

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 106

Date: September 25, 2024

File Nos.: HR-DP-2818-22, HR-DP-2819-22 & HR-DP-2820-22

Between:

Cheryl Maloney

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

**Mi'kmaq Nova Scotia Tripartite Forum, Assembly of First Nations & Crown-
Indigenous Relations and Northern Affairs Canada**

Respondents

Ruling

Member: Athanasios Hadjis

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I. Introduction

[1] The Complainant, Cheryl Maloney, filed human rights complaints against three respondents, the Assembly of First Nations (AFN), the Mi'kmaq-Nova Scotia-Canada Tripartite Forum (the "Forum"), and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). The Canadian Human Rights Commission (the "Commission") referred the complaints to the Tribunal for inquiry.

[2] The AFN has made a preliminary motion to dismiss the complaint against it. The parties are still not due to file their Statements of Particulars (SOP) under Rules 18 to 20 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 ("Rules of Procedure").

[3] Ms. Maloney alleges in all three complaints that the Forum's Executive Chair, Morley Googoo, harassed her based on several prohibited grounds of discrimination while she served on one of the Forum's committees as the representative of the Nova Scotia Native Women's Association (NSNWA). Ms. Maloney did not name Mr. Googoo as an individual respondent in any of the complaints. At the time, Mr. Googoo was also a member of the AFN's Board of Directors (the "AFN Board"), sitting as the Regional Chief for the Nova Scotia and Newfoundland region.

[4] The AFN submits that it was never a member of the Forum and that it had nothing to do with Mr. Googoo's involvement in the Forum. It maintains that it can therefore not be held liable for Mr. Googoo's conduct and that it should not have been named as a respondent.

[5] Ms. Maloney argues that to have the complaint summarily dismissed, the AFN must show that it is plain and obvious that the complaint against it cannot succeed. Ms. Maloney maintains that the AFN has failed to do so and that an inquiry into the full circumstances and context of the complaints is required before the Tribunal can rule on the question.

[6] The AFN, Ms. Maloney, and the Commission filed submissions on the motion. CIRNAC did not file any, which I understand to mean that it takes no position on it.

II. Decision

[7] The AFN's motion to summarily dismiss the complaint is denied.

[8] I find that it is not plain and obvious that Ms. Maloney's complaint against the AFN has no reasonable prospect of success. The evidence adduced by the parties in support of their submissions leaves open the possibility that the AFN could be found vicariously liable for Mr. Googoo's acts, especially considering that at this stage of the hearing process, the parties have yet to file their SOPs or exchange their disclosure material.

[9] Two months after the oral hearing on the motion was held, Ms. Maloney asked to reopen the hearing to introduce new evidence. Given my decision denying the AFN's motion, Ms. Maloney's request is also denied as moot.

III. Issue

[10] Is it plain and obvious that Ms. Maloney has no reasonable prospect of successfully proving that Mr. Googoo committed the alleged discriminatory practice as an officer, a director, an employee or an agent of the AFN acting in the course of his employment?

IV. Analysis

A. The test for summary dismissal

[11] There is consensus among the parties that the Tribunal is not obliged to hold a full hearing on the merits regarding every complaint that the Commission refers to it. As the Federal Court noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras 138–140 [*Caring Society*], the Tribunal may dismiss a case in advance of a full hearing, but it should exercise this authority cautiously and “only in the clearest of cases.”

[12] The parties appear to disagree, however, on what must be established to summarily dismiss a complaint. Ms. Maloney contends that for a complaint to be summarily dismissed, the Tribunal would have to conclude that it is plain and obvious that the complaint would fail

if it went to a hearing. She makes an analogy to tests applied for motions to strike in civil proceedings (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para 15).

[13] The AFN, relying on authorities, including *Caring Society*, at paras 137, 145–146, and *Leonard v. Canadian American Transportation Inc.*, 2022 CHRT 20, at paras 110 and 131, submits that the Tribunal may dismiss a complaint on a summary basis where:

- i. the complaint has no reasonable prospect of success,
- ii. where the respondent is “clearly and obviously not the right party,”
- iii. where the dismissal of the complaint has the potential to narrow the issues for inquiry,
- iv. where summary dismissal is the most just, informal and expeditious means of resolving the issue,
- v. where the complaint amounts to an abuse of process, or
- vi. where fairness dictates.

