Canadian Human
Rights Tribunal

Tribunal canadien
des droits de la personne

BETWEEN:

JOHN ENNIS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TOBIQUE FIRST NATION

Respondent

RULING

MEMBER: J. Grant Sinclair

2006 CHRT 21
2006/04/27

[1] The complainant, John Ennis, has filed a complaint with the Canadian Human Rights Commission dated July 11, 2002. He alleges that the respondent, Tobique First Nation, discriminated against him contrary to s. 5 of the *Canadian Human Rights Act,* by raising the "Social Basic Rates" by 5% without at the same time increasing the "Disability Rates" for members of the Tobique First Nation.

[2] The respondent seeks an order from the Tribunal that s. 67 of the *CHRA* applies, so that the Tribunal lacks jurisdiction to hear the complaint.

[3] The Social Basic Rates were increased following the Band Council Resolution dated May 23, 2000. The respondent argues that the payment of social assistance monies to band members is authorized by ss. 66 and 69 of the *Indian Act*. Further, the band must pay social assistance in accordance with the *First Nations Social Development Manual for Malisset at Tobique.*

[4] Under s. 66(1) of the *Indian Act*, the Minister of Indian Affairs and Northern Development, with the consent of the Band Council, may authorize and direct the expenditure of revenue monies for any purpose that will promote the general progress and welfare of the band or any member thereof.

[5] Section 66(2) authorizes the Minister to make expenditures out of revenue monies of the Band to assist sick, disabled, aged or destitute band members.

[6] Section 69(1) provides that the Governor in Council may by order permit a Band to control, manage and expend in whole or in part its revenue monies.

[7] In its motion, the respondent merely asserts that ss. 66 and 69 of the *Indian Act* constitute the legal authority for the respondent Band Council to dispense social assistance payments.

[8] The respondent has not provided any evidence of the Band Council's consent or the Minister's authorization and direction as required by s. 66.

[9] Section 66(2) authorizes the Minister, not the Band, to make expenditures out of band revenue monies.

[10] The respondent did not provide any evidence of an order by the Governor in Council permitting the Band to deal with its revenue monies under s. 69.

[11] There are a number of cases that have considered s. 67 of the *CHRA*. The first case is *Desjarlais v. Piapot Band No. 75*, [1989] 3 F.C. 605, 12 C.H.R.R. D/466 (C.A.). In this case, the Band dismissed its Band Administrator pursuant to a formal resolution of the Band Council. The resolution was a vote of non-confidence in the complainant, based on complaints relating to her age. She filed a complaint with the Commission alleging discrimination because of age.

[12] Ultimately the case was heard by the Federal Court of Appeal, which rejected the respondent's argument that s. 67 of the *CHRA* applied.

[13] In interpreting s. 67, the Court considered that the words ". . . or any provisions made under or pursuant to that *Act*" included any decision taken by a Band Council under a specific section of the *Indian Act*. But the Court concluded that a vote of non-confidence in an employee of the Band was not specifically authorized by the *Indian Act*. Section 67 did not apply.

[14] The next case in this line of cases is *Canada (Human Right Commission) v. Canada (DIAND)*, (1995), 25 C.H.R.R. D/386) ("*Prince*"). Section 115 of the *Indian Act* authorizes the Minister of Indian Affairs to make policies in regard to the funding of native children to attend residential schools. The Minister adopted a policy requiring native children to attend the school closest to their residence. The complainant's daughter attended a religious school away from home and was denied governmental assistance.

[15] The Tribunal declined jurisdiction, reasoning that the Minister's funding decision was a decision under s. 115 of the *Indian Act*, so that s. 67 of the *CHRA* applied. The Federal Court, on review, agreed with the Tribunal.

[16] In *MacNutt v. Shubenacadie Indian Band Council*, [1998] 2 F.C. 198; aff'd (2000), 37 C.H.R.R. D/466 (F.C.A.), a non-Indian spouse, who lived on the reserve with permission of the Band Council, was denied social assistance. The federal government had contracted with the Band to administer the social assistance program for band members. The guidelines for administering the agreement specifically provided that a non-Indian spouse who resides legally on a reserve is eligible for benefits.

