

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 Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

File No.: T1340/7008

Members: Sophie Marchildon, Réjean Bélanger and Edward P. Lustig

Date: January 14, 2015

Citation: 2015 CHRT 1

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I. Background

[1] The Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN), have filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c. H-6 (the *Act*).

[2] On July 10, 2012, a Panel composed of Members Marchildon, Lustig and Bélanger, was appointed by the Canadian Human Rights Tribunal (the Tribunal) to hear this case (2012 CHRT 16).

[3] On December 9, 2013, the Commission recalled Dr. Cindy Blackstock to the stand. Following an objection from the Respondent pertaining to the admissibility of a document being put to Dr. Blackstock and, after hearing the parties' submissions on the issue, the Tribunal briefly adjourned the proceedings to consider the objection. The Tribunal advised the parties that, in light of the Commission's intention to put a number of other newly disclosed documents to Dr. Blackstock in a similar manner, the Tribunal felt that it would be best to decide the issue of document admissibility at that time, rather than to wait until the end of the hearing as had been initially agreed upon by the parties.

[4] The Caring Society advised the Tribunal that it would therefore file a motion regarding document admissibility with the Tribunal the following day, or soon thereafter. The Caring Society provided the Tribunal and parties with a Notice of Motion, entitled "Motion for an Order Admitting Documents as Evidence for the Truth of their Contents".

[5] In a Case Management Conference (CMC) in the afternoon of December 9, 2013, the parties agreed to argue the Motion on December 10, 2013. The parties also agreed to argue the question of the parameters of the recall of witnesses, as raised by the Respondent.

[6] Given the fact that the Complainants had planned to have Dr. Blackstock testify in early January 2014, and in order to expedite matters so as to provide the parties with greater certainty, the Tribunal issued, on January 6, 2014, a point form ruling with reasons to follow.

[7] On January 14, 2014, the Commission recalled Dr. Blackstock to the stand. The parties requested clarification of the Tribunal's point form ruling of January 6, 2014. The Tribunal deliberated on the matter and, following a brief adjournment, orally issued the following clarification decision:

1. Portion means "a part". The use of the term portion in the point form ruling means the part that the witness is testifying about or that Counsel directs the Panel to. For example, Dr. Blackstock testified to several portions of the BC service agreement found at tab 275;

2. The Panel's intention is to ensure that the opposing party knows the case to be met in response to the party adducing evidence;

3. In dispensing of the requirement to authenticate documents through a witness, the Tribunal did not intend to permit the party adducing evidence to rely on evidence during its final argument that wasn't introduced during the evidence phase of the hearing according to the procedure set out in paragraph c of the point form ruling without giving the opposing party an opportunity to adequately prepare a response, if need be; [Underlining ours]

4. If a party intends in argument to rely on portions of documents that were not introduced during the hearing phase in accordance with paragraph c), it runs the risk of the Panel allowing the opposing party additional time to adequately prepare a response. [Underlining ours]

5. The Tribunal takes note of Mr. Champ's suggestion that prior to the Respondent commencing its case, he will provide a clear indication of portions of documents not introduced during the evidence phase of the hearing that he intends to rely on in argument. [Underlining ours]

6. This may help to allow the Respondent to prepare its own evidence during the hearing phase and may avoid the need for the Panel to provide the curative measures set out in paragraph d) of the point form decision. [Underlining ours]

[8] The reasons of the point form ruling were provided on January 16, 2014 (2014 CHRT 2).

[9] On October 24, 2014, the hearing on the merits concluded and the Panel advised the parties it would communicate to them, the following week, on a process to best address the evidence forming part of the Tribunal's evidentiary record.

[10] On November 3, 2014, the Tribunal requested that the parties "circulate and exchange between themselves a list indicating what documents were not referred to by the parties at the hearing from the evidence filed at the Tribunal also considering the Commission's and the Complainants' Chart, detailing the documents upon which the Complainants had relied in support of their case.

[11] In its letter dated December 1, 2014, the Commission provided the Tribunal with a list found at Appendix A, listing the documents that the parties agree can be removed from the Books of Documents. The documents are identified according to their exhibit and tab numbers.

[12] In the same letter, the Commission also listed documents over which there is no agreement. The list is found at Appendix B of the Commission's letter. (See Appendix B for reference).

