Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 31
Date: August 27, 2021
File No.: T1810/4012

Between:

Mushuau Innu First Nation and Sheshatshiu Innu First Nation

Moving Parties

- and -

Mississaugas of the Credit First Nation

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member: Edward P. Lustig

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I. BACKGROUND

[1] This is a motion under Rule 8(4) of the *Rules of Procedure under the CHRA* (03-05-04) (the "Old Rules") by the Mushuau Innu First Nation ("MIFN") and the Sheshatshiu Innu First Nation ("SIFN"), who are First Nations located in Labrador, to be added as parties to Tribunal file: T18410/4012, which involves an inquiry into an existing complaint brought by the Complainant.

[2] The Old Rules have recently been revised in *Canadian Human Rights Tribunal Rules of Procedure, 2021,* SOR/2021-137 (the "New Rules") but the parties have agreed, as is their right, that while the New Rules will apply to the proceeding, the Old Rules will govern this motion.

[3] The complaint in these proceedings was received by the Commission on September 28, 2009 and was referred to the Tribunal for an inquiry on March 30, 2012, following an investigation by the Commission, as part of its screening mandate, pursuant to section 49(1)of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the "CHRA"). The initial complaint alleged discrimination based on race and disability by the Department of Indian and Northern Affairs ("INAC"), now Indigenous Services Canada ("ISC"). It included the allegation that if any of the Complainant's members sought educational services off-reserve, their families were required to pay tuition, including for specialized schools for children with special needs, while this requirement to pay tuition costs for public schools and specialized public schools did not apply in the Ontario provincial school system to parents and children who lived off-reserve. In particular, the Complainant had identified in September of 2008 that it had two children with Downs Syndrome who needed specialized schooling off-reserve, the cost of which was beyond the funding available to the Complainant from INAC.

[4] On October 11, 2016, the parties advised the Tribunal that they had concluded an agreement to resolve the portion of the complaint relating to the two children with Downs Syndrome, and that the agreement would also initiate a review of special education for First Nations in Ontario. On November 14, 2016, the Tribunal ordered an indefinite adjournment of the remaining portion of the complaint relating to systemic issues. Thereafter, the parties

produced a report on the first phase of the review of special education funding for First Nations and agreed to a further adjournment to continue to work together on identifying and implementing reforms to improve the special education services available to First Nations students on reserve. During 2016/17 a new national policy framework was developed by Canada for the transformation of primary and secondary school education on reserve including provisions for individual First Nations or groups of First Nations to develop a Regional Education Agreement ("REA"), and an Interim Funding Model ("IFM") on a province-by-province basis pending the development of a REA.

[5] On May 15, 2020, the parties advised the Tribunal that despite their best efforts and some progress having been made, the parties had not been able to resolve the systemic discrimination issues and wanted to resume the litigation. Between June and October 2020, the parties filed fresh amended Statements of Particulars ("SOPs") to reflect developments since 2009 and define the complaint as they feel it currently exists. On June 9, 2021, the Moving Parties brought this motion.

[6] In the existing complaint, according to its fresh amended SOP, the Complainant alleges that Canada's IFM is discriminatory in failing to meet the standard of substantive equality with respect to First Nations education in Ontario. It is alleged by the Complainant that the existing complaint is focused on Ontario but that the foundational flaw in the IFM applies across Canada. Canada acknowledges that the complaint does engage the IFM as a national program but that the existing complaint is about the implementation of the IFM in Ontario and its impact on students in Ontario, not in other provinces. For reasons elaborated below, the Moving Parties feel they should be added as parties to the inquiry into the existing complaint under Rule 8(4), despite not having filed a complaint with the Commission. The Complainant supports the Moving Parties motion. The Commission takes no position on this motion. The Respondent opposed the Motion.

[7] The Innu are an Indigenous people whose traditional territory is located on the coast of Labrador and into the interior of the peninsula where it is divided by the provincial boundary between Newfoundland and Labrador and Quebec. There are approximately 3000 Innu in Labrador who live mainly in the two Innu communities: Natuashish and Sheshatshiu. Each community elects its own Chief and Council and delivers a number of

local services, including K-12 education which is delivered jointly through Mamu Tshishkutamashtau Innu Education ("MTIE") to approximately 875 children.