[17] The case went to the Federal Court, which decided that the Band Council's decision to deny benefits was not immunized by s. 67 of the *CHRA*. The Court pointed out that the Band Council's decision was not based on any specific provision of the *Indian Act.*

[18] Further, s. 67 of the *CHRA* should not be taken as exempting all Band Council decisions, but only those decisions authorized by the *Indian Act.*

[19] The respondent appealed to the Federal Court of Appeal, which dismissed the appeal. In its reasons confirming the lower court decision, the Court of Appeal reviewed the history of social assistance agreements between the Federal Government and First Nations.

[20] The Court noted that in 1996, Parliament enacted the Canada Assistance Plan ("CAP"), which provided for cost sharing income maintenance programs between the Federal Government and the provinces. Under Part II of the CAP, the Minister for DIAND could enter into such cost-sharing agreements to extend provincial welfare payments to Indian residents on reserves. No province to date has signed a Part II agreement.

[21] Apart from the CAP, Parliament has not enacted any legislation that expressly provides for social assistance to Indian residents on reserves. However, since 1964, Treasury Board has had in place a policy which authorizes DIAND to provide social assistance to First Nations. This is the legal basis for such social assistance programs, and it is found in *Treasury Board Minute Number 627879*, which was adopted on July 16, 1964.

[22] In its reasons, the Court referenced a document entitled *Background of the Development of the Social Assistance Program.* (This document is also included in Appendix 1 of the respondent's *First Nations Manual.*)

[23] According to this *Background* document, *Treasury Board Minute Number 627879* authorized DIAND to adopt provincial and municipal welfare assistance rates and conditions in the administration of social assistance programs to First Nations. The *Background* document confirms that there is no specific legislation providing for social assistance programs for First Nations.

[24] The respondent did not provide the Tribunal with any contract or agreement between DIAND and the Maliseet Nation at Tobique relating to the funding of its social assistance program. (Presumably such an agreement is in place). Instead, the respondent pointed to the *Tobique First Nations Development Manual* as authorizing the May 23, 2000 Band Council Resolution. My reading of the *Manual* does not show that it is the source of the Band Council's authority. Rather, the *Manual* provides the guidelines and procedures for the Band to administer the social development program. Even if it can be viewed as the basis for the May 23, 2000 Resolution, the Resolution is not *a provision made under or pursuant to the Indian Act.*

[25] In *Canada (Human Rights Commission) v. Gordon Band Council*, [2001] 1 F.C. 124 (C.A.), the complainant, a status Indian who lived on the Gordon First Nation Band reserve with her non-Indian spouse, applied for rental housing on the reserve. Her request was denied by the Band Council. She filed a complaint with the Commission alleging discrimination on the basis of sex and family status.

[26] The respondent raised s. 67 of the *CHRA* and the Tribunal concluded that it lacked jurisdiction to hear the case. The Tribunal reasoned that the Band Council's decision not to allot housing to the complainant was specifically authorized under s. 20 of the *Indian Act*. Section 20 provides that no Indian is lawfully in possession of land on a reserve unless, with the approval of the Minister, it has been allotted to him by the Band Council.

[27] The Federal Court of Appeal agreed with the Tribunal. In its reasons, the Court said, as did the Tribunal, that s. 67 of the *CHRA* must be narrowly interpreted because it limits the scope of human rights legislation. In this regard, the Court relied on the Supreme Court of Canada's decision in *Zurich Insurance Company v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at 339, where the Supreme Court accorded the Ontario's *Human Rights Code* quasi-constitutional status, such that any exceptions to the legislation had to be narrowly construed.

[28] Substantively, the Court accepted that s. 20 confers not only the authority to make a housing allotment, but also, by necessary implication, the authority to refuse a housing allotment.

