File Nos.: T1894/12412, T1895/12512 & T1896/12612

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Robert Renaud, Darlene Sutton and Abraham Morigeau

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Aboriginal Affairs and Northern Development Canada

Respondent

Ruling

Member: Sophie Marchildon
Date: November 13, 2013
Citation: 2013 CHRT 30

Table of Contents

Page

I. Complaints

[1] The Complainants allege the Respondent has engaged in a discriminatory practice on the basis of age, sex and/or family status, contrary to s. 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*CHRA*").

[2] Specifically, the Complainants challenge the Respondent's application of s. 6(1)(c.1) of the *Indian Act* in denying their applications for Indian registration. Under this statutory provision, the Complainants were denied Indian registration because they were born before September 4, 1951.

II. Request that Tribunal proceedings be adjourned

[3] In April 2013, the Respondent proposed that these complaints be adjourned pending the Tribunal's decision in *Matson et al. v. Indian and Northern Affairs Canada* (T1444/7009) [*Matson*] and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada* (T1686/4111, T1725/8011) [*Andrews*], relating to similar complaints with respect to the Respondent's application of the registration provisions of the *Indian Act*. The Complainants opposed the request that the Tribunal process be adjourned. The Commission proposed that the parties exchange particulars and proceed with disclosure in the normal course, with a discussion on the possibility of adjournment thereafter.

[4] Before the Tribunal had an opportunity to rule on the parties' submissions, on May 24, 2013, the Tribunal released the *Matson* decision, 2013 CHRT 13. In that decision, the Tribunal dismissed the complaint, finding that the Complainant was challenging the registration provisions of the *Indian Act*, as opposed to any "service", within the meaning of s. 5 of the *CHRA*, offered by the Respondent. Applying the Federal Court of Appeal's decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7, the Tribunal found that attacks aimed at legislation, and nothing else, fall outside the scope of the *CHRA*.

[5] On August 8, 2013, the Tribunal requested "...the parties' submissions on how they wish to proceed with their complaints moving forward", in light of the *Matson* decision.

[6] The Complainants once again opposed adjourning their complaints.

[7] The Commission advised the Tribunal that it had filed an application for judicial review of the *Matson* decision. The Commission was of the view that *Matson* was wrongly decided and, therefore, the Tribunal should continue to process the present matters in the normal course.

[8] Given the application for judicial review in *Matson*, the Respondent proposed two methods of proceeding: bifurcating the complaints into two phases - (a) jurisdiction and (b) merits - and proceeding with particulars only relevant to the first phase; or adjourning the matters pending the Commission's application for judicial review.

[9] In its reply, the Commission agreed that the present complaints should be adjourned pending a resolution of its application for judicial review of the *Matson* decision. It also proposed terms for keeping the Tribunal apprised of the status of the judicial review proceedings and re-assessing the adjournment.

[10] On September 30, 2013, the Tribunal released its decision in *Andrews*, 2013 CHRT 31. Similar to the *Matson* decision, both complaints in *Andrews* were dismissed because the Tribunal found the Complainant was challenging the registration provisions of the *Indian Act*, as opposed to any "service", within the meaning of s. 5 of the *CHRA*, offered by the Respondent.

[11] On the same day, the Tribunal wrote to the parties to see if there were any additional submissions on how they wished to proceed given the release of the *Andrews* decision.

[12] The Complainants did not provide any additional submissions and both the Commission and Respondent reiterated their support for adjourning the present complaints pending the

resolution of the application for judicial review of the *Matson* decision before the Federal Court. The Respondent noted that the Commission had also filed an application for judicial review of the decision in *Andrews* and it proposed consolidating that application with the one in *Matson*.

