Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 23
Date: August 3, 2021
File No.: T2396/5519

Between:

Wayne Wallace (on behalf of Jaxon Wallace)

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Madawaska Maliseet First Nation

Respondent

Ruling

Member: Jennifer Khurana

BACKGROUND

[1] Wayne Wallace is a member of the Madawaska Maliseet First Nation (MMFN), the respondent. Mr. Wallace's husband is not. They are the parents of twin boys. Both Mr. Wallace and his husband created embryos from the same egg donor. One embryo from each of them was implanted into a surrogate, which resulted in the birth of their twin boys born in 2013.

[2] Mr. Wallace applied for membership to the MMFN on behalf of his two sons. According to the terms of the MMFN's Membership Code, new persons applying for membership are required to show that they are blood descendants of a current member. The MMFN granted membership to one son based on a DNA test linking him to Mr. Wallace but denied his twin brother Jaxon membership because he is not genetically linked to a member.

[3] Mr. Wallace filed this complaint on behalf of Jaxon. He alleges that by denying membership to his son, the MMFN discriminated against him in the provision of services based on genetic characteristics, family status, sex and/or race. While Mr. Wallace acknowledges that one of his sons is not genetically related to him, he argues that the DNA testing requirement is not the only means of proving paternal descendancy.

[4] The MMFN argues that the Tribunal does not have jurisdiction to hear this complaint because Mr. Wallace is challenging the validity of the Membership Code. It submits that the Membership Code, enacted as part of the MMFN's exercise of self-government and self-determination, is analogous to legislation. The MMFN maintains that its laws are entitled to the same deference and legal treatment as other legislation.

[5] According to the respondent, the complaint does not relate to the provision of "services customarily available to the general public" within the meaning of s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act"). It argues that the Tribunal, the Federal Court of Appeal and the Supreme Court of Canada have found that direct attacks on legislation are not a "service" under s. 5 of the *Act* and are therefore outside of the

Tribunal's jurisdiction. It takes the position that the Tribunal therefore has no jurisdiction to hear Mr. Wallace's complaint.

[6] According to the MMFN, because the matter is not properly before the CHRT, the appropriate venue for a challenge to legislation is a constitutional challenge or judicial review, which must be heard by the Federal Court. It argues that Mr. Wallace's preference for this venue cannot confer jurisdiction on the Tribunal if it has none.

The MMFN's motion to split the case into two parts

[7] The MMFN filed a motion asking the Tribunal to bifurcate or split the case. It wants the Tribunal to first decide whether it has jurisdiction to hear this complaint and only schedule the merits hearing if necessary.

[8] The respondent takes the position that the Tribunal should first decide two threshold or preliminary issues: 1) whether the Tribunal has jurisdiction to determine the validity of a First Nation's membership code, legally enacted pursuant to its right of self-government and/or s.10(1) of the *Indian Act*, R.S.C. 1985, c. I-5 and; 2) whether membership in the MMFN is a "service" under s. 5 of the *Act*. It argues that these questions are not complicated and can be most efficiently and economically determined in a preliminary hearing which could conclude this matter. The Commission boils the jurisdictional issues down to one question for the Tribunal to determine: is the complaint outside the scope of s. 5 of the *Act*, and therefore, outside the Tribunal's jurisdiction?

[9] Mr. Wallace and the Commission oppose MMFN's request. They submit it would be best to hold a single hearing to address all aspects of the case at once. Mr. Wallace and the Commission argue that answering the jurisdiction question will involve calling both expert and fact witnesses, some of whom may be recalled for the merits of the case. To determine the jurisdiction question, they submit that the Tribunal will have to address the relationship between the complaint, s. 5 of the *Act*, and collective rights of self-government. The Commission also submits that splitting the process will run the risk of delay and fragmentation if the Tribunal finds that it does have the jurisdiction to proceed.

[10] Mr. Wallace argues that splitting the process as proposed by the MMFN will impose a greater burden on the parties in terms of time, cost, and complexity because the legal and evidentiary issues are intertwined with the merits of the case.

DECISION

[11] The respondent's motion is dismissed. I do not find that it will be more efficient to bifurcate this process. The parties intend to present expert and fact evidence, which may end up being intertwined with the merits of the complaint.

ISSUES

[12] This ruling determines two issues which I have addressed below:

1. Does the Tribunal have the jurisdiction to order that a hearing proceed in a bifurcated manner?
2. If so, should it grant the MMFN's request to hold a preliminary hearing to determine the jurisdictional question before scheduling a hearing on the merits, if necessary?

