Federal Court  Cour fédérale

Date: 20210401

Docket: T-681-20

Citation: 2021 FC 289

Ottawa, Ontario, April 1, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

TANYA NORTHCOTT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2004, the Applicant, Ms. Tanya Northcott, sought recognition of her status under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] through Indigenous and Northern Affairs Canada [INAC].

[2] INAC determined that Ms. Northcott was ineligible for Indian status based on the then applicable registration provisions under the *Indian Act*, a decision that INAC maintained over a period of 15 years. In 2019, following the coming into force of certain amendments to the *Indian Act*, INAC recognized Ms. Northcott's Indian status (*An Act to amend the Indian Act in response to the Superior Court of Québec decision in Descheneaux c Canada (Procureur général)*, SC 2017, c 25, s 10.1 [Bill S-3]).

[3] In 2015, prior to her status being recognized, Ms. Northcott filed a complaint with the Canadian Human Rights Commission [CHRC or Commission] in which she alleged (1) discrimination arising out of the refusal to recognize her status and (2) that the manner in which she was treated by INAC in the processing of her request was discriminatory.

[4] In a decision dated April 22, 2020, the CHRC advised Ms. Northcott that it had decided not to deal with her complaint. The CHRC determined the complaint was trivial, a decision it reached on the basis that section 10.1 of Bill S-3 prevents individuals from seeking compensation from the Crown for a past denial of status. Ms. Northcott now seeks judicial review of the CHRC decision pursuant to section 18 of the *Federal Courts Act*, RSC, 1985, c F-7.

[5] INAC, the responsible department has used various names during the period relevant to this Application. I will refer to the department as INAC throughout these reasons.

[6] After careful consideration of the written and oral submissions of the parties, I conclude that the Court's intervention is warranted. The CHRC's decision as it relates to the alleged discriminatory treatment of Ms. Northcott in the processing of her request for status is not reasonable. My reasons follow.

II. Background

A. *The Indian Act and Bill S-3*

[7] Individuals are entitled to registration under the *Indian Act* based on their ancestry and the status, or entitlement to status, of their ancestors (*Indian Act*, s 6). Historically, status determinations for women who married a non-status man have disadvantageously differed from those applicable where a man married a non-status woman. Many of these provisions in the *Indian Act* have been removed or amended over the years.

[8] In this regard, Bill S-3 addresses, in part, circumstances where women and their descendants have lost status due to marriage. The Bill also includes section 10.1, which provides that a right to claim compensation, damages or indemnity does not arise where a person newly entitled to registration as a result of the Bill S-3 amendments had previously not been registered:

No liability	**Absence de responsabilité**
10.1 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or	**10.1** Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce

a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because	qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à la date d'entrée en vigueur du présent article et que la personne ou l'un de ses parents ou un autre de ses ascendants a le droit d'être inscrit en vertu de l'un des alinéas 6(1)a.1), a.2) ou a.3) de la *Loi sur les Indiens*.
(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and	
(b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under paragraph 6(1)(a.1), (a.2) or (a.3) of the *Indian Act*.	

[9] It was the Bill S-3 amendments that addressed Ms. Northcott's ineligibility allowing her to become eligible for status upon their coming into force in 2019.

B. *The CHRA Complaint Process*

[10] The CHRC administers the complaint process established in the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. Section 40 of the CHRA provides that any person who believes another party has engaged in a discriminatory practice may file a complaint with the CHRC. In administering the process, the CHRC acts as a screening body in relation to complaints based on the enumerated grounds of discrimination identified in the CHRA (s 3).

[11] The CHRA defines discriminatory practices in sections 5 to 14.1. In providing services customarily available to the public, the CHRA provides that it is a discriminatory practice to "differentiate adversely in relation to any individual" on a prohibited ground of discrimination (s 5(b)).

[12] The CHRC may designate an investigator to investigate the complaint (CHRA, s 43(1)). Upon the conclusion of the investigation, the investigator must submit a report of the findings of the investigation to the CHRC (CHRA, s 44(1)). This investigation report is referred to as the section 40/41 report.