[8] In 2009, the Moving Parties established MTIE as an Innu board to administer Innu schools located in their communities and in the same year Canada began to fund education directly through this organization. In 2018 Canada moved to a new model in funding Indigenous education. Namely, it developed IFM across Canada based upon the comparable provincial funding for provincial schools in each province.

[9] Initially, Canada chose to use figures from provincial funding in New Brunswick as the "proxy" for comparability to calculate funding for First Nations schools across the Atlantic Region, including Innu. However, as Innu objected to this proxy as being inapplicable to their needs Canada agreed to work on an IFM specific to Newfoundland and Labrador. To date, however, the Moving Parties say that the revisions to the IFM for Newfoundland and Labrador applicable to them, that were unilaterally put into effect by Canada for 2020-2021 and 2021-2022, based upon averages that mainly reflect provincial education services in St. John's, are unjust and fail to account for their circumstances, including remoteness.

[10] As a result, the Moving Parties say that the MTIE has raised the concern with Canada that the IFM is inadequate and being applied in a discriminatory manner that does not provide substantive equality. MTIE estimates that there is an annual shortfall in funding of what should be comparability of approximately $7.5 million equaling 50% of what is currently being funded. The Moving Parties say that despite raising this concern with Canada, the level of funding for Innu education to develop a needs-based funding model has not been adjusted. This is why this motion has been brought by the Moving Parties.

[11] In 2016/2017, as mentioned above, a new national policy framework was developed by Canada for the transformation of elementary and secondary education on reserve. The new policy framework, according to the Respondent, does not call for the creation of a single, nation-wide funding model but instead provides for a two-pronged approach to transformation efforts.

[12] The first prong of the national policy framework provides for individual First Nations, or groups of First Nations to develop a Regional Education Agreement ("REA") with

Canada. REAs are supposed to provide a mechanism for funding to be tailored to local priorities and to specific and unique needs of signatory communities, according to the Respondent.

[13] The second prong of the national policy framework provides for the IFM on a province-by-province basis pending the development of an REA. According to the Respondent, each IFM is based on the relevant provincial funding model for non-First Nations students but is adapted and enhanced to account for circumstances and needs that are unique to First Nations in that province. As such, it says that there is no single national funding model. Rather, each province has its own unique funding model.

[14] Neither the Complainant nor either of the Moving Parties have developed an REA yet. Currently the Complainant receives education funding under the IFM developed for Ontario based upon that Province's comprehensive funding formula, which is known as the Grants for Student Needs (“GSN”). Currently the Moving Parties also receive education funding under the IFM, however, as Newfoundland and Labrador do not have a comprehensive formula for elementary and secondary education, the provincial Department of Education directly administers certain components of education funding and as noted above, the IFM being used for the Moving Parties mainly reflect provincial education services in St. John's. The Moving Parties say that Canada has not adjusted its level of funding for Innu education to develop a needs-based funding model for Innu education.

II. SUMMARIES OF PARTIES' POSITIONS

A. MOVING PARTIES' POSITION

[15] The Moving Parties submit that the Respondent's IFM for funding First Nations' education, and thus Innu education, fails to meet the standard of substantive equality and is discriminatory contrary to the CHRA. It also fails to meet Canada's own standard of comparability. These are identical issues to those being determined in the existing complaint. Rather than have those same issues adjudicated in a separate proceeding, it would be more just and more efficient to allow the Moving Parties to participate in the present proceeding.

[16] Furthermore, the existing complaint challenges the IFM, which is applied by Canada nationally, but currently there is only one First Nation from one province, Ontario, in the present proceeding. The addition as parties of First Nations from a different province would add to the richness of the evidentiary record and would assist the Tribunal in understanding how the IFM is applied. This would assist in the determination of whether it and its application in practice are discriminatory. The Moving Parties wish to participate in the present proceeding as complainants to end the discriminatory funding practices applied to the Innu education by the Respondent.