[13] The Commission stated it understands that the documents listed in Appendix B fall into the two following categories:

a) Documents in Exhibits HR-01 to HR-15 which were identified in the Commission and Complainants' Chart as being "relied on by Counsel", but which were not referred to during the oral hearing or in final written submissions; and

b) Documents in Exhibits HR-01 to HR-15 which were identified in the Commission and Complainants' Chart as being "relied on by Counsel", which were referred to only in final written submissions. One document from Exhibit R-13 also falls into this category. [Underlining ours]

[14] The Commission also indicated that, based on its discussions with the parties, it understands that the Attorney General objects to the above-mentioned categories of documents forming part of the record before the Tribunal because they were not entered into evidence in accordance with paragraph 75 of the Tribunal's ruling of January 16, 2014 (2014 CHRT 2), which states:

The witnesses who have previously given evidence, to the extent that they testified with respect to portions of documents tendered in evidence and to their relevance to the issues in this case, have done so in a manner consistent with this paragraph of the Panel's point form ruling. The documents that will be removed at the end of the hearing will be all documents where no portion has been referred to by a witness in testimony or by Counsel during oral argument. In rendering its final decision, the Tribunal will be relying on the portions of documents tendered that have been referred to in this manner. [Underlining ours]

[15] The Commission's position is reproduced in part below:

Earlier this year, the Commission and Complainants prepared a Chart outlining the portions of each document in Exhibits HR-01 to HR-15, Exhibit C-2 and Exhibit AFN-1 upon which we intended to rely. The purpose of this Chart, which was initially provided to the Tribunal and parties on March 5, 2014 in advance of the start of the Attorney General's case, was to ensure that these documents were introduced in accordance with part (c) of the Tribunal's point-form ruling of January 6, 2014, which states:

- c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
 - i. which portions of the document are being relied upon; and
 - ii. how these portions of the document relate to an issue in the case.

[16] Following further disclosure from the Attorney General and the close of the Respondent's case, the Commission and Complainants circulated an updated version of the Chart to the Tribunal and parties on July 9, 2014, with a corresponding letter indicating that in their view:

- (i) the documents shaded in "grey" in the Chart could be removed from the Commission's Books of Documents HR-01 to HR-15 in accordance with Rule 9(4) of the Tribunal's Rules of Procedure; and
- (ii) the remaining documents had been properly introduced.

[17] The Commission received no response from the Attorney General and no concerns were raised with respect to the admissibility and proper introduction of the documents listed in the Chart. The Attorney General now raises concerns regarding the admissibility of documents "relied on by Counsel" for the Commission, the Caring Society and the AFN that were not referred to by Counsel orally during the hearing.

[18] In the Commission's view, the documents identified in the Commission's and Complainant's Chart as being "relied on by Counsel" ought to form part of the record before the Tribunal, regardless of whether they were explicitly referred to during the oral hearing, for the following reasons. First, the Attorney General has had ample notice of the Commission and Complainants' intention to rely on these documents, and has therefore suffered no prejudice.

[19] Second, in the Commission's view, the inclusion of these documents complies with the letter and spirit of the Tribunal's ruling (2014 CHRT 2). For all these reasons, the Commission submits that all of the documents listed in Appendix B ought to form part of the record before the Tribunal.

[20] On the same day, the Caring Society and the AFN wrote to the parties and the Tribunal, supporting the Commission's position that all of the documents listed in Appendix B ought to form part of the record before the Tribunal.

[21] The Caring Society noted that the Tribunal's January 2014 ruling (2014 CHRT 2) allowed a party to refer to a document for the first time in its closing arguments, which would have given the other parties as little as a day to prepare a response to use the document. Given that such use of document was contemplated under the Tribunal's January 2014 ruling, there should be no objection to the Caring Society having referred to documents in its reply, which the Respondent received two weeks before closing oral arguments, or in its written submissions, which the Respondent received two months before closing oral arguments.

[22] The Respondent also replied that same day to the parties' correspondence and requested clarification of the Tribunal's January 2014 ruling, more specifically with regard to paragraph 75 (reproduced above), as there was uncertainty and lack of consensus among the parties regarding its meaning. The Respondent requested a ruling from the Tribunal so as to determine whether documents introduced by Counsel during "oral argument", as described in paragraph 75, include those that are relied upon by the parties in their written submissions only.

[23] The present ruling aims to provide this clarity.

II. Analysis

[24] The Panel's ruling must be read in its entirety, therefore, it is important to avoid isolating specific paragraphs from the rest of the decision in an effort to properly understand the context and reasons thereof.

[25] For ease of reference, the paragraphs containing the reasons in the Tribunal's January 16, 2014 ruling are reproduced below:

[67] The legislature has, in these provisions, provided explicitly for the limitations to the Tribunal's ability to admit evidence and to compel witnesses. With the exception of these limitations, paragraph 50(3)(c) allows the Tribunal to "receive and accept any evidence and other information" which is limited only by the Tribunal overarching duty of procedural fairness pursuant to paragraphs 48.9(1) and 50(1) of the *Act* and the relevancy of the evidence: *Dhanjal v. Air Canada*, [1996] C.H.R.D. No. 4 at paras. 21-22; *Warman v. Kouba*, 2006 CHRT 50 at para. 124 [*Warman*].

