Federal Court  Cour fédérale

Date: 20210118

Docket: T-1847-19

Citation: 2021 FC 60

Ottawa, Ontario, January 18, 2021

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

NIKOTA BANGLOY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms Nikota Bangloy, is an aboriginal person. She, along with her mother and children, sought annuities and educational benefits under the terms of Treaty 11. After Indigenous and Northern Affairs Canada [INAC] denied their claims, Ms Bangloy and her family complained to the Canadian Human Rights Commission that they had experienced discrimination based on race, or national or ethnic origin contrary to s 5 of the *Canadian Human*

Rights Act, RSC 1985, c H-6 [CHRA] (see Annex for all enactments cited). They also maintained that INAC denied them the benefits in question as retaliation for previous complaints of discrimination the family had lodged against INAC, contrary to s 14.1 of the CHRA.

[2] Just before a hearing of the complaints before the Canadian Human Rights Tribunal, INAC agreed that the family was owed a substantial portion of the annuities they were seeking. The Tribunal went on to conclude that INAC had not discriminated against Ms Bangloy's children by denying them annuities commencing on their dates of birth, as they had claimed.

[3] The Tribunal also found that INAC's delay in determining that the family was owed annuities was a form of retaliation for the previous complaints. But it rejected the family's contention that INAC's other conduct, including its failure to provide educational benefits or information about those benefits, was retaliatory.

[4] The Tribunal awarded Ms Bangloy and her mother $500.00 each as compensation for pain and suffering, and $1,500.00 to each of the four complainants as special compensation.

[5] Ms Bangloy seeks judicial review of the Tribunal's adverse findings and its remedy orders. She maintains that those conclusions were incorrect and asks me to quash them and order a reconsideration of the complaints. In particular, Ms Bangloy argues that the Tribunal erred by dismissing the complaints relating to annuities and education benefits, by finding that the question of educational benefits had already been decided by the Federal Court, and by failing to recognize the family's constitutionally protected treaty rights.

[6] I can find no basis to overturn the Tribunal's conclusions. They were not unreasonable on the evidence before the Tribunal.

[7] I have framed the issues somewhat differently from Ms Bangloy. In my view, there are five issues:

1. What is the appropriate standard of review to apply to the Tribunal's decision?
2. Did the Tribunal err in finding that the issue of entitlement to education benefits had already been decided?
3. Was the Tribunal's decision that there was no discrimination unreasonable?
4. Was the Tribunal's decision about retaliation unreasonable?
5. Were the Tribunal's remedy orders unreasonable?

[8] Before addressing the issues, a brief summary of the proceedings involving Ms Bangloy and her family is required to put the current case in context.

II. Background

A. *The First Education Claim*

[9] Thirty years ago, Ms Bangloy's mother, Ms Joyce Beattie, requested from INAC's predecessor, Indian Affairs and Northern Development [IAND], reimbursement of Ms Bangloy's tuition fees at a private school in Victoria, BC. Ms Beattie argued that the costs were reimbursable under the terms of Treaty 11. IAND's position was that education expenses could

be claimed under the *Indian Act*, but only for children living on reserve, which Ms Beattie's children were not.

[10] In 1990, Ms Beattie sued the predecessor of INAC in Federal Court, arguing that Treaty 11 provided for education expenses to which she was entitled. The Court disagreed. It found that Treaty 11's terms were confined to the geographical area of the treaty (*Beattie v Canada (Minister of Indian Affairs and Northern Development)*, [1998] 1 FC 104, 1997 CarswellNat 1267 at para 32 (Fed TD) [*Beattie*]).

B. *The Adoption Complaint*

[11] Ms Beattie is the biological daughter of a member of the Fort Good Hope Band, a signatory to Treaty 11. Ms Beattie was later custom-adopted by members of another Treaty 11 Band, Loucheux No 6.

[12] Ms Beattie asked INAC to recognize her custom adoption and change her registration under the *Indian Act* accordingly. In 2011, after INAC refused to make the change, Ms Beattie initiated a complaint against INAC, alleging discrimination based on family status. The Canadian Human Rights Tribunal upheld Ms Beattie's complaint and INAC changed her registration. The change meant that Ms Beattie's grandchildren, Ms Bangloy's children, became eligible for registration and Treaty 11 annuities according to the *Gender Equity in Indian Registration Act*, SC 2010, c 18, s 2(3) [GEIRA]. INAC paid Ms Beattie, Ms Bangloy, and her two children annuities up to and including 2013.