[17] The Moving Parties submit that the Tribunal has the authority to grant the request to be added as parties to the present proceeding under section 48.9(2)(b) of the CHRA and Rule 8(4) of the Old Rules. The Moving Parties cite several cases for the proposition that the Tribunal may add a party to a complaint after careful consideration of the following factors:

a) whether the addition of the part is necessary to resolve the complaint;

b) whether it could not reasonably have been foreseen that the new party should have been added when the complaint was filed; and,

c) whether the addition of a party will result in serious prejudice to the opposing party.

[18] With respect to the first factor in paragraph 17 above, the Moving Parties argue that to properly determine the existing complaint based upon the scope of the remedies now being sought by the Complainant which, if granted, apply beyond Ontario, it would assist the Tribunal to have an evidentiary base from more than one region. As well, adding the Moving Parties would be more efficient by avoiding a multiplicity of proceedings on identical issues.

[19] With respect to the second factor in paragraph 17 above, the Moving Parties argue that it is unreasonable to assume that they could have foreseen when the complaint was filed that the Complainant's fresh amended Statement of Particulars filed on June 25, 2020 respecting the implementation of the national IFM in Ontario, could also apply to them or that the Complainant would know about the challenges that the national IFM would present for the funding of education for the Innu in Labrador.

[20] With respect to the third factor in paragraph 17 above, the Moving Parties argue that the prejudice suffered by the Respondent in the loss of benefit of certain procedural protections that are provided at the pre-referral stage by the Commission if a complaint is filed is outweighed by the prejudice to the prejudice to the Moving Parties and the public that would result from requiring a separate inquiry into their complaints about the IFM, given that the issues to be adjudicated are the same issues and the only difference is the province that the complaints take place in. Avoiding multiplicity of hearings with the potential for unnecessary delay, expense, inconvenience to witnesses, repetition of evidence and the risk of inconsistent findings by the Tribunal is in the public interest as well as in the interest of the parties.

B. COMPLAINANT'S POSITION

[21] The Complainant submits that the motion should be granted as this would:

1. Conserve the Tribunal's scarce resources by having one hearing where the issues range from being identical to being very similar and hence more efficient if heard together;
2. Better inform the Tribunal in making a decision in this case;
3. Avoid conflicting decisions on overlapping issues;
4. Not materially impact the current schedule;
5. Provide access to justice for Innu school children living in Labrador. If not granted the Moving Parties will have to file a complaint which may delay things by two to three years thereby potentially denying two or three cohorts of Innu children who will have graduated any opportunity to access justice.

C. COMMISSION'S POSITION

[22] As noted above, the Commission takes no position on the motion.

D. RESPONDENT'S POSITION

[23] Instead of simply adding a party to the complaint, the Moving Parties seek to enlarge the scope of the existing proceeding by adding their own distinct complaint concerning the IFM for on-reserve elementary and secondary education in Newfoundland and Labrador. The existing complaint concerns the implementation of the IFM for Ontario not for Newfoundland and Labrador and does not ask the Tribunal to decide whether the IFM for Newfoundland and Labrador or any other province is discriminatory.

[24] The use of Rule 8(4) in this manner is both unprecedented and inconsistent with the requirements of the CHRA and should be dismissed for the following three reasons:

1. An element of the test for joinder under Rule 8(4) is that the addition of the party is necessary for the Tribunal to adjudicate the existing complaint. The Respondent submits that the addition of other parties is not necessary to adjudicate the existing complaint. Being able to provide relevant evidence is an insufficient reason, in itself, to justify adding a party as necessary to assist the Tribunal in resolving the existing complaint. Moreover, having an interest in issues does not justify adding a party as necessary either. Otherwise, the adjudication of systemic discrimination complaints would be rendered impractical and unworkable, as all potentially interested parties would also have to be joined as parties. Besides, the evidence from Newfoundland and Labrador is not relevant to assist the Tribunal in deciding whether the IFM's implementation in Ontario is discriminatory.

