

File No.: T1683/3811, T1684/3911

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

**Gran Chief Stan Louttit in a representative capacity on behalf of the First Nations of
Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity**

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member: Sophie Marchildon

Date: October 17, 2013

Citation: 2013 CHRT 27

Table of Contents

	Page
I. Complaint and request for direction	1
II. Background	1
III. Positions of the parties	5
IV. Direction	7

I. Complaint and request for direction

[1] The Complainant claims the First Nations of Mushkegowuk Council have received and continue to receive inferior policing services in comparison with non-First Nations communities in Canada. According to the Complainant, this amounts to discrimination on the basis of race, pursuant to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*).

[2] The following ruling is to provide the parties with direction regarding ongoing issues related to the disclosure of documents.

II. Background

[3] On October 1, 2012, the Complainant brought a motion seeking an order for further and better disclosure from the Respondent.

[4] Submissions on the motion were completed on November 16, 2012. In an attempt to expedite the disclosure process, the Tribunal issued an order for the disclosure of the additional documents requested by the Complainant, with reasons to follow, on December 21, 2012:

1. The Respondent shall disclose all documents requested by the Complainants in Table A of its October 1, 2012 Motion Record; or, confirm that the documents requested do not exist.

a. With specific regard to the documents requested at paragraph 5(a) of Table A of the Complainants' October 1, 2012 Motion Record, the Respondent is to disclose all documents outlining the process by which staffing and funding levels are set in remote or isolated communities served by the Royal Canadian Mounted Police (the RCMP). The request is for general RCMP policy documents, and the individual staffing and funding levels of each remote or isolated community need not be disclosed.

b. With specific regard to the documents requested at paragraph 5(b) of Table A of the Complainants' October 1, 2012 Motion Record, the Respondent is to disclose all documents outlining the process by which staffing and funding levels are set in remote or

isolated communities served by First Nations police forces operating under the federal government's First Nations Policing Policy. The request is for general policy documents under the First Nations Policing Policy, and the individual staffing and funding levels of each First Nations police force need not be disclosed.

c. With specific regard to the documents requested at paragraph 11 of Table A of the Complainant's October 1, 2012 Motion Record, the Respondent is to disclose all documents outlining the standards of the RCMP governing service levels; facilities; equipment; wages, benefits, and isolation pay; and, any standards specific to policing in remote or isolate communities. The request is for general RCMP policy documents, and the individual standards governing specific First Nations or non-First Nations communities need not be disclosed.

2. The Respondent shall disclose all documents in its possession for the time period covering 2007 to the present, that relate to a fact, issue, or form of relief sought in the present case, including those facts, issues and forms of relief identified by the other parties; or, confirm that the documents requested do not exist.

3. Pursuant to Rule 6(1)(d) and 6(5) of the Tribunal's *Rules of Procedure*

(03-05-04), the Respondent shall provide the other parties with a consolidated list of documents in the Respondent's possession, for which no privilege is claimed. This consolidated list shall include all non-privileged documents disclosed to date and any non-privileged documents disclosed pursuant to orders 1 and 2 above.

4. Pursuant to Rule 6(4) of the Tribunal's *Rules of Procedure* (03-05-04), the Respondent shall produce to the other parties a copy of the documents identified in the consolidated list under order 3 above. Each document produced shall be clearly titled or labelled to correspond with the consolidated document list to allow the Complainant to easily identify and consult the document.

5. The documents produced under order 4 above shall be unredacted. If documents cannot be produced in unredacted form, the Respondent shall provide an explanation thereof.

6. Pursuant to Rule 6(1)(e) and 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*, the Respondent shall provide the other parties with a consolidated list of documents in the Respondent's possession, for which privilege is claimed. The Respondent shall provide an explanation for each privilege claimed. This consolidated list shall include all privileged documents disclosed to date and any privileged documents disclosed pursuant to orders 1 & 2 above.

7. The Respondent shall complete orders 1 to 6 above by February 15, 2013.

[5] The Tribunal's reasons for issuing this order, *Grand Chief Stan Louttit in a representative capacity on behalf of the First Nations of Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada*, 2013 CHRT 3 [Louttit], were released on January 16, 2013.

[6] On February 15, 2013, the date set in the Tribunal's December 21, 2012 order for the disclosure of the additional documents requested by the Complainant, the Respondent requested an extension to March 15, 2013 to comply with the order. As the Complainant and Commission did not oppose the extension, it was granted by the Tribunal.

[7] Assuming the additional disclosure was completed on March 15, 2013, the Tribunal scheduled a case management conference call (CMCC) for April 19, 2013 to discuss other matters in the file in preparation for a hearing of the matter. However, on April 18, 2013, the Complainant wrote to the Tribunal indicating that it had yet to receive any further disclosure from the Respondent pursuant to the Tribunal's order of December 21, 2012 and requested that a penalty be levied against the Respondent.

