

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2018 CHRT 13

Date: May 14, 2018

File No.: T2185/0717

Between:

Glen Jones

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Munsee-Delaware Nation

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I.	Background.....	1
II.	Witness fees and allowances.....	3
III.	The witnesses' contact information.....	7
IV.	Order.....	8

I. Background

[1] This ruling is intended to determine whether the Canadian Human Rights Tribunal (the “Tribunal”) should exempt Glen Jones (the “Complainant”) from paying the fees and allowances payable to witnesses following a summons to appear at a hearing.

[2] The Tribunal will take this opportunity to provide a little background information on the motion. The undersigned was assigned to the case on January 10, 2018. That same day, the Complainant forwarded an amended list of witnesses to the Tribunal by email, because he wanted to call 9 witnesses to testify at the hearing. In this email, Mr. Jones indicated that he did not have the means to pay the fees and allowances remitted to witnesses because of his fixed pension income. On March 26, 2018, the Tribunal asked Mr. Jones to file a formal motion on this matter. The Tribunal also informed the Munsee-Delaware Nation (the “Respondent”) that it could file a reply if it chose to do so.

[3] The Tribunal issued instructions on the motion to be filed. Most notably, Mr. Jones was invited to provide details, clearly justify his motion and file it with supporting documents, if necessary. The Tribunal also asked the parties to let the Tribunal know whether the contact information for the witnesses was available (or not) and, if applicable, to indicate where this information could be obtained. Lastly, the parties were asked to address issues related to the personal information of witnesses and a possible confidentiality order.

[4] On April 3, 2018, the Tribunal received the Complainant’s motion. Unfortunately, the Complainant’s motion included very few details and amounted to no more than approximately ten lines. It is appropriate to fully reproduce his submissions here:

The addresses for the witnesses in my case against the Munsee-Delaware Nation reside with the Administration Office of the aforementioned organization. I don't have the addresses for the witnesses as the Administration office has the addresses and I do not.

I do not know if the witnesses live on the reservation or off the reservation. The subpoena costs are too much for me to bear as I am on a fixed income pension. I am requesting an exemption from paying witness fees and other costs associated with the witnesses.

I am therefore requesting an exemption from paying witness costs.

[5] For its part, the Respondent filed a response on April 16, 2018, which focused more on the issue of the confidentiality of the contact information for the witnesses. It did not take a position with respect to Mr. Jones' motion concerning witness fees. Lastly, Mr. Jones filed a reply on April 23, 2018. In his reply, the Complainant agreed to keep the contact information for the witnesses confidential, as proposed by the Respondent. Finally, he essentially reiterated the same arguments made in his initial motion and the relevant paragraphs of his submissions are presented below:

This is the response to the submission by Mr. Daly, dated April 16, 2018, on behalf of the respondent in this Motion.

Mr. Daly duly notes that I do not have the addresses, phone numbers or anything to do with the witnesses I intend to call. I require the information from the First Nation Administration office to contact and subpoena the witnesses. I will not further communicate the privacy of the information provided but only to those that need to know certain information. I will abide by all orders of the Tribunal. Because I am a First Nations person and on a fixed pension income, it was one of the reasons that I moved to Wasaga Beach, Ontario. It will be a financial hardship for me to pay the witnesses and other associated costs of the witnesses.

[...]

I am nonetheless requesting exemption from paying witnesses costs and other associated costs of the witnesses.

[6] The Commission, who is not participating at the hearing, did not file any submissions concerning Mr. Jones' motion.

II. Witness fees and allowances

[7] Subsection 50(6) of the *Canadian Human Rights Act (CHRA)* provides that:

Any person summoned to attend the hearing is entitled in the discretion of the member or panel to receive the same fees and allowances as those paid to persons summoned to attend before the Federal Court.

[8] The Federal Court Rules SOR/98-106 provide that:

Personal service of subpoena

42 No witness is required to attend under a subpoena unless the subpoena has been personally served on the witness in accordance with paragraph 128(1)(a) and witness fees and travel expenses have been paid or tendered to the witness in the amount set out in Tariff A.

Witness fees

43 Where a witness is required under these Rules to attend a proceeding other than pursuant to a subpoena, the witness is entitled to witness fees and travel expenses in the amount set out in Tariff A.

[9] With respect to Tariff A, the following is provided for non-expert witnesses:

Witness fees

3 (1) Subject to subsection (2), a witness is entitled to be paid by the party who arranged for or subpoenaed his or her attendance \$20 per day plus reasonable travel expenses, or the amount permitted in similar circumstances in the superior court of the province where the witness appears, whichever is the greater.

