Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 83
Date: June 4, 2024
File No.: T2662/3821

Between:

Wanita Mitchell

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Tallcree Tribal Government

Respondent

Ruling

Member: Athanasios Hadjis

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I. OVERVIEW

[1] The Canadian Human Rights Commission (the "Commission") has requested that the Canadian Human Rights Tribunal (the "Tribunal") order the Respondent, Tallcree Tribal Government (Tallcree), to disclose documents in its possession, as required by the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137, (the "Rules of Procedure"). The Commission also requests that the Tribunal order the Respondent to file its list of documents in the form required by the Rules of Procedure.

[2] The Complainant, Wanita (Lana) Mitchell, alleges in her complaint that she is a member of Tallcree First Nation with the right to vote in Tallcree elections. In 2018, she was denied the right to vote, even though she had voted in the past. Ms. Mitchell claims that the denial is linked to the fact that her mother, Maryann Moberly, who was a Tallcree First Nation member, lost her status under the *Indian Act*, R.S.C. 1985, c. I-5, because she had married a non-Indigenous person. After *An Act to Amend the Indian Act*, S.C. 1985, c. 27 ("Bill C-31") was adopted, eliminating this rule, Ms. Moberly regained her status. Ms. Mitchell alleges that she and her mother then became registered as Tallcree First Nation members.

[3] Ms. Mitchell contends that Tallcree's refusal to let her vote is a denial of a service customarily available to the public, based on her family status, sex, national/ethnic origin, and race. This, she argues, is a discriminatory practice under s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "CHRA").

[4] Tallcree argues that Ms. Mitchell was never a registered member and that, in any event, the determination of membership is not a service within the meaning of s. 5. Tallcree also argues that Ms. Mitchell was not on the list of eligible voters for Tallcree elections because she was not on the membership list under the Tallcree Membership Code (the "Membership Code"). Most significantly, it submits that the entire question of who is a Tallcree First Nation member is not subject to the CHRA. Tallcree bases this submission on *Treaty No. 8*, which was entered into in 1899 with the Crown and several Indigenous Nations inhabiting the territory covered by the treaty, the *Constitution Act, 1867*, the *Constitution Act, 1982*, the *Canadian Charter of Rights and Freedoms* (the "Charter"), and many other

constitutional instruments. Tallcree has filed a Notice of Constitutional Question in this case, which it has served on the federal, provincial, and territorial attorneys general.

II. DECISION

[5] I grant the Commission's requests in part.

III. ISSUES

[6] The issues addressed in analyzing the disclosure order request are as follows:

- Must I determine the jurisdictional question Tallcree has posed before any order for disclosure?
- If not, are the requested documents in Tallcree's possession or have they already been disclosed?
- If so, do they relate to a fact or issue that is raised in the complaint or to an order that is being sought by any of the parties?

[7] As a separate matter, I must determine whether Tallcree has filed its list of documents in accordance with the Rules of Procedure.

IV. ANALYSIS

A. Must I determine the jurisdictional issue before deciding the disclosure issue?

[8] Tallcree's principal argument in response to the Commission's disclosure order request is that the Tribunal lacks the jurisdiction to deal with the complaint since the determination of who are its members is beyond the scope of the CHRA. It submits that I should rule on the jurisdictional issue first and only address the disclosure order request if I decide not to summarily dismiss the complaint.

[9] In support of its jurisdictional argument, Tallcree points out that *Treaty No. 8* was signed by Chiefs and Headmen, including Kuis Kuis Kow Ca Poohoo, the Headman of the Tallcree, on behalf of their peoples as they determined them, not as the Crown determined. The *Constitution Act, 1982*, recognizes and affirms treaty and aboriginal rights in s. 35.

Recognition of treaty rights includes the recognition of the peoples who made the treaty and their ability to determine their citizenry.

[10] Tallcree submits that in reality Ms. Mitchell's complaint involves a constitutional question arising from *Treaty No. 8*, s. 25 of the Charter, and s. 35 of the *Constitution Act, 1982*. It is a question of law about the scope of the Tribunal's jurisdiction, which must be determined before disclosure questions are addressed.

[11] Tallcree notes that through the mechanism described in s. 10 of the *Indian Act*, it assumed control of its membership in 1987. From that moment on, Tallcree alone has determined its members, and the Government of Canada does not have any jurisdiction to make this determination. Membership is a matter beyond the legislative competence of Parliament and constitutes a treaty and aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. In its submissions, Tallcree highlights that s. 25 of the Charter provides that the guarantee of rights in the Charter "shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."

