Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Roger William Andrews

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Aboriginal Affairs and Northern Development Canada

Respondent

Ruling

Member: Sophie Marchildon
Date: December 8, 2011
Citation: 2011 CHRT 22

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I. Motion

[1] On September 26, 2011, the Respondent, the Attorney General of Canada representing the Ministry of Indian and Northern Affairs Canada (INAC), filed a motion to consolidate the cases of Roger William Andrews (Tribunal file T16686/4111) and Roger William Andrews on behalf of his daughter Michelle Dominique Andrews (Tribunal file T1725/8011). The Respondent's final reply on this motion was received October 12, 2011. The Complainant in both cases, Mr. Roger William Andrews, is unrepresented and opposes the consolidation of the two cases.

II. Background

[2] The Complainant filed two complaints with the Commission. The first complaint, filed on October 20, 2008, alleges that INAC engaged in a discriminatory practice within the meaning of section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *CHRA*) on the grounds of race, national or ethnic origin, family status and age. According to the Complainant, INAC denied his daughter's application for Indian status because she was born after April 17 1985. This denial of status resulted in her being denied services offered by INAC and it also denied her full access to her culture.

[3] The second complaint, filed on behalf of the Complainant's daughter on February 1, 2010, alleges that INAC engaged in a discriminatory practice within the meaning of s. 5 of the *CHRA* on the grounds of race, national or ethnic origin and family status. According to Mr. Andrews, as a result of his father's enfranchisement, he has status under section 6(2) of the *Indian Act*, instead of section 6(1) of the *Indian Act*. Due to his status under section 6(2), he did not receive services, such as health care and educational funding, prior to 1985. Furthermore, as a result of his status under section 6(2), his daughters are being denied status under the *Indian Act* and the resulting benefits; are not considered part of the First Nations community and culture; and, are being discriminated against.

[4] Pursuant to section 44(3)(a) of the *CHRA*, the Commission referred the 2008 complaint to the Canadian Human Rights Tribunal (the Tribunal) for inquiry on April 4, 2011. The 2010 complaint was referred to the Tribunal for inquiry on August 11, 2011. The Commission has indicated that it will participate fully in the hearings of both complaints.

[5] On September 14, 2011, Shirish P. Chotalia, Q.C., the Chairperson of the Tribunal, determined that the Respondent's motion would be dealt with through written arguments. I was designated by the Chairperson to decide the present motion.

III. Positions of the Parties

[6] Having carefully reviewed all the materials filed by the parties in support of their positions on this motion, the following is a summary of the positions of the parties.

[7] According to the Respondent, the Tribunal may institute a single inquiry into several complaints where they involve substantially the same issues of fact and law. In this case, the complaints have common factual and legal issues: both complaints are concerned with the entitlement to Indian registration for Mr. Andrews and his daughter. The nexus between these two complaints is evident in Mr. Andrews' own words in his 2010 complaint: "the discrimination that was initially against my father has trickled down to me and my daughters". Since entitlement to Indian registration is determined on a genealogical standard, Michelle Andrews's entitlement flows from and depends on that of her father, Mr. Andrews. Whatever factual and legal issues underpin Mr. Andrew's eligibility necessarily flow through to that of his daughter Michelle.

[8] The Respondent argues that a single inquiry would avoid the possibility of inconsistent decisions, will be more efficient and will result in the Respondent, the Commission and the Tribunal incurring lower costs than they would for two hearings. The Respondent plans on challenging the Tribunal's jurisdiction pursuant to section 5 of the *CHRA* in both cases and will

use similar evidence to support its defense. Both cases are at similar stages of the proceeding and the fact that the 2010 complaint is brought in a representative capacity is of no consequence for the purpose of consolidation. Nothing about consolidation affects the ability of Mr. Andrews to present evidence and make the arguments he wishes to make in his two complaints, and the potential prejudice caused by delay is minor and outweighed by the benefits of consolidation. On the other hand, the Respondent states that proceeding with the complaints separately would mean duplicating potentially voluminous material; having witnesses testify twice; and, an overall significant cost would be incurred by the Respondent. Considering that the underlying policy objective of consolidation is to avoid a multiplicity of proceedings and promote the determination of proceedings expeditiously, consistently and inexpensively, the Respondent contends that these factors are met in this case.