REASONS AND ANALYSIS

1. Does the Tribunal have the jurisdiction to order that a hearing proceed in a bifurcated manner?

[13] Yes. The Tribunal can determine its own process in deciding issues raised by a human rights complaint. Tribunal processes must be fair. They must give all parties a full and ample opportunity to be heard and proceedings must be conducted as informally and expeditiously as possible (ss. 48.9(1) and 50(1) of the *Act* and Rule 1(1) of the Tribunal's Rules of Procedure ("Rules")).

[14] The parties do not dispute that the Tribunal can decide how the matter will proceed. In other cases, the Tribunal has split or bifurcated its process into phases, first deciding whether or not the complainant has proven that there was discrimination under the *Act* (the liability portion of the complaint) before determining what remedies might flow from the discrimination if it found there was discrimination. The Tribunal can also determine other

substantive issues, such as questions of jurisdiction, in a phased approach if it is fair and efficient to do so (see, for example, *Canada (Human Rights Commission v. Canada (Attorney General)*, 2012 FC 445 ("*First Nations Child and Family Caring Society*") at paras. 124-132).

2. If so, should it grant the MMFN's request to hold a preliminary hearing to determine the jurisdictional question before scheduling a hearing on the merits, if necessary?

[15] No. I do not find that hearing the case in the way proposed by the MMFN is the most appropriate or efficient manner of proceeding. There is much in dispute amongst the parties, even on the points the respondent contends are straightforward. Based on the parties' stated positions thus far, I do not find that the law and evidence are so easily severable that we could cleanly separate the hearing of the preliminary issues from the determination of the merits of the complaint, if necessary. I am not convinced that it would necessarily save us time to split the hearing in the manner requested by the MMFN given what is in dispute.

Evidence needed to address the jurisdiction issue

[16] Based on the positions of the parties taken thus far, I am not persuaded that the evidentiary foundation to determine the preliminary question of jurisdiction will not have any overlap with the merits of the hearing. It does not appear that these issues will be simple legal determinations.

[17] As the Commission submits, the Tribunal may be more likely to exercise its discretion to deal with a preliminary question first if the question can be dealt with based on agreed facts or pure law (see *First Nations Child and Family Caring Society* at paras. 124-132).

[18] While the MMFN argues that the issue does not require an extensive evidentiary foundation, the other parties do not accept this characterisation. There are very few, if any, agreed facts that have been identified and the parties do not agree that this jurisdiction question is one of pure law. For example, Mr. Wallace states that he does not accept or agree that his son is not a direct descendent of a member of the MMFN, which the membership law requires.

[19] The parties also do not agree on the scope and nature of the MMFN's right to self-government. According to the MMFN, its right of self-government, which includes passing its own membership laws, is obvious and does not require extensive evidence. It argues that a First Nation's right to self-government and self-determination are well-recognised and established in international and Canadian law jurisprudence.

[20] According to Mr. Wallace, the MMFN has presented a simplified notion of self-determination and self-governance that cannot be analysed in an evidentiary vacuum. Rather, he submits that the MMFN's self-determination and self-governance must be considered in the context of the rights of two-spirited Madawaska Maliseet persons. While a First Nation may have the right to enact its own membership code, Mr. Wallace argues that the MMFN is not entitled to apply that code in a way that is discriminatory under the *Act*. He also argues that Parliament intended to extend the protections of individual and collective rights to First Nations peoples when it enacted *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, s. 1.2 and repealed s. 67 of the *Act.* Mr. Wallace disagrees that membership is not a "service" within the meaning of s. 5 of the *Act*.

[21] Mr. Wallace submits that determining whether membership is a service is a mixed question of law and fact. Further, he suggests that the question of membership as a service is also connected to the alleged discrimination in this case and ought to be analysed in the full evidentiary context.

[22] The MMFN acknowledges that if Mr. Wallace does not agree on the scope of its right to self-determination or if he does not admit that the Membership Code is a law, it would have to lead expert evidence as well as evidence on the way the Membership Code was adopted and was subsequently amended. It would also call evidence on the facts and circumstances that led to the adoption of the Membership Code in effect since 1987 and reaffirmed in 2014, though it argues that this will not be complicated or lengthy.

[23] Based on the parties' submissions, I am not persuaded the evidentiary foundation will remain uncomplicated or that the issues will be simple. While I agree with the MMFN that the preliminary issues have the potential to dispose of the complaint, it appears the parties have much to dispute, both in evidence and in law, on these fundamental questions.

Expediency and efficiency

[24] In my view, the question then becomes one of expediency and efficiency.