[13] The CHRC may dismiss a complaint if it is satisfied that an inquiry into the complaint is not warranted, (CHRA, s 44). The grounds for dismissal include those circumstances where the Commission finds a complaint to be trivial, frivolous, vexatious or made in bad faith (CHRA, s 41(1)(d)).

[14] In performing its screening function and determining whether in response to a complaint an inquiry is warranted, the Commission may rely on the section 40/41 report. Where the Commission follows an investigator's recommendations without providing its own supplementary reasons, the CHRC decision's reasonableness depends mainly upon the rationality of the report's reasoning and the conclusions (*Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 15).

C. *Ms. Northcott's Request for Status*

[15] In April 2004, Ms. Northcott requested that INAC recognize her status under the *Indian Act*. In May 2007 the request was denied—INAC was unable to establish whether either of Ms. Northcott's birth parents were themselves entitled to status and registration under the *Indian Act*.

[16] In October 2010, Ms. Northcott protested the initial denial. In September 2011, the protest was refused on two grounds. First, the protest was initiated after the expiry of the three-year protest period identified in the original decision letter and therefore could not be accepted as a valid protest. Second, although changes to the *Indian Act* that came into force in January 2011 might have made her birth mother eligible for registration (*Gender Equity in Indian Registration Act*, SC 2010, c 18) it was not established that her birth father was eligible. As only one birth parent was entitled to registration under the *Indian Act*, INAC was unable to establish that Ms. Northcott was entitled to registration.

[17] In June 2014, Ms. Northcott asked that her file be reopened and INAC agreed to do so. In April 2015, she filed the human rights complaint that is the subject of this Application.

[18] In June 2017, INAC informed Ms. Northcott that she remained ineligible for registration. Following the Bill S-3 amendments to the *Indian Act*, INAC advised Ms. Northcott to reapply for status. On September 20, 2019, INAC confirmed that Ms. Northcott had become registered under the *Indian Act.*

D. *The CHRC Complaint*

[19] Ms. Northcott's complaint alleges discrimination based on race, sex, and family status. First, she alleges that denial of status under the *Indian Act* based on her parentage is discriminatory. Second, she alleges that the long wait times she experienced in the processing of her request are attributable to inadequate staffing which reflected INAC's view that these were not important services for Indigenous persons, and that this too amounted to discrimination under the CHRA:

> …I feel that if this was a segment of the Government that catered to the general public that it would not take such an unacceptable extraordinary long time for responding to queries; because it's an Aboriginal issue the Aboriginal Affairs and Northern Development Canada do not hire enough people to handle the case load because it's not considered an important service for Aboriginal people which is discrimination upon a person's Race.

[20] The CHRC initially advised Ms. Northcott that the complaint would be held in abeyance as it challenged discriminatory impacts flowing from the wording of federal legislation, an issue that was before the Supreme Court of Canada for final determination. The Supreme Court issued its decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 in June 2018. Subsequently, an investigator was appointed and a section 40/41 report was completed.

[21] Ms. Northcott suffers from Fetal Alcohol Spectrum Disorder. As a result, it often takes longer for her to comprehend what is being relayed to her, and she does not always understand information properly. Ms. Northcott did not identify this medical condition in her initial complaint, a matter that I address later in these reasons (see paragraph 36).

III. The CHRC Investigation

A. *The Section 40/41 Report*

[22] The investigator found that the complaint raised an issue of whether, if the complaint was successful, a practical remedy was available. The investigator noted that allegations without a practical remedy may be "trivial" within the meaning of the CHRA.

[23] The investigator recognized that prior to Bill S-3, the *Indian Act* contained provisions that discriminated against and negatively affected Ms. Northcott. However, the investigator found section 10.1 of Bill S-3 applied to Ms. Northcott's complaint. The investigator also noted that although the complaint alleged undue hardship in the registration process, the underlying issue was INAC's determination that Ms. Northcott was ineligible for status under the *Indian Act*. As such, the investigator found section 10.1 also prevented the Tribunal from ordering any useful remedy in respect of this part of the complaint. Having concluded damages could not be awarded for either claim, the investigator found that "there does not appear to be any practical remedy that the Tribunal could order with respect to the issue of obtaining Indian Status." Without a practical remedy, the investigator concluded all the allegations were trivial as provided for at paragraph 41(1)(d) of the CHRA and recommended that the CHRC not deal with the complaint.

