

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development of Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Member: Susheel Gupta

Date: July 10, 2012

Citation: 2012 CHRT 16

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I. Motion

[1] The co-complainant in this matter, the Assembly of First Nations (AFN), makes a motion for “...an order that Susheel Gupta, Vice-Chairperson, Acting Chairperson appoint a panel of three members [as opposed to a single member] to hear the within complaint”.

II. Background

[2] This motion is raised in the context of a complaint, pursuant to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*), made by the AFN and the First Nations Child and Family Caring Society of Canada (FNCFCSC). The Complainants allege that the Department of Indian and Northern Affairs Canada (the Respondent), now known as the Department of Aboriginal Affairs and Northern Development Canada, provides inequitable levels of child welfare funding to First Nations children living on reserve. According to the Complainants, this amounts to discrimination on the grounds of race and national or ethnic origin.

[3] On March 14, 2011, following a motion by the Respondent, the Tribunal had dismissed the complaint (see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2011 CHRT 4 [*FNCFCSC et al.*]).

[4] Subsequently, three applications for judicial review of the Tribunal’s March 2011 ruling were filed with the Federal Court. In *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, dated April 18, 2012, the Federal Court granted the applications for judicial review and set aside the Tribunal’s ruling. The matter was remitted back to a differently constituted panel of the Tribunal for re-determination.

[5] Pursuant to the Federal Court’s order in 2012 FC 445 and section 49(2) of the *Act*, on May 7, 2012, I, as Acting Chairperson, assigned Member Sophie Marchildon to inquire into the complaint.

[6] On May 23, 2012, counsel for the FNCFCFS sent a letter to the Tribunal stating, among other things, that it had canvassed the views of the AFN and the Canadian Human Rights Commission (the Commission) on the assignment of a new member to hear the case and that it was their collective position that the Tribunal should assign a panel of three members to inquire into the matter.

[7] On May 31, 2012, I advised the parties that Member Marchildon was assigned to inquire into the complaint on May 7, 2012.

[8] On June 5, 2012, the AFN wrote to the Tribunal urging me to reconsider the decision to assign the case to a single member and instead assign a panel of three members. The AFN requested an opportunity to discuss the matter in a case conference call or to make representations to the Tribunal on the issue.

[9] In response to the AFN's letter, on June 8, 2012, I indicated that I would consider a motion submitted by the AFN in support of its request that I reconsider my May 7, 2012 assignment decision.

[10] On June 15, 2012, the AFN filed the current motion requesting that I appoint a panel of three members to inquire into its complaint.

III. Positions of the parties

[11] According to the AFN, section 49(2) of the *Act* grants broad discretion to the Chairperson to govern the Tribunal's procedure and the Chairperson retains the discretion to revisit any assignment decisions as long as there is no breach of the principles of fairness and there is no prejudice to any party before it.

[12] Based on previous case management discussions held on December 14, 2009, the AFN submits that it had a reasonable expectation that best efforts would be made to appoint a three member panel. The AFN also claims that it had a legitimate expectation that there would be an

opportunity to further set out its concerns in an open, transparent process akin to that of a case management meeting. In this regard, the AFN submits that the failure to provide an opportunity to participate and to state the reasons for the shift in commitment from a three member panel to a single member panel may constitute a reviewable error.

[13] The AFN also submits that it is in the interests of justice and expediency for me to revisit the assignment decision in this case. According to the AFN, in deciding whether to appoint a three member panel, consideration must be given to the impact the decision to appoint a panel may have on the conduct of the hearing and the deliberative process. It submits that the complaint raises complex issues that will have far-reaching consequences both in terms of the impact on First Nations children, as well as on human rights jurisprudence in general. The evidence will be extensive and detailed, and the Tribunal will likely be called upon to make numerous rulings on procedural objections. Further, they submit that as competent as a single member may be, there is an advantage in complex cases to having the insight and contribution to the deliberative process of two additional members. In this regard, the AFN adds that the high level of scrutiny which this case will be under merits consideration of the increased confidence that may result from knowledge by the parties and the broader public that a more nuanced result has been obtained due to the contribution and reflection of a three member panel.