[14] I find that some of these items are not really tests. For instance, items ii and iii are really more of a policy justification for why in certain circumstances it makes sense for a Tribunal to have the authority to dismiss cases summarily, as is evident from a closer reading of *Caring Society* at para 145.

[15] In any event, the AFN’s submissions basically centred on the first criterion. I will nonetheless address some of the other items later in this ruling.

[16] I note that in *Dorey v. Employment and Social Development Canada*, 2023 CHRT 23 at para 79, the Tribunal based its analysis on what amounts to a convergence of the first criterion in the AFN’s list and the test proposed by Ms. Maloney. The Tribunal held that a complaint must be dismissed where it was “plain and obvious” the complaint’s allegations had “no reasonable prospect of success.” I agree with this approach.

[17] In addressing this question, I do not need to only look at the allegations in the complaint to assess whether it clearly and obviously has no reasonable prospect of success. I can also consider additional evidence presented by the parties with their submissions (*Caring Society* at para 149). Accordingly, at the Case Management Conference Call convened to determine how the AFN motion would be dealt with, there was consensus between the parties that they could file affidavits in support of their submissions and that the affiants could be cross-examined if a party so requested. Only the AFN ultimately filed an

affidavit, which was sworn by the AFN's Acting Chief Executive Officer, Amber Potts. None of the other parties asked to cross-examine her.

[18] Furthermore, the parties filed hundreds of pages of documents for my consideration regarding an earlier motion from the Commission about which I issued a ruling (*Maloney v. Mi'kmaq Nova Scotia Tripartite Forum*, 2023 CHRT 41 [*Maloney No. 1*]). The AFN and Ms. Maloney produced hundreds of additional pages of documents with their submissions on this motion as well. All these documents form part of the Tribunal's official record and, as I did for *Maloney No. 1*, I rely on all the filed documents and treat them as authoritative for the purposes of this motion, unless a party made any specific challenge.

B. What is the legal basis upon which the AFN could be held liable for Mr. Googoo's actions?

[19] Ms. Maloney alleges in her complaint that Mr. Googoo harassed her. Although there is no allegation that the AFN itself directly harassed her, the AFN could still be held vicariously liable for Mr. Googoo's actions if the criteria set out in s. 65(1) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the "Act") are met.

[20] Section 65(1) states that a person, association, or organization is deemed to have committed the acts of *its officers, directors, employees, or agents made in the course of their employment*:

Acts of employees, etc.

65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

Exculpation

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed

Présomption

65 (1) Sous réserve du paragraphe (2), les actes ou omissions commis par un employé, un mandataire, un administrateur ou un dirigeant dans le cadre de son emploi sont réputés, pour l'application de la présente loi, avoir été commis par la personne, l'organisme ou l'association qui l'emploie.

Réserve

(2) La personne, l'organisme ou l'association visé au paragraphe (1) peut se soustraire à son application

by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

s'il établit que l'acte ou l'omission a eu lieu sans son consentement, qu'il avait pris toutes les mesures nécessaires pour l'empêcher et que, par la suite, il a tenté d'en atténuer ou d'en annuler les effets.

[21] If a complainant proves these facts, then a respondent may still be able to exculpate itself from liability if it proves that it did not consent to the commission of the discriminatory act and that it exercised all due diligence to prevent it from being committed and, subsequently, to mitigate or avoid its effect (s. 65(2) of the Act).

[22] Thus, for the motion to succeed, the AFN must demonstrate that it is plain and obvious that Ms. Maloney has no reasonable prospect of proving that Mr. Googoo was an officer, director, employee, or agent of the AFN who harassed her within the meaning of the Act in the course of his employment with the AFN.

C. What is the Forum and what were the roles of Ms. Maloney and Mr. Googoo within it?

[23] As I explained in my ruling in *Maloney No. 1*, the Forum is not a corporation or agency like those that are often named as respondents in human rights complaints.

[24] The Forum was established in 1997 as a “partnership between the Nova Scotia Mi’kmaq, the Province of Nova Scotia and the Government of Canada, to strengthen relationships and to resolve issues of mutual concern affecting Mi’kmaw communities.”

[25] The Forum was formed through a Memorandum of Understanding (MOU) that was signed on July 2, 1997. The parties to the MOU are Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of Nova Scotia, and the thirteen Mi’kmaq Saqmaq (or the Mi’kmaq of Nova Scotia). The AFN is not a signatory.

