Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 31
Date: October 8, 2020
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 Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

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Proposed Interested Party: Innu Nation

I. Context

[1] This ruling addresses the Innu Nation's request to make a limited intervention in this matter as an interested party. In particular, Innu Nation seeks to participate in a motion with respect to First Nations children and families receiving services from provincial or territorial agencies and service providers funded by Indigenous Services Canada (ISC) on-reserve and in the Yukon.

[2] This request arises in the context of a complaint brought by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) against Canada on behalf of First Nations children. 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 *Merit Decision*), the Tribunal found that the complaint was substantiated and that Canada engaged in discriminatory practices contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *CHRA* or the *Act*) in its provision of services to First Nations children.

[3] The complaint is now in the remedial phase. In addition to financial compensation for affected First Nations children and caregivers (2019 CHRT 39), the Tribunal has issued extensive orders remediating the discriminatory funding framework for First Nations child and family services (in particular 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 and 2018 CHRT 4). The Tribunal has retained jurisdiction to address the remaining remedial matters.

A. Previous Interested Party Requests

[4] A number of organizations and representatives of First Nations governments have identified this case as having significant interest and importance to them or their members and have sought to intervene as interested parties.

[5] In September 14, 2009, the Tribunal granted interested party status to the Chiefs of Ontario (COO) and Amnesty International. The COO was given broad participatory rights including calling evidence and cross-examining opposing witnesses. Its participation was

subject to the limit that its submissions and evidence not duplicate or overlap those of the parties or the Commission. Amnesty International was given an opportunity for more limited participation. Its participation was limited to legal submissions, including on international sources of law.

[6] The Nishnawbe Aski Nation (NAN) requested interested party status during the remedial stage in 2016. The Tribunal granted that request in 2016 CHRT 11. The extent of NAN's participation was limited 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." (para. 5). The Tribunal found it clear that NAN had an interest in the proceedings and that it could provide assistance to the Panel in determining outstanding remedial issues. NAN was directed to limit its submissions to outstanding remedial issues and not seek to re-open matters that had already been decided. NAN was to ensure its contributions were not duplicative of those of other parties.

[7] The Congress of Aboriginal Peoples (CAP) requested interested party status in 2019 to participate in the determination of the scope of Jordan's Principle for children without *Indian Act*, RSC 1985 c I-5, status living off-reserve. The Tribunal, in 2019 CHRT 11, granted CAP limited interested party status. CAP was allowed to make submissions on the applicable motion but was required to take the evidentiary record as it was and to conform to the existing timeframe for the hearing.

B. The Caring Society' s underlying motion

[8] The specific motion in which the Innu Nation wishes to intervene is a motion brought by the Caring Society for a determination that First Nations children and families living on-reserve and in the Yukon who are served by a provincial or territorial agency or service provider are within the scope of the Tribunal's current remedial orders (the Caring Society's Motion). These are First Nations that are not served by First Nations Child and Family Services Agencies (FNCFS Agencies). The Caring Society's motion also seeks corresponding orders that Canada be directed to remedy this deficiency.

[9] In the notice of motion, the Caring Society asserts that Canada has taken the position that the Tribunal's remedial orders in this matter only apply to FNCFS Agencies and do not apply to First Nations children and families who receive services from a provincial or territorial agency or service provider through the First Nations Family and Child Services Program (FNCFS Program).

[10] The parties and the Panel have agreed on a timeline for adjudicating the Caring Society's motion.

II. Party Positions

A. Innu Nation

[11] Innu Nation is a political body that represents the Innu people of Labrador, inclusive of the two First Nations in Labrador: Sheshatshiu Innu First Nation and Mushuau Innu First Nation. The Innu represented by Innu Nation primarily reside in the on-reserve communities of one of the two Innu First Nations.