[9] The Commission supports the motion to consolidate the two complaints as it would promote the overall efficiency of the proceedings. The parties to both complaints are the same, and there is no risk that combining the cases will prejudice the Complainant by requiring him to sit through evidence or submissions that are unique to one of the cases. Each party will have a direct interest in all aspects of the combined proceedings. The Commission anticipates that both complaints will require that the Tribunal, among other things to consider:

- the history of the Andrews family;
- the history and current operation of the status provisions of the *Indian Act*;
- whether the granting of Indian status under the *Indian Act* is a ''service" within the meaning of section 5 of the *CHRA*;
- whether the impugned registration provisions are *prima facie* discriminatory for reasons relating to the past enfranchisement of the Complainant's father;
- whether the respondent can prove a *bona fide* justification under s.15 of the *CHRA*; and,

- if the Tribunal finds that the impugned aspects of the registration are discriminatory, and have no *bona fide* justification, what remedies can be awarded.

[10] The Commission acknowledges that the 2008 complaint raises an issue that is not expressly raised in the 2010 complaint, namely the impact of the second generation cut-off rule. However, complaints do not have to be precisely identical to proceed together. Combining the two complaints will not prevent the Complainant from raising all the arguments he wishes to raise in connection with the complaint filed on behalf of his daughter.

[11] The Complainant opposes the consolidation of his two complaints. According to him, the two complaints are very different and different laws are being questioned. The only overlap is enfranchisement. The Complainant fears that the enfranchisement question will overshadow the important challenge to the registration system's "second generation cut-off". According to the Complainant, the Commission's Statement of Particulars already indicates a focus on enfranchisement as a major issue. The Complainant argues that it would be unfair to First Nations people to set aside the issue of the registration system's "second generation cut-off". First Nations people deserve a clear decision regarding both issues and not a hybridized one that would likely cause confusion. Even the smallest chance that confusion could occur should be enough to keep these two complaints separate. According to the Complainant, consolidation will not save time and money, because someone else might challenge the registration section of the *Indian Act* if it is not dealt with now. In this regard, processing a new complaint would require the Commission to spend additional time and money.

IV. Law & Analysis

[12] Pursuant to section 40(4) of the *CHRA*, it is the Commission who has the power to determine whether complaints should be dealt with together through a single inquiry by the Tribunal. However, the issue of whether to hold a single hearing or multiple hearings is a

procedural matter (see *Lattey v. Canadian Pacific Railway*, (February 25, 2002), TD 1 (CHRT) at para. 12 [*Lattey*]). With regards to procedure, section 48.9(2) of the *CHRA* provides that the Chairperson of the Tribunal may make rules of procedure governing the practice and procedure before the Tribunal. Furthermore, section 48.9(1) indicates that proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. Together, these two sections indicate that, as long as its procedure is fair, the Tribunal is master of its own procedure. Therefore, the Tribunal can determine whether a single hearing or multiple hearings should be held with regards to the two complaints in issue here.

[13] In *Lattey*, in determining whether the complaints in issue in that case should be heard together, the Tribunal identified that it must balance a number of factors, including:

> (1) The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;
>
> (2) The potential prejudice to the respondent [in this case-the complainant-who opposes the consolidation] that could result from a single hearing, including the lengthening of the hearing for each respondent as issues unique to the other respondent are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one respondent or the other; and
>
> (3) Whether there are common issues of fact or law.
>
> (see *Lattey* at para. 13)

[14] Considering the circumstances of these two complaints, I find that hearing both complaints of discrimination together would expedite the proceedings and would be in the public interest. Although there may be different questions of law raised in the two complaints, I accept that these questions are intertwined and that evidence on these issues will necessarily overlap. Furthermore, both complaints share a similar factual underpinning. Therefore, hearing both complaints together would give the Tribunal a clear historical and factual context to the complaints, which will form the basis of the Tribunal's decision on each legal and factual question. Having a clear historical and factual context to the complaints will also reduce the risk of inconsistencies between the analysis of two complaints. Also on this point, considering that the parties to both complaints are the same, there will be no confusion in the introduction of evidence related to only one of the complaints as per the second factor outlined in *Lattey*. Finally, both complaints are at similar stages of the inquiry, and any delay with consolidating the hearings can be reduced through active case management.

[15] I do not agree that hearing both complaints together will cause confusion for First Nations people with regards to the issues raised in each complaint. Each party will have an ample opportunity to present their case regarding both complaints. While the hearing of the complaints will proceed together, the Tribunal will consider the issues raised in each complaint separately and will provide reasons for its decision regarding each complaint based on the evidence adduced by the parties.

[16] For all the above reasons, the motion to consolidate the two complaints for the purpose of a single hearing is granted.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
December 8, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1686/4111 & T1725/8011

Style of Cause: Roger William Andrews v. Aboriginal Affairs and Northern Development Canada

Ruling of the Tribunal Dated: December 8, 2011

Appearances:

Roger William Andrews, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Sean Stynes and Brett C. Marleau, for the Respondent