[29] The most recent two cases on s. 67 are *Bernard v. Waycobah Board of Education*, (1999) 36 C.H.R.R. D/51 (C.H.R.T.) and *Bressette v. Kettle and Stoney Point First Nation Band Council (No. 1)* 2003 CHRT 41. In *Bernard*, the complainant, a member of the Waycobah First Nation, was employed as a school secretary. Her employment was terminated by the respondent because of her conduct on two or three occasions, which the Board believed was caused by a mental disability. She filed a complaint with the Commission alleging discrimination on the grounds of disability.

[30] The respondent argued that s. 114 of the *Indian Act*, which authorizes the Minister to establish, maintain and operate schools for Indian children, authorized the Board of Education to make the decision it did.

[31] The Tribunal rejected this argument. Although, said the Tribunal, s. 114(2) of the *Indian Act* does so authorize the Minister, there was no substantive connection between s. 114(2) of the *Indian Act* and the decision of the Waycobah Board of Education to terminate the complainant's employment.

[32] *Bressette v. Kettle and Stoney Point First Nation Band Council* involved a status Indian and member of the Kettle and Stoney Point First Nation who applied for, but was not given, the position of Band family case worker. He filed a complaint with the Commission alleging that he was denied the job on the ground of family status.

[33] The respondent argued that its decision was specifically authorized under ss. 69, 81 and 83 of the *Indian Act*. Sections 81 and 83 authorize Band Councils to make by-laws dealing with the subject matters specified in those sections.

[34] In the final analysis however, the respondent relied on two regulations under the *Indian Act*, both of which, in general terms, provide for the management, control and expenditure of band revenue monies.

[35] The Tribunal concluded that the decision of the respondent had both a staffing aspect and a financial aspect. But the predominant purpose of the Band Council's decision was to staff the family case worker position. There is no specific provision in the *Indian Act* relating to staffing positions for a band. Thus, s. 67 did not apply.

[36] In my opinion, the same reasoning applies to this case. The Band Council Resolution of May 23, 2000 was a decision that involved the allocation of social assistance funds to band members living on the reserve. The expenditure of revenue monies was only consequential to this decision.

Conclusion

[37] The preceding analysis of the *Indian Act*, the Tribunal decisions, and the Court decisions establishes the following:

(1) Section 67 of the *CHRA* must be given a narrow interpretation, being an exception to human rights legislation;

(2) The predominant purpose of the Band Council Resolution of May 23, 2000 was the allocation of social assistance benefits to band members on the reserve;

(3) There is no specific provision in the *Indian Act* that authorizes a Band Council to make decisions relating to the allocation of social assistance to members of the band living on a reserve. The legal authority is the 1964 *Treasury Board Minute Number 627879*;

(4) Of the cases dealing with the application of s. 67 of the *CHRA*, only two have concluded that the decision of the Band Council was exempt from human rights review. In these two cases, the Band Council's decision was supported by a specific provision of the *Indian Act;*
In the other cases, the respondent was unable to point to any specific section of the *Indian Act* to support the decision complained of;

(5) In none of the cases referred to where the Band Council's decision involved the expenditure of band monies, did the Tribunal or Court find that the impugned decision was justified by ss. 66 or 69 of the *Indian Act*;

(6) In fact, other than in *Bressette*, no respondents argued that these decisions were, or could be, supported under ss. 66 or 69;

(7) There is no evidence that the pre-conditions for the exercise of the power granted under ss. 66 and 69 have been satisfied;

(8) Sections 66 and 69 are general and non-specific, and should not prevail over human rights review, given the judicial directive that s. 67 of the *CHRA* must be narrowly interpreted.

[38] For all these reasons, the respondent's motion is dismissed.

"*Signed by*"

J. Grant Sinclair

OTTAWA, Ontario
April 27, 2006

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T927/4704
STYLE OF CAUSE:	John Ennis v. Tobique First Nation
RULING OF THE TRIBUNAL DATED:	April 27, 2006

APPEARANCES:

John Ennis	For himself
Daniel Pagowski	For the Canadian Human Rights Commission
Harold Doherty	For the Respondent