[12] Innu Nation seeks leave to intervene in this matter for the limited purpose of participating in the Caring Society's motion. The Innu Nation requests that their participation be on a without costs basis. Innu Nation seeks to:

A. file evidence that does not duplicate the content of other parties, and according to the timeline set by the Tribunal;

B. cross-examine on the evidence of other parties in a limited manner that does not duplicate the questions of other parties, and according to any particular sequence among parties for such examinations the Tribunal may provide;

C. make oral and written arguments, as may apply in the course of the Caring Society's motion, of a length and time that may be fixed by the Tribunal, and according to the timeline set by the Tribunal; and

D. participate in any conference calls, mediation, negotiation or other dispute resolution or administrative processes further to this case, only to the extent specifically connected to the Caring Society's motion.

[13] Innu Nation submits it meets the applicable test from *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources*

and Skills Development Canada), 2011 CHRT 19 [*Walden*], at para. 23 for interested party status:

A. whether the proposed interested party brings expertise that will be of assistance to the Tribunal;

B. whether the involvement of the proposed interested party will add to the legal positions of the other parties; and

C. whether the proceeding will have an impact on the proposed interested party's interests.

[14] First, Innu Nation argues it has expertise that will assist the Tribunal. Innu Nation has first-hand experience of the issues in this motion. In particular, Innu Nation has experience establishing an agency that provides prevention services, the Labrador Innu Round Table Secretariat Inc. (IRT Secretariat), but nonetheless being told by Canada that it is not eligible for funding because the agency does not fit within Canada's eligibility policies. Canada's issue is that the IRT Secretariat is not a provincially delegated agency that is responsible for both prevention and protection. The IRT Secretariat only provides prevention services because ISC funds Newfoundland and Labrador to provide prevention services. Newfoundland and Labrador takes the position that its legislation does not cover prevention services and therefore it cannot designate an agency to provide prevention services. This experience allows Innu Nation to add nuance to some of the positions framed in the Caring Society's notice of motion. Further, Innu Nation has experience with the manner in which Canada's policies are inflexible to regional circumstances, such as Newfoundland and Labrador's legislation not providing for prevention services.

[15] Second, Innu Nation submits that the specific expertise, based on Innu Nation's specific experiences, will allow it to bring a distinct perspective from the other parties. No other party has comparable first-hand experience to draw on.

[16] Third, Innu Nation has filed a human rights complaint dated June 29, 2020 based on the same issue as the Caring Society's motion. The complaint is currently before the Commission. The Innu Nation's complaint relates to the funding they receive for prevention services. The complaint alleges that it is discriminatory for Canada to limit the Innu Nation's prevention funding to be drawn from a fixed budget line instead of funding actual costs, as

Canada is required to do under 2018 CHRT 4. The complaint also raised a second issue of the Innu Nation's exclusion from band representative type funding. The Innu Nation contends that it would be redundant to pursue their grievance through the entire complaint and adjudication process when the Caring Society's motion addresses one of the main issues in their complaint. The results of the motion will therefore affect Innu Nation's legal interests.

[17] Innu Nation provides the evidence of its particular experiences and circumstances in support of its request for interested party status through an affidavit of Grand Chief Etienne Rich, to which the June 29, 2020 human rights complaint is attached as an exhibit.

[18] In reply, Innu Nation agrees to exchange any affidavits by October 23, 2020 and file submissions by December 4, 2020. Innu Nation also agrees to avoid duplicating submissions of other parties and agrees with the Caring Society's position on the appropriate scope of Innu Nation's involvement in any negotiations or case management activities.

[19] In response to Canada's submissions, Innu Nation reiterates the value it identifies in its initial submissions of it being able to provide not only argument but evidence to the Tribunal on the Caring Society's motion.

B. Other Parties and Interested Parties

[20] The Caring Society, the AFN, the COO, the NAN and the Commission all indicated their consent to Innu Nation being granted interested party status for the purpose of the Caring Society's motion. Canada indicated that it did not object to Innu Nation's limited participation. The AFN, the COO, the NAN and the Commission consent to the terms proposed by the Innu Nation for their limited interested party status. Some of the parties and interested parties provided further comments.

