

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 28

Date: September 12, 2022

File Nos: HR-DP-2794-22 and HR-DP-2795-22

[ENGLISH TRANSLATION]

Between:

Mohammed Choudhary

Complainant

- and -

Greg Scott

Respondent

- and -

Kinistin Saulteaux Nation

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I.	Background.....	1
II.	Ruling.....	1
III.	Issue.....	2
IV.	Preliminary remark – Delay in filing of Nation's reply.....	2
V.	Legal framework	4
VI.	Positions of the parties and analysis.....	6
	A. Procedural fairness, natural justice and Commission decisions.....	6
	B. Expeditiousness and abuse of process	11
	C. Prejudice and other considerations.....	14
	D. Interest of justice to stay proceedings.....	14
VII.	Orders	18

I. Background

[1] This is a ruling of the Canadian Human Rights Tribunal (the “Tribunal”) deciding the motion filed by the Kinistin Salteaux Nation (the “Nation” or the “Respondent Nation”) to stay the Tribunal’s proceedings until the Federal Court of Canada (the “Federal Court”) decides its application for judicial review.

[2] In its judicial review, the Nation seeks (1) a review of the decision by the Canadian Human Rights Commission (the “Commission”) to refer the complaint to the Tribunal for inquiry and (2) a review of the Commission’s decision to ask the Tribunal to join the complaints against the Nation with the one against another respondent, Greg Scott (“Mr. Scott” or the “Individual Respondent”) in a single inquiry.

[3] The Nation filed its motion on April 29, 2022, without providing extensive representations in support. On May 13, 2022, the Tribunal requested that the parties provide representations on this motion, which the Nation did on June 2, 2022, and Mr. Choudhary did on June 14, 2022. The Nation filed a short reply on July 13, 2022.

[4] Greg Scott was served with the representations from the parties, as appears from proof of service provided by the Nation and Mr. Choudhary, but did not participate in this motion and did not submit any representations. Mr. Scott also did not contact the Tribunal in any way, although he was invited to do so. The Tribunal has also not been able to contact Mr. Scott since the complaint was referred, despite its various attempts to do so.

[5] The Tribunal is satisfied that Mr. Scott received notice of this motion and was given a full and ample opportunity to present his representations (subsection 50(1) of the *Canadian Human Rights Act* (“CHRA”)) but failed to do so. In the absence of a reply from him, the Tribunal will give its ruling.

II. Ruling

[6] For the reasons that follow, the Tribunal allows the Nation’s motion and stays the proceedings until the Federal Court decides the application for judicial review bearing file number T-517-22 and makes other orders in Section VII, “Orders”.

III. Issue

[7] The Tribunal must rule on whether it is in the interest of justice to suspend its proceedings until the Federal Court completes the judicial review filed by the Nation.

IV. Preliminary remark – Delay in filing of Nation's reply

[8] In a letter to the Tribunal dated August 2, 2022, the Complainant complained about the late filing of the Nation's reply, which was supposed to be filed on June 24, 2022, but was actually filed on July 13, 2022. As a result, he requests that the Tribunal not consider the Nation's late reply.

[9] First, the Tribunal must mention that in its direction dated May 27, 2022, the Nation's time to file its reply was extended to July 4, 2022; June 24, 2022, was the first time limit set in the initial direction from the Tribunal on May 13, 2022.

[10] That being said, the Nation alleges, in support of its reply, that it was expecting that the Tribunal would perhaps confirm the lack of a response from Mr. Scott, the other respondent involved in the proceedings. The Tribunal will address the Nation's argument directly.

[11] It was clear from the Tribunal's orders dated May 13 and 27, 2022, that if Mr. Scott decided to respond to the Nation's motion to stay the proceedings, he would have to serve his representations on the other parties, including the Nation, no later than June 24, 2022. On that date, the Nation should therefore have expected to receive service of Mr. Scott's representations on the date ordered by the Tribunal. He decided not to participate in the motion, despite being served.

[12] The Nation notes that it had anticipated confirmation from the Tribunal that it had not received any representations from Mr. Scott. On the one hand, the obligation to serve the motion and the representations is on the parties themselves, not the Tribunal. On the other hand, neither the Tribunal nor its Registry was required to confirm the non-receipt of a party's representations.

