

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE**

MARGARET KELLY (STACEY)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MOHAW COUNCIL OF KAHNAWAKE

- and -

COUNCIL OF ELDERS

- and -

DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondents

RULING

MEMBER: Karen A. Jensen 2008 CHRT 42
2008/09/30

[1] The Respondent, Department of Indian and Northern Affairs Canada (the Department), has requested that the Tribunal dismiss a complaint by Margaret Kelly (Stacey) against the Department on the basis that the matters raised in the complaint were the subject of an unconditional settlement agreement reached by the parties in 2003.

[2] This is the second time that the Respondent has made this request. On May 27, 2008, the Tribunal dismissed the motion ruling that the request was premature as a more complete record was needed to make a determination. The Tribunal did not rule on the merits of the motion and indicated that the Respondent was free to bring a similar motion at a later date.

[3] Since that ruling the parties have disclosed all the documents in their possession and their Statements of Particulars. In addition, the Respondent has filed two Affidavits in support of the present motion, one from Louis-Alexandre Guay, counsel for the Department of Justice Canada, and the other from Allan Tallman, of the Indian Registrar Office of the Department of Indian Affairs and Northern Development Canada. Attached as exhibits to those Affidavits are numerous documents including the complaints, the Settlement Agreement, the Membership Law, and a Certificate of Independent Legal Advice. In my view, there is now sufficient material on the record to make a determination on the present motion.

Background

[4] In 1999, the Complainant filed human rights complaints against the Mohawk Council of Kahnawake ("MCK") and the Department (then known as the Department of Indian and Northern Development). She alleged that the MCK refused to accept her as a Band member based on her family status, and that this refusal resulted in her being denied services from the

MCK. She claimed that the denial of services constituted a discriminatory practice within the meaning of s. 5 of the *Canadian Human Rights Act* (the *CHRA* or the *Act*). In her complaint against the Department, Ms. Kelly (Stacey) alleged that the Department was also discriminating against her by not intervening in the Band's conduct and by continuing to fund the MCK for the provision of services that were allegedly being denied to her.

[5] In 2003, the Complainant settled her complaints with the MCK and the Department. At the time that the settlement was being concluded, MCK was revising its Membership Law. It was thought that the revision might resolve the issues that were raised in the complaints. The settlement agreement reflected the uncertainty regarding the resolution of the complaint by stating that although Ms. Kelly (Stacey) released MCK from all actions that she ever had or may have, if Ms. Kelly (Stacey) and MCK did not reach a satisfactory resolution of the Membership Claim by December 31, 2004, then the release "only insofar as it relates to the Membership Claim against MCK, is null and void".

[6] In contrast, the provision in the settlement agreement regarding the Department was unconditional. It stipulated that Ms. Kelly (Stacey) released the Department and the Crown from all actions that she had or may have arising in any way out of the matters alleged in the complaint against the Department including without limitation the Monetary Claim and the Membership Claim against the Department.

[7] Ms. Kelly (Stacey) received independent legal advice before signing the agreement. The Certificate of Independent Legal Advice indicates that she was fully aware of the terms of the Settlement Agreement and their legal impact before signing the agreement.

[8] After the agreement was signed, the Canadian Human Rights Commission approved the settlement agreement and a Notice of Discontinuance was filed before the Tribunal in both files on December 23, 2003. The settlement agreement was made enforceable as an order of the Federal Court pursuant to subsection 48(3) of the *Canadian Human Rights Act*.

[9] In 2005, the Complainant filed new complaints against the MCK, the Department and the Council of Elders, alleging that her membership issue had not been resolved under the new Kahnawake Membership Law and that she continued to be denied access to programs and services. The complaints were referred to the Tribunal for further inquiry.

Analysis

[10] The Respondent, the Department, argues that the Tribunal should dismiss the complaint against the Department because the matters raised in the complaint have been settled.

[11] The Respondent, MCK, does not oppose the motion. It submits that the present dispute does not involve the Department but is an internal membership dispute between the Complainant and the Respondent MCK.

[12] The Commission does not oppose the motion to dismiss the complaint against the Department.

[13] The Complainant, Ms. Kelly (Stacey), provided a submission stating that as a First Nations person she does not fall within Canadian jurisdiction. Rather, she attorns only to the jurisdiction

of a traditional body consisting of the People, in accordance with the Great Law of Peace and the Two Row Wampum. In her view, any negotiations made with the Government of Canada do not apply to her. Those negotiations would seem to include the negotiations leading to the settlement agreement.