[Emphasis added]

[10] As the hearing is scheduled to be held in London, Ontario, it is necessary to consult the rules concerning witness fees and allowances for appearances before the Superior Court of Ontario. In this regard, subsections 4 and 5 of section 53.04 of the *Rules of Civil Procedure*, R.R.O. 190, Reg. 194, provide that:

Summons to be Served Personally

(4) A summons to witness shall be served on the witness personally and not by an alternative to personal service and, at the same time, attendance money calculated

in accordance with Tariff A shall be paid or tendered to the witness. R.R.O. 1990, Reg. 194, r. 53.04 (4).

(5) Service of a summons to witness and the payment or tender of attendance money may be proved by affidavit. R.R.O. 1990, Reg. 194, r. 53.04 (5).

[11] Tariff A, in section 21, provides that:

21. Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows:

1. Attendance allowance for each day of necessary attendance: \$50.
2. Travel allowance, where the hearing or examination is held,
 - (a) in a city or town in which the witness resides, \$3.00 for each day of necessary attendance;
 - (b) within 300 kilometres of where the witness resides, 24¢ a kilometre each way between his or her residence and the place of hearing or examination;
 - (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus 24¢ a kilometre each way from his or her residence to the airport and from the airport to the place of hearing or examination.
3. Overnight accommodation and meal allowance, where the witness resides elsewhere than the place of hearing or examination and is required to remain overnight, for each overnight stay: \$75.

[12] As the fees and allowances provided in the rules of the Superior Court of the province are higher than those provided by the Federal Courts, it is typically the former fees and allowances which must be paid by the party summoning the witness.

[13] It is unfortunate that the Complainant failed to provide additional details and evidence in support of his motion, despite the clear instructions provided by the Tribunal Member. In addition to the instructions concerning the content of his motion, the Tribunal also gave Mr. Jones approximately a dozen days to file his motion. Considering the nature of the motion, this period of time was long enough to allow Mr. Jones to file a more detailed motion with the Tribunal.

[14] It is important to remember that when a party files a motion with the Tribunal (the “Applicant”), the onus is on that party to justify the merits of the motion and to indicate the remedies sought and the supporting reasons.

[15] I do not believe that it is enough for Mr. Jones to say that, in light of his fixed pension income, he does not have the financial means to pay the witness fees and allowances. The Complainant simply did not provide detailed reasons in support of his claims.

[16] Member Paul Groarke was previously required to address a similar matter in the decision rendered in *Day v. Canada (National Defence)*, 2003 CHRT 7. I completely agree with the following comments made by my colleague:

I note that a witness is entitled to these fees and allowances: although the subsection gives me a discretion in the matter, I think that the fees and allowances should be paid unless there are compelling reasons to depart from normal practice. Testifying at a hearing is an inconvenient and often troublesome duty, which requires witnesses to rearrange their private lives in order to accommodate the interests of society. I am firmly of the view that they should be compensated for their trouble. The process of applying for subpoenas and paying these fees may also discourage the parties from calling unnecessary witnesses.

[Emphasis added]

[17] As explained by Member Groarke, exempting a party from paying the witness fees and allowances must be based on compelling reasons. In other words, there would have to be exceptional circumstances. In this case, I do not see any compelling reason that would allow me to exempt Mr. Jones from paying the fees and allowances to which the witnesses are entitled.

[18] As the Tribunal previously indicated in *Duverger v. 2553-4330 Québec Inc (Aéropro)* 2018 CHRT 5, at paragraph 70:

... Stress, anxiety, costs, time, energy, etc., are factors borne by all parties. I recognize that these inconveniences are inherent to the participation in judicial and quasi-judicial proceedings.

[Emphasis added]

[19] It must be understood that witnesses who are required to attend Tribunal hearings, following a summons to appear, may also have to deal with inconveniences that have financial implications for them. Witnesses may perhaps need to take time off work, with or without pay, miss school, incur childcare costs, incur travel costs or find alternative means of travel if they do not own a car, etc. It is these costs, in part, which the fees and allowances payable to witnesses seek to lessen, although frankly, this does not provide a full and complete reimbursement for the costs incurred in relation to a summons to appear.