[13] The Nation received nothing from Mr. Scott on June 24, 2022. It could therefore start to prepare its reply, knowing that Mr. Scott had not served it with anything. If the Nation had had doubts about this, it had the opportunity to inquire with the Registry about the situation between June 24 and July 4, 2022, which it did not do. The Nation should have therefore followed the Tribunal's order and filed its reply within the prescribed time limit, that is, no later than July 4, 2022.

[14] That being said, it is true that the time limits ordered by the Tribunal are mandatory and that non-compliance with an order, such as failing to meet the time limit for filing representations, may lead to consequences (see Rule 9 of the *Canadian Human Rights Tribunal Rules of Procedure*, SOR/2021-137 ("the Rules")). Nevertheless, the CHRA requires Tribunal proceedings to be conducted as informally and expeditiously as possible (subsection 48.9(1) of the CHRA). This principle is also reflected in Rule 5 of the Tribunal's Rules.

[15] In this case, the Tribunal finds that accepting the Nation's reply, although late, does not prejudice either Mr. Choudhary or any other party to the proceedings. The Tribunal finds that the Nation's reply essentially repeats the same information provided in its main motion and therefore does not include any material that would have a decisive and determinative impact on the Tribunal's ruling in the circumstances.

[16] In the absence of this reply, the Tribunal would reach the same conclusion: to allow the motion to stay proceedings on grounds also found in the Nation's main motion.

[17] Lastly, Mr. Choudhary stated that he had had discussions with the Federal Court Registry regarding his involvement in the judicial review proceedings initiated by the Nation. At this stage, the Honourable Kathleen Ring, Prothonotary of the Federal Court, decided that the case filed by the Nation before the Federal Court be scheduled for hearing, as appears from the index of recorded entries for the case before that court.

[18] Although the Tribunal is sensitive to Mr. Choudhary's representations regarding his involvement in the Federal Court case, whether he participates in the Federal Court case or not is not determinative in the circumstances. What matters here is the potential impact of the Federal Court decision itself on the Tribunal's proceedings, thereby justifying the stay of

proceedings. This factor will be addressed in the Tribunal's reasons, which are set out below in this ruling.

V. Legal framework

[19] It is undisputed that the Tribunal has the authority to stay its own proceedings (*Laurent Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2018 CHRT 5 (CanLII) [*Duverger*], at para 33). Based largely on our Tribunal's analysis in *Duverger*, my colleague, Member Lustig, recently summarized the guiding principles for staying proceedings in *Williams v. Bank of Nova Scotia*, 2021 CHRT 24 (CanLII) [*Williams*]. He wrote the following at paragraphs 31 to 38 of his ruling:

[31] In exercising this jurisdiction, the Tribunal has a general obligation to act informally and expeditiously, in accordance with the principles of natural justice, procedural fairness, and the scheme of the CHRA (par. 48.9(1) of the CHRA and par. 1(1) of the Rules).

[32] It is also understood that the Tribunal does not have jurisdiction to review the Commission's referral decision. The mandates of the Commission and the Tribunal are different. The Commission decides whether to refer the complaint to the Tribunal for inquiry and the scope of the referral. Once the referral is made, the Tribunal decides the complaint on its merits (see *Banda v. Correctional Service Canada*, 2021 CHRT 19 at paras 20-22).

[33] However, the Tribunal, in proceeding with its inquiry into the complaint, may be called upon to hear evidence that was examined by the Commission in its investigation and to determine issues that arise therefrom, within the scope of the case referred to it.

Stay of Proceedings – Applicable Test

[34] A stay of proceedings should only be granted in exceptional circumstances (*Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 at para 22; *Hughes v. Transport Canada*, 2020 CHRT 21 at para 20 [*Hughes*], citing *Canadian Association of Elizabeth Fry Societies and Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para 14).

[35] In deciding whether the Tribunal should stay its proceedings pending judicial review, the Tribunal's ruling in *Duverger* is the leading and most comprehensive authority to follow. It has indeed been relied upon by all of the parties to this case.

