Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 37
Date: October 18, 2021
File No.: T1810/4012

Between:

Mississaugas of the Credit First Nation

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member(s): Edward P. Lustig

Table of Contents

I. BACKGROUND: 1

II. ISSUE: 1

III. LEGAL FRAMEWORK: 1

IV. SUMMARY OF PARTIES' POSITIONS: 5

A. Complainant's position: 5

B. Commission's position: 7

C. Respondent's position: 8

V. ANALYSIS: 9

I. BACKGROUND:

[1] In my letter of October 6, 2021 to the parties, following the virtual hearing of a motion for disclosure before me on September 24, 2021 , I decided to order the Respondent to forthwith disclose to the parties a complete, unredacted copy of the excel spreadsheet for the Respondent's Ontario Interim Funding Model ("IFM"), in response to a joint request made by the Complainant and the Commission, as set out in the Complainant counsel's letter to me of September 3, 2021, a copy of which was attached to my letter. My letter stated that written reasons would follow. The following are my reasons for the decision.

[2] The redacted copy of the IFM excel spreadsheet that had been provided to the parties by the Respondent and was the subject of the motion for disclosure, was provided to the parties by the Respondent on July 29, 2021, with the data related to each First Nation school redacted. Due to the size and format of the document it will not be annexed to this ruling but is available upon request.

[3] A summary of the background of this case can be found at paragraphs 3 to 6 in my recent ruling in 2021 CHRT 31.

II. ISSUE:

[4] The sole issue in this motion is whether the redacted data in the IFM excel spreadsheet is arguably relevant to this case and not privileged and needs to be disclosed for 2021 and 2022.

III. LEGAL FRAMEWORK:

[5] The parties filed a Joint Book of Authorities accurately covering the law related to disclosure of arguably relevant documents as follows:

1. Each party is entitled to disclosure of all arguably relevant documents in the possession of the opposing party. *While* the threshold for arguable relevance is low, the moving party has the burden of demonstrating that there is a nexus between

the issues to be proven and the requested documents. Requests for documents must be reasonably particular, and not be too broad or general.

Egan v. Canada (Revenue Agency), 2017 CHRT 33, at para. 31 [CanLII].

Guay v. RCMP, 2004 CHRT 34, at paras. 40, 42 [CanLII].

T.P. v. Canadian Armed Forces, 2019 CHRT 19, at para. 36 [CanLII].

2. In *Brickner v.* RCMP, the Tribunal set out key principles regarding the applicable test for disclosure:

> "[5] In deciding whether the information ought to be disclosed, the Tribunal must consider whether the information at issue is arguably relevant (see *Warman v. Bahr*, 2006 CHRT 18 at para. 6). This standard is meant to "prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" (see *Day v. Department of National Defence and Hortie,* Ruling No. 3, 2002/12/06). This also ensures the probity of the evidence.
>
> [6] The standard is not a particularly high threshold for the moving party to meet. If there is a rational connection between a document and the facts, issues, or forms of relief identified by the parties in the matter, the information should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (*Rules*) (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34 at para. 42 (*Guay)*; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6 at para. 28; and, *Seeley v. Canadian National Railway*, 2013 CHRT 18 at para 6 (*Seeley*)).
>
> [7] However, the request for disclosure must not be speculative or amount to a "fishing expedition" (see *Guay* at para. 43). The documents requested should be identified with reasonable particularity. It is the Tribunal's view that in the search for truth and

> despite the arguable relevance of evidence, the Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the *Rules* are respected, in order to ensure the informal and expeditious conduct of the inquiry (see *Gil v. Canada (Minister of Citizenship and Immigration*), 1999 CanLII 8407 (FC) at para. 13; see also s. 48.9(1) of the *Act*). [8] This Tribunal has already recognized in its past decisions that it may deny ordering the disclosure of evidence where the probative value of such evidence would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal should be cautious about ordering searches where a party or a stranger to the litigation would be subjected to an onerous and far-reaching search for documents, especially where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para. 4; *Seeley* at para. 7; see also *R. v. Seaboyer* [1991] 2 S.C.R. 577 at 609-611)."
>
> *Brickner v. RCMP*, 2017 CHRT 28 [CanLII]

3. In *Communications, Energy and Paperworks Union of Canada v. Bell Canada*, the Tribunal considered the "Requirement of Relevance" portion of a decision of the Supreme Court of Canada:

> …On the question of relevance, the Supreme Court noted that a defendant must show not that the evidence is relevant in the traditional sense, but that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document is related to the dispute [paragraph number omitted].
>
> Communications, Energy and Paperworkers Union of Canada v. Bell

Canada, 2005 CHRT 34, at para 11 [CanLII], referring to Smith & Nephew Inc. v. Glegg, 2005 SCC 31 at para. 23.