[13] However, INAC refused to pay the family annuities for subsequent years because they were no longer registered with a Treaty 11 Band; they had relinquished their registration with the Fort Good Hope Band and registered with the Loucheux No 6 Band, but the latter was no longer listed under Treaty 11. The family refused to be registered with any other Treaty 11 Band.

[14] In addition, INAC refused to pay annuities in respect of Ms Bangloy's children as of their dates of birth because in its view their entitlement to annuities arose as a result of the passage of GEIRA in 2010. Therefore, according to INAC, they were not eligible for annuities before 2010.

C. *The Present Complaint*

[15] The family initiated a human rights complaint against INAC alleging discrimination on the basis of race or national or ethnic origin for INAC's alleged failure to provide Ms Bangloy with education benefits, its failure to provide her information about those benefits, and for its refusal to pay the family members annuities unless they added their names to a Band list. It also submitted that INAC's conduct represented retaliation against the family for its earlier complaints.

[16] Just before the Tribunal heard the complaint, INAC changed its position on the issue of Band registration, stating that the family fell within an exception to its policy and was entitled to additional annuities even without registration in a Treaty 11 Band. INAC also agreed to pay the family $5,000.00 for inconvenience and hardship.

[17] Notwithstanding INAC's change of stance, the family maintained that INAC's initial refusal to pay the requested annuities was discriminatory and retaliatory. They also argued that INAC's refusal to pay annuities to the children as of their dates of birth, and their private education fees, was retaliatory.

D. *The Tribunal's Decision*

[18] The Tribunal addressed two preliminary questions. First, was the issue relating to treaty annuities moot in light of INAC's change of position? Second, did the Federal Court already decide the education funding issue in Ms Beattie's 1990 action?

[19] On the first question, the Tribunal concluded that it could still consider whether INAC's conduct prior to its change of position amounted to discrimination or retaliation. Further, even though INAC had agreed to pay $5,000.00 for inconvenience or hardship, the question of the appropriate remedy in the circumstances remained alive.

[20] On the second question, the Tribunal found that the doctrines of issue estoppel and abuse of process applied – in effect, the same family was raising the same issue that had already been decided by the Federal Court. Further, the Tribunal concluded that it would not be unfair to the complainants to apply those doctrines in the circumstances.

[21] On the substantive issues, the Tribunal found that there was no connection between INAC's alleged failure to provide Ms Bangloy with information about obtaining educational

benefits and her race or ethnic or national origin. Therefore, she had not made out a claim of discrimination.

[22] In addition, the Tribunal found that INAC's position that only persons registered with a Treaty 11 Band could receive annuities was not discriminatory. Again, the Tribunal concluded that INAC's policy was not linked to Ms Bangloy's race or ethnic or national origin.

[23] In respect of the complaints of retaliation, the Tribunal found that the existence of a previous complaint was not a factor that influenced INAC's alleged failure to provide information about education benefits. Therefore, there was no retaliation involved. It reached the same conclusion in respect of INAC's refusal to pay Ms Bangloy education benefits, its refusal to pay annuities to Ms Bangloy's children as of their dates of birth, and its refusal to add the complainants' names to the list of Loucheux No. 6 Band members.

[24] However, the Tribunal did find that INAC's delay from 2015 to 2018 in assessing and granting the complainants' request for annuities until the eve of the hearing before the Tribunal was at least partially linked to their previous human rights complaints and, therefore, retaliatory. As a result, it ordered payments to Ms Beattie and Ms Bangloy of $500 each for pain and suffering, as well as $1,500 to each of the four complainants as special compensation.

(1) Issue One – What is the appropriate standard of review to apply to the Tribunal's decision?

[25] Ms Bangloy submits that the complaints before the Tribunal related to constitutionally-protected treaty rights. Therefore, she says, judicial review should be based on a standard of review of correctness.

[26] I disagree. The presumptive standard of review is reasonableness (*Canada (MCI) v Vavilov*, 2019 SCC 65 at para 16). There are no circumstances here that justify departure from that standard. The Tribunal was interpreting its home statute and applying it to the facts before it. While the treaty rights in issue may have been constitutionally protected, the Tribunal's role did not involve an interpretation of the Constitution; rather, the Tribunal determined whether the complainants had been discriminated against according to the terms of the *Canadian Human Rights Act* and, having found a violation of the Act, what the appropriate remedy should be. The standard of reasonableness should apply to those findings.

[27] The question, then, in respect of each the Tribunal's conclusions, is whether its analysis provides sufficient justification, intelligibility, and transparency (*Vavilov*, above, para 100). The burden falls on Ms Bangloy to establish that the Tribunal's conclusions were unreasonable.