[68] As a creature of statute, the Tribunal derives its powers solely from its enabling legislation. In the context of the present motion, the jurisprudence has recognized that the wide discretion provided at paragraph 50(3)(c) allows the Tribunal to receive and accept hearsay evidence: *Canada (Attorney General) v. Mills (F.C.A.)*, [1984] F.C.J. No. 917. The parties' submissions pertaining to the principled approach of reliability and necessity along with the common law exceptions to hearsay are of little help in this regard.

[69] The Tribunal agrees with the Caring Society and the Commission that it would be onerous and unhelpful to require that they call the authors of the documents for the sole purpose of authenticating them. The parties agreed that this would not be a necessary step at the February 19, 2013, CMCC prior to the beginning of this hearing. The Tribunal's practice in this case so far has been to admit relevant documents, regardless of hearsay, on a case-by-case basis as the parties introduce them into evidence, and to consider any issues regarding their reliability at the weighing stage. This enables the Tribunal to clearly identify the record which will form the basis for its final decision. The Tribunal informed the parties that this is the approach that it would follow in its oral ruling of February 26, 2013. This approach is also supported by the jurisprudence: *Canada (Attorney General) v. Brooks*, 2006 FC 1244 at paras. 36 – 38; *Warman, supra*, at para. 124. Contrary to the submissions of the Complainants and the Commission, the Tribunal is not of the view that the decisions in *Ault*, *PIPS* and *Éthier* support the admission of documents in a blanket manner. The Tribunal sees no reason to now depart from its practice and admit at once "all documents contained in HR Binders 1 to 13 which were obtained from the Respondent through the *Access to Information Act*, *Privacy Act*, or disclosure in these proceedings", as requested in the Caring Society's motion.

[70] The motion goes even further and as such, has highlighted the importance for the Tribunal to take this opportunity to further clarify its rules of

procedure regarding the introduction of evidence. In its motion, in addition to seeking a blanket admission of the documents, the Caring Society requests that the documents be “admissible as evidence for the truth of their contents, regardless of whether or not they are put to a witness”. It seeks, in this regard, an exception to the Rule 9(4) of the Tribunal’s Rules of Procedure. Pursuant to Rule 9(4), the Tribunal’s usual practice at the end of a hearing is to remove from the Books of Documents any document which parties have not referred to during the proceedings. The Commission confirmed its understanding of this rule and its applicability in the February 19, 2013, CMCC and the Tribunal informed all parties of this procedure in the summary of this CMCC.

[71] If the Tribunal were to allow this request, this would mean that documents which were never discussed by a witness during the hearing would be admitted into evidence and form part of the record. The Caring Society does not state that it would instead refer to these documents in final argument, although Counsel for the Caring Society expressed in oral argument that it was their intention to do so as much as possible. **The result is that documents, never discussed at any point during the hearing, could conceivably form part of the evidence on which the Tribunal is to rely to render its final decision.** [Emphasis ours]

[72] This request raises a number of issues. The Complainants have already tendered several hundred documents and recently reiterated their wish to reserve their right to introduce an unknown amount of additional documents as they complete their review of the Respondent’s disclosure. **Allowing this request would put the Tribunal in the position of having to examine and even interpret potentially lengthy and even technical documents without the benefit of any *viva voce* evidence or oral argument.** While the Tribunal recognizes that the amount of evidence introduced is significantly less than the hundred thousand plus documents that formed part of the disclosure that the parties had to review, **this does not discharge the Complainants of the onus of making their case.** [Emphasis ours]

[73] **Moreover, to proceed in this manner also raises a serious issue of fairness for the Respondent. In both the point form decision and the clarification decision, the Tribunal expressed the necessity for a party to know the case that it needs to meet**[Emphasis ours]. In admitting documents without requiring that the Complainants specify their relevance to the case and the manner in which they support their position, the Tribunal may place the Respondent in a position where it is unable to adequately respond or rebut this evidence.

[74] **In light of this, as stated in the Tribunal’s point form decision, the Tribunal denies the request for an exception to Rule 9(4) and will, at the end of the hearing, proceed with the removal of documents that have not been properly introduced and accepted by the Tribunal, which would have thereby completed their admission into evidence [Emphasis ours].** The Tribunal clarified the necessary steps to follow to ensure the introduction of documents at paragraph c. of its point form decision. In doing so, the Tribunal has relaxed the application of Rule 9(4). This paragraph reads as follows:

- c. For the purposes of Rule 9(4), a document has not been fully “introduced” at the hearing until counsel or a witness for the party tendering it has indicated:
 - i. which portions of the document are being relied upon; and
 - ii. how these portions of the document relate to an issue in the case.