[12] The CHRA applies to matters "within the purview of the matters coming within the legislative authority of Parliament" (s. 2 of the CHRA). Tallcree submits that this legislative authority does not extend to passing laws about who its citizens are, which falls within Tallcree's jurisdiction, as protected by s. 25 of the Charter and s.35 of the *Constitution Act, 1982*. As such, Tallcree is arguing an infringement on their existing Indigenous and treaty rights and rights to self-government as protected by s. 35 of the *Constitution Act, 1982* and s. 25 of the Charter.

[13] Tallcree submits that the Federal Court is the proper venue for Ms. Mitchell's challenges regarding her membership and right to vote. According to Tallcree, Ms. Mitchell did in fact present such claims to the Federal Court in the past, but she chose to discontinue those proceedings.

[14] I note that Tallcree has already set out these constitutional and jurisdictional arguments in its Statement of Particulars (SOP). As I mentioned above, it submits that I

should determine the jurisdictional issue now, as a preliminary matter, before addressing the Commission's request for a disclosure order.

[15] There is no question that the Tribunal has the authority to rule on whether it has jurisdiction to inquire into a given complaint given its power to decide all questions of law or fact necessary to determine a matter (s. 50(2) of the CHRA).

[16] Furthermore, the Tribunal may, at a preliminary stage, decide issues that could result in the dismissal of the complaint without conducting a full hearing on the merits of the complaint. It does not always have to hold a full evidentiary hearing in relation to each and every issue raised by a complaint in order to decide substantive issues coming before it (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 [*FNCFCS*] at para. 119). The Tribunal has the power to identify an appropriate procedure to secure the just, fair, and expeditious determination of each complaint coming before it. The nature of that procedure may vary from case to case, depending on the type of issues involved (*FNCFCS* at para 128).

[17] The Court observed, in *FNCFCS* at para 141, that human rights cases are highly dependent on their individual facts and those facts are often hotly contested. As a result, many cases involve serious issues of credibility. The more contested the facts and the greater the issues of credibility, the less appropriate dealing with these issues as a preliminary matter will be. Such cases may well require a full hearing on their merits, including oral evidence in chief and cross-examinations held in the presence of a Tribunal member.

[18] This is not to say that there are not circumstances where the Tribunal may deal with a jurisdictional issue as a preliminary matter. This could include cases where there is no dispute as to the facts, or where the issue is a pure question of law (*FNCFCS* at para 143).

[19] The Federal Court in *FNCFCS* at paras 145 and following also noted that it may be appropriate for the Tribunal to decide a truly discrete or threshold question in advance of the full hearing on the merits of the complaint if the determination has the potential to narrow the issues, focus the hearing, or dispose of the case altogether. For instance, the Court referred to pay equity cases, which the Tribunal was seized with quite often at the time. Their

hearings could last for two years or more. In these circumstances, it would make sense to deal immediately with an issue that could dispose of the case before a full examination of the rest of the merits of the case. The Court pointed out that the Tribunal would need to consider the facts and issues raised by the complaint before it and would have to identify the procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow (s. 48.9(1) of the CHRA).

[20] The evidence to be adduced on the merits of the claim as brought by Ms. Mitchell does not appear anywhere near as lengthy as in the example of pay equity cases. According to the parties' SOPs, no more than six witnesses are expected to testify. Accordingly, I would anticipate that the hearing would not likely extend beyond a couple of weeks.

[21] Moreover, I note that a good portion of Tallcree's submissions and SOP recount the facts surrounding Ms. Mitchell's alleged actions or omissions regarding her membership, the legal recourses she exercised, and other surrounding facts. Ms. Mitchell and the Commission contest Tallcree's account and interpretation of these facts.

[22] Furthermore, due to unforeseen circumstances, this case has regrettably already remained inactive on the Tribunal's docket for a long time. Following the judicial appointment of the member who was originally managing the case, the Tribunal was unable to reassign it until recently. This unfortunate delay militates in favour of moving forward on the entire matter rather than devoting time and energy to the jurisdictional issue as a preliminary matter, which, if it does not result in the dismissal of the complaint, would mean that the hearing of the merits of the complaint has been further delayed.

[23] I also note that Tallcree did not allege that disclosing any of the requested documents would be an onerous task that would risk adding substantial delay to the efficiency of the inquiry. On the contrary, deferring the disclosure order so as to first deal with the jurisdictional issue has the potential to significantly delay the process.

