

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 7

Date: March 14, 2022

File No.: T2407/6619

Between:

Earl Ka-Nowpasikow (Earl Andrew)

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Poundmaker Cree Nation

Respondent

Ruling

Member: George E. Ulyatt

I. The Motion

[1] The Respondent, Poundmaker Cree Nation has applied to dismiss the complaint in its entirety pursuant to section 9 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 [*Rules of Procedure*]. That rule states:

9. If a party does not comply with these Rules, an order of a panel or a time limit established under these Rules, the panel may, on the motion of another party or its own initiative, and having regard to the circumstances, order the party to remedy their non-compliance, proceed with the inquiry, dismiss the complaint or make any other order to achieve the purpose set out in Rule 5.

II. Procedural Background

[2] On January 9, 2018, Earl Ka-Nowpasikow filed a complaint at the Canadian Human Rights Commission (CHRC) against Poundmaker Cree Nation alleging discrimination relating to the provision of housing on the Poundmaker Cree Nation's reserve. On July 15, 2019, the CHRC referred the complaint to the Tribunal for an inquiry. The hearing of the complaint occurred over ten days between August 16, 2021, and September 14, 2021.

[3] On the final day of hearing, the Tribunal directed the Parties to file their final written arguments according to this schedule:

- a. Complainant's written argument to be filed on or before October 26, 2021;
- b. Respondent's and CHRC's written arguments to be filed on or before November 23, 2021;
- c. Complainant's reply, if any, to be filed on or before December 7, 2021.

[4] The Complainant did not adhere to this schedule, leading to the following events:

- a. With the consent of the Parties, on October 25, 2021, the Tribunal granted a 2-week extension for the Complainant to file its final argument by November 9, 2021, with a corresponding extension to the other parties for their final arguments;
- b. On November 16, 2021, the Complainant requested by email a further 2-week extension of time to file its final argument to November 23, 2021, but did not copy the Respondent on this email (the "November 16 Correspondence");

- c. Also on November 16, 2021, the Respondent advised the Parties and the Tribunal that it opposed a further extension and intended to make an application to dismiss the complaint pursuant to section 9 of the Rules of Procedure;
- d. At a Case Management Conference Call (CMCC) held on November 19, 2021, the Tribunal discussed the motion to dismiss the complaint with the Parties, set deadlines for the service and filing of submissions from the parties on the motion to dismiss, and confirmed with the Parties that the Complainant did not intend to file further final argument other than a reply, if necessary, and the Respondent preferred to file final argument after the resolution of the motion to dismiss the complaint;
- e. On November 26, 2021, after receiving the CMCC Summary, the Respondent notified the Registry that it had not received a copy of the November 16 Correspondence;
- f. On November 26, 2021, the Registry notified all parties that the Respondent had not received a copy of the November 16 Correspondence and enclosed a copy of that correspondence; and
- g. Consequently, the Respondent's and CHRC's final arguments, as well as any reply, have not yet been filed.

III. Parties Positions

[5] The Respondent seeks dismissal of the complaint in its entirety. The Respondent submits that the Complainant:

- a. missed deadlines set by the Tribunal for serving and filing final argument on October 26, 2021, and November 9, 2021;
- b. did not copy the Respondent on the November 16 Correspondence; and,
- c. failed to respond to correspondence from the Tribunal dated November 10 and 12, 2021, relating to the Complainant's having missed the November 9, 2021, deadline for filing final argument.

[6] The Complainant and the CHRC seek dismissal of the application.

[7] The Complainant submits that the *Rules of Procedure* are subject to the overriding consideration in Rule 5:

5. These Rules are to be interpreted and applied so as to secure the informal, expeditious and fair determination of every inquiry on its merits.

[8] The Complainant notes that it remedied its lateness by filing its final argument on November 18, 2021, and serving it on the other parties on November 26, 2021. The Complainant says its failure to copy the other parties when it filed its further request for an extension of time on November 16, 2021, was inadvertent.

[9] The Complainant further states that the application should be evaluated in the context of the entire proceeding and all parties' actions relating to the conduct of the proceeding.

[10] The Complainant considers that the Respondent suffered no prejudice by the delay, while the Complainant would experience serious prejudice if the matter were dismissed at this late stage based on an inadvertent correspondence error and short delay in service and filing.

[11] The CHRC offered two tests for motions to dismiss based on delay, as summarized in *Chisholm v Halifax Employers Association*, 2019 CHRT 38 at para 18-19:

Under what has been referred to as the “classic test” for dismissal of a matter for delay, the adjudicator must determine 1) whether there has been an inordinate delay; 2) whether the delay is inexcusable; and 3) whether the defendants are likely to be seriously prejudiced by the delay. ...

The second approach is set out in *Seitz v Canada* To apply this approach, the Tribunal has to consider whether the litigant has shown a “wholesale disregard” for the Tribunal’s time limits and rules where cases have remained static for an unreasonable length of time and where the litigant appears to have no intent to bring the case to a conclusion. The impact of these breaches is not only to be considered from the viewpoint of the litigants, but also in terms of an abuse to the administration of justice, separate and apart from any prejudice caused by inordinate and inexcusable delay. These sorts of cases can give rise to a finding of abuse of process.

[12] The CHRC submits that in evaluating the motion to dismiss, the Tribunal must balance the facts of the case, the need for efficiency and economy, any prejudice, the importance of bringing finality to human rights complaints, and the duty of fairness to all parties. The CHRC considers that resolving the complaint on its merits remains in the public interest considering:

- a. that considerable resources have already expended including a full hearing;
- b. that the procedural deficiency has been addressed;

- c. the shortness of the delay;
- d. the lack of prejudice to the Respondent; and,
- e. the significant prejudice to the Complainant.

IV. Analysis

[13] Section s. 48.9 (1) of the *Canadian Human Rights Act*, RSC, 1985, c. H-6 (CHRA), provides: “Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow”.

[14] By either of the two tests in *Chisholm*, the balance of factors weighs in favour of continuing to the resolution of this complaint on its merits. The dismissal of a complaint due to delay is a harsh remedy that is cautiously applied. In this instance, the delays in filing argument and in copying correspondence were brief and have been remedied. The hearing has already been completed subject to the filing of the final arguments of the Respondent, the CHRC, and any reply by the Complainant. The Respondent did not provide specifics regarding any prejudice suffered. The delay and error in copying correspondence were not so significant as to enable the Tribunal to infer prejudice on the part of the Respondent or conclude that the Complainant’s conduct poses a threat to the administration of justice.

V. Ruling

[15] The Respondent’s application is dismissed.

[16] The Respondent and the CHRC will file their final written arguments on or before March 29, 2022.

[17] The complainant will file its final reply on or before April 21, 2022.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
March 14, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2407/6619

Style of Cause: Earl Ka-Nowpasikow (Earl Andrew) v. Poundmaker Cree Nation

Ruling of the Tribunal Dated: March 14, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Eldon B. Lindgren, Q.C., for the Complainant

Brittany Tovee, for the Canadian Human Rights Commission

Deanne Kasokeo, for the Respondent