[26] The MOU states that the Canadian and Nova Scotian governments agree to share the costs associated with the participation of representatives of the Mi’kmaq of Nova Scotia.

[27] The parties to the MOU adopted the Terms of Reference for the Forum as contemplated in the MOU, which established the Forum's "organizational structure". This structure consists of the Executive Committee, the Officials Committee, and the Working Committees. A Steering Committee was later created as well.

[28] The Executive Committee mandates the Forum's agenda, issues, parameters, and direction. It has the final decision-making authority for the Forum and must approve all decisions reached by any other committee. The Executive Committee is comprised of the representatives of the Mi'kmaq of Nova Scotia (i.e., the Kji Saqmaw (Grand Chief) of the Mi'kmaq Grand Council and the 13 Mi'kmaq Chiefs of Nova Scotia), the Federal Minister of Indian Affairs and Northern Development or their delegate, and the Minister responsible for Aboriginal Affairs of Nova Scotia or another authorized minister (their titles when the MOU was signed).

[29] The Officials Committee consists of representatives from several Mi'kmaq organizations including the NSNWA. The Officials Committee coordinates, directs, and assigns activities based on decisions made by the Executive Committee regarding the Forum's agenda, issues, parameters, and direction.

[30] The Terms of Reference stipulate that the Executive Committee will appoint an independent Chair (the "Executive Chair") to host and provide organizational requirements to the Executive and Officials Committees. The Terms of Reference do not specify any selection criteria for the Executive Chair position. In 2011, the Executive Committee appointed Mr. Googoo to be the Forum's Executive Chair.

[31] In her complaints, Ms. Maloney alleges that, sometime before 2009, she competed and won a paid position with the NSNWA as its liaison to the Forum (i.e., the NSNWA's representative on the Officials Committee). Around 2009, she was elected president of the NSNWA. She held that political position while continuing to work for the NSNWA as its Forum liaison.

[32] It is in her capacity as Forum liaison that Ms. Maloney dealt with Mr. Googoo.

[33] According to Ms. Maloney's complaints, concerns about Mr. Googoo's conduct began to emerge around May or June 2017. She brought her concerns to various officials and her lawyer sent a letter detailing them. In February 2018, the Forum's Executive Committee ordered an independent investigation into the matter. The investigation report found that Mr. Googoo had engaged in bullying, harassment, and gender discrimination.

[34] CBC News reported on the investigation report on July 19, 2019. Some time afterwards, Mr. Googoo resigned from his position as the Forum's Executive Chair.

[35] On October 30, 2019, Ms. Maloney filed three human rights complaints with the Commission. The three complaints are worded identically, but each complaint names a different one of the three respondents. Notably, Mr. Googoo is not named as a respondent in any of the complaints.

D. What does Ms. Maloney specifically allege against the AFN?

[36] As with the other two complaints, the allegations in the complaint against the AFN are three pages long. In the first two pages, Ms. Maloney recounts the incidents of harassment regarding Mr. Googoo, the reports she made to some Chiefs about his conduct, their failure to address her concerns, and Mr. Googoo's reaction. She explains that as a result of these incidents, she had to take medical stress leave. She also refers to the investigation and its report that found Mr. Googoo had discriminated against her and the NSNWA as a whole. Statements attributed to him were found to amount to bullying and harassment.

[37] On the last page of the complaints, Ms. Maloney describes the negative effect of the harassment on her and the steps she took to resolve the situation. She had to step down as NSNWA president and leave her employment with the Forum, which she considers a constructive dismissal. She stopped attending any Mi'kmaq events. She felt stigmatized and feared for her well-being. She ceased all contact with the media. Having become unemployed, she suffered financial and emotional hardships. She had difficulty finding legal counsel to help her.

[38] The AFN is only mentioned in the complaints' third paragraph of the first page, where its name is referred to twice. The paragraph reads as follows:

Finally, after obtaining a lawyer, and sending an official letter along with repeated calls for a response in February of 2018 an independent investigation was ordered by the Executive committee. The investigation was completed in September 18, 2018 at approximately thirty pages. I received a three-page summary in November of 2018 with the email message from investigator that I should be hearing soon from officials on next steps. Since that date there has been no response and silence up **until a CBC report on July 18, 2019 outlining the report findings and discussing a motion by the NSNWA made in December 2018 calling for the resignation of Morley Googoo from his position as AFN vice chief. His position with the AFN was the nexus for his appointment as the forum Executive Chair.** That motion was not carried out and was reported on in the CBC report. The following are some dates of major developments:

(emphasis added)

[39] Of the two AFN references in the paragraph, the most relevant to the question of the AFN's involvement in this case is the second one: that Mr. Googoo's position with the AFN was the nexus for his appointment as Forum Executive Chair.