4. In *Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First* Nation*) v. Public Safety Canada,* the Tribunal held that the moving party must demonstrate that the requested documents are relevant even when systemic issues are raised.

Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada, 2019 CHRT 21 [CanLII].

[6] The Respondent and the Complainant also cited the following cases related to privilege of documents vis a vis non-party privacy issues and public interest immunity: *T.P v Canadian Armed Forces*, 2019 CHRT 14; *Carey v Ontario*, [1986] 2 SCR 637.

[7] The Tribunal has recognized the privacy interests of non-parties to a proceeding and has given protection to those interests in various ways. While it is difficult to make a general statement about how and when these interests may arise, where serious privacy interests of a non-party are engaged or imperiled by the questions, issues or evidence raised on an inquiry before the Tribunal, it is in the public interest to ensure that care is taken to consider those interests and protect them where appropriate. This could include, but is not limited to, measures taken under the Tribunal's common law authority over its own procedures, or s. 52 of the Canadian Human Rights Act (*CHRA).* The weight given to the interests of non-parties must be contextual and case specific.

Clegg v. Air Canada, 2019 CHRT 4 (Can LII) at paras. 75,77,78 and 79.

[8] The common law recognizes that, in some limited circumstances, governments may claim immunity from disclosing certain documents on grounds that doing so would harm a specified public interest such as a state secret needed to protect the public from harm to national security or damage to policy development and government decision making. Such immunity claims, however, can involve conflicts between different public interests that must be weighed by the decision-maker on a case-by-case basis. Invariably this involves determining whether the public interest in the administration of justice, which favors giving litigants full access to all arguably relevant information to know the case they are to meet,

outweighs concerns that the government may have about releasing the information given the sensitivity of it for the public safety or other harm to the public interest. In making the determination the courts have used several factors, known as the "*Carey* factors".

T.P. v. Canadian Armed Forces, 2019 CHRT 14 (Can LII) at paras. 62-81.

[9] Although public interest immunity may be raised by any party or by the reviewing court itself, the government has the burden of establishing that a document should not be disclosed because of the public interest immunity. The government should put in a detailed affidavit to support its claim of public interest immunity. The affidavit should be as clear and helpful as possible in identifying with as much detail as possible the precise policy matters and the public interest sought to be protected from disclosure.

British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia,2020 SCC 20 (Can LII) at para. 102; Carey v. Ontario, [1986] 2 SCR 637 (CanLII) at para 40 ("Carey").

IV. SUMMARY OF PARTIES' POSITIONS:

A. Complainant's position:

[10] The Complainant submits that the IFM excel spread sheet with the redacted data is arguably relevant and not protected from disclosure by any legal claim for privilege. The Complainant's request is for one document with the data unredacted, not a fishing expedition for a broad range of documents. The one document requested is simple to produce.

[11] The Complainant argues that the IFM is the central issue in the case and that the entire case is about the IFM excel spread sheet. The redacted data is critical to understand whether there is discrimination in this case, since the IFM excel spreadsheet is the basis of how the model is used to calculate education funding in Ontario. Without the redacted data the required calculations cannot be made. As such, the Complainant says the complete unredacted document populated with the data for such things as First Nations schools' enrollments and locations that are currently redacted from the spreadsheet, not only meets

the low standard of arguable relevance but is the most relevant of all the documents in the possession of the Respondent.

[12] In particular, the Complainant submits that the effects of the model on the funding levels for one First Nation cannot be determined from the redacted spreadsheet because for some types of grant, the funding levels for one school are dependent on the allocations to other schools. An unredacted version is sought to fully understand the effects of location, student numbers, and interdependencies in the funding model, and to estimate the dollar value of any alleged deficiencies in the model and its implementation. The Complainant stated that running the model with hypothetical data had been tried and was ineffective.