[24] Lastly, the Federal Court in *FNCFCS* at paras 140 and 142 advised that the power to hear matters before a full hearing on the merits should be exercised cautiously, especially where the issues of fact and law are complex and intermingled. The Tribunal should not

decide issues raised by Tallcree on an incomplete record; a proper determination requires a full factual setting. The complexity of the jurisdictional questions raised by Tallcree renders the issue inappropriate for determination as a preliminary matter; in my view, a full hearing of the evidence is required.

[25] I therefore will not determine the jurisdiction issue raised by Tallcree as a preliminary matter. The question of jurisdiction will be addressed as part of the general inquiry into the complaint, along with other legal issues such as Tallcree's submission that membership is not a "service" within the meaning of s. 5 of the CHRA.

[26] I will now deal with the disclosure issue.

B. The principles regarding disclosure

[27] Parties are required to provide each other a list of documents in their possession that relate to a fact or issue that is raised in the complaint or to an order sought by any of the parties (Rules 18(1)(f), 19(1)(e), and 20(1)(e) of the Rules of Procedure). The list must indicate the documents in respect of which privilege is claimed and the basis for the privilege (Rules 18(2), 19(2), and 20(2)). Parties must provide each other copies of the listed documents *except* for documents for which privilege is claimed (Rule 23(1)).

[28] In *Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28 at paras 4-10, the Tribunal set out the following principles that have been developed around the disclosure process.

[29] The parties' duty to disclose is consistent with their right under s. 50(1) of the CHRA to have a full and ample opportunity to present their case. This requires, among other things, that all arguably relevant information in the possession or care of parties be disclosed to each party before the hearing of the matter. The disclosure of information allows each party to know the case it is up against and, therefore, adequately prepare for the hearing.

[30] The standard is not a particularly high threshold for the requesting party to meet. If there is a rational connection between a document and the facts, issues, or forms of relief identified by the parties in the matter, the information should be disclosed. However, the

disclosure request must not be speculative or amount to a “fishing expedition.” The documents requested must also be identified with reasonable particularity.

[31] The Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the Rules of Procedure are respected, to ensure the informal and expeditious conduct of the inquiry.

[32] The Tribunal may deny a disclosure request where the probative value of the evidence sought would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal is cautious when an order would subject a party to an onerous and far-reaching search for documents, especially if it would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute.

[33] Pre-hearing disclosure of arguably relevant information does not mean that it will be admitted in evidence at the hearing or that it will be afforded significant weight in the decision-making process.

[34] Moreover, given that a party’s obligation to disclose is limited to documents that are “in the party’s possession” under the Rules of Procedure, the Tribunal cannot order a party to generate or create new documents for disclosure.

[35] My analysis below begins with the documents that Tallcree states it has already disclosed or it does not possess, followed by the documents for which I grant a disclosure order.

C. Documents that Tallcree states it has already disclosed or does not possess

(i) All versions of the Tallcree Membership Code in existence since 1987

[36] Tallcree states that it has disclosed to the Commission the only membership code that it has. It was provided in the initial disclosure of documents.

(ii) All correspondence, notes, and documents related to Ms. Mitchell's registration under the *Indian Act*

[37] Tallcree states that it has already produced the only document in its possession related to Ms. Mitchell's registration under the *Indian Act*, consisting of a letter from Indian and Northern Affairs Canada dated February 25, 1986. Tallcree claims that it has no other document related to Ms. Mitchell's membership.

(iii) All correspondence, notes, and documents related to Ms. Mitchell's membership in Tallcree from 1985 to the present

[38] Tallcree says that the only documents in its possession are those received from "Indian Affairs," which it obtained and produced already.

(iv) All correspondence, notes, and documents related to Ms. Moberly's Tallcree First Nation membership

[39] Tallcree states that the letter from Indian and Northern Affairs Canada restoring Ms. Mitchell's mother, Ms. Moberly, to the Band List for Tallcree was already disclosed and that it has no other documents on this issue.

D. Documents that must be disclosed

[40] The Commission asked that the following four groups of documents be disclosed:

- Item 1: All Tallcree First Nation membership lists since 1987;
- Item 2: All correspondence, notes, and documents related to changes to the Tallcree First Nation membership list leading up to the 2018 election;
- Item 3: The 2013 Tallcree Election Code and all versions in existence since that time; and
- Item 4: All correspondence, notes, and documents related to Ms. Mitchell's eligibility to vote in Tallcree elections since 1987. This includes, but is not limited to, any list of eligible voters where Ms. Mitchell's name appears.