III. Law and Analysis

[13] It is well established that this Tribunal is the master of its own procedure, and that it is within its discretion to adjourn its proceedings. In *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14, the Tribunal stated:

> [15] It is well established that administrative tribunals are the masters of their own proceedings. As such, they possess significant discretion in deciding requests for adjournments. This principle was discussed in some detail by the Supreme Court of Canada in *Prassad v. Minister of Employment and Immigration*, [1989] 1. S.C.R. 560. In this case, the appellant sought an adjournment of her immigration inquiry pending a decision on her application to the Minister to permit her to remain in Canada. The adjudicator refused the adjournment.
>
> [16] In dealing with her appeal, the Supreme Court stated that administrative tribunals, in the absence of specific statutory rules or regulations, are masters of and control their own proceedings. But when tribunals exercise judicial or quasi-judicial functions, they must comply with the rules of natural justice. [See also *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America*, (1971), 22 D.L.R. (3d) 40, 50 (Ont. C.A.), *Pierre v. Manpower and Immigration*, [1978] 2 F.C. 849, 851 (FC.T.D.)].

[14] That said, the exercise of the Tribunal's discretion is subject to the rules of procedural fairness and natural justice, as well as the regime of the *CHRA*. The C*HRA* requires the Tribunal to institute an inquiry into complaints when requested by the Commission and to give parties a full and ample opportunity to present their case and make representations (see ss. 49(2) and 50(1) of the *CHRA*). Section 2 of the *CHRA* also expresses an overriding public interest in the elimination of discriminatory practices. And, of particular significance, s. 48.9(1) of the *CHRA* provides for proceedings before the Tribunal to be conducted as expeditiously as the requirements of natural justice allow.

[15] In a recent decision I find applicable in this case, *Marshall v. Cerescorp Company*, 2011 CHRT 5, the Tribunal reasoned:

> [11] According to section 48.9(1) of the *Canadian Human Rights Act*, proceedings before the Tribunal are to be conducted as informally and, of particular relevance to this motion, as expeditiously as the requirements of natural justice and the rules of procedure allow. **However, as master of its own procedure, the Tribunal may, nonetheless, adjourn its proceedings where appropriate in its discretion** (See *Léger v. Canadian Railways* (1999) C.H.R.D. No. 6 (CHRT), at para. 4; *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 at para. 15). The Tribunal must exercise this discretion having regard to principles of natural justice (*Baltruweit*, at para. 17). Some examples of natural justice concerns to which the Tribunal could respond would include the unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party. **(emphasis added)**

[16] The complaints here resemble those that were at issue in the *Matson* and *Andrews* cases, insofar as they allege the Respondent engaged in a discriminatory practice when it applied the registration provisions of the *Indian Act*. If the Tribunal's reasoning from the *Matson* and *Andrews* decisions were to be applied to the complaints here, the result would presumably be the same: the complaints would be dismissed. Like the Complainants here, the Complainants in *Matson* and *Andrews* also alleged the Respondent engaged in a discriminatory practice when it applied the registration provisions of the *Indian Act*. As mentioned above, the Tribunal dismissed those complaints because it found they were challenging the registration provisions of the *Indian Act*, as opposed to any "service", within the meaning of s. 5 of the *CHRA*, offered by the Respondent. The Tribunal found that attacks aimed at legislation, and nothing else, fall outside the scope of the *CHRA*.

[17] In the present cases, the Commission argues the *CHRA* allows for complaints that directly challenge a government department's application of mandatory legislation. The Respondent contends that type of complaint falls outside the jurisdiction of *CHRA*. The Tribunal provided its views on the issue in *Matson* and *Andrews*. The issue has now been brought to the Federal Court on judicial review. Therefore, given the fact that the same question is currently before the Federal Court, hearing the complaints at this time would not provide a full answer to the issues

they raise. In my view, in terms of efficiency and fairness, the parties and the Tribunal would benefit from further clarification of these issues by the Federal Court.

