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NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF The Northwest Territories
***Human Rights Act,* R.S.N.W.T, 1988. as amended,**

BETWEEN:

ELIZABETH PORTMAN

Appellant

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES
SUN LIFE ASSURANCE COMPANY OF CANADA
Respondents

Reasons for Decision
Ruling on access to public to pre-hearing conferences

Before: Adrian Wright, Chair, Human Rights Adjudication Panel

Appearing:
Elizabeth Portman, for herself (written submission only)
Karen Lajoie, Counsel for the Respondent, Government of the Northwest Territories in both complaints (written submission only)
James Neilson, Q.C., Counsel for the Respondent Sun Life Assurance Company of Canada (written submission only)

Authorities considered:
***Human Rights Act,* S.N.W.T. 2002, c. 18, as amended*: Sections 52 and 59;**
Rules of Practice and Procedure of the Human Rights Adjudication Panel, Rules 16 to 22 and 40.

[1] This decision concerns whether the public may be present for pre-hearing conferences and preliminary applications. It also addresses the notice to be given to the public of these procedures.

[2] This issue arose during the course of these two complaints. Ms Portman applied to have the two complaints heard together; the Respondents Government of the Northwest Territories (GNWT) and Sun Life Assurance Company of Canada (Sun Life) both opposed this application. GNWT also applied to be removed as a respondent to complaint 04-11.

[3] Ms Portman requested all steps taken on these complaints be held in public. This includes pre-hearing conferences, preliminary applications and the hearings.

[4] Section 52 of the Human Rights Act provides for the practice and procedure in hearings and appeals. Section 52 (1) allows the Panel to make rules for hearing and pre-hearing matters; section 52 (2) allows the adjudicator to determine the practice and procedure for the conduct of hearing and pre-hearing matters so as to promote the just and timely resolution of the complaint or appeal.

[5] Section 52 (3) contemplates the adjudicator may require the parties to attend a pre-hearing conference relating to a complaint or appeal. The pre-hearing conference may concern issues relating to the complaint or appeal and the possibility of simplifying or disposing of issues.

[6] Section 59 requires a hearing be open to the public unless the adjudicator decides there are sufficient reasons to hold all or part of the hearing in private. This request may be made by a party or on the adjudicator's own initiative. The Adjudication Panel holds pre-hearing conferences in most, if not all complaints and appeals. These conferences are almost always held by telephone. A date and time when the parties are available is set. The parties are then given written notice of the conference.

[7] Rules 16 to 22 of the Adjudication Panel's Rules of Practice and Procedure address pre-hearing conferences. Rule 18 lists a number of matters the parties should be prepared to discuss at pre-hearing conferences.

[8] The Rules are silent on whether the public may attend pre-hearing conferences. Rule 40, however, repeats the requirement in section 59: hearings are open to the public unless the adjudicator decides otherwise after hearing from the parties.

[9] In this case, Ms Portman requests pre-hearing conferences be open to the public. She submits,

- The hearing starts with the first conference call.
- Pre-hearing conferences may deal with more significant issues than setting dates and advising of witness lists. If so, the conference should be open to the public.
- Matters of law may be decided in pre-hearing conferences
- Individuals with an interest in human rights in the Northwest Territories should have the opportunity to observe these conferences
- There is no compelling reason to "cloak these calls in secrecy".
- Canadian legal proceedings are generally held in public.

[10] Both respondents oppose allowing the public at pre-hearing conferences. They contend pre-hearing conferences are "where logistical and procedural questions can be ironed out, discussed or if need be argued". Public access to pre-hearing conferences is something to be determined by the adjudicator as part of the adjudicator's "discretion to control the process."

[11] I will first address the various procedures used by the Panel as outlined in the Act and the Rules of Practice and Procedure. I will then deal with allowing public access to these procedures fits in with their purpose.

[12] In *Aurora College* v. *Niziol*, 2010 NWTSC 87 (CanLII), Schuler J. found an adjudicator operates under the adversarial model. A complaint is made about a possible contravention of the Act. The parties to the complaint present evidence and make argument. The adjudicator decides if there is discrimination and, if there is, on the appropriate remedy.

[13] The pre-hearing conference is a management tool. It assists the adjudicator and the parties to take a complaint from its receipt by the Panel to resolution. The adjudicator and the parties will discuss the issues in the

complaint; the evidence; scheduling – and the possibilities of settlement. This must be an open process. The parties cannot be concerned what they reveal in a pre-hearing conference may end up in the adjudicator's final decision. They must be able to freely discuss all the issues. This frank exchange of positions will both enhance the possibility of settlement of some or all the issues in the case and streamline the procedure at the hearing.

[14] As a result, pre-hearing conferences are not part of the hearing. The hearing commences when the adjudicator says it does. Only the evidence received by the adjudicator and argument made at the hearing can be considered by the adjudicator in deciding the case.

[15] As indicated, section 59 of the *Act* and Rule 40 require hearings to be public unless the adjudicator orders otherwise. The reasons for this are clear – human rights cases are important. The public must be able to observe them, to learn from them and understand them. It must be able to see the principles in the *Human Rights Act* are observed.

[16] Pre-hearing conferences are different. In order to be effective, the parties must be prepared to speak freely and openly at them. The adjudicator should be able to canvass the possibilities of settlement and discuss the strengths and weaknesses of the parties' positions. This is less likely if these conferences are open to the public.

[17] Sometimes issues must be decided before the hearing. For example, in this case, Ms Portman requests complaints 04-11 and 05-11 be heard together; the Government asks to be let out of 04-11. The Government also argues complaint 05-11 should be brought by Ms Portman's union – not Ms Portman herself. These issues must be resolved before the hearing. As a result, they are resolved in pre-hearing applications. The reasons favouring not allowing the public – encouraging openness and candour – do not apply to preliminary applications. So, pre-hearing applications involving significant and distinct issues to be resolved before the hearing should be open to the public.

[18] Clearly, many issues will be resolved at pre-hearing conferences. It will be more practical and expedient to decide the date for the hearing and other similar procedural issues at pre-hearing conferences. When possible, however, more

substantial matters requiring some argument from the parties should not be decided at pre-hearing conferences but at preliminary applications which should be open to the public.

[19] I note section 52 of the *Act* and Rules 16 to 22 are all silent about the attendance of the public at pre-hearing conferences. This is consistent with my view about the purpose of these conferences and the detriment resulting from allowing the public to attend.

[20] Finally, public notice of these preliminary applications was given by posting a notice on the Adjudication Panel's website.

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Adrian Wright
Chair
Human Rights Adjudication Panel
15 July 2013