(2) Issue Two – Did the Tribunal err in finding that the issue of entitlement to education benefits had already been decided?

[28] Ms Bangloy maintains that the Tribunal wrongly concluded that the entitlement to education benefits had already been decided by the Federal Court in *Beattie*, above. She also argues that the Court did not create a requirement that recipients of education benefits reside

within the Treaty area; rather, the Court recognized that access to free education was constitutionally guaranteed.

[29] I disagree. The Tribunal's conclusion that this issue had already been finally determined in the Federal Court's earlier decision was not unreasonable.

[30] The Tribunal correctly applied the three-part test on the question of issue estoppel (see *Angle v MNR*, 1974 CanLII 168 (SCC)), finding that the Federal Court's decision was final, that there were no significant differences between the question before the Court and that which had to be answered by the Tribunal, and that it would not be unfair to apply the doctrine of estoppel to the complainants.

[31] Contrary to Ms Bangloy's submissions, the Tribunal did not interpret the Federal Court's decision as establishing a residency requirement for eligibility for education benefits. Rather, it correctly summarized the Court's decision as recognizing access to free education at schools within the treaty area. Indeed, the Court expressly found that education benefits were accessible only within the treaty area – that is, that the school attended by the applicant must be within the treaty area, regardless of where the applicant lived (*Beattie* at 16-18). Accordingly, it was proper for the Tribunal to find that the issue before the Court – whether the Treaty's education benefits provision applies beyond the treaty area – was the same as the issue before the Tribunal. In both cases, the issue to be decided was whether benefits could be paid in respect of schooling that took place outside the treaty area. Accordingly, the Tribunal's conclusion on this point was justified, intelligible, and transparent.

(3) Issue Three – Was the Tribunal's decision that there was no discrimination unreasonable?

[32] Ms Bangloy submits that the Tribunal erred by concluding that INAC's requirement that recipients of annuities be listed with a Band, and its failure to provide her information about education benefits, was not discriminatory. She maintains that entitlements under the Treaty are constitutionally-mandated and cannot be subjected to discretionary statutory requirements, such as Band registration. In effect, Ms Bangloy contends that the Tribunal misunderstood its role when it declared that the case before it was not about a breach of constitutional rights, but about statutory human rights.

[33] I disagree. The issue before the Tribunal was relatively narrow – had the complainants been deprived of a benefit because of discrimination on the basis of race or national or ethnic origin? In my view, the Tribunal properly characterized the issue before it and arrived at a reasonable conclusion.

[34] The Tribunal recognized that the complainants were protected from discrimination on the basis of race and national or ethnic origin. It also found that they had been denied annuities for a number of years. However, it went on to find that INAC's adverse treatment of the complainants was not discriminatory because that treatment was not connected to their race or national or ethnic origin. In fact, as the Tribunal explained, the complainants chose not to be listed with a Treaty 11 Band. It was that choice, not their race or national or ethnic origin, that resulted in the denial of annuity benefits.

[35] In respect of the allegation of delay in providing information about education benefits, INAC's position was that the complainants were not entitled to those benefits because the children attended school outside the treaty area. The Tribunal observed that INAC likely concluded that the complainants were already aware of their ineligibility based on their involvement in the Federal Court case and did not require further information. In any case, there was no evidence that INAC's conduct was connected to the complainants' race, or national or ethnic origin.

[36] In the circumstances, the Tribunal's conclusions and explanations were not unreasonable. It was dealing with complaints of discrimination, not a request for a declaration of the scope of the complainants' constitutional rights.

(4) Issue Four – Was the Tribunal's decision about retaliation unreasonable?

[37] Ms Bangloy argues that the Tribunal wrongly concluded that INAC's failure to provide information about education benefits, reimburse her for education expenses, and pay her children's annuities beginning on their dates of birth did not amount to retaliation. She claims that a finding of retaliation should have flowed from proof of adverse treatment for which INAC had not provided a reasonable explanation.

[38] I disagree. The test for a finding of retaliation requires more than just proof of adverse treatment.

[39] The Tribunal conducted a reasonable assessment of the various grounds of retaliation put forward by the complainants. It found in each case (except for the allegation of retaliation by delaying the payment of annuities) that the existence of a previous complaint was not a factor in the adverse treatment that the complainants had experienced. To make out a case of retaliation, as the Tribunal explained, there must be a previous human rights complaint, adverse treatment by the respondent, and a connection between the two. The Tribunal found that that there was no evidence to support the existence of that connection in the retaliation claims that it rejected, and that the complainants' perception that there was a connection was not reasonable. Those conclusions were not unreasonable on the evidence – they were justified, intelligible, and transparent.