In *Duverger*, where a motion for a stay pending a judicial review was denied, the Tribunal adopted the interest of justice test used in the context of requests for adjournment, and expanded on it:

[58] In my opinion, the interest of justice allows for a broader assessment of factors relevant to a motion to stay proceedings, which would **include** the principles of natural justice, procedural fairness and expeditiousness provided under subsection 48.9(1) of the *Act*. Moreover, as articulated by the Federal Court of Appeal at paragraph 26 of *Clayton*, the Tribunal may also consider certain factors developed in *RJR-MacDonald* (a serious issue of fact and/or law to be tried, irreparable harm and a balance of convenience).

[59] It goes without saying that the interest of justice includes the interest of all the parties. It also includes the public interest. It is important to recall that complaints filed before the Tribunal concern individuals who believe that their human rights have been violated. These allegations are serious and require the Tribunal to act expeditiously. Every time allegations of discrimination are made under the CHRA the public interest is obviously involved (see *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)* (Ont. Div. Ct.), 1988 CanLII 4794 (ON SC)). There is no question that public interest notably demands that complaints related to discrimination be dealt with expeditiously (see *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 F.T.R. 44, 1997 CanLII 4851 (FC), [*Bell Canada*], see also subsection 48.9(1) of the CHRA).

(*Duverger*, supra, at paras 58-59)

[*Emphasis in original.*]

[37] In answering the question of whether the interests of justice support the proceedings being delayed, the Tribunal must consider the legislative scheme, which envisions a balancing of the principles of natural justice and expeditiousness in subsection 48.9(1) of the CHRA.

[38] Furthermore, as the Tribunal recently stated:

The “interest of justice” approach relies on a “reasonable and flexible assessment of factors relevant to stay requests including but not limited to principles of procedural fairness, irreparable harm, the balance of convenience between the parties, and the public interest in dealing with human rights

complaints expeditiously.” The factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances of each case.

(*Hughes* at para 21)

[20] The parties did not make any arguments that would allow the Tribunal to depart from the application of this analysis. The Tribunal will therefore keep these principles in mind in making its ruling.

VI. Positions of the parties and analysis

[21] The Tribunal has read the representations from the Nation and Mr. Choudhary and will focus its analysis on the necessary, essential and relevant arguments in order to make the ruling in a concise and effective manner (*Turner v. Canada (Attorney General)*, 2012 FCA 159 (CanLII), at para 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 (CanLII), at para 54, *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2, at para 32).

A. Procedural fairness, natural justice and Commission decisions

[22] On February 9, 2022, the Commission made a ruling referring Mr. Choudhary’s complaints involving the Nation and Mr. Scott for inquiry by the Tribunal under subsection 49(1) of the CHRA. At the same time, it decided to request that the Tribunal join the complaints against both respondents into a single inquiry under subsection 40(4) of the CHRA.

[23] On March 9, 2022, the Nation filed an application for judicial review of the Commission’s decision. It challenges two components of that decision: (1) the referral of its complaint to the Tribunal; and (2) the request to join the two complaints in a single inquiry. On April 19, 2022, the Nation moved that the Tribunal stay its proceedings until the Federal Court decides on its application for judicial review.

[24] One of the Nation’s main arguments is that the Commission’s decision breaches the principle of procedural fairness. It argues that Mr. Choudhary filed two complaints, one

against it and the other against Mr. Scott, who was one of its former employees. The Nation states that, during its investigation, the Commission was unable to contact Mr. Scott, despite several attempts to do so. It therefore alleges that the Commission made a decision based only on the information received from Mr. Choudhary and other individuals but not from Mr. Scott, owing to his absence from the investigation process.

[25] The Nation adds that the Tribunal also tried to contact this individual several times but was unsuccessful. It feels that the Tribunal also acted unfairly by unilaterally deciding to assign a file number involving Mr. Scott and by requesting that the parties (the Nation and Mr. Choudhary) serve him with their representations regarding this motion for a stay of proceedings.

[26] In this respect, this argument will be addressed directly, as the Nation is mistaken in its interpretation of the situation and it is clear to the Tribunal that there is no breach of the principles of natural justice or procedural fairness in its proceedings.

