceedings and can

assist the Tribunal in determining the issues before it; and, if so, what the extent of NAN's participation should be.

[5] For the reasons that follow, the NAN's motion seeking interested party status is granted. The extent of its participation shall be limited to written submissions with respect to the specific considerations of delivering child and family services to remote and Northern Ontario communities and the factors required to successfully provide those services in those communities.

II. Interest in proceedings and assistance to be provided

[6] The NAN seeks to file written materials on the order resulting from this Panel's decision in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*). In the *Decision*, the Panel determined First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*). The Panel ordered Aboriginal Affairs and Northern Development Canada (AANDC), now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[7] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The NAN seeks to assist in this remedial clarification process. It submits that the Tribunal's remedies will have a direct impact on child and family services within its territory. That is, NAN communities are typically remote and isolated, without year-round road access, and dispersed amongst a swath of land covering two-thirds of Ontario. It claims to have unique subject-matter expertise with respect to the specific considerations of delivering child and family services to remote and northern communities and the factors required to successfully provide those services in those communities. In this regard, it is also engaged with the Government of Ontario on the development of an Aboriginal child and youth strategy. The NAN submits these discussions are addressing the same issues as those in the *Decision*, including Jordan's Principle, Ontario's *Child and Family Services Act*, and funding for prevention programs. The NAN seeks to bring its experience and knowledge before the Tribunal to ensure that any ordered remedies are designed and implemented pursuant to the particular context of remote and northern communities.

[9] Indeed, many of the Panel's findings with respect of the *1965 Agreement* were related to the circumstances and challenges faced by remote communities in Ontario. The Panel identified various factors which impact the performance and quality of the child and family services delivered to those communities and which can result in more children being sent outside the community to receive those services. Those factors include the added time and expense for Children's Aid Societies to travel to remote communities; the challenges remote communities face in terms of recruiting and retaining staff while dealing with larger case volumes; the lack of suitable housing, which makes it difficult to find foster homes in remote communities; the lack of surrounding health and social programs and services available to remote communities and their limited access to court services; and the lack of infrastructure and capacity building for remote communities to address all these issues (see the *Decision* at paras. 231-235, 245 and 392).

[10] The NAN's direct affiliation with remote communities experiencing these issues will ensure their interests inform any remedy issued by the Panel and will assist in crafting an effective and meaningful response to these issues. In the same vein, the NAN's involvement in developing an Aboriginal child and youth strategy with the Government of Ontario may assist the Panel in crafting effective and meaningful orders to address other

findings it made regarding the *1965 Agreement*; specifically, that the agreement has not been updated for quite some time and does not account for changes made over the years to the *Child and Family Services Act* for such things as band representatives and other mental health and prevention services. The Panel found this last issue was compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act* (see the *Decision* at paras. 228-230, 235, 392 and 458).

[11] Given these findings in the *Decision* and the Panel's order to reform the *1965 Agreement* to reflect those findings, it is clear that the NAN has an interest in these proceedings and, more importantly, that it can potentially provide a meaningful contribution and assistance in determining the remaining remedial issues in this case.

III. Extent of participation

[12] Despite the NAN's interest and potential contribution, the Panel must ensure that its proposed intervention will not unduly affect the informality and expeditiousness of these proceedings or cause prejudice to the parties or the Tribunal. In this regard, the NAN proposes to file written submissions on remedies, addressing its unique perspective as an advocate for Ontario's northern and remote communities, without duplicating submissions already made.

[13] With already four parties and two interested parties to this litigation, the management of this case and hearing to date has presented numerous challenges in terms of satisfying the rights of the parties, but also in terms of effectively administering the Tribunal's limited time and resources. Adding another party to all this, especially at this late stage, is not only rare, but also adds to the challenge of effectively managing this case. That said, the Panel finds the benefit of the NAN's proposed intervention outweighs the impact it may have on the conduct of these proceedings.

[14] However, given we are at the remedial stage of these proceedings, the NAN's written submissions should only address the outstanding remedies and not re-open

matters already determined. The hearing of the merits of the complaint is completed and any further evidence on those issues is now closed. The Panel's role at this stage of the proceedings is to craft an order that addresses the particular circumstances of the case and the findings already made in the *Decision*. The Tribunal's remedial clarification and implementation process is not to be confused with a commission of inquiry or a forum for consultation with any and all interested parties. If that were the case, every First Nation community or organization could seek to intervene in these proceedings to share their unique knowledge, experience, culture and history. Processing those applications, let alone admitting further parties into these proceedings, would significantly hinder the Panel's ability to finalize its order.

[15] Furthermore, in not duplicating the submissions made by other parties, the NAN should limit its written submissions to the areas where it says it can provide a different perspective to the positions taken by the other parties. That is, the specific considerations of delivering child and family services to remote and northern communities in Ontario and the factors required to successfully provide those services in those communities. Pursuant to the NAN's unique perspective, the Panel expects its submissions to focus mainly on the application and reform of the *1965 Agreement*. Indeed, in a recent ruling in this matter (2016 CHRT 10), the Panel made orders on immediate relief in accordance with its findings in the *Decision*, but determined it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* following the determination of the NAN's motion (see paras. 28-29).

[16] Limiting the NAN's submissions in this manner recognizes the contribution it can make to these proceedings, while at the same time acknowledging the organizations already representing the main interests at stake in this matter. The Assembly of First Nations and the Chiefs of Ontario represent the various First Nations communities across Canada and Ontario. The interests of First Nations children, youth and families, along with the agencies that serve them, are represented by the First Nations Child and Family Caring Society of Canada. Furthermore, the Canadian Human Rights Commission (the Commission) represents the public interest and has led the majority of the evidence in this

matter, including the evidence relied upon by the Panel to make the findings in the *Decision* identified above about remote Ontario communities.

[17] With the assistance of these parties and interested parties, along with the NAN and INAC, the Panel believes it will have more than enough submissions to craft a meaningful and effective order in response to the *Decision*.

IV. Ruling

[18] The NAN shall be added as an interested party to these proceedings. It can file written submissions on remedies pursuant to the parameters outlined above.

[19] Within ten business days of this ruling, the NAN shall provide its written submissions on immediate relief items. INAC, the Caring Society, the AFN, the Chiefs of Ontario and the Commission will then have ten business days to respond to those submissions. Any reply thereto by the NAN can be filed within seven business days of INAC's response and the other parties' responses, if any.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 5, 2016