[Emphasis ours]

[75] The witnesses who have previously given evidence, to the extent that they testified with respect to portions of documents tendered in evidence and to their relevance to the issues in this case, have done so in a manner consistent with this paragraph of the Panel’s point form ruling. The documents that will be removed at the end of the hearing will be all documents where no portion has been referred to by a witness in testimony or by Counsel during oral argument. In rendering its final decision, the Tribunal will be relying on the portions of documents tendered that have been referred to in this manner.

[76] **Counsel for the Commission and the Caring Society have indicated that it is their intention to lead the Panel in their closing submissions to portions of the documents tendered into evidence in this case that they feel are relevant to the proceedings. To the extent that they do so in respect to portions of documents not testified to by witnesses, this is a departure from normal practice and the Tribunal’s usual procedure with regard to leading evidence. While, in light of its flexible Rules of Procedure, the Tribunal has allowed this request, this departure from usual practice requires that the Tribunal ensure the observance of natural justice principles. [Emphasis ours]**

[77] **Parties are free to decide their strategy to present their case, however fairness dictates that parties must also know the case they have to meet and can adequately prepare a response. If the Complainants or any**

other party wishes to introduce during its final argument evidence which was not introduced during the evidence phase of the hearing, the Tribunal provided for a curative provision that may be invoked to remedy any unfairness caused to the opposing party. This is found at paragraph d. of the point form ruling which reads:

d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings. [Emphasis and underlining ours]

[78] The Complainants and the Commission have not yet closed their case and may still decide to call additional witnesses. **The Complainants and for the Commission have also communicated their intent to provide the Tribunal and the Respondent with a chart in which they will detail the portions of the documents on which they will rely during final argument. They have indicated that they would provide this chart in advance of the beginning of the Respondent's case so as to allow the Respondent to adequately respond.** In as much as the Respondent will receive this chart in advance of the beginning of the presentation of its case it may be helpful to the Respondent in presenting its case and avoid the need to invoke the curative provisions of paragraph d. of the point form ruling. This, of course, will depend on what the chart actually includes in describing the portions of relied on and the time that the Respondent will have to review the document in advance of having to present its case. [Emphasis and underlining ours]

[26] As highlighted in these paragraphs, the purpose of the ruling was to ensure the opposing party knows the case it has to meet and to avoid leaving it up to the Panel to interpret technical evidence and information without the benefit of hearing an explanation as to the relevance of a specific document through a witness or Counsel. The Complainants and the Commission provided the Respondent with a Chart, detailing the portions of documents on which they were going to rely, before the Respondent commenced its case. Given the ongoing nature of the disclosure, they also amended their Chart as new evidence was disclosed.

[27] The Respondent was therefore put on notice over a month prior to the hearing on final arguments. Yet it is only after the hearing, on December 1, 2014, that the Respondent objected to documents being entered into evidence that were only referred to by Counsel in final written submissions. The Respondent chose to wait rather than raising its objection at the hearing on final oral arguments.

[28] The only exception to this is tab 66. The Caring Society included this document in the binders of evidence in support of its case, but did not expressly refer to portions of the document during the oral proceedings. The Respondent, however, raised the document in its final submissions, challenging its credibility and weight. In so doing, the Respondent opened the door for the Caring Society to refute the Respondent's assertions in its reply and, in the process, to rely on the document which it reproduced at tab 66. The Caring Society's reply was provided to the Respondent two weeks before the hearing of final oral arguments, providing the Respondent with sufficient time to respond. For these reasons, the Panel is of the view that tab 66 should be considered as forming part of the evidentiary record before the Tribunal. With regard to tab 477, also referred to in the Caring Society's reply, the Panel notes, that this document was also raised in the Commission's written submissions. The Panel therefore does not consider this document as forming part of the above-mentioned exception.

[29] We also have to bear in mind the special circumstances and disclosure history in this case that prompted these specific measures. At the time of the January 16, 2014 ruling, the Panel was not fully aware that the disclosure of documents would continue until after the hearing, as late as August 2014, when final written submissions from the Complainants and the Commission were due.

III. Order

[30] In an effort to respect the spirit of the entire ruling, in fairness to all parties, and in order to address the special circumstances that were created with parties receiving documentary disclosure after the closing of the parties' case, the Panel orders the following:

Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

The Panel continues to reserve the right to ask clarification questions to the parties concerning any issue or document while it reviews the evidence.

Signed by

Sophie Marchildon
Panel Chairperson

Réjean Bélanger
Tribunal Member

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 14, 2015