[24] The section 40/41 report was provided to the parties for comment. Ms. Northcott provided submissions on the report and counsel for the Respondent provided a response to Ms. Northcott's submissions.

B. *Ms. Northcott's Response to the 40/41/ Report*

[25] In responding to the section 40/41 report, Ms. Northcott took the position that section 10.1 of Bill S-3 did not apply to her. She maintained her claim that her Indian Status was denied prior to Bill S-3 because of a discriminatory policy, not because of requirements under the *Indian Act.* She further submitted that Section 10.1 blocks claims for damages against the government related to past denials of Indian Status "for anything done or omitted to be done in good faith." and that the INAC policy requiring that she prove the identity of her birth father coupled with the lengthy processing delays amounted to bad faith conduct.

[26] She further alleged that INAC's bad faith conduct continued after the submission of her complaint after her status was recognized in 2019, in the context of her attempts to obtain a Secure Certificate of Indian Status [Status Card]. She alleged that INAC: (1) was not sensitive to her Fetal Alcohol Spectrum Disorder; (2) she again experienced lengthy process delays; (3) call back practices were unreasonable; and (4) an INAC employee hung up on her and she was left believing that her file would be closed if documents were not submitted by defined dates. She reports this caused her distress because she thought closing her file meant she would lose her status under the *Indian Act*.

C. *The Respondent's Response to the 40/41 Report*

[27] The Respondent submitted the complaint was moot because Ms. Northcott's status had been recognized. The Respondent noted that Ms. Northcott's request for Indian Status was not denied because she could not prove her birth father; this information was known to the

Respondent at the time. Instead, the issue was that her birth father was not entitled to registration. The Respondent notes that Ms. Northcott's status request was denied because she did not meet the requirements of section 6 of the *Indian Act* at the time.

[28] In addressing the alleged bad faith, the Respondent submitted there was no evidence that Ms. Northcott's Indian Status registration was deliberately denied or delayed with the intent to harm her. The Respondent also argued that Ms. Northcott's treatment when obtaining a status card and any alleged failure to account for her Fetal Alcohol Spectrum Disorder were new issues not raised in her original complaint.

IV. Decision under Review

[29] In dismissing Ms. Northcott's complaint the Commission issued no supplementary reasons, relying on the recommendation of the investigator and the section 40/41 report.

V. Issues and Standard of Review

[30] Ms. Northcott argues that the CHRC erred in dismissing the whole of her complaint on the basis that section 10.1 of Bill S-3 prevented the tribunal from ordering any practical remedy because the decision unreasonably:

A. focuses exclusively on the first part of the complaint and thereby fails to address whether the second part the complaint was barred by section 10.1; and

B. interprets section 10.1 to be a bar to the second part of the complaint.

[31] Decisions by the CHRC to dismiss complaints under *CHRA* section 41(1)(d) are reviewed on a reasonableness standard (*Stukanov v Canada (Attorney General),* 2021 FC 49 at para 28). A decision maker's interpretation of statute is also to be reviewed against a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 115 [*Vavilov*]). In interpreting legislation "[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case," although the merits of their interpretation must still accord with the provision's text, context, and purpose (*Vavilov* at para 119-120). "Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements" (*Vavilov* at para 120).

[32] A decision will be reasonable if it "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at paras 85).

VI. Analysis

[33] In this Application, Ms. Northcott does not take issue with the conclusion that section 10.1 of Bill S-3 prevents her from claiming any compensation regarding the past denial of her status, the first part of her complaint. This aspect of the decision is reasonable

[34] However, the CHRC's decision to dismiss the second part of Ms. Northcott's complaint is unreasonable. The decision, when read as a whole, does not disclose a chain of analysis

supporting the conclusion that s 10.1 prevents the ordering of a practical remedy in respect of the second part of the complaint.