[14] The FNCFCSC submits that, for several years, it was the practice of the Tribunal to reconsider assignment decisions if it was in the interests of efficiency, expediency and justice. According to the FNCFCSC, an assignment decision pursuant to section 49(2) of the *Act* affects the interests of parties and, therefore, parties should generally be canvassed if they have a view on the matter. Given the history of the present matter, and the complexity of the legal and factual issues raised, the FNCFCSC claims that prior to making its assignment decision, it would have been appropriate for the Tribunal to canvass the parties on whether a panel ought to be appointed.

[15] The Commission adopted the submissions filed by the FNCFCSC.

[16] The Attorney General took no position on the motion.

IV. Analysis

[17] Section 48.4(3) of the *Act* provides that the Vice-Chairperson shall perform the functions of the Chairperson if the Chairperson is absent or unable to act or the office of Chairperson is vacant.

[18] In this regard, section 49(1) and 49(2) of the *Act* provide:

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.

(2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.

(2) Sur réception de la demande, le président désigne un membre pour instruire la plainte. Il peut, s'il estime que la difficulté de l'affaire le justifie, désigner trois membres, auxquels dès lors les articles 50 à 58 s'appliquent.

[19] The power to assign a member or a panel of three members is vested exclusively in the Chairperson (see *Brink's Canada Ltd. v. Canada (Human Rights Commission)*, [1996] 2 FC 113 (QL) at para. 28 [*Brink's*]). In making this determination, section 49(2) provides that the Chairperson consider the complexity of the complaint.

[20] Complexity must be assessed on a case-by-case basis and some of the factors to consider can include the nature and scope of the complaint, the specific facts giving rise to the complaint, the legal issues raised, and the potential nature and volume of documentary and witness evidence.

[21] Section 48.9(1) of the *Act* directs that proceedings should be conducted as expeditiously as possible. The *Act* also provides that the Chairperson is the Chief Executive Officer of the Tribunal and has supervision over and direction of the Tribunal's work, including the allocation of work among the members and the management of the Tribunal's internal affairs (see section 48.4(2)). As a steward of public funds, the Chairperson has a responsibility to manage the Tribunal's resources to effectively and efficiently fulfill its mandate to the public. This responsibility includes considering the institutions resources when deciding the assignment of cases in order to allow the Tribunal to deal with all complaints that are referred to it.

[22] Therefore, given the scheme and wording of the *Act*, the decision to assign a member or a panel of three members to an inquiry is one based on the Chairperson's consideration of not only the complexity of the complaint, but also the management of the Tribunal. Subject to the analysis below, the parties have not demonstrated that submissions are generally required prior to making a decision regarding the assignment of a case pursuant to section 49(2) of the *Act*.

[23] In this case, the Tribunal appointed a single member to inquire into this complaint on May 7, 2012. That said, the authority of the Chairperson to assign members to an inquiry is not subject to the principle of *functus officio* where circumstances require the authority to be exercised more than once for the purposes of the *Act* to be served (see *Brink's* at para. 28). However, the authority to alter an assignment decision does not permit making such changes in circumstances where doing so breaches the principles of fairness or causes prejudice to any party before the Tribunal (see *Brink's* at para. 29). On this motion, none of the parties raised any fairness issues or claimed there would be prejudice if the May 7, 2012 assignment of a single member was replaced by the assignment of a three member panel. Rather, aside from the Attorney General who took no position on the motion, the other parties advocate for the Tribunal

to assign a three member panel to this inquiry. I am therefore free to reconsider my May 7, 2012 assignment decision.

[24] The AFN submits that it had a reasonable expectation that best efforts would be made to appoint a three member panel. Its position is based on a case management meeting held on December 14, 2009 between the Tribunal and the parties, which was summarized in a letter from the Tribunal sent to the parties on December 23, 2009. In that letter, under the heading “Panel”, it states: “The Chair indicated that she is willing to make her best efforts to constitute a panel”.