[27] First, the Commission not only decided to refer Mr. Choudhary's complaints involving the Nation and Mr. Scott for inquiry before the Tribunal, but it also formally requested that they be joined in a single inquiry. The Nation has rightly drawn the Tribunal's attention to *Gullason and Attaran v. Tri-agency Institutional Programs Secretariat*, 2018 CHRT 21 (CanLII) [*Gullason*]. Without going into all the details of that decision, my colleague, Member Harrington, has already found that once the Commission's decision is made under subsections 40(4) and 49(1) and (2) of the CHRA, regarding its authority to refer complaints jointly (or as a single matter), the Tribunal must comply with this request.

[28] It is sufficient to repeat her conclusion in paragraph 38 of *Gullason*, where she wrote:

[38] In my view, subsection 40(4) of the Act, when read in conjunction with subsections 49(1) and (2), *does* provide clear statutory direction to the Tribunal Chairperson. **When the Commission requests a single inquiry pursuant to subsection 40(4) of the Act, the Chairperson must comply with this request.**

[Emphasis added.]

[29] Contrary to the Nation's argument, there was no violation of procedural fairness when the Tribunal assigned a file number to Mr. Scott's complaint. On the contrary, the Tribunal had to assign a file number to the complaint involving the Individual Respondent following the Commission's decision. The Tribunal is bound by this decision and must begin inquiring into both complaints as a single inquiry, which thus includes three parties: Mr. Choudhary, the Nation and Mr. Scott.

[30] In addition, the Tribunal notes that its role is not to review the Commission's decisions (*Williams*, at para 32; *Oleson v. Wagmatcook First Nation*, 2019 CHRT 35 (CanLII) [*Oleson*], at para 34; *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (CanLII) [*Warman*], at para 56; *Leonard v. Canadian American Transportation Inc. and Penner International Inc.*, 2022 CHRT 20, at paras 61 and 62). Thus, upon referral by the Commission, the complaint inquiry must follow its course. All parties to the case have the right to present a full and ample defence as provided for in subsection 50(1) of the CHRA, and Mr. Scott has just as much right to do so as the Nation.

[31] Now, the Nation has the right to plead before the Federal Court that the Commission erred in interpreting its powers. If the Nation decides to do so, it will be up to that court to decide this issue on judicial review. It is not up to the Tribunal to decide this issue.

[32] That being said, and as the Nation asserts, the Tribunal finds that the issue of joining the complaints at the Commission stage is important and may be a serious question within the meaning of *RJR-MacDonald* (see *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311). In this regard, the Federal Court's decision and its positions on the question, if it chooses to rule on it, may have a significant impact not only on the Tribunal's proceedings in this particular case but also on future complaints referred to it by the Commission.

[33] It must also be said that the Nation's motion for a stay of proceedings and its impact may also affect Mr. Scott's rights and obligations in relation to the proceedings that involve him. More importantly, and contrary to the Nation's argument, procedural fairness was shown when the Tribunal required that this motion and the parties' representations also be served on Mr. Scott. It would be difficult for the Tribunal to conclude otherwise. The Tribunal

adds that the parties' representations were served by email, as permitted by its Rules of Procedure. There was certainly no prejudice to either the Nation or Mr. Choudhary in having to serve their representations on Mr. Scott so that he was informed of the situation, and it is thus up to him to decide whether or not he participates in it.

[34] The Nation also adds that the Commission's decision to refer the complaints to the Tribunal as a single matter, in addition to assigning a file number to Mr. Scott's complaint when he is not involved in the proceedings, has the effect of placing full responsibility for defending both complaints on its shoulders. The Tribunal is not persuaded by this argument.

[35] When the Tribunal conducts its inquiry, the Nation will have the opportunity to provide a statement of particulars in which it can present the theory behind its case and its supporting evidence. It will have the opportunity to present a full and ample defence as provided for in subsection 50(1) of the CHRA. If it wants to argue that it is not liable for the discrimination alleged by Mr. Choudhary, it will still be possible for it to do so.

[36] Mr. Choudhary, meanwhile, will still need to prove, on a balance of probabilities, that there is *prima facie* discrimination. The Nation will then be able to present its evidence to refute his claims. And if Mr. Choudhary is able to meet his burden, it will be up to the Nation to present a defence under section 15 of the CHRA, if it wishes to do so. Not only that, but it may also attempt to rebut the presumption under subsection 65(1) of the CHRA for acts that may have been committed, for example, by one of its employees or agents.