(5) Issue Five – Were the Tribunal's remedy orders unreasonable?

[40] The complainants had requested that the Tribunal issue an Order requiring INAC to "meaningfully consult and reconcile" with them in order to prevent any further discrimination. The Tribunal concluded that the remedy sought was beyond the scope of the proceedings before it, given that its finding in the complainants' favour was limited to a single instance of retaliation. Ms Bangloy submits that the Tribunal was obliged to recognize and affirm the complainants' treaty rights, and its Order should have reflected that obligation.

[41] I disagree. The Tribunal fashioned a remedy, in the form of a monetary award, that corresponded with the conclusions that it reached in respect of the complainants' allegations. I cannot conclude that the Tribunal's refusal to issue a broad declaration of the complainants' constitutional rights was unreasonable in the circumstances.

III. Conclusion and Disposition

[42] The Tribunal reasonably found that the issue of entitlement to education benefits had already been decided by the Federal Court. Its conclusions that Ms Bangloy had not made out a claim of discrimination in respect of annuity payments or information about educational benefits were also reasonable given the absence of evidence of a connection between INAC's position and Ms Bangloy's race, or national or ethnic origin. Finally, the Tribunal reasonably concluded, with one exception, that INAC's conduct was not retaliatory. In respect of that single instance, the Tribunal issued a reasonable, proportionate monetary award in the complainants' favour. Each of the Tribunal's conclusions was justified, intelligible, and transparent. I must, therefore, dismiss this application for judicial review. The respondent has not sought costs.

JUDGMENT IN T-1847-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with no Order as to costs.

"James W. O'Reilly"
Judge

ANNEX

Canadian Human Rights Act (RSC 1985, c H-6)	**Loi canadienne sur les droits de la personne (LRC 1985, ch H-6)**
Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.
Denial of good, service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	**a)** d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	**b)** de le défavoriser à l'occasion de leur fourniture.
Retaliation	**Représailles**
14.1 It is a discriminatory practice for a person against whom a complaint has been	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte

filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

53 …

53 …

Complaint substantiated

Plainte jugée fondée

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the

order any of the following terms that the member or panel considers appropriate:

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) making an application for approval and implementing a plan under section 17;

(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévus à l'article 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances

rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

ou avantages dont l’acte l’a privée;

Treaty No. 11 (June 27, 1921) and Adhesion (July 17, 1922)

Traité No 11 (27 juin 1921) et adhésion à ce dernier (17 juillet 1922)

…

…

HIS MAJESTY, also agrees that during the coming year, and annually thereafter, He will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, to each Headman fifteen dollars, and to every other Indian of whatever age five dollars, to be paid only to heads of families for the members thereof, it being provided for the purposes of this Treaty that each band having at least thirty members may have a Chief, and that in addition to a Chief, each band may have Councillors or Headmen in the proportion of two to each two hundred members of the band.

SA MAJESTÉ convient aussi que l'an prochain et toutes les années subséquentes pour toujours, il fera payer aux dits Indiens en argent, à des endroits et des dates convenables, dont avis leur sera donné, vingt-cinq dollars à chaque chef, à chaque conseiller, quinze dollars, et à chaque autre Indien de tout âge, cinq dollars; ces montants devront être payés au chef de famille pour tous ceux qui en font partie, étant entendu, aux fins du présent traité, que chaque bande comptant au moins trente personnes peut avoir des conseillers ou des dirigeants à raison d'un conseiller ou d'un dirigeant par centaine de membres.

…

…

FURTHER, His Majesty agrees to pay the salaries of teachers to instruct the children of said Indians in such manner as His Majesty’s Government may deem advisable.

EN OUTRE, Sa Majesté s'engage à payer le salaire des maîtres d'écoles que son gouvernement du Canada jugera nécessaires pour instruire les enfants des Indiens.

Gender Equity in Indian Registration Act (SC 2010, c 18)

Loi sur l’équité entre les sexes relativement à l’inscription au registre des Indiens (SC 2010, ch 18)

2 …

(3) Paragraph 6(1)(c) of the Act is replaced by the following:

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(c.1) that person

(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,

(ii) is a person whose other parent is not entitled to be registered or, if no longer

2 …

(3) L'alinéa 6(1)c) de la même loi est remplacé par ce qui suit :

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

c.1) elle remplit les conditions suivantes :

(i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)b) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions,

(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce

living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;

FEDERAL COURT
SOLICITORS OF RECORD

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Nicholas Claridge	FOR THE RESPONDENT

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