[21] The Caring Society summarized a number of the Tribunal's previous statements about interventions by interested parties. Accordingly, the Caring Society recognizes that the Innu Nation should be accorded participatory rights because it will be affected by the

results of the motion and that its ability to add to the record would assist the Tribunal, especially given its experiences with ISC between 2018 and 2020.

[22] The Caring Society requests that the Innu Nation's participation be on a timeline that would avoid delaying the proceedings. That can be best managed by providing the Innu Nation the same timelines for affidavits (October 23, 2020) and submissions (December 4, 2020) as those accorded to the Caring Society and the AFN. The Caring Society also requests that the Innu Nation's participation have a term included that its contributions do not duplicate those of the other parties. Finally, the Caring Society notes that although it does not have any objection to the Innu Nation's participation in Tribunal facilitated mediations or case conferences, the Tribunal cannot order the parties to include the Innu Nation more generally in their negotiations and dispute resolution.

[23] The AFN believes the Innu Nation is in a position to bring a unique perspective on the issues in the motion and able to provide evidence that will assist the Panel.

[24] Canada has acknowledged the Innu Nation has an interest in the proceedings and suggested their participation should be granted on terms similar to those limited participatory rights granted to CAP. In particular, Canada requests that Innu Nation's participation, as an intervening interested party, be limited to written and oral submissions and that Canada have an appropriate opportunity to respond to those submissions.

III. Law

[25] The *CHRA* contemplates interested parties in s. 50(1) and 48.9(2)(b) and accordingly confirms the Tribunal's authority to grant a request to become an interested party. The procedure for adding interested parties is set out in Rule 8 of the Tribunal's Rules.

[26] Prior cases indicate the test for granting a request for interested party status. *Walden* concisely summarizes the criteria for interested party status at paragraph 23:

> (a) the prospective interested party's expertise will be of assistance to the Tribunal;
>
> (b) its involvement will add to the legal positions of the parties; and

(c) the proceeding will have an impact on the moving party's interests.

[27] As noted, the Panel addressed the test for granting interested party status in 2016 CHRT 11 when the Panel granted interested party status to the NAN. In that ruling, the Tribunal outlined the considerations on granting interested party status, at paragraph 3, as follows:

> 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).

[28] The Tribunal in granting interested party status within the context of this specific case, recognized the challenge in determining which potential organisations or First Nations governments should be granted interested party status when the nature of the issues means that a large number of First Nations communities are directly affected by this case:

> 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 [*Merit*] *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.
>
> (2016 CHRT 11, at para. 14).

[29] As indicated earlier, in applying the test, the Panel granted the NAN interested party status. The Tribunal concluded that the Tribunal's decisions would have a direct impact on the remote First Nation communities represented by the NAN and that the NAN had specific expertise in the challenges providing child and family services to remote, northern communities that, for example, lack year-round road access.

[30] In granting the NAN's interested party request, the Tribunal recognized the challenge of maintaining an efficient and effective hearing process. Accordingly, the Tribunal directed the NAN to limit its written submissions to the context of remote and northern communities that was within its particular expertise distinct from the expertise of the other parties. The Tribunal also directed the NAN to limit its submissions to the outstanding remedial issues and avoid re-opening any matters that had already been determined. The Tribunal further directed a timeline for the NAN's submissions that would avoid unduly delaying the proceedings.

[31] As mentioned above, the Tribunal granted the CAP limited interested party status in 2019 CHRT 11 on the specific issue of determining who constituted a First Nations child living off-reserve for the purpose of Jordan's Principle. In reaching that decision, the Panel relied on its earlier analysis in 2016 CHRT 11. While emphasising the obligation of organizations seeking interested party status to avoid delaying the matter, the Tribunal found that the CAP had relevant expertise and could bring a different perspective than the existing participants in the case.

[32] Accordingly, the Tribunal granted the CAP scope to participate as an interested party solely for the particular motion in which it had a particular interest and expertise, and on specific terms. Those terms excluded the CAP from case management, did not allow it to file evidence, and imposed submission deadlines that would avoid delaying the matter. The CAP's participation was limited to making legal submissions.