[40] As mentioned earlier, an organization can be vicariously liable under s. 65(1) of the Act for the acts of its directors, officers, agents, or employees committed in the course of their employment. Mr. Googoo's alleged conduct occurred while performing the functions of Forum Executive Chair. Was this conduct made in the course of his "employment" with the AFN?

E. What is the AFN and what was Mr. Googoo's position within it?

[41] The AFN provided a copy of its constituting document, the Charter of the Assembly of First Nations (the "AFN Charter"). According to Ms. Potts' affidavit, the AFN is incorporated as a not-for-profit corporation, pursuant to the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. It serves as a national political forum for First Nations in Canada.

[42] All First Nations in Canada have the right to be members of the AFN (Art. 4 of the AFN Charter). At least once a year, the Chiefs of all member First Nations gather to examine

and vote on issues of interest to their constituents. Together, these representatives are referred to as the “First Nations-in-Assembly.” They provide direction to the AFN and define its mandate by voting on key issues. In this manner, according to Ms. Potts, they perform a function akin to Members of Parliament.

[43] In the execution of this mandate, First Nations from each region across Canada must elect a chosen representative (a “Regional Chief”) to act as their emissary. The Regional Chiefs are elected by the Chiefs in their regions, generally delineated along provincial and territorial lines. One of those listed regions is Nova Scotia and Newfoundland (Art. 17(3) of the AFN Charter). The AFN Regional Chiefs are elected for three-year terms. The Chiefs of Nova Scotia and Newfoundland region first elected Mr. Googoo as their Regional Chief in 2011. The term of office of an AFN Regional Chief may be terminated if the Chiefs of that region so decide at a meeting called for that purpose (Art. 17(4) of the AFN Charter).

[44] The Regional Chiefs serve on the AFN Board, together with the National Chief who is elected by the First Nations-in-Assembly. The AFN Board is also sometimes referred to as the AFN’s Executive Committee (the AFN’s By-Law No. 1). The Chairperson of the Knowledge Keepers’ Council is also a member of the AFN Board, in an advisory capacity (Art. 17-19 of the AFN Charter).

[45] The AFN Board is responsible for implementing the directions of the First Nations-in-Assembly. Each Regional Chief—or director—is given responsibility for a discrete portfolio (e.g., education, health, etc.). All are accountable to the First Nations-in-Assembly and are subject to public disclosure requirements. In this manner, according to Ms. Potts, Regional Chiefs perform a function akin to that of a Cabinet Minister.

[46] The AFN submits that, as an institution, it takes its direction from the Regional Chiefs. The Regional Chiefs do not derive their authority from the AFN, but rather from the Chiefs of their region who elect them. The AFN retains only a small measure of discretion with respect to Regional Chiefs. They remain free to engage in other activities, outside and unrelated to the AFN, provided that, in doing so, they do not engage in conduct detrimental to the organization.

[47] The AFN Board may take steps to suspend or expel a Regional Chief who has violated the AFN Charter, the AFN's By-laws, or any policies, or who has carried out conduct detrimental to the AFN, or for any other reasonable ground (section 16 of the AFN By-Law No. 1).

[48] The AFN submits that it is on this basis that the AFN Board voted to suspend Mr. Googoo, after learning of the Complainant's allegations in July 2019 from the CBC News report. The AFN began conducting its own investigation. However, before it was completed, on October 11, 2019, the Mi'kmaq Chiefs of Nova Scotia and Newfoundland held a special meeting at which they decided to remove Mr. Googoo as their Regional Chief as contemplated in Article 17(4) of the AFN Charter. He therefore automatically ceased sitting on the AFN Board.

[49] The AFN points out that the Forum's Terms of Reference do not require the Regional Chief for Nova Scotia and Newfoundland to be appointed Executive Chair of the Forum.

F. What is the basis for Ms. Maloney's claim, and could the s. 65(1) criteria be satisfied?

[50] It is evident from the Forum's and the AFN's constitutive documents that the AFN as an organization did not select Mr. Googoo to serve as Executive Chair of the Forum. The Forum's Executive Committee appointed him as an independent Chair, in accordance with the Forum's Terms of Reference.