[8] In response, the Respondent indicated that due to the volume of material and the complexity of the task of fulfilling the Tribunal's December 21, 2012 order, more time was needed to complete the disclosure process. The Respondent indicated it would provide the additional disclosure by May 17, 2013.

[9] The Complainant agreed not to pursue a penalty against the Respondent for not complying with the Tribunal's December 21, 2012 order as long as the Respondent provided its full and complete disclosure by May 17, 2013.

[10] On May 21, 2013, the Respondent produced additional disclosure to the parties and provided a consolidated list of the documents it had disclosed to date. There was no indication in the consolidated list, or otherwise, as to which documents had been disclosed previously and which documents were disclosed in response to the Tribunal's December 21, 2012 order.

[11] On June 19, 2013 the Tribunal, in an effort to expedite matters and, in the absence of any follow-up from the parties since May 2013 on the issue of compliance with the Tribunal's December 21, 2012 ruling, requested a CMCC be scheduled for early July or mid-September 2013. The CMCC was scheduled for September 16, 2013, the purpose of which was to discuss the status of disclosure, any outstanding issues and to finalize details for a hearing.

[12] Prior to the CMCC, in the early afternoon of September 16, 2013, the Complainant advised the Tribunal that it would be making a request during the call for the Respondent to explain, in a list, how it has responded to the Tribunal's December 21, 2012 order. Although the Complainant had yet to complete its review of the Respondent's disclosure package, it indicated that it appeared there were a considerable amount of missing materials. The Complainant suggested that, after the Respondent indicated which of the documents were intended to respond to the Tribunal's order, it would be in a better position to assess the adequacy of the Respondent's disclosure package.

[13] During the September 16, 2013 CMCC, counsel for the Complainant and counsel for the Respondent agreed to discuss ongoing issues related to disclosure amongst them. The Tribunal encouraged the parties to raise issues in as timely a manner as possible and scheduled a further CMCC for October 3, 2013 to receive an update from the parties.

[14] During the CMCC on October 3, 2013, the Complainant indicated it still had ongoing issues with the disclosure provided by the Respondent and that the parties were unable to resolve those issues.

III. Positions of the parties

[15] The parties provided their positions on how best to address the ongoing disclosure issues in this matter during the October 3, 2013 CMCC.

[16] Based on its initial review of the documents provided by the Respondent, the Complainant says it appears there are documents missing. However, it is difficult for the Complainant to know for sure without the Respondent indicating which documents it views as responding to each aspect of the Tribunal's order. Therefore, the Complainant asks the Respondent to explain, in a list, how it has responded to the Tribunal's order in 2013 CHRT 3. After the Respondent has indicated which of the documents are intended to respond to the Tribunal's order, the Complainant says it will be in a better position to assess the adequacy of the Respondent's disclosure package.

[17] According to the Complainant, this would be the most efficient way of addressing the disclosure issues. Rather than the Complainant guessing which documents were disclosed to address each aspect of the Tribunal's order, the individuals who compiled the documents for the Respondent would be in a better position to indicate this more quickly, because presumably they have already performed this task in compiling the disclosure materials. Similarly, the Complainant says it would be far less work for the Respondent to indicate which documents were disclosed to address each aspect of the Tribunal's order than it would be for the Complainant to attempt to identify which documents may be missing. One reason for this is that, due to the previous disorganized disclosure provided by the Respondent, the Complainant is unable to identify which documents were previously disclosed and which documents have now been disclosed to address the Tribunal's order.

[18] The Complainant adds that, although there is no rule in the Tribunal's *Rules of Procedure (03-05-04)* requiring the Respondent to create a list indicating how it has responded to the Tribunal's order, it is within the Tribunal's authority to make such a direction to ensure an expeditious and orderly hearing process.

[19] Alternatively, the Complainant says it could bring a motion for additional disclosure. However, in the Complainant's view, this would be a less efficient way of addressing the disclosure issues.

[20] The Commission points out that regardless of the procedure taken to address the disclosure issues in this matter - whether the Respondent is directed to explain, in a list, how it has responded to the Tribunal's order or, alternatively, the Complainant brings a motion in this regard - the Respondent will be required to provide an explanation as to how it has fulfilled the Tribunal's disclosure order in 2013 CHRT 3. As the Respondent has already performed the task of compiling materials in response to each aspect of the Tribunal's order, the Commission says the Respondent is best placed to indicate which documents it has provided to satisfy the order, presumably with minimal work.

[21] On the other hand, the Respondent invites the Complainant to indicate which documents it thinks are missing or are inadequate. Once the Complainant has done so, the Respondent can then inquire into and indicate whether there are or are not more documents. As opposed to the Complainant and Commission's point of view, the Respondent says it would be a lot of work to go back through the disclosed materials, read each document, and determine which documents are new and what aspect of the Tribunal's order they address. Therefore, in the Respondent's view, it would be more practical and cost efficient for the Complainant to go through the disclosed materials and indicate what is inadequate. While the Respondent does not question the Tribunal's authority to make the direction requested by the Complainant, it says it is unprecedented.