[13] The Complainant says that it and the Commission have no intention of disclosing individual First Nation information on the public record. Nevertheless, if the data is released to them, the Complainant and the Commission agree that it will be protected by the deemed undertaking, In addition, both undertake not to submit this date into evidence without seeking leave from the Tribunal and obtaining any confidentiality orders that may be appropriate.

[14] The Complainant submits that the IFM fails to meet the standards of substantive equality because it is not needs-based and therefore doesn't address the fact that children's needs are higher on reserve and the cost of delivering education services is higher on reserve. It doesn't even meet the lower standard of comparability because it undercuts First Nations in the assumptions used to apply the model to individual First Nations when it was originally built to apply to Provincial school boards. Without the data that has been redacted the Complainant says the model is not a functioning model where the inner workings can be understood; where variables can be adjusted; where accuracy can be verified and where there can be a check of problems to see whether results stand up against real world realities.

[15] The Complainant argues that holding back the data requested because it involves information related to First Nations who are not parties to this case is not a ground for claiming privilege. None of the categories for privilege, such as solicitor client privilege, apply in this case. The First Nations data requested is not sensitive as it relates to matters

like the number of students per grade and the location of First Nations schools not personal information about the students. The leading case for public interest immunity is *Carey* but that case involved Cabinet confidential information unlike this case. In any event, the Complainant and the Commission have agreed to the actions mentioned in paragraph 17 above to deal with keeping the data confidential.

B. Commission's position:

[16] The Commission argues that the redacted data has probative value, and the request for it is very narrowly focused on the core issue of this case and not so broad in scope as to be prejudicial to the Respondent to respond to.

[17] The alleged discriminatory implementation of the IFM in Ontario is the central issue of this case and the excel spread sheet used to do the calculations in the funding model is key to understanding whether there has been discrimination in the application of the funding model. The spread sheet currently produced by the Respondent without First Nations school data is of very limited use according to the Commission.

[18] Because of the interdependence of various data, without the redacted data, the use of the spreadsheet won't produce the right numbers in the end. As such, it will not be possible to determine how or if there the funding is comparable, needs based, and substantively equitable. The parties will then have to rely on the Respondent's representations that these factors have been taken into consideration, without the opportunity to properly check.

[19] The Commission submits that despite the High-Cost Special Education Program (HSEP) to cover shortfalls in funding, the IFM is still going to be the base for calculations. Also, in situations in which Regional Education Agreements are in place, the IFM still forms the basis for the agreement. To understand whether the HSEP adequately remedies the alleged discriminatory shortfalls in the IFM, the calculations in the excel spread sheet must be analyzed. That analysis cannot be done without the data currently redacted from the spread sheet by the Respondent.

C. Respondent's position:

[20] The Respondent says that the requested information is not relevant. The focus of the inquiry should be on the impact of the model on MCFN and systemic impacts on other First Nations. The data for the MCFN has been disclosed, and aggregate data has been disclosed which addresses the systemic discrimination allegation. In response to the concern that the formula cannot be run without data, the Respondent submitted that it can be run as a simulation. Simulated results would not provide the actual allocation for MCFN or other First Nations, but that information is not necessary given the earlier disclosure of MCFN data and aggregate data. Running the model with the requested data would enable determinations of the allocations for communities not involved in this proceeding, but that is not the subject of this inquiry.

[21] The Respondent submits that it does not want to stymie the inquiry into whether the funding model produces discriminatory results as alleged by the Complainant. It has already provided a great deal of information to the parties. The spread sheet as produced still contains the formulas or math about how the formulas work in the model and how funding allocations are determined. Additionally, the Respondent has produced a narrative guide which details how each element of the model works and how funding allocations are determined. As well, the Respondent has answered questions about how the model works and is prepared to continue to do so.

[22] The Respondent submits that it has also produced a great deal of aggregate information about education funding in Ontario generally for funding applications of each component of the model including per student funding for the Province as a whole, as well as aggregate data with respect to First Nations Education Authorities ("FNEAs").

[23] What has been refused to be produced by the Respondent is data that is specific to First Nations communities who are not involved in this case and who have not expressed their approval of the use of the data related to them. Canada takes this seriously as its experience is that First Nations communities don't want sensitive confidential information about them released by Canada. As such, since the Complainant is not a representative of other First Nation communities in Ontario, whose data is being requested

but who are not parties to this case, that data is not related to or of probative value in the complaint that is the subject of this inquiry by the Tribunal and therefore is irrelevant.