[51] With that understanding, what is the basis for Ms. Maloney's claim in her complaints that the AFN should be held vicariously liable for Mr. Googoo's alleged discriminatory practices while serving as Forum Executive Chair?

[52] As cited earlier, her complaint alleges first that her own employer, the NSNWA, adopted a motion calling for Mr. Googoo to resign from the AFN Board. Ms. Potts states in her affidavit that when the AFN heard of Mr. Googoo's conduct from the CBC News report of July 19, 2019, the AFN Board acted by suspending Mr. Googoo from the AFN Board.

[53] Ms. Potts states that it was important that AFN Board members uphold and exemplify core values espoused by the AFN, which include refraining from bullying or harassing. So, steps were taken to mitigate or prevent further harm. The AFN launched its own external investigation into the allegations made against Mr. Googoo. However, before the investigation could be completed, the Chiefs of Nova Scotia and Newfoundland voted to remove Mr. Googoo from the position of Regional Chief. This meant that he automatically ceased being a member of the AFN Board.

[54] I agree with the AFN that the mere allegation that NSNWA called on the AFN to remove Mr. Googoo from the AFN Board would not establish that the criteria of s. 65(1) of the Act are met (i.e., that Mr. Googoo's acts while serving as Forum Executive Chair were committed as an officer, director, employee, or agent of the AFN in the course of his "employment" with the AFN).

[55] What about Ms. Maloney's second allegation? She states in the complaint that Mr. Googoo's position with the AFN "was the nexus for his appointment as the Forum Executive Chair."

[56] This statement alone would not appear at first view to satisfy the criteria in s. 65(1) either. The term "nexus" appears to imply that but for his position as Regional Chief, he would not have held the role of Forum Executive Chair. According to the Forum's Terms of Reference, however, the selection of the Forum Executive Chair is made by the Forum Executive Committee, which is comprised of the 13 Mi'kmaq Chiefs along with the representatives of the Canadian and Nova Scotia governments. There are no selection criteria for the Executive Chair position mentioned in the Terms of Reference, nor is there any mention of the AFN having a role in that decision. I also note that it is the Chiefs of Nova Scotia and Newfoundland who select their Regional Chief.

[57] Even if it were true that the Forum's Executive Committee elected Mr. Googoo to be Executive Chair because of his status as Regional Chief, how would that serve to establish the requirements of s. 65(1) of the Act, namely that Mr. Googoo is an officer or director of the AFN and that, as Forum Executive Chair, he was acting in the course of his "employment" with the AFN?

[58] I am satisfied that as Regional Chief and member of the AFN Board, Mr. Googoo could be considered a director or officer of AFN, within the meaning of s. 65(1) of the Act.

[59] As for the second element in s. 65(1), the complaint does not explicitly state that Mr. Googoo was acting in the course of his employment with the AFN while working as Forum Executive Chair. According to Ms. Potts' affidavit, the AFN has no financial record of any claims or payments having been made to Mr. Googoo relating to his work at the Forum. According to the Terms of Reference, the Forum's activities are funded on a shared basis by the governments of Canada and Nova Scotia. There is no mention of the AFN in the MOU and the Terms of Reference.

[60] Thus, the two allegations in the complaint, read literally, would appear to be insufficient to establish that the AFN could be vicariously liable under s. 65(1) of the Act for any discriminatory practices committed by Mr. Googoo in the course of his employment as Forum Executive Chair.

[61] However, as I mentioned earlier, this motion's record is not comprised solely of the two allegations in the complaint. Additional evidence has been put before me, which touches upon the nexus allegation.

G. Additional material that leaves open the possibility for the AFN's liability under s. 65(1) of the Act

[62] The additional material filed by the parties in support of their positions on the AFN's motion leads me to conclude that there are several indicators of a possible linkage between Mr. Googoo's role as AFN Regional Chair and his activities at the Forum. These indicators prevent me from concluding that the clearest of cases has been made out that it is plain and obvious the complaint against the AFN would have no reasonable prospect of success.