[25] Mr. Wallace suggests that the time and evidence required to deal with the defences raised by the MMFN on the preliminary issue will dwarf the hearing on the merits. The bulk of witnesses will need to be called to determine this threshold issue in any case. He also notes that if the MMFN's position is rejected by the Tribunal, we will not save any time or resources since the parties would need to call many of the same witnesses again when the Tribunal considers the merits of his allegations of discrimination. It will be a more efficient use of time to hear all the evidence at once and to argue the points raised.

[26] The Commission argues that the questions of the relationship between the complaint and s. 5 of the *Act*, as well as the collective rights of self-government, are likely to be the primary focus of evidence and argument in this case. The additional preparation required to hear the other issues, namely whether denying membership based on a descendancy requirement results in adverse impacts or can be justified within the meaning of the *Act*, would not appear to be substantial.

[27] The Commission argues there could be intermingling of evidence and some overlap if the Tribunal were to decide in Mr. Wallace's favour. For example, the evidence about the benefits associated with membership could be relevant in determining whether the denial of membership resulted in an adverse impact, and in determining appropriate remedies in the event of a liability finding. Similarly, evidence about the MMFN's collective right to self-government introduced in support of its position on the jurisdictional question would also be relevant to the Tribunal's consideration of any justification of discrimination, and remedy.

[28] I agree with Mr. Wallace and the Commission. I am not persuaded by the MMFN's arguments on efficiency. While answering the jurisdictional question in the negative could dispose of the complaint, the parties dispute even whether, and how much evidence they may have to call to address this preliminary question. It does not appear to be a purely legal matter to determine at this early stage of the proceedings.

[29] The Tribunal would have to give the parties a full and ample opportunity to make their relevant cases, including presenting relevant evidence and making argument as they see fit. Based on the positions taken by the parties to date, it appears that to answer the jurisdictional question, the Tribunal will likely have to hear from expert and fact witnesses with respect to the questions of the scope and nature of the MMFN's right of self-governance, the manner in which the Membership Code came into existence, the duties of the officials who administer the Membership Code, the benefits associated with membership, the reasons why the complainant applied for membership and the interactions between Mr. Wallace and the respondent's officials surrounding his application for membership. If the Tribunal may hear from several witnesses to determine the threshold question, then it is not clear what we are saving in terms of time and resources, at least in any significant way.

The potential consequences of splitting the case

[30] Mr. Wallace also submits that bifurcating the process could prejudice his right to be heard and could avoid or put off dealing with the alleged discrimination. Hearing only the jurisdictional issues without addressing the discrimination itself would also deplete his time and resources as it would complicate the issues and increase hearing time and costs.

[31] The Commission argues that there are important consequences of splitting the case to consider in deciding how to proceed. First, if the Tribunal dismissed the complaint and found that it does not relate to the provision of services, the decision could be overturned following judicial review or appeal and sent back to the Tribunal in any case. But by hearing only the preliminary issue, in this scenario, the remaining evidence would not have been collected or preserved.

[32] The Commission submits that if the Tribunal were to split the process and determine at the end of the first phase that the complaint does relate to the provision of services, the parties would have to schedule a second hearing and call their evidence relating to the remaining issues. They may have to recall some or all of the same witnesses, prepare a second time, and incur travel costs if the matter were to be held in person. The MMFN may seek judicial review of the Tribunal's determination on the services question, which could

lead to other challenging outcomes, namely proceeding on the other issues at the same time as the application for judicial review, or staying the Tribunal hearing while awaiting the court's determination or even a potential appeal.

[33] I agree that it may be necessary to break up hearings into phases in some circumstances but am not persuaded on balance that the benefits will outweigh the potential challenges in terms of the hearing of the evidence, the timing and resources involved, and eventual consequences.

[34] I agree with Mr. Wallace and the Commission that one hearing will allow the Tribunal to consider the full context of the case and hear all the evidence including witness testimony. This could avoid causing disruption and imposing additional preparation costs on the parties. It would eliminate the possibility of the parties having to proceed before both the Tribunal and the federal court(s) if the Tribunal finds in favour of Mr. Wallace and MMFN seeks to have that finding judicially reviewed.

[35] We will proceed with one hearing. The parties should prepare accordingly.

Order

[36] The respondent's motion is dismissed.

[37] The Tribunal will convene a case management call with the parties to address next steps in this matter.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
August 3, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T23962/5519

Style of Cause: Wayne Wallace (on behalf of Jaxon Joselin Wallace) v. Madawaska Maliseet First Nation

Ruling of the Tribunal Dated: August 3, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Daniel Bertrand and Dock Currie, Student-at-law, for the Complainant

Brian Smith and Sasha Hart, for the Canadian Human Rights Commission

Timothy M. Hopkins, for the Respondent