[24] The Respondent submits that the inquiry is not about the circumstances and needs of the other First Nations who are not involved in the inquiry to give their positions, the focus of the inquiry is about the impact of the model on the Complainant. Larger systemic impacts are what the aggregate data goes to.

[25] The formula can be run as a simulation of output data but it won't provide the actual funding allocations for other First Nations or for the Complainant. The Complainant's data is unnecessary as that data has already been produced by the Respondent for the Complainant's case. There is no probative value or relevance in producing the requested data for funding allocations of First Nations communities who are not involved in this inquiry.

[26] The Respondent also raised public interest immunity. When balancing the public interest in disclosing information to the Complainant and Commission to assist them in understanding issues in the case, against protecting the confidentiality of sensitive information about First Nations who are not parties to the case, the Respondent argues that the probative value, if any, of the information being sought is greatly outweighed by the need to keep it confidential.

V. ANALYSIS:

[27] It's common ground among the parties that the central issue in this case is now whether the implementation of the IFM in Ontario produces discriminatory funding allocations for the Complainant. It's also common ground among the parties that the excel spreadsheet in issue in this motion is used in running the model and in so doing is dependent on data inputted to determine the funding allocations for First Nations in Ontario.

[28] It seems to me on its face, therefore, that the data that has been redacted by the Respondent showing such things as First Nations school enrollment and the location of the First Nation schools in the Province might be helpful to the Complainant in understanding whether its allocation of funding is deficient in a manner that is discriminatory and should be

produced as it meets the low threshold of arguable relevance that the parties agree is the appropriate standard for disclosure.

[29] That said, it's very difficult at this stage, based upon what I have received, to read the redacted spreadsheet without any data and fully understand its ultimate probative value. Even with data such as school enrollment and location of schools, the methodology and programming necessary to bring the excel spread sheet to life in the context of this case is not yet clear to me. It may be that on further examination, the data is helpful, , as suggested by the Complainant and Commission and it could be unhelpful, unnecessary, and possibly when run in the model, misinterpreted by the Complainant and Commission, as suggested by the Respondent. At this stage, I really don't know for sure, but based on the submissions to date, and given the importance of the IFM to this case, it appears to me that the unredacted spreadsheet is rationally connected to the issues in this proceeding and is likely to contribute to the search for the truth about whether there has been discrimination as alleged in this case.

[30] If on further analysis it is unhelpful then that will be something that the parties requesting it will have to deal with later in these proceedings. Ultimately, if it is tendered as evidence at the hearing and objected to by the Respondent, I will have to rule on its admissibility, relevance, and weight, if any. At this preliminary stage, in my view, the Complainant and Commission have demonstrated enough to meet the low threshold of arguable relevance.

[31] Further, I see no reason to redact the data based on any supportable legal argument of privilege. The Respondent has provided no evidence that the First Nation communities whose data is being sought consider the data to be sensitive or confidential and given that it concerns matters such as school enrollment and location of First Nations schools, I doubt if such concern exists based on sensitivity and confidentiality. Nor is there any evidence of public interest immunity for any other reason such as cabinet confidence, harm to national security or damage to government policy development and decision making. Moreover, the implied and direct undertakings with respect to keeping the data confidential that have been provided by the Complainant and the Commission, as well as potential confidentiality orders that can be issued, remove any danger of harm in that regard.

[32] In balancing the public interest of disclosing the redacted data to allow it to be used in running the model to possibly assist in finding the truth in this case against refusing to disclose it because of potential harm to First Nations communities not parties to this case, I find that the need to disclose this arguably relevant data outweighs the need to refuse to disclose it. As such, I have ordered that it be disclosed and produced forthwith for funding years 2020-2021 and 2021-2022.

Signed by

Edward P. Lustig
Tribunal Member(s)

Ottawa, Ontario
October 18, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1810/4012

Style of Cause: Mississaugas of the Credit First Nation v. Attorney General of Canada

Ruling of the Tribunal Dated: October 18, 2021

Date and Place of Motion Hearing: September 24, 2021, by Zoom videoconferencing

Appearances:

Kent Elson, for the Complainant

Sheila Osborne-Brown, Jessica Walsh and Sonia Beauchamp, for the Canadian Human Rights Commission

Dan Luxat and Sophia Gabbani, for the Respondent