[20] For these reasons, I am not inclined to exempt Mr. Jones from paying the fees and allowances payable to witnesses. Consequently, if the Complainant does not pay the fees and allowances provided for by the Province of Ontario (see paragraph 11 of this decision for the calculation of fees and allowances), the witnesses are not obligated to attend the hearing, unless they waive the right to receive these fees and allowances. Therefore, Mr. Jones could contact his potential witnesses, and if they agreed to waive their right to receive the fees and allowances to which they are entitled, Mr. Jones would be free to call them to testify at the hearing.

[21] However, at this juncture, I would like to note the following, particularly for Mr. Jones. If he is unable to call the 9 witnesses to testify because he is unable to assume the related costs for fees and allowances, the Tribunal encourages him to reassess his case and, if possible, identify only the key witnesses whose testimony would be necessary to support the facts of his case. This could significantly reduce the fees and allowances that he would have to incur.

[22] Without taking a position on the merits of the case, it should be remembered that testimony is just one means of evidence that parties may use to support their claims. Even though testimony is highly valuable in certain cases, it is not necessarily needed in all cases. In other words, testimony is not the only means of evidence admissible at a hearing. Besides the fact that Mr. Jones may personally testify at the hearing, he will also have an opportunity to file documentary evidence in order to support his claims. The Tribunal Member's decision is based on all evidence filed by each party and admitted into evidence at the hearing (testimony, documents, etc.) (see most notably *First Nations Child*

and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2014 CHRT 2 at paras. 58, 63, 69).

[23] It is also important to keep in mind that the Tribunal is a quasi-judicial administrative tribunal. It is not a court of justice per se. Consequently, it is not necessarily subject to the same rules of evidence. The rules are less formal and more flexible and the Tribunal Member is recognized as having broad discretion in terms of the admissibility of evidence (subsection 50(3)(c) of the *CHRA*; see also *Temple v. Horizon International Distributors*, 2017 CHRT 30, at paras. 34 and 35). For example, the Tribunal Member may authorize admitting hearsay evidence or authorize the filing of undated and unsigned written statements (see most notably *Constantinescu v. Correctional Service Canada*, 2018 CHRT 8, at para. 12).

III. The witnesses' contact information

[24] As Mr. Jones indicated in his motion of April 3, 2018, he does not have the witnesses' contact information. Consequently, he is not able to send the summonses to appear to these witnesses.

[25] As indicated in the Respondent's written submissions, the Respondent has the information concerning the witnesses which would allow Mr. Jones to send them summonses to attend the hearing as well as the fees and allowances to which they are entitled. It is clear to me that this information is very important for the Complainant's presentation of evidence.

[26] The Respondent has agreed to forward this information, but is asking the Tribunal to order the Complainant to keep the personal information of the witnesses confidential and to refrain from using this information for any purposes other than to send each of the witnesses a summons to appear. Mr. Jones has agreed to comply with this request.

[27] Considering that the parties agree on this issue, I completely agree with the position that it is important to protect witnesses' contact information. In this case, only the contact information for potential witnesses will need to be kept confidential. The interests of the persons concerned outweigh society's interest in obtaining access to this type of

information, which, in fact, does not change the instruction, since the Tribunal's hearing remains entirely public.

[28] Therefore, I am ordering Mr. Jones to keep the contact information for the witnesses to be forwarded by the Respondent strictly confidential. Mr. Jones may contact potential witnesses in order to summon them to attend the Tribunal's hearing. Moreover, Mr. Jones is not precluded from contacting the potential witnesses in order to prepare for the hearing. A party has the right to a full and complete hearing, which includes the opportunity to adequately prepare for the hearing. Contacting the witnesses and preparing them for the hearing are steps which may prove to be necessary and useful. That said, apart from the obligations arising directly from the summons to appear, witnesses are not obligated to cooperate with the party who summoned them, in terms of preparation for their testimony.

IV. Order

[29] For the reasons set out above, I

- 1) deny the Complainant's motion to be exempted from paying witness fees and allowances.
- 2) confirm that the witness fees and allowances to be paid are set out in paragraph 11 of this decision;
- 3) confirm that the witnesses are not obligated to appear at the hearing if they do not receive the fees and allowances with the summons, unless they waive their right to receive these fees and allowances;
- 4) order the Respondent to send Mr. Jones the contact information for the 9 potential witnesses listed in his amended witness list within 5 business days of communication of this order;

5) order Mr. Jones to keep the witnesses' contact information strictly confidential.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
May 14, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2185/0717

Style of Cause: Glen Jones v. Munsee-Delaware Nation

Ruling of the Tribunal Dated: May 14, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

Glen Jones, for himself

Brian T. Daly, for the Respondent