[25] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court of Canada stated that the doctrine of legitimate expectation

...is based on the principle that the “circumstances” affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

(*Baker* at para. 26)

[26] While the doctrine of legitimate expectation can give rise to a right to make representations, a right to be consulted or more extensive procedural rights, it does not create substantive rights and does not fetter the discretion of a statutory decision-maker (see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 78).

[27] Given that the doctrine of legitimate expectation does not create substantive rights and does not fetter the discretion of a statutory decision-maker, I find that there could not have been a legitimate expectation that a three member panel would absolutely be assigned to this case. However, given that the Chairperson was actively consulting the parties through case management, and given her statement that best efforts would be made to constitute a panel, this may have created an expectation that the parties would be consulted prior to an assignment decision being made. While the parties were not afforded this opportunity before my May 7,

2012 assignment decision, this current motion has provided the parties with a forum to express their views on the matter. Therefore, in my view, if there was an expectation of being consulted before assigning the case, that expectation has been addressed by the parties' ability to make representations on the issue in the current motion.

[28] The AFN also submits that it is in the interests of justice and expediency to revisit the assignment decision in this case. Specifically, the AFN suggests there is an advantage in complex cases to having the insight and contribution to the deliberative process of two additional members, which also increases confidence in the decision rendered. The complexity and importance of the issues raised in this complaint have been acknowledged by both the Tribunal and the Federal Court. As the AFN points out, the complexity of the complaint will require extensive and detailed evidence, resulting in numerous rulings on procedural objections and several weeks of hearing. In this regard, whether a single member or a three member panel is assigned to this case, the parties and the Tribunal have and will continue to have to expend significant time and resources on adjudicating this complaint. As Acting Chairperson and CEO, and pursuant to section 48.4(2) of the *Act*, as previously discussed, I must effectively manage the limited resources of the Tribunal, including the allocation of work among the members. In weighing the needs of this case and the management of the Tribunal, I must facilitate a fair and expeditious process not only for the adjudication of this complaint, but for all complaints referred to the Tribunal. As the Complainants have indicated, most recently in the FNCFCS' May 23, 2012 letter to the Tribunal, the expeditious resolution of this complaint is of great consequence to them:

As stated in previous letters to the Tribunal, expeditiousness is of utmost importance to our clients. [...] Every delay that occurs in this matter causes thousands of First Nations children to be further isolated from their families and communities and deprived of adequate and culturally relevant care. Any further delays would bring the administration of justice into disrepute and cause significant prejudice to the victims of discrimination.

[29] Given the Tribunal's current workload and the availability of members, assigning a three member panel to this particular matter may impact the scheduling of case management

conference calls, the hearing of motions and the ultimate dates for the hearing, as compared to continuing with a single member. That being said, if the parties remain cognizant of and flexible with regards to the challenges of coordinating member availability, and work together to move this matter forward with the management and assistance of the Tribunal, I find that assigning a three member panel to inquire into this complaint may not significantly affect the management of the Tribunal's workload, internal affairs, or the expeditious inquiry into this complaint. With this in mind, I note the parties' openness and agreement to having Member Marchildon case manage this matter while this motion was being considered. On this basis, a three member panel shall be assigned to inquire into this complaint.

V. Ruling

[30] For the reasons stated above, this ruling serves to advise the parties that a three member panel is assigned to inquire into this complaint. In addition to Member Marchildon, the two additional members assigned to inquire into this complaint and form the panel are Member Bélanger and Member Lustig. Pursuant to section 49(3) of the *Act*, I designate Member Marchildon as the chair of the inquiry.

Signed by

Susheel Gupta
Vice-Chairperson, Acting Chairperson and CEO

Ottawa, Ontario
July 10, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).

Ruling of the Tribunal dated: July 10, 2012

Appearances:

Paul Champ, for the Complainant First Nations Child and Family Caring Society of Canada

David Nahwegahbow, for the Complainant Assembly of First Nations

Daniel Poulin and Samar Musallam, for the Canadian Human Rights Commission

Jonathan Tarlton and Edward Bumburs, for the Respondent

Michael Sherry, for the Interested Party Chiefs of Ontario

Justin Safayeni, for the Interested Party Amnesty International