IV. Analysis: Interest in Proceedings, Public Interest, Assistance to be Provided and Parameters

[33] The Panel grants the Innu Nation's motion for a limited interested party status for the reasons, and on the parameters indicated, below.

[34] The Panel reiterates that granting interested party status is a question governed by a case-by-case approach in applying the relevant legal principles to the particular facts of the case before the Tribunal. In this specific case, the Tribunal's reform orders impact First Nations on-reserves and in the Yukon across Canada.

[35] The Innu Nation's interest in the Caring's Society's motion is accepted by all parties in these proceedings and is also recognized by this Panel. In sum, no one opposes the Innu Nation's participation as an interested party for the limited purposes of participating in the Caring Society's motion.

[36] On this question the Panel finds the Innu Nation is impacted by these proceedings both as a First Nation government seeking to provide prevention services through an agency and as a complainant in a human rights matter seeking similar relief. The Innu Nation submits it has experience establishing an agency that provides prevention services to First Nations children, the IRT Secretariat. The Innu Nation also alleges it was informed by Canada that the IRT Secretariat is not eligible for funding because the agency does not fit within Canada's eligibility policies. While it appears that the Innu Nation could potentially be covered by the Tribunal's orders, differing views between the Innu Nation and Canada may have resulted in excluding the Innu Nation from the purview of the Tribunal's orders. The Innu Nation submits it has specific evidence to support its position. This evidence would potentially bring expertise and a different legal position than the legal positions advanced by the other parties.

[37] Moreover, in June 2020, the Innu Nation filed a complaint with the Commission on a matter that is a live issue before this Panel and involving similar questions of fact and law concerning the impacts of this Panel's previous rulings and orders on the Innu Nation and their Agency, the IRT Secretariat. The Panel believes that given the procedural history in this case and, given that children are central in this matter, there is also a public interest for

efficiency and expeditiousness to resolve this issue. Therefore, allowing the Innu Nation to participate in this motion would effectively account for this public interest. Again, the subject matter raised in the Caring Society's motion also addresses implementation and compliance to the Panel's previous orders especially the Panel's 2018 CHRT 4 ruling and orders and the interpretation of its related orders.

[38] Where the Panel finds some parties have differing views is in the extent of the Innu Nation's participation and more specifically on the question of allowing or disallowing the Innu Nation to bring new evidence supporting their position.

[39] As mentioned above, the Panel granted the CAP limited interested party status to participate in a motion brought by the Caring Society on the issue of First Nations children's eligibility under Jordan's Principle (see 2019 CHRT 11). The parties all argued that, for reasons of expediency, the CAP should not be allowed to file evidence. In its deliberations, the Panel found that while not allowing CAP to file new evidence expedited the hearing process it did lengthened the Panel's deliberations and findings given the nature of some requests made by the other parties.

[40] Additionally, the NAN, who were granted interested party status after the Tribunal rendered the *Merit Decision*, were ordered to take the record as it was and were not allowed to reopen or revisit the evidentiary record. This principle still applies. The Panel reviewed thousands of pages of evidence to arrive at its findings in the *Merit Decision* and the record leading to this decision stands. Where the Panel has accepted new evidence from parties, including the COO and the NAN, is in the implementation phase of its orders and in the issuance of further clarification orders. This was necessary given that the implementation of the Panel's orders logically followed the original orders contained in the *Merit Decision*. The Panel has retained jurisdiction on the matter to ensure it effectively eliminates the discrimination found and prevents its reoccurrence. The Panel foresaw the need to address remedies in three phases: immediate, mid-term and long-term. The intent was to start addressing the discrimination expeditiously and make adjustments in the mid-term supported by the record and new evidence while expert studies and data collection directed by the lived experiences and specific expertise of First Nations would highlight best practices and inform long-term orders on consent or otherwise.