A. *Failure to Address the Whole of the Complaint Renders the Decision Unreasonable*

[35] In responding to the section 40/41 report Ms. Northcott notes that section 10.1 of Bill S-3 is of application only if the government has acted in good faith. She takes issue with the conclusion that section 10.1 is of application because she alleges INAC had acted in bad faith in the processing of her request. She points to the lengthy delays, the lack of clear reasons for the refusals, the repeated requests that she supply documents, the difficulties in getting a response to her inquiries, the INAC call back process, and the failure to consider and accommodate her Fetal Alcohol Spectrum Disorder. She further highlights that the process issues were ongoing; she continued to experience them in the processing of her request for a status certificate.

[36] The section 40/41 report details both aspects of the complaint. In summarizing the second part of the complaint, it is acknowledged that Ms. Northcott's allegations relating to process were ongoing in that she had experienced similar issues while seeking to obtain a status certificate. In this regard, I note that Ms. Northcott wrote to the Commission in December 2019 (Application Record at page 27) detailing her experience in obtaining a status certificate. She reported a conversation she had with an INAC official where she notified the official that she suffered from a brain injury and described its impact on her. She reported that the INAC official hung up on her and again complains of the INAC call back system. She specifically requests that the investigator include this letter as part of her complaint.

[37] Despite Ms. Northcott's bad faith allegations, the section 40/41 report and the Commission's decision are silent on the issue. The report limits its consideration of the process complaint to a single paragraph finding that the underlying issue for this complaint was the ineligibility decision. It appears that the report takes the position that because the first complaint underlies the second, the second complaint should be addressed in the same manner as the first. Why this is so is not readily evident. There is no doubt that had the initial status decision been different Ms. Northcott would not have been exposed to the process issues she now alleges are discriminatory. However, this does not reasonably lead to the conclusion that the second aspect of the complaint cannot stand independently of the first.

[38] Ms. Northcott's submissions in response to the section 40/41 report argue that section 10.1 could not apply to the second part of the complaint because INAC had not acted in good faith. The Respondent briefly addresses this submission in its reply to the section 40/41 report. However, neither the section 40/41 report nor the Commission's decision attempts to address or grapple with this issue. The failure to address a fundamental issue or argument may well render an administrative decision unreasonable (*Walker v Canada (Attorney General)*, 2020 FCA 44 at para 9 citing *Vavilov* at paras 96-98, 127-128).

[39] Ms. Northcott's bad faith submissions were central and fundamental to her reply to the section 40/41 report. They directly address the applicability of section 10.1 to the process aspect of her complaint.

[40] The reasons contained in the section 40/41 report and Commission's decision itself must be considered and read "in light of the history and context of the proceedings" (*Vavilov* at para 94). In the context of the CHRA complaint process, it may be possible to view the submissions of a complainant and respondent in response to a section 40/41 report as informing the Commission's decision and adoption of the section 40/41 report as it reasons. Presuming, without deciding this could be so, I would decline to adopt such an approach in this circumstance. The issue not addressed is central or fundamental to the position advanced by the complaint.

[41] The Respondent also takes the position that many of the facts Ms. Northcott cites in support of her bad faith submissions were not included in her original complaint and are not relevant to the issues raised in her complaint. While these issues, including Ms. Northcott's medical conditions, might well have been new to the Respondent, they were placed before the Commission in advance of the completion of the section 40/41 report. They were not new to the Commission and Ms. Northcott had expressly requested they form part of her complaint.

[42] Administrative decision makers must grapple with the key issues or central arguments raised (*Vavilov* at para 128). Bad faith was Ms. Northcott's central submission in her reply to the section 40/41 report and it impacted directly upon the application of section 10.1 to her claim. The Commission's failure to address this issue renders the decision unreasonable.

B. *The Interpretation of Section 10.1 of Bill S-3 was also unreasonable*

[43] My conclusion above is determinative of the Application so I will only briefly comment on the issue of the reasonableness of the Commission's interpretation of section 10.1.