(i) Are the documents in Tallcree's possession?

[41] Tallcree has not denied being in possession of these documents.

(ii) Do the documents relate to a fact or issue raised by any of the parties?

[42] I find that all of these requested documents relate to facts or issues raised by Ms. Mitchell and the Commission for the following reasons.

(a) Item 1 (membership lists)

[43] The Commission states, in its SOP and response to the Respondent's SOP, that Tallcree assumed control over its membership list in 1987, when it created the Membership Code, pursuant to s. 10 of the *Indian Act*. The Membership Code provides that the names of persons who were on the "Band List" maintained by the former Department of Indian Affairs and Northern Development (the "Department") immediately prior to the Membership Code rules taking effect are entered onto Tallcree First Nation membership list (the "Membership List"). Tallcree contends that Ms. Mitchell's name was not entered on the Membership List.

[44] Ms. Mitchell maintains that her mother, Ms. Moberly, applied to the Department in 1985 and that it successfully added Ms. Moberly's and Ms. Mitchell's names to the Department's list. Ms. Mitchell claims therefore that her name should have been added to the Membership List at the time and remained there afterwards. Tallcree denies that any application was ever made to add Ms. Mitchell's name to the Membership List, and, consequently, it was never added.

[45] Given Ms. Mitchell's allegations that she was in fact a member, I find that Tallcree's Membership Lists since 1987 (Item 1) are relevant to the facts and issues of the complaint. The disclosure request does not constitute a fishing expedition, as Tallcree also contends.

(b) Items 2 (documents about Membership List changes), 3 (the Tallcree Election Code), and 4 (documents about Ms. Mitchell's voting eligibility)

[46] In 2013, Tallcree adopted the Tallcree First Nation Election Code (the "Election Code"), under which it conducts its elections. The Election Code sets out the eligibility of electors and the procedures under which elections are conducted. Ms. Mitchell alleges that she voted in all Tallcree elections until 2018. She states that, in 2018, her name was removed from the list of electors and that she was unable to vote. Ms. Mitchell claims that she and over 400 other people were removed from the list because they were not "born treaty," meaning that they acquired their membership after Bill C-31 was adopted.

[47] I find that Items 3 and 4 are arguably relevant to these allegations. The Election Code, in its original and any subsequent version, clearly relates to the issue of the right to vote, which Ms. Mitchell alleges was denied to her. Similarly, any correspondence, notes, and other documents regarding Ms. Mitchell's eligibility as a voter from the date when Tallcree took control of its Membership List in 1987 until the 2018 election at issue in this case are relevant.

[48] As for Item 2, the Commission alleges that Tallcree conducted a review of the Membership List prior to the 2018 election. Ms. Mitchell believes this review resulted in her removal from the Membership List, which led to her not being on the list of eligible electors. She claims discriminatory grounds were factors in this outcome. Therefore, any changes to the list are also arguably relevant.

[49] Accordingly, Tallcree must disclose Items 1, 2, 3, and 4.

E. Tallcree's lists of documents

[50] All parties are required to provide to each other lists of the relevant documents in their possession. The requirement for respondents is set out in Rule 20(1)(e) of the Rules of Procedure, which states that a respondent must serve on the other parties and file with the Tribunal a list of the documents in its possession that relate to a fact or issue raised in

the complaint or to an order sought by any of the parties. This list must indicate the documents in respect of which privilege is claimed and the basis for the privilege.

[51] In other words, a respondent must prepare a list describing *every* relevant document in its possession and if it believes that any of those documents are subject to a privilege, the respondent must identify those documents (for instance, with a mark or in a separate column) and state what sort of privilege is being claimed for those documents. The list must describe each document with reasonable particularity to enable the other parties to understand what it consists of.

[52] The Commission submits that Tallcree has failed to comply with this rule with respect to both the non-privileged and privileged lists of documents.

(i) Non-privileged list of documents

[53] The Commission filed with its motion copies of correspondence between its and Tallcree's counsel, as well as the Tribunal's summary letters of several Case Management Conference Calls (CMCC) that dealt with disclosure issues. These exchanges reveal that Tallcree was emailing documents in a somewhat piecemeal fashion to the other parties, sometimes in response to requests for the disclosure of specific documents. Eventually, Tallcree provided a document entitled "Updated List of Documents and Privileged Documents," in several iterations, the last of which is dated August 5, 2022 (the "Updated List").