[41] The Panel also hopes to make long-term orders shortly on consent or otherwise to ensure the ordered reform's sustainability. At this time, the Panel has received important studies and reports including, the Ontario specific study, the remoteness quotient final report, the Institute of Fiscal Studies and Democracy's final report and the Spirit Bear Plan to name a few. While the Panel is not making a determination on those studies and reports at this time, they could potentially inform best practices moving forward as part of a settlement of this case or for future long-term orders on consent or otherwise.

[42] In this particular request for interested party participation from the Innu Nation, compliance with and interpretation of the Panel's previous orders is squarely in question. The Panel remains seized of the matter in order to ascertain whether the Panel's orders are effective and implemented so the Panel can ensure it eliminates the discrimination found and prevents similar practices from reoccurring.

[43] As explained above, the Innu Nation alleges it has evidence supporting its position. The Panel finds this will be adding expertise and a different legal position than that of the other parties to these proceedings. The Panel finds the Innu Nation may provide assistance to the Tribunal in determining the issues before it and that this evidence could be potentially valuable in assisting the Panel to determine the specific Caring Society motion in light of the Panel's previous orders and especially the 2018 CHRT 4 orders. The Panel in the past, has allowed the COO and the NAN, who are both interested parties in this case, to file new evidence and cross-examine affiants. Therefore, the Panel disagrees with Canada that the Tribunal should not allow interested parties to file evidence or to cross-examine affiants. As masters of its own house and, in keeping with the search for truth in an inquiry format as per the terms of the *Act*, the Tribunal has the ability to allow interested parties to bring evidence and cross-examine affiants as long as the Tribunal honours two legal principles pursuant to section 48.9(1) of the *CHRA*: the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[44] On these points, the Panel finds the Innu Nation will not unduly delay the Panel's determination of the issue. Furthermore, the benefit of having the Innu Nation participate in this motion in adding expertise and a different legal position than that of the other parties to

these proceedings outweighs the inconvenience of a short delay that may occur in determining the matter. So far, the Innu Nation was courteous and complied with the Tribunal's short timeframes. The Panel is confident that this will continue.

[45] The Innu Nation's participation, including presenting evidence, is also permitted by the Tribunal's Rules of Procedure.

[46] In terms of fairness and natural justice, the complainants in this case and the two interested parties agree that the Innu Nation's evidence may provide relevant context to them as well as the Panel in determining the question.

[47] As for Canada, insofar as the evidence presented by the Innu Nation may be adverse to Canada's case and in respecting the principles of fairness and natural justice, the Panel believes any potential prejudice is cured by providing a full and ample opportunity for Canada to respond by way of submissions, affidavits, cross-examinations, etc. In fact, the Panel desires this in order to make an informed decision.

[48] Concerning Canada's request to have an opportunity to respond to the Innu Nation's submissions, the Panel agrees with Canada and adds that Canada must be able to fully respond to the Innu Nation's submissions and to the other parties' submissions as well. Therefore, the Innu Nation will abide by the pre-established schedule and will file their affidavits no later than **October 23, 2020**, their factum no later than **December 4, 2020** and their reply no later than **January 6, 2021**. Canada's responding affidavit(s) will be filed by **November 13, 2020**; Canada's factum will be filed by **December 18, 2020.**

[49] The Innu Nation's participation in the Caring Society's motion will not duplicate the parties' submissions. It will make best efforts to avoid duplicating questions during cross-examinations scheduled tentatively for the week of **November 23, 2020** and focus its submissions at the hearing in **January 2021**. For clarity, the Innu Nation's assistance should bring expertise and add a different perspective to the positions including the legal positions taken by the other parties and further the Tribunal's determination of the matter.

[50] Finally, the Innu Nation is allowed to participate in case management only to the extent it discusses the Caring Society's motion. If a Tribunal mediation is contemplated, the Panel can address the extent of the Innu Nation's participation at that time.

V. Order

[51] The Panel grants the Innu Nation's motion for a limited interested party status with the parameters indicated above.

VI. Retention of Jurisdiction

[52] Nothing in this ruling affects the Panel's retention of jurisdiction in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 8, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: October 8, 2020

Motion dealt with in writing without the appearances of the parties

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