[44] As I have previously noted, administrative decision makers need not engage in a formal statutory interpretation analysis when considering the meaning of legislation. However, where an issue of interpretation arises the decision maker must demonstrate in its reasons that it was alive to the provision's text, context, and purpose (*Vavilov* at para 119-120). In this instance, an issue of interpretation unquestionably arises.

[45] The purpose of section 10.1 of Bill S-3, which at the time was clause 8, was described as follows by the Minister's delegate before the Senate Standing Committee on Aboriginal Peoples:

> …clause 8 of the bill has the effect of preventing claims by individuals newly entitled to registration under BillS-3 for compensation for benefits that they were not entitled to in the past. That is the policy behind clause 8…That kind or provision actually reflects a common law rule, and it was put in the bill for clarity (Senate, Standing Committee on Aboriginal Peoples, *Evidence*, 41-2, No 14 (30 November 2016)).

[46] The Respondent, in its reply to the section 40/41 report, described the purpose of section 10.1 in similar terms:

> This provision merely codifies the general public law that damages will not be awarded for harm suffered as a result of the application of a law subsequently declared invalid, absent bad faith (Certified Tribunal Record at page 26, also see *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 78).

[47] The section 40/41 report, adopted by the CHRC, found that section 10.1 applied to the second part of Ms. Northcott's complaint. This conclusion is, on its face, at odds with the text and purpose of the section. The section 40/41 report does not detail any analysis in support of the conclusion that section 10.1 applies to the second part of the complaint. Instead, the conclusion is explained on the basis that the second part of the complaint is subsumed in the first part of the complaint. I have already found that this determination was unreasonable.

[48] I am not satisfied that in concluding section 10.1 was determinative of the second part of Ms. Northcott's complaint, that the investigator considered the meaning of the section in a manner reflective of the text, context, and purpose of section 10.1.

VII. Costs

[49] The parties have agreed on costs, proposing the amount of $2750 be ordered payable to the successful party. I am satisfied that the quantum proposed is appropriate.

[50] The parties further advised the Court that in the event costs are payable to Ms. Northcott, the Order should provide costs be payable to Ms. Northcott's counsel in trust subject to the following directions:

A. the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;

B. any amount that remains may be retained by her counsel; and

C. if any dispute arises as to the amount to which the Applicant is entitled a motion may be made to this Court for a resolution.

[51] The parties note that where *pro bono* counsel is involved in a matter, the payment of costs to counsel, in trust, is consistent with the decision of the Federal Court of Appeal in *Roby v Canada (Attorney General)*, 2013 FCA 251 [*Roby*].

[52] In *Roby*, the Court of Appeal noted that *pro bono* representation is not a bar to a costs award (para 24). The Court further noted that although costs are normally payable to and by the parties in accordance with Rule 400(7) of the *Federal Courts Rules*, SOR/98-106, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust (para 26). In turn the jurisprudence has recognized that *pro bono* counsel may enter into fee arrangements with their client allowing a costs award to be payable to counsel and assuring no windfall to a client benefitting from *pro bono* representation (para 25 citing *1465778 Ontario Inc v 1122077 Ontario Ltd*, 2006 CanLII 35819, 82 OR (3d) 757 (Ont CA)).

[53] I am satisfied that the quantum of costs proposed, in addition to making costs payable to Applicant's counsel in trust subject to the directions set out above, is appropriate in the circumstances. Absent counsel's *pro bono* involvement, the matter may not have been pursued and the issues raised may have been less effectively defined.

VIII. Conclusion

[54] The Application is granted and the CHRC's decision as it relates to Ms. Northcott's treatment is set aside and remitted to the Commission for redetermination in accordance with these Reasons.

JUDGMENT IN T-681-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The April 22, 2020 decision of the Canadian Human Rights Commission, is set aside in part and the matter is returned for reconsideration in accordance with these reasons

3. Costs to the Applicant in the amount of $2750 inclusive of all disbursements and taxes payable to Nelligan O'Brien Payne LLP, subject to the following:

    a) the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;

    b) any amount that remains may be retained by her counsel; and

    c) if any dispute arises as to the amount to which the Applicant is entitled, a motion may be made to this Court for a resolution.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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