[18] Dealing with a similar request for an adjournment pending judicial review, the Tribunal's reasoning in *Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 [*Bailie*], is instructive :

> [22] In the instant motion, the "admonition" to proceed as expeditiously as possible must be seen in the larger context. In cases such as the section 13 hate message ones (i.e., Abrams and Makow) and the Air Canada pilots cases (Vilven/Kelly, Thwaites et al., and Bailie et al.), short term delay can achieve long term gain, and a better final result. In other words, allowing one case with the same or substantially similar issues to run its course through the administrative justice/judicial system is fairer and more just and "expeditious" in the long run to the parties and future parties than holding a hearing in each case, followed by judicial review applications and appeals. It is also more just in terms of the public interest, with finite resources of the taxpayer-funded Tribunal and courts. I do agree with the Commission's submission that, "It is therefore only in the most exceptional circumstances that the hearing of complaints should be suspended." This is such a case; "exceptional circumstances" exist here.

[19] The Tribunal, in *Bailie*, added:

> [27] I have followed the reasoning and approach of Member Lustig in Abrams and Makow, supra, dealing with the section 13 hate messages cases before the Tribunal, as stated in para. 9 and 8 of those Decisions, respectively. I note that in the hate messages cases, there too were conflicting Tribunal Decisions on the constitutionality of section 13: see Lemire, supra and Schnell v. Machiavelli and Associates Emprize Inc., 2002 CanLII 1887. However, unlike Bailie et al., with the s. 13 cases, there was at least a Supreme Court of Canada Judgment from 1990, Canada (Human Rights Commission) v. Taylor, 1990 3 S.C.R. 892 on the constitutionality of s. 13. Since the Tribunal in Makow and Abrams found that the interests of justice clearly favoured adjourning (notwithstanding the presence of a highly instructive Supreme Court of Canada authority), then the argument for adjourning in the present case is even stronger, given the absence of similar judicial direction.

[20] In the present motion, the "admonition" to proceed as expeditiously as possible must also be seen in the larger context; delaying the proceedings now, in anticipation of the Federal

Court's decision, can avoid applications for judicial review later on and will provide guidance to the Tribunal on how to deal with these complaints. As in *Bailie*, the argument for adjourning these proceedings is also supported by the absence of a judicial direction on the issues raised by the present complaints.

[21] The Tribunal has already taken this approach with another set of complaints that raise similar allegations regarding Veterans Affairs Canada's application of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (Tribunal Files T1898/12812 to T1901/13112). On consent of all parties, those complaints have been adjourned pending the resolution of the *Matson* judicial review.

[22] In this case, the Complainants do not consent to an adjournment. Given the time that has passed since they filed their complaints and their ages, it is understandable that they want to proceed with their cases and avoid additional delays. However, given the potential result of these complaints without any further clarification from the Federal Court, I am not convinced that proceeding now will avoid additional delays. In fact, it may create further delays in the long term.

[23] I recognize that every case has its own particularities since we are dealing with unique individuals and with different facts and issues. I also recognize the significant role that elders play in our society and the importance of their right to be heard in exercising this role. I also carefully considered the impacts on the Complainants in adjourning their cases. However, I find those considerations are outweighed by the potential additional delays and complexities that would be created if the Tribunal were to proceed with these complaints without further clarification from the Federal Court.

[24] The Respondent suggested a middle ground in which the cases would be adjourned until the Federal Court has ruled in *Matson* and potentially *Andrews*, if the cases are joined, after which the Tribunal could revisit the adjournment status. The Respondent added that it does not

view the adjournment being applicable to all appeals (Federal Court of Appeal and Supreme Court) in the event that they would occur.

[25] Having considered the various interests and needs of the parties and the Tribunal, I grant the request to adjourn these proceedings.

IV. Ruling

[26] For the reasons above, Tribunal files T1894/12412, T1895/12512 and T1896/12612 are adjourned *sine die* with the following conditions:

(1) The Commission shall keep the Tribunal apprised of the status of judicial review applications/appeals in the *Matson* and *Andrews* matters, including any Reasons for Judgment;

(2) The issue of any further adjournment/abeyance can be revisited and dealt with after the Federal Court decision in the *Matson* and/or *Andrews* judicial review application is rendered.

(3) Any party or the Tribunal may request the holding of a Case Management Conference Call after the release of Reasons for Judgment in any of the judicial reviews/appeals referred to in clause (1) in order to re-assess the adjournment/abeyance status herein.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
November 13, 2013