[37] Accordingly, the Tribunal is satisfied that there is no unfairness in the circumstances, and it will be able to determine at the hearing (1) whether there is a *prima facie* case of discrimination; if so, (2) whether the Nation was able to present a defence under section 15 of the CHRA; and (3) whether the Nation was able to rebut the presumption set forth under subsection 65(1) of the CHRA for the acts committed by its employee. And after all this analysis, the Tribunal will be able to determine whether the perpetrator or perpetrators are liable for the alleged discriminatory practice and, if so, to what extent.

[38] Lastly, the Nation argues that there was another breach of procedural fairness in the Commission's process. It maintains that, to its knowledge, the Commission has not made a decision regarding the complaint involving Mr. Scott and that there is no legal basis for not

making such a decision. This argument by the Respondent Nation regarding the Tribunal case is erroneous.

[39] First, the Tribunal notes that it acquires jurisdiction from the moment the Commission refers a complaint to it for inquiry and that it cannot act without this referral (*Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2 (CanLII) [*Karas*], at para 14; *Warman*, at para 55; *Oleson*, at para 34); *AA v. Canadian Armed Forces*, 2019 CHRT 33 (CanLII) at para 59; *Connors v. Canadian Armed Forces*, 2019 CHRT 6 (CanLII) [*Connors*], at para 28). At any stage after the filing of a complaint, the Commission may refer it to the Tribunal for inquiry if the circumstances warrant it (subsection 49(1) of the CHRA) and this referral is in the form of a letter addressed to the Chairperson of the Tribunal (*Karas*, at para 18; *Connors*, at paras 42 and 43). As the Tribunal wrote in *Karas*, at paragraph 19:

[19] As indicated by the Commission in paragraph 26 of its submissions, and as understood by the Tribunal, the Commission issues two separate letters: one setting out the Commission's decision, which is sent to the parties, and one that is sent to the Chairperson of the Tribunal confirming the referral for inquiry. **It is on the basis of this second letter that the Tribunal acts** (*Itty v. Canada Border Services Agency*, 2013 CHRT 33 at paras 47 and 48 [*Itty*]).

[Emphasis added.]

[40] The Tribunal did indeed receive the Commission's decision dated February 9, 2022. However, it also received the letter from the Commission to the Chairperson of the Tribunal, Jennifer Khurana, dated February 16, 2022, requesting (1) that an inquiry into Mr. Choudhary's complaints against the Nation (20181210) and Mr. Scott (20181284) be held under subsection 49(1) of the CHRA; and (2) that these two complaints be joined in a single inquiry under subsection 40(4) of the CHRA.

[41] The Tribunal has reproduced the content of this letter from the Commission:

Dear Ms. Khurana:

I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaints (20181210) of Mohammed Choudhary against the Kinistin Saulteaux Nation **and (20181284) of Mohammed Choudhary against Greg Scott.**

The Commission decided, pursuant to subsection 49(1) of the *Canadian Human Rights Act*, to request that you institute an inquiry into the **complaints** as it is satisfied that, having regard to all the circumstances of the complaints, an inquiry is warranted.

The Commission also decided, pursuant to subsection 40(4) of the *Canadian Human Rights Act*, to request that you institute **a single inquiry into the complaints** as it is satisfied that the allegations and issues are substantially the same in fact and in law.

...

[Emphasis added.]

[42] Contrary to the Nation's claim, and based on the Commission's letter of February 16, 2022, there is no doubt that both complaints, including the one involving Mr. Scott, were indeed referred to the Tribunal for a single inquiry at the Commission's request. Now, if the Nation has arguments to present in this regard to the Federal Court, it is still free to do so.

[43] Lastly, the Nation's other arguments as to the unfairness of the Commission's decision, including its representations on its internal appeal procedures and policies, must be presented to the Federal Court, since the Tribunal cannot review the Commission's decisions (*Williams*, at para 32; *Oleson*, at para 34; *Warman*, at para 56; *Leonard v. Canadian American Transportation Inc. and Penner International Inc.*, 2022 CHRT 20, at paras 61 and 62). While these points are interesting, the Tribunal does not consider them to be sufficiently serious issues, by themselves, that warrant a stay of proceedings.

B. Expeditiousness and abuse of process

[44] That being said, the Nation argues that its motion to stay proceedings until the Federal Court decides its application for judicial review will not prevent the Tribunal from inquiring into the complaints expeditiously.