[14] In my view, the Tribunal's authority to make a determination on the issue raised in this motion resides in the power granted to it under s. 50(2) of the *CHRA* to decide all questions of law or fact necessary to determining a matter in the course of an inquiry. In *Canada (Canadian Human Rights Commission) v. Canada Post Corp.* 2004 FC 81, the Federal Court indicated that the determination of a preliminary issue was part of the inquiry process. As master of its own house, the Tribunal was entitled to "clear the procedural underbrush" prior to holding a hearing on the merits of the case.

[15] Ms. Kelly (Stacey) received monetary compensation in exchange for an agreement not to bring any further action regarding the matters raised in the complaint against the Department. The matters raised in the 1999 complaint against the Department are identical to the issues raised in the 2005 complaint against the Department: the failure of the Department to prevent the MCK from excluding Ms. Kelly (Stacey) from Band membership and from denying her membership benefits. Although the settlement agreement left open the possibility of filing a complaint against the MCK if Ms. Kelly (Stacey) was not happy with the outcome of the Membership Renewal process, it explicitly closed that possibility with respect to the Department. The settlement agreement left no option to raise the issue again with the Department. Ms. Kelly (Stacey) received legal assistance to help her to understand this point.

[16] The material on the file in the present case indicates that Ms. Kelly (Stacey) did not sign the agreement until she had received independent legal advice. The lawyer with whom she consulted certified that he was satisfied that Ms. Kelly (Stacey) fully understood and accepted the terms of the agreement and the legal consequences of signing the agreement. He further satisfied himself that she was not compelled or under duress to enter into the settlement agreement and that she did so on a voluntary basis.

[17] Ms. Kelly (Stacey) has not challenged the validity of the release on the basis of duress, capacity, *non est factum* or any other such basis. Her claim that she does not recognize the jurisdiction of the federal government does not affect the validity of the release.

[18] In the Tribunal's previous ruling on this issue, Vice-Chairperson Hadjis noted that new facts appeared to have emerged after the signing of the release that might affect the applicability of the release. Those facts included the development of a new Membership Law by MCK, and the delegation of the power to determine Band membership to the Council of Elders.

[19] The settlement agreement, however, clearly contemplated that a new Membership Law was being developed and that depending upon how that Law was applied to the Complainant, she might wish to file a fresh complaint against the MCK. That right was not reserved with respect to the Department. Therefore, the new Membership Law has no bearing on the applicability of the release to the present complaint against the Department.

[20] The issue of the Department's power to intervene in matters regarding the Complainant's membership in the Band was settled in 2003. Therefore, the delegation of the power to decide

Band membership to the Council of Elders is not relevant to the applicability of the release to the complaint against the Department.

[21] In my view, therefore, the record now discloses that neither of these two fresh facts has any bearing on the application of the release to the complaint against the Department.

[22] This is not a case where Ms. Kelly (Stacey) has contracted out of her right to the protection of the *CHRA*. Ms. Kelly (Stacey) signed an agreement not to raise this particular issue with the Department again; the matter was resolved. That is not the same as signing an employment contract or a lease that denies recourse to the *CHRA* for any potential future claims of violations of the *Act*. As in the case of *Gee v. Canada (Minister of National Revenue)* 2002 FCA 4, I find it difficult to characterize the agreement in this case as an agreement to opt out of the protection of the *Act*.

[23] As the British Columbia Human Rights Tribunal stated in *Thompson v. Providence Health Care* 2003 BCHRT 58, there is a strong public policy interest in encouraging parties to resolve their disputes on a voluntary, consensual basis. This public policy would be severely undermined if parties who had entered into a final settlement of their human rights dispute were, absent public policy considerations to the contrary, permitted to come forward and pursue a complaint before the Tribunal. Ms. Kelly (Stacey) settled her complaint against the Department in 2003; she should not be permitted to pursue the same complaint before the Tribunal now.

[24] Ms. Kelly (Stacey)'s complaint against the Department is therefore dismissed.

"Signed by"

Karen A. Jensen

OTTAWA, Ontario
September 30, 2008

PARTIES OF RECORD

FILE:	T1268/8007, T1269/8107, T1270/8207
CAUSE:	Margaret Kelly (Stacey) v. Mohawk Council of Kahnawake, Council of Elders, Department of Indian Affairs and Northern Development Canada
DATE OF THE TRIBUNAL DECISION:	September 30, 2008
APPEARING FOR:	
Complainant	For the Complainant
Respondent	For the Canadian Human Rights Commission
Armstrong	For the Respondent (Mohawk Council of Elders)

	Khanawake)
pearing	For the Respondent (Council of Elders)
antave	For the Respondent (Department of Indian and Northern Affairs (Canada)