2. The power to add parties to an existing complaint does not include adding new complaints that have not been referred to the Tribunal under section 49(1) of the CHRA. While the IFM is a national policy, the only complaint that is properly before the Tribunal concerns the alleged discriminatory implementation of the IFM for Ontario; it does not concern the implementation of the IFM in Newfoundland and Labrador.

3. Granting the motion will cause significant prejudice to the Respondent and to the public interest in the fair, efficient and orderly resolution of human rights complaints. In particular, the Respondent will be denied the pre-referral stage procedural protections provided by the CHRA, and the hearing of the existing complaint will be significantly delayed. By contrast, dismissing the motion will cause no prejudice to the Moving Parties. They will still be able to pursue their complaints through the ordinary statutory process that is applicable to all other human rights complaints. The need to follow mandatory statutory processes that apply to all complaints does not constitute prejudice.

[25] Further, the Respondent argues that the risk of multiplicity of proceedings and considerations of efficiency is not the test for joinder under Rule 8(4) rather it is about whether the addition of a party is necessary for the proper adjudication of a complaint. This is not a case of joining a party whose complaint has been referred to the Tribunal by the Commission. If the Moving Parties file their proposed complaint with the Commission and it is referred to the Tribunal then a motion to join it with the existing complaint under a single inquiry may then occur but the issues of that type of joinder are different than those raised by this motion. Moreover, in spite of the national aspect of the IFM, the issues in the existing complaint do not overlap to any significant degree with the proposed complaint of the Moving Parties as they are distinct cases and the Tribunal does not require the addition of the Moving Parties to adjudicate the existing complaint which is the only one that has been referred to it and that it is seized of.

[26] Finally, the Respondent argues that in the absence of the Commission referring the Moving Parties proposed complaint to the Tribunal under section 49(1) of the CHRA, the Tribunal has no authority to adjudicate the proposed complaint and the Moving Parties cannot use Rule 8(4) to bypass the Commission's gatekeeping function in respect of the proposed complaint. In support of its position, the Respondent invokes judicial interpretation of joinder under the Federal Courts Act, RSC 1985, c. F-7].

E. MOVING PARTIES' REPLY

[27] The Moving Parties, in reply, submit that adding them as parties to the existing complaint would not enlarge the scope of the inquiry as it is already of national scope as the IFM is a national policy. This is reflected in the Complainant's Fresh as amended SOP including the relief sought and the areas targeted as flaws of the policy that lead to discrimination wherever the policy is implemented, not just Ontario.

[28] [28] The Moving Parties further disagree with the Respondent that the way the IFM is implemented is unique in each province and that therefore theirs is a separate complaint from the existing complaint that needs to be filed with the Commission, as it pertains to Newfoundland and Labrador not to Ontario. The same flaws and principles at issue in the

existing complaint apply to the Moving Parties as they are common to the implementation of the IFM as a national policy.

[29] The Moving Parties reject the Respondent's argument that allowing the motion would open the floodgates for other parties to be joined to the inquiry and would make it an inquiry into a systemic case impractical and unworkable until all affected parties were added. No other party, however, has actually come forward. Further, it is unrealistic to expect that every human rights issue faced by First Nations vis-à-vis Canada's national policies is going to be taken up by all affected parties or that a national organization will take up every case involving national interests. Rather having a case like the existing complaint that can be joined when and if other parties are able is the proper process to provide for access to justice.

[30] The Moving Parties also reject the Respondent's reliance on the judicial interpretation of joinder under the *Federal Courts Act*, as this is not a proceeding under that legislation. This is a human rights proceeding which is different and the Tribunal is master of its own procedure, subject to the rules of fairness and natural justice.

[31] Finally, the Moving Parties argue that the Respondent would need to provide real evidence of serious prejudice to sustain its argument in that regard and it has not provided any such evidence.

III. ISSUE

[32] Should the Moving Parties be added as parties to Tribunal file T1810/4012?