[63] I explained earlier that, pursuant to s. 65(1) of the Act, the complaint against the AFN hinges on whether Mr. Googoo was an officer, director, employee, or agent of the AFN, acting in the course of his employment with the AFN. Mr. Googoo sat on the AFN Board and, as I just indicated, his role was more of a director or officer than a typical "employee." But he must have been remunerated for his work with the AFN since the AFN stated in

correspondence between its counsel and Ms. Maloney dated September 23, 2019, that it had suspended Mr. Googoo with pay pending the AFN's investigation into the harassment allegations.

[64] As an AFN officer or director, in Mr. Googoo's position, what would be the scope of his AFN "employment" in the context of s. 65(1)? Should this term be interpreted restrictively or broadly? I note that the Supreme Court of Canada has said that quasi-constitutional human rights legislation "attracts a generous interpretation" (*McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 17).

[65] Ms. Maloney has pointed to several indicators in the additional material before me that leave open the reasonable possibility that while performing activities at the Forum, Mr. Googoo was acting in the course of what could generously be interpreted as "employment" with the AFN. I set out those indicators in the following paragraphs.

(i) The AFN Regional Chief has been the Forum's Executive Chair for years

[66] Ms. Maloney submits that Mr. Googoo became the Forum's Executive Chair in fulfilment of his role as Regional Chief, as evidenced by the fact that he began holding both positions in the same year, 2011. The Forum's annual report for 2011–12 included a "Message from the Nova Scotia Mi'kmaq" highlighting Mr. Googoo's new AFN role by "welcome[ing] new Assembly of First Nations Regional Chief Morley Googoo as Executive Chair." In Mr. Googoo's "Greeting from the Executive Chair" message in the same annual report, he signed at the end as "Tripartite Forum Executive Chair" and "Assembly of First Nations Regional Chief Nova Scotia and Newfoundland."

[67] Ms. Maloney points out as well that the previous Regional Chief for Nova Scotia and Newfoundland (who need only be referred to here as AB) was also appointed Executive Chair of the Forum, from 2004 until 2011. In the Forum's annual report for 2010–11, AB signed off his message as "Executive Chair, AFN Regional Chief," and Chief Executive Officer of his First Nation.

[68] However, the person who preceded AB as Executive Chair until 2004 was not the AFN Regional Chief. No evidence was presented about any other Forum Executive Chairs. As already noted, the Forum's Terms of Reference do not require that the Executive Chair be Regional Chief.

[69] Nonetheless, the circumstances from 2004 until 2018, leave open the possibility that Mr. Googoo acted with an authority derived jointly from the AFN and the Forum.

(ii) The AFN National Chief's mandate letter to Mr. Googoo

[70] Ms. Maloney referred the Tribunal to a mandate letter signed by the AFN National Chief on February 9, 2016, addressed to Mr. Googoo, in which the National Chief outlined his expectations with respect to the portfolios assigned to Mr. Googoo. Many of those mandates reference the requirement to engage and advocate within his region and nationally.

[71] While the Forum is not specifically mentioned in the mandate letter, Ms. Maloney submits that Mr. Googoo's involvement in the Forum fulfilled many of the responsibilities as AFN Regional Chief mentioned in the letter and in furtherance of the AFN's role in the Forum. At this stage of the case, the information before me is insufficient to determine if Ms. Maloney's claim is clearly unfounded.

(iii) The AFN annual reports

[72] Ms. Maloney also referred to the AFN's annual reports in which each Regional Chief summarizes their respective activities for the year. Mr. Googoo wrote in the summary for the AFN's 2017–18 annual report that the AFN's regional office for Nova Scotia and Newfoundland worked in collaboration with the Forum to host a Truth and Reconciliation regional symposium. He notes elsewhere in the summary that one of his portfolios is as an AFN Board member in matters related to the Truth and Reconciliation Commission.

[73] Mr. Googoo also mentions in the summary that the Forum had appointed him as its Executive Chair. Although he does not say that the AFN was involved in the appointment,

he states that the AFN's Regional Chief's office "continues to work collaboratively to improve communications and establish a commitment to make the structure more efficient and effective."

[74] In the AFN's 2016–17 annual report, among the 16 activities that Mr. Googoo reported, he included a three-line statement that as Executive Chair of the Forum it was his goal to provide a structure that improves communication and to establish a commitment to make the organization more efficient and effective.