[45] It also states that neither Mr. Choudhary, nor the Attorney General of Canada, nor the Commission filed objections to its application for judicial review. It feels that the application will proceed expeditiously.

[46] In his representations, Mr. Choudhary states that he filed an objection to the application for judicial review. He said that he sent his Form 305 by email to the Federal Court to object to the application on March 18, 2022.

[47] The Nation states that the Complainant did not send his notice to the Federal Court but to the Saskatoon offices of the Department of Justice. It adds that Mr. Choudhary did not file an affidavit, did not request to cross-examine the Nation on its affidavit and did not submit his respondent's record. Accordingly, it believes that the Complainant is not taking the proceedings before the Federal Court seriously and that he does not intend to participate in them. It adds that it filed its application for a hearing and is waiting for a date.

[48] It appears from the Federal Court's index of recorded entries and from the decision dated July 18, 2022, by the Honourable Ms. Ring, Prothonotary of the Federal Court, that at this stage, Mr. Choudhary has not taken any action to participate in the judicial review proceedings. It is also apparent from updated index of recorded entries filed by the Nation, in response to the Tribunal's request, that a hearing will be held in the near future.

[49] The Nation adds that there would be no impact on the parties if the Tribunal's proceedings were suspended until the Federal Court makes its decision on the judicial review. It states that the lack of involvement and participation by Mr. Choudhary in these proceedings says a lot about the lack of impact that it may have on him. With respect to the lack of participation by the Attorney General of Canada and the Commission, once again, the Nation states that it is indicative of the lack of consequences for the public.

[50] Whether Mr. Choudhary (or the Commission or the Attorney General of Canada) is involved or not is not really decisive in the circumstances. The Tribunal fully understands that if there are no objections, a case can be expected to proceed more expeditiously before the Federal Court. That said, this is not the most compelling argument in the circumstances. The Tribunal may rely on other reasons that provide ample grounds for justifying a temporary stay of proceedings, in particular the potential impact on its own proceedings from a Federal Court decision on the joining of complaints by the Commission.

[51] In this regard, the Nation finds that it is important for the Federal Court to look into the Commission's misinterpretation of subsection 40(4) of the CHRA and its power to join

complaints involving different respondents. It is of the view that the Tribunal should nevertheless stay its proceedings, since questions of law and questions of mixed fact and law in this regard will have to be decided by the Federal Court.

[52] As mentioned earlier, the Tribunal has no jurisdiction to review the Commission's decision. However, the Tribunal believes that, in fact, the issue regarding the joining of parties at the referral stage by the Commission and its potential impact on the Tribunal, the Commission and the entire complaint management system provided under the CHRA can be considered a sufficiently serious question within the meaning of *RJR-MacDonald* and advocates for a stay of proceedings.

[53] As for Mr. Choudhary, he believes that both the application for judicial review and the Respondent Nation's motion to stay proceedings are, in fact, tactics intended to hinder the present proceedings. He argues that the Nation is trying to draw out the inquiry to see if he will ultimately drop his complaint. Mr. Choudhary also argues that the Nation's arguments against the Commission's conclusions are simply false arguments or straw-man fallacies. According to him, the Nation's goal is to make many attempts in the hope that one of them will succeed. He also adds that the Nation and Mr. Scott have infringed on his rights and that the complaints he filed with the Commission against the two respondents form a whole.

[54] The Nation rejects these arguments and feels that it was entitled to challenge the Commission's decisions at the Federal Court. It feels that it has just as much right to file a motion to stay proceedings before the Tribunal and that Mr. Choudhary had the opportunity to respond to that motion. With respect to the argument that Mr. Choudhary had been wronged by the Respondents, the Nation states that it is up to the Tribunal to decide and that this has no connection to the motion to stay proceedings.

[55] The Tribunal is sensitive to Mr. Choudhary's claims that his rights were infringed by the Respondents and that he wants his proceedings to carry on as quickly as possible. The Tribunal equally understands his argument that he feels that the Nation is trying to draw out or frustrate his proceedings.