IV. LEGAL FRAMEWORK

[33] Rule 8(4) of the Old Rules and sections 48.9(2)(b) and 49(1) of the CHRA are relevant to this motion and read as follows:

> Old Rules
>
> 8(4) Anyone who is not a party, and who wishes to be added to the inquiry as a party, may bring a motion under Rule 3 for an order to this effect.

> CHRA
> 48.9 (2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing
>
> (b) the addition of parties and interested persons to the proceedings;
>
> 49 (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

[34] While the Tribunal has authority to add additional parties to an existing complaint, it should only be done in exceptional circumstances and after careful consideration of the following factors:

> (i) Is the addition of the parties necessary to resolve the existing complaint?
>
> (ii) Was it reasonably foreseeable that the addition of the parties was necessary when the complaint was originally filed?
>
> (iii) Will the addition of the parties result in serious prejudice?
>
> *Coupal v. Canada (Border Services Agency)*, 2008 CHRT 24 (CanLII) at paras. 8-9 and 20 [*Coupal*].

[35] Dealing with two complaints together is very different from adding a party to a complaint. Simply put, the addition of parties means the act by the Tribunal of adding a new party to an existing complaint that has been referred to the Tribunal by the Commission for an inquiry. While dealing with complaints together means the act by the Tribunal of instituting a single inquiry into two or more complaints that have already been referred to the Tribunal by the Commission for an inquiry.

> *Karas v Canadian Blood Services and Health Canada,* 2020 CHRT 12 (CanLII) at para 13.

[36] The Commission has the statutory authority to receive complaints of discrimination under the CHRA and to investigate them and then to either dismiss or refer them to the Tribunal for an inquiry, while also offering voluntary mediation services to the parties to try to settle the case. In this respect the mandates of the Commission and the Tribunal are separate and distinct. The Commission acts as a screen or gatekeeper to make sure that

the facts of the case warrant an inquiry, after giving the parties the opportunity to advise them of their position with respect to the allegations and to investigate the facts fully. If referred to it, the Tribunal then takes over to undertake the inquiry of the complaint as referred to it, including case managing the case, offering voluntary mediation services to try to settle the case and holding a hearing, if necessary, to adjudicate the case based on the facts and the law. Member Gaudreault has recently described this process very well at paragraphs 10 to 18 of *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2 (CanLII) as follows:

> [10] The *Canadian Human Rights Act* (the "CHRA") is the legislation that governs complaints of discrimination within the legislative authority of Parliament (section 2 CHRA).
>
> [11] It is therefore the CHRA that establishes the mechanisms for dealing with discrimination complaints (*Canada (Human Rights Commission) v. Lemire et al.*, 2012 FC 1162 [*Lemire*]; *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (CanLII), at para 55 [*Warman*]; *Oleson v. Wagmatcook First Nation*, 2019 CHRT 35, at para 29 [*Oleson*]).
>
> [12] The Commission, which is a separate entity from the Tribunal, plays a key role in dealing with discrimination complaints. It is the Commission that receives complaints (subsection 40(1) CHRA). Without ignoring its other powers and important mandates, for purposes of this decision, it is sufficient to understand that the Commission has the power to investigate complaints that have been filed with it (subsection 43(1) CHRA).
>
> [13] As such, Parliament has not given the Tribunal the power to investigate complaints under the CHRA. Rather, the Tribunal has jurisdiction to institute an inquiry into complaints that have been referred to it by the Commission (subsections 44(3), 49(1) and 50(1) CHRA).
>
> [14] In other words, it is the referral of the complaint by the Commission, following its investigation, that creates the Tribunal's jurisdiction to institute an inquiry into the complaint. The Tribunal can act only when the complaint is referred to it (see *Lemire* and *Warman*, above; *Oleson* at para 35; *AA v. Canadian Armed Forces*, 2019 CHRT 33 at para 59 [*AA*]; *Connors v. Canadian Armed Forces*, 2019 CHRT 6 at para 28 [*Connors*]; *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT) [*Cook*]).
>
> [15] Conversely, the Commission does not have jurisdiction to institute inquiries into complaints. Nor does it have adjudicative authority. Its function is to screen complaints (*Desgranges v. Canada (Administrative Tribunals Support Service)*, 2020 FC 315 at para 29 [*Desgranges*]). As such, when it deems that