(iv) The Forum's organizational chart

[75] The Forum's annual report of 2011–12 includes a multi-level organizational chart for the Forum. The box at the top of the chart is that of the Executive Committee and identified "Regional Chief Morley Googoo" as the Executive Chair. Below this box is a series of other boxes. One refers to the 13 Mi'kmaq Saqmaq of Nova Scotia, the Nova Scotian and Canadian governments represented by their respective ministers, the representative of the Mi'kmaw Grand Council, and finally the AFN, with the name of the National Chief who is referred to as sitting on the Executive Committee "ex officio."

[76] Ms. Maloney argues that this demonstrates the AFN National Chief was acting in his capacity as an executive of the AFN and that the AFN is therefore connected to the Forum, having a "distinct role" in the Forum's Executive Committee.

[77] According to Ms. Potts' affidavit, the AFN has no record of any National Chief ever attending a meeting of the Forum. It has no record of being invited or agreeing to participate in the Forum in this or any other capacity.

[78] Be that as it may, the document emanating from the Forum suggests that the AFN has some form of interest in the Forum's activities and could potentially be involved in administering them through Mr. Googoo's participation.

H. Conclusions regarding the additional facts

[79] These facts alone may not be sufficient to ultimately prove on a balance of probabilities all the elements of s. 65(1) of the Act and find the AFN vicariously liable for Mr. Googoo's acts. The AFN has raised some serious questions about the sufficiency of the complaint filed against it.

[80] However, these additional facts prevent me from concluding at this stage, before the hearing or even the exchange of disclosure and SOPs have taken place, that Ms. Maloney plainly and obviously has no chance of establishing that, under a generous interpretation, the criteria of s. 65(1) have been met with respect to the AFN. The clearest of cases has not been made out to exclude that possibility.

[81] My findings would not be any different even if I were to consider some of the other criteria that AFN proposed would justify dismissing the complaint, to which I referred earlier in this ruling. As I indicated, the items in the AFN's list are really more of a policy justification for the Tribunal's authority to summarily dismiss complaints than actual criteria. But even if I were to treat them as additional tests, I would find that they have not been met.

[82] Thus, I certainly could not conclude at this stage that the AFN is not the right party given my finding that it is possible Mr. Googoo was acting in the course of his employment with the AFN.

[83] This is also not a situation where issues could be narrowed by the dismissal of the complaint. There is only one real issue to begin with—whether Mr. Googoo acted in the course of his employment and, considering the uncertainty about that issue at this stage, there is really no other issue to eliminate.

[84] The claim that a summary dismissal would be the most just means of resolving the issue is also without merit, particularly since the complaint's viability remains possible.

[85] Similarly, there is no question of fairness or abuse of process engaged here. Ms. Maloney has alleged that the AFN should be held vicariously liable for Mr. Googoo's acts, and it is not plain and obvious at this stage that she has no reasonable possibility of success.

[86] Finally, I note in passing that the AFN stated in its reply to Ms. Maloney's submissions that it had no knowledge of Mr. Googoo's conduct at the Forum and no ability to control it. This statement appears to relate to the defence set out in s. 65(2) of the Act and is really an argument going to the merits of this potential defence. I do not understand the statement to be a claim that it is plain and obvious the criteria of the s. 65(2) defence have been met. In any event, I would not be able to make such a finding on a summary basis. More evidence is required.

V. Ms. Maloney's request to reopen the hearing

[87] As mentioned earlier in this ruling, Ms. Maloney requested to reopen the hearing to provide "a supplemental affidavit with documents that supports her position." Given my finding denying the AFN's motion to summarily dismiss the complaint based on the record that existed at the time of the oral hearing, Ms. Maloney's request is dismissed as moot.

[88] I have not considered any of the additional material that Ms. Maloney sought permission to introduce, which in any event was never even produced. The order she was seeking was for permission to file the additional material 30 days later.

VI. Order

[89] For these reasons, the AFN's preliminary motion to dismiss the complaint against it is denied.

[90] Ms. Maloney's request to reopen the hearing of the motion is denied.

[91] The Tribunal will convene a Case Management Conference Call shortly to set down disclosure dates and address other case management matters.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
September 25, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: HR-DP-2818-22, HR-DP-2819-22 & HR-DP-2820-22

Style of Cause: Cheryl Maloney v. Mi'kmaq Nova Scotia Tripartite Forum et al.

Ruling of the Tribunal Dated: September 25, 2024

Appearances:

Alisa Lombard and Virginia Lomax, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Peter Mantas and Gabrielle Cyr, for the Respondent, AFN

Kelly A. Peck and Kim Duggan, for the Respondent, CIRNAC