[56] On the one hand, it is clear that the Tribunal will be able to determine whether there is discrimination on the basis of the evidence that will be submitted at the hearing and, in

doing so, determine whether his rights were infringed by the Respondents. On the other hand, the Tribunal finds that at this stage, there is no evidence to suggest that the Nation is trying to abuse the process. Abuse of process must be demonstrated by submitting tangible evidence on a balance of probabilities, which the Tribunal does not have at this stage.

C. Prejudice and other considerations

[57] The Nation alleges that if the Tribunal does not stay its proceedings, it will be impacted. In this regard, it argues that it will need to defend itself not only from the complaint against it but also from the complaint against its former employee. It believes that this may create a negative precedent for future cases before the Tribunal.

[58] It adds that not correcting the Commission's misinterpretations on questions of law and questions of mixed fact and law may also create a negative precedent. Lastly, it argues that most of the Nation's council members currently in office are not involved in Mr. Choudhary's complaint.

[59] As for Mr. Choudhary, he does not address these arguments directly. He does not argue the concept of prejudice directly; instead, he argues against the undue prolongation of the proceedings, the additional delays caused and the fact that the Respondents infringed his rights.

[60] Regarding the actual prejudice that may have been caused to the parties and the other considerations raised in their representations, the Tribunal finds that neither the Nation's arguments nor Mr. Choudhary's are convincing in the circumstances. As for the prejudice that may have been caused to them, it is not supported by evidence on a balance of probabilities. At this stage, the prejudice remains uncertain and potential, even hypothetical.

D. Interest of justice to stay proceedings

[61] Considering the position of the parties and the arguments that they have presented, the Tribunal finds that it is in the interest of justice, at this early stage of the inquiry, to stay

the proceedings until the Federal Court decides the application for judicial review bearing the number T-517-22.

[62] First, as the Tribunal mentioned earlier, the Nation's arguments on breach of procedural fairness are not very persuasive and are of little use to the Tribunal in ruling on the motion. The Nation will be able to plead its case before the Federal Court, which will have the jurisdiction to hear its claims.

[63] Now, the Tribunal must mention that it understands Mr. Choudhary's representations and concerns. The Tribunal is sensitive to the fact that the filing of his complaints dates back to September 2018 and that he is eager to have his case proceed quickly. However, the Tribunal finds that there are compelling reasons to stay the proceedings, the most important being that there are two respondents and that its inquiry may be severed depending on the decision made by the Federal Court.

[64] On this point, it is not the fact that the Nation challenged the Commission's decision to refer the complaints to the Tribunal for inquiry that is creating difficulties. In this respect, the Tribunal is reluctant to grant a stay of proceedings for such a situation (see for example *Duverger* or *Williams*, mentioned above). Rather, it is the potential decision of the Federal Court on the Commission's joining of the complaints (if, according to that decision, the Commission should not have joined the complaints) that may have a major impact on the Tribunal's inquiry, the proceedings and their conduct. Such a decision by the Federal Court would affect the very foundations of the proceedings.

[65] If the proceedings do move forward to this stage, the parties will have to proceed with the filing of their statements of particulars, the disclosure of documents that are potentially relevant to the dispute and the identification of lay witnesses and expert witnesses, including all the intermediary steps in this regard. If the Tribunal proceeds at this time, the parties will undertake all of these steps, taking into consideration that the Nation and Mr. Scott are respondents in the same inquiry. This has multiple consequences for the proceedings.

[66] The theory of the case and the manner in which the evidence will be considered and presented by the parties will be affected by the presence of two respondents. And if the Federal Court overturns the decision to join the complaints, and should the Tribunal begin

the proceedings, then there will need to be consideration for amending what was already placed in the Tribunal record. In other words, in a sense, we will have to go back in the process in order to correct the situation. Proceeding in this manner would certainly complicate the inquiry needlessly and prolong it.

[67] In addition, the prior disclosure of documents will necessarily be affected. In this regard, the parties are obliged to exchange all documents with each other that are potentially relevant to the dispute. This disclosure between the Complainant, the Nation and Mr. Scott would certainly be different if the inquiry were to be severed by the Federal Court. It is possible to avoid having the parties exchange documents with each other that they would not need to receive in the first place if their cases were proceeding separately. Both the Nation and Mr. Scott will have to exchange documents that they perhaps should not have to exchange, and these documents will necessarily contain information that may, in some cases, be sensitive or even confidential.