IV. Direction

[22] In its December 21, 2012 order, the Tribunal directed the Respondent to disclose the additional documents requested by the Complainant. The Tribunal also ordered the Respondent to produce a consolidated list of all documents disclosed to the Complainant, including any documents disclosed to the Complainant following the ruling. The basis for ordering the consolidated list was:

Producing an unorganized CD, with unindexed and unsorted documents, inhibits the Complainants' ability to rely upon or address evidence that the Respondent finds relevant to the present case. Furthermore, the unorganized First Disclosure CD has inhibited the timely and efficient presentation of arguments and evidence in this case. The parties have been unable to move past the disclosure stage of these proceedings since March 2012. While the unorganized First Disclosure CD may not be the sole reason for this, it has been a contributing factor. In fact, the Respondent has pointed out that some of the documents being requested in the current motion have already been provided to the Complainants. Perhaps if the documents had been produced in a more efficient manner in the first place, the current motion, or at least aspects of it, may have been unnecessary and these proceedings could have advanced more expeditiously.

(Louttit at para. 14)

[23] Similar issues arise again in the context of the current request for directions. While the Respondent has complied with the Tribunal's order to produce a consolidated list of documents, the consolidated list alone does not allow the Complainant to determine whether the Respondent has complied with the main aspect of the Tribunal's order: to disclose additional documents. In this regard, I note that the Tribunal's December 21, 2012 order provided:

1. The Respondent shall disclose all documents requested by the Complainants in Table A of its October 1, 2012 Motion Record; **or, confirm that the documents requested do not exist.**

(emphasis added)

[24] While the Respondent was not explicitly directed to indicate which additional documents were provided to address each aspect of the Complainant's request, implicit in this direction was an understanding that the Respondent would somehow indicate how it had complied with the Tribunal's order to disclose additional documents. Despite the fact that the Respondent was asked to indicate whether any of the documents requested did not exist, it now invites the Complainant to indicate which documents it thinks are missing or are inadequate. This is not in line with the spirit of the Tribunal's order or disclosure in general:

While the *Rules* do not specify the manner or form by which production is to take place, the purpose of the *Rules* and the principles of fairness in general dictate that the disclosure and production of documents be sufficient to allow each party the full and ample opportunity to be heard.

(*Louffit* at para. 14)

[25] Neither the *Act* nor the Tribunal's *Rules of Procedure (03-05-04)* specifically address the situation brought forward by the current request for direction. However, in the absence of a specific statutory direction, it is well established that the Tribunal is master of its own procedure. In determining an appropriate procedure in this situation, I note that pursuant to subsection 48.9(1) of the *Act* proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[26] At this stage, the Complainant is unable to determine whether the Respondent has complied with the Tribunal's December 21, 2013 order for additional disclosure. This order created an obligation on the Respondent to disclose documents to allow the Complainant the full and ample opportunity to be heard. The Respondent has not fully complied with that obligation. Considering it gathered the additional documents, it is also in the best position to indicate how those documents responded to the Tribunal's order and the Complainant's request for disclosure, as opposed to the Complainant endeavouring to do so. It is not uncommon for sophisticated

parties, such as the Attorney General of Canada, to be able to track its own disclosure and to indicate how it has complied with a Tribunal order regarding disclosure. If the Respondent were unable to do so, it would be difficult, if not impossible, for the Tribunal and the other parties to verify compliance with a disclosure order.

[27] Therefore, I believe the most expeditious way of moving past the current disclosure issue would be for the Respondent to identify which documents it disclosed in compliance with the Tribunal's December 21, 2012 order. While perhaps inconvenient to the Respondent, proceeding in this manner has no effect on the Respondent's right to a fair hearing in this matter. As a result, the Tribunal directs as follows:

- (1) The Respondent is directed to indicate in writing to the Tribunal and all parties, in an unequivocal manner, how it has complied with the Tribunal's December 21, 2012 order. Specifically, what additional documents it provided on May 21, 2013 and how those documents respond to each request in Table A of the Complainant's October 1, 2012 Motion Record.
- (2) The Respondent will provide its response to direction 1 above by December 9, 2013.
- (3) Within (4) weeks of receiving the Respondent's response to direction 1 above, the Complainant is directed to indicate, in writing to the Tribunal and all parties, whether there are any outstanding issues with regard to the Respondent's compliance with the Tribunal's December 21, 2012 order.
- (4) After receiving the Complainant's response to direction 3 above, a conference call will be scheduled to discuss any outstanding issues and to attempt to set hearing dates.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
October 17, 2013