[54] The Updated List contains an initial listing of five documents or categories of documents (e.g., the Election Code of March 28, 2013, the Membership Code of 1987, and Auditors Reports – 2002 to 2009). There are two sub-headings afterwards. The first is "Documents from legal decisions and pleadings" (the "Legal Decisions List"), and the second is "Litigation Privilege and Solicitor-Client Privilege" (the "Privileged List").

[55] The Legal Decisions List consists almost entirely of legal citations for decisions of the Federal Court, the Federal Court of Appeal, the Alberta Queen's Bench, and an arbitrator. An affidavit filed in one of the cases is also mentioned, as well as the Recorded Entries for one of the Federal Court cases, presumably from the Federal Court's website, listing all

entries in the Court's record for that case. The final listed document is a form that was filed with the Supreme Court of Canada.

[56] The Commission contends that this is an insufficient list of documents since basically only the decisions are listed, not the underlying documents to those cases. The Commission submits that Tallcree is only producing documents that it perceives as being of evidentiary value rather than of arguable relevance to any of the issues in this case, which is the standard for documentary disclosure under the Rules of Procedure.

[57] Tallcree counters that the relevance of the cited decisions, which are public documents, is to demonstrate the ways Ms. Mitchell and others have "orchestrated a campaign to improperly challenge Tallcree Membership without applying for Membership."

[58] Presumably, those court and arbitrator decisions speak for themselves with respect to this issue that Tallcree believes is relevant to the complaint. The Commission seems to be arguing that all the procedural documents filed in those cases also become relevant and should be listed and disclosed.

[59] With the information I have before me, I am not persuaded by this argument. The claimed relevance of those cases' decisions is only tangential to the complaint. I fail to see how the proceedings that may have been filed in those other cases, if that is what the Commission is seeking disclosure of, are arguably relevant to the complaint before me. The request is quite far-reaching and would amount to a fishing expedition. This is not to say that my finding is definitive on this point. Facts or information may emerge through the course of the inquiry process that may reveal the arguable relevance of any underlying documents to those cases. But I am not prepared at this time to order that they be disclosed.

(ii) Privileged list of documents

[60] The Privileged List is not really a list. It is a three-line paragraph, which simply says "Solicitor-client and litigation privilege files" before repeating the legal citations for several of the court cases mentioned in the Legal Decisions List. The second sentence of the paragraph then states, "There is one decision outstanding, one in QB 1803-05262 not yet scheduled to be heard."

[61] As mentioned, this is not a list. No specific document is described, nor is the type of privilege being claimed for each document set out.

[62] In its response to the Commission's motion, Tallcree refers to jurisprudence that underscores the importance of solicitor-client privilege and the principle that protected documents are not required to be disclosed by general provisions requiring production of documents.

[63] However, these notions have no bearing on the requirement in Rule 20(2). The rule does not compel respondents to disclose documents protected by a privilege; they are only required to describe the arguably relevant document and the privilege that is being invoked. The existence of a privilege does not relieve a party from the obligation to include it in their list of arguably relevant documents.

[64] I therefore find that Tallcree has not provided a list of documents over which privilege is claimed in accordance with the Rule 20(2) of the Rules of Procedure.

V. ORDER

[65] I grant the Commission's disclosure requests in part. I order Tallcree to disclose:

1. All Tallcree First Nation Membership Lists since 1987;
2. All correspondence, notes, and documents related to changes to the Tallcree First Nation Membership List leading up to the 2018 election;
3. The 2013 Tallcree Election Code and all versions in existence since that time;
4. All correspondence, notes, and documents related to Ms. Mitchell's eligibility to vote in Tallcree elections since 1987. This includes, but is not limited to, any list of eligible voters where Ms. Mitchell's name appears.

[66] I order Tallcree to provide a list describing with reasonable particularity the documents over which privilege is claimed and the basis for the privilege being claimed, in accordance with Rule 20(2) of the Rules of Procedure.

[67] The disclosure of documents and the list of privileged documents must be provided within 30 days after this order is communicated to Tallcree.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
June 4, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2662/3821

Style of Cause: Wanita Mitchell v. Tallcree Tribal Government

Ruling of the Tribunal Dated: June 4, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Wanita Mitchell, for the Complainant

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