[68] It must be added that Mr. Scott's non-involvement inevitably increases the difficulty and complexity of the proceedings. The Tribunal is clear: it is neither Mr. Choudhary's nor the Nation's fault if Mr. Scott does not participate in the inquiry. However, the absence of a party unfortunately creates additional difficulties in a judicial proceeding or a quasi-judicial proceeding such as ours.

[69] This inevitably involves committing the Tribunal and the parties to additional steps and processes that would not take place if Mr. Scott were involved in the inquiry. As an example of such additional steps, we could mention notifying the absent party of motions and procedures, documents, statements of particulars, lists of lay and expert witnesses, and any other document relating to the proceedings. This also requires ensuring that the absent party has received the notice of hearing so that the Tribunal is satisfied that the party received proper notice of the hearing involving it (Rule 35 of the Rules).

[70] In short, if the Federal Court set aside the Commission's decision to join the two complaints, this would have a significant impact on the involvement of Mr. Choudhary and the Nation in the inquiry. In the event that the inquiry follows its course, the Tribunal then sees several procedural difficulties. It finds that staying the proceedings until the Court

decides the question will prevent the proceedings from becoming complicated in a way that can be avoided.

[71] The Tribunal adds that the Nation's argument that the judicial review that is currently before the Federal Court raises a serious question within the meaning of *RJR-MacDonald* is another factor that favours a stay. As noted above, the Federal Court's decision as to the Commission's power to join complaints involving two different respondents under subsection 40(4) of the CHRA may have a major impact not only on this inquiry but also on all future complaints that are referred by the Commission to the Tribunal for inquiry. Thus, the Tribunal finds that the potential impact of the Federal Court's decision may be a sufficiently serious question to warrant a stay within the meaning of *RJR-MacDonald*.

[72] Now, the Tribunal reiterates that the prejudice that may be caused to the parties – aside from the passage of time, Mr. Choudhary's desire to see his proceedings against the Respondents move forward expeditiously, and the alleged infringement of his rights – is neither real nor evident at this stage. Mr. Choudhary has not presented compelling evidence that would enable the Tribunal to determine that a stay of proceedings would be irreparably harmful to him.

[73] In addition, although the interest of justice, which also includes the public interest, requires that human rights complaints be dealt with as expeditiously as possible, the Tribunal is not satisfied that it would be more expeditious to move ahead with the proceedings at this stage if the Federal Court ultimately decided to set aside the Commission's decision to join the complaints. As previously determined by the Tribunal, doing so would require going back to correct the situation, amending the pleadings, correcting disclosures, etc. It would be in everyone's interest to avoid this.

[74] Lastly, the Tribunal recalls that the Tribunal's proceeding is a *de novo* one, independent from that of the Commission. Thus, once the referral is made, the case starts over from scratch, and the inquiry, at this stage, is still at the very beginning. Although Mr. Choudhary believes that the Nation is trying to frustrate the Tribunal's proceedings, both by filing its application for judicial review with the Federal Court and by filing its motion to stay proceedings, there is no basis for the Tribunal to find that the Nation's actions are time-

consuming, vexatious, frustrating or abusive. The Nation applied for judicial review as permitted by law and filed a formal motion to stay proceedings.

[75] Having said that, the Tribunal wants to allay Mr. Choudhary's concerns: this is a temporary stay to await the outcome from the Federal Court. Once the decision is made, the proceedings will resume as expeditiously as possible.

VII. Orders

[76] For the above reasons, the Tribunal **ALLOWS** the Nation's motion and **STAYS** the proceedings until the decision from the Federal Court in case T-517-22 is made, and the Tribunal **ORDERS** the Nation to inform it of the Federal Court's reasons and decision once they are known, without delay. After receiving this information, and in accordance with the Federal Court's findings, the Tribunal will end its stay and the proceedings may continue, in accordance with the Court's findings, as appropriate.

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
September 12, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: HR-DP-2794-22 and HR-DP-2795-22

Style of Cause: Mohammed Choudhary v. Greg Scott and Kinistin Saulteaux Nation

Ruling of the Tribunal Dated: September 12, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Mohammed Choudhary, for himself

Bruce Slusar, for the Respondent Kinistin Saulteaux Nation

No written representations for the Respondent Greg Scott