> an inquiry into a complaint is warranted having regard to all the circumstances, it **may refer** the complaint to the Chairperson of the Tribunal (subsections 44(3) and 49(1) CHRA). The Chairperson of the Tribunal will institute an inquiry by assigning a member to inquire into the complaint (subsection 49(1) CHRA; *Oleson* at para 32).
>
> [16] For this reason, the Commission's role is often described as that of an administrative gatekeeper for complaints under the CHRA.
>
> [17] When a complainant files a complaint with the Commission, they do so in a form acceptable to the Commission (section 40(1) CHRA). The complainant describes the events that they believe led to the alleged discriminatory practices. As the Tribunal understands it, the complaint is submitted on a form designated for this purpose (*AA* at para 56).
>
> [18] As noted above, once the investigation process is complete, the Commission may decide to refer the complaint to the Tribunal if the circumstances warrant (subsection 49(1) CHRA). It does so in the form of a letter to the Chairperson of the Tribunal (*Connors* at paras 42, 43).

V. DECISION

[37] For the reasons set out below I am dismissing this motion.

VI. ANALYSIS

[38] Section 49(1) of the CHRA, as well as the provisions referred to in paragraph 36 above, contemplate that complaints of discrimination are to be filed with the Commission as the statutory body authorized to receive, investigate, and process them in the manner described above, to properly screen them before dismissing them or referring them to the Tribunal for an inquiry.

[39] Rule 8(4) and section 48.9(2)(b) of the CHRA contemplate that the Tribunal can add additional parties to an existing complaint on the motion of anyone who is not a party such as the Moving Parties in this case.

[40] Only in exceptional cases, however, should the order of events described in paragraph 38 above be changed to allow the Tribunal to add parties to an existing complaint

who have not filed their proposed complaint with the Commission and gone through the screening process that is the mandate of the Commission.

[41] The separation of responsibilities between the Commission and the Tribunal under the CHRA is fundamental, both from an effective administrative standpoint as well as from a procedural fairness and natural justice standpoint. The Commission with its investigative apparatus and independence from the judiciary is best suited to perform the administrative function of the screening process described above, including undertaking full and proper investigations by professional investigators. To deprive some respondents of the protections afforded by this process by eliminating the opportunity to answer the allegations, during an investigation by the Commission before a referral takes place, would deprive them of procedural fairness and natural justice afforded to those respondents who are permitted to participate fully in the process at the Commission.

[42] In my view, this motion does not present such an exceptional case that would allow for a change in the order of events described in paragraph 38 above, to allow the Tribunal to negate and circumvent the Commission's fundamental role as described above, by adding to an existing complaint that has been referred to the Tribunal, an additional complainant who has not filed a complaint with the Commission. In this regard, it is notable that the Commission, who has been fully participating in the existing complaint, is not supporting the motion.

[43] Almost none of the cases cited by the parties involved the proposed addition to an existing complaint of an additional complainant. Rather, they almost all involved the proposed addition of additional respondents. So, while the test for adding parties may be the same, it is important to note that unlike complainants, respondents do not initially have to submit their case to the Commission to be investigated and put through the screening process for complaints described above. Hence, there is no issue in those cases of the Tribunal negating and circumventing the Commission’s fundamental role as described above, or of prejudicing parties by not first having a screening process by the Commission. In the one case cited that involved a motion to add an additional complainant without first filing a complaint cited in paragraph 34 above, former Chair Grant Sinclair in *Coupal, supra* dismissed the motion on the basis that it would be prejudicial to the

respondent by virtue of the loss to it of procedural protections that may be otherwise available at the pre-referral stage by the Commission. At paragraphs 8 and 9 and 20 and 21 he wrote as follows:

> [8] The Tribunal has jurisdiction under s. 48.9(2)(*b*) of the *Act* to add parties to existing proceedings. In the majority of cases, this jurisdiction has been exercised to add respondents rather than complainants.
>
> [9] It has been said that adding parties should be done with caution and only after careful consideration of a number of factors. These factors include: whether the addition of the party is necessary to resolve the complaint; whether it could not reasonably have been foreseen that the new party should have been added when the complaint was filed; and, whether the addition of a party will result in serious prejudice to the opposing party (See for example: *Brown v. National Capital Commission*, 2003 CHRT 43 ; *Wade v. Canada (Attorney General),* 2008 CHRT 9; and, *Groupe d'aide et d'information sur le harcèlement sexuel au travail v. Barbe,* 2003 CHRT 24 where the Tribunal granted a motion to add a complainant. See also : *Syndicat des employés d'exécution de Québec-Téléphone v. TELUS Communications (Québec) Inc.* 2003 CHRT 31 at para. 30; and, *Smith v. CNR* 2005 CHRT 23 at para. 52).
>
> [20] Once the complaint has been referred to the Tribunal, the addition of a party may result in a deprivation of the benefit of certain procedural protections that are provided at the pre-referral stage. These protections include the opportunity to persuade the Commission during its investigation process, that it should refuse to deal with the complaint because, for example, the complaint is without merit or it is based on acts or omissions that occurred more than one year before the receipt of the complaint (*Warman v. Lemire* 2006 CHRT 48 at paras. 4-7).
>
> [21] PSAC argues that there is no procedural unfairness to the Respondent in circumventing the Commission process given that the Respondent has known since 2001 that PSAC had concerns about the UFT as it was applied to aging and disabled workers. PSAC's position with respect to the complaints will therefore come as no surprise to the Respondent. This may be so, but this argument does not address the loss of procedural protections that may be otherwise available if PSAC is added as a complainant at this stage of the proceedings.

[44] While I agree that the second factor of the test outlined in paragraph 17 above for adding additional parties to an existing complaint is satisfied, I don't believe that the Moving Parties have satisfied the other two factors of the test.

[45] In my view, this case has always essentially been about the alleged discriminatory implementation of Canada's national programs and policies for funding education needs of the First Nations children living on-reserve in Ontario as compared to the funding Ontario provides for children living off-reserve. Initially, the complaint focused on special education needs. Over the many years that the complaint has been on going, the same parties that have always been on the case, spent a great deal of time attempting to settle the case through direct negotiation, as Canada developed new national programs and policies for First Nations education on reserve, including the IFM. In my opinion, despite the IFM being a national policy and despite the Complainant's current SOP including its requested remedies, the complaint remains, at its core, about the alleged discriminatory implementation of Canada's national policy in Ontario and not in Newfoundland and Labrador or any other province. As such, as per the first factor of the test, I do not feel that the Moving parties are necessary to be added as parties for me to properly and fairly adjudicate the existing complaint.

[46] I see the Moving Parties proposing what is essentially a new complaint about the implementation of the IFM in Newfoundland and Labrador that has not been screened by the Commission. The Moving Parties are free to file that complaint with the Commission and if referred by the Commission to the Tribunal for an inquiry, then move to have it joined with the existing complaint into one inquiry. However, I am not willing to exercise my discretion to add the Moving Parties to the existing complaint which, in my opinion, would effectively circumvent and negate the screening process of the proposed complaint by the Commission as provided for in the CHRA. As such, as per the third factor of the test, for the same reasons that former Chair Sinclair gave in *Coupal, supra* as quoted above, I feel that there would be serious prejudice to the Respondent by adding the Moving Parties to the existing complaint as parties, by virtue of the loss to it of procedural protections that may be otherwise available at the pre-referral stage by the Commission.

VII. ORDER

[47] For the foregoing reasons the motion of the Moving Parties is dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 27, 2021

Canadian Human Rights Tribunal

Parties of Record

Motion dealt with in writing without appearance of parties

Written representations by:

Benjamin Brookwell, for the Moving Party

Kent Elson, for the Complainant

Dan Luxat, for the Respondent