

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Mississaugas of the New Credit First Nation

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

File No.: T1810/4012

Member: Edward P. Lustig

Date: December 9, 2013

Citation: 2013 CHRT 32

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I. Complaint

[1] In 2008, the Complainant says two young members of its community with Down syndrome required special education supports not available in their on-reserve school. As a result, they were sent to an off-reserve provincial school. According to the Complainant, while the federal government provided some funds for bussing and regular provincial tuition, it refused to help pay for the \$80,000 required for special education supports.

[2] The Complainant claims the Respondent's refusal to fund its two members' special education amounts to a discriminatory practice, on the basis of race and disability, pursuant to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. More broadly, the Complainant asserts flaws in the federal government's First Nations Special Education Program result in systemic discrimination against First Nations parents and children. That is, First Nations children living on reserve do not receive the same quality of special education supports as their non-First Nations counterparts living off-reserve.

II. Motion

[3] In preparing for a hearing in this matter, the Complainant says the Respondent has not adequately responded to its and the Commission's requests for the disclosure of documents.

[4] Particularly, in a letter to the Respondent dated August 1, 2013, the Complainant reiterated a request it made on December 21, 2012 for the disclosure of additional documents. The Complainant says the Respondent, in correspondence dated January 23, 2013, indicated that it would provide these documents; however, it has not done so. Based on its review of the materials already provided by the Respondent, the Complainant provided a chart outlining the documents it believes still remain outstanding.

[5] The August 1, 2013 letter also requests materials to explain how the federal government establishes the yearly overall national and Ontario budgets for Aboriginal Affairs and Northern

Development's ("AANDC") First Nations Special Education Program. The Complainant lists the documents that it believes likely exist, but have not been disclosed.

[6] Finally, after reviewing the Respondent's disclosure to date, the Complainant's August 1, 2013 letter also requests further documentation with respect to some of the materials already provided, including: legible versions of some documents; missing pages from certain documents; explanations for acronyms appearing in some documents; non-redacted copies of certain documents; explanation for duplicate copies of some documents; documentation to explain the origin or context of certain documents; documents referred to in documents already provided, but which have not been disclosed; and, details regarding the Respondent's search parameters for finding relevant documents.

[7] The Commission also sent a letter to the Respondent, dated August 9, 2013, supporting the Complainant's request for additional documentation as outlined in the August 1, 2013 letter. The Commission's letter also requests additional disclosure from the Respondent. Based on its review of the materials provided by the Respondent to date, the Commission's letter provides a detailed list of the additional documents it requests.

[8] The Complainant says the Respondent has not responded to its August 1, 2013 letter or the Commission's August 9, 2013 letter. Therefore, it has brought the present motion for further and better disclosure from the Respondent.

[9] As part of its motion, the Complainant also asks that the Respondent to indicate: (i) which of the additional requested documents can and cannot be located; (ii) which of the requests in the Complainant's August 1, 2013 letter and the Commission's August 9, 2013 letter each of the additional documents are intended to respond to; and, (iii) for those materials that cannot be located, a description of the search conducted by the Respondent.

III. Response

[10] In response to the Complainant's motion, the Respondent indicates that it is committed to ensuring that there is a complete evidentiary record in this matter. In this regard, the Respondent is prepared to provide the disclosure requested by both the Complainant and the Commission. It anticipates being able to disclose most of the materials requested by mid-January 2014.

[11] For the documentation relating to the yearly overall national budget for the First Nations Special Education Program, while the Respondent does not oppose this request, it says it may take some time to produce these materials. According to the Respondent, it is estimated that a significant number of documents (electronic, paper and emails) will be captured by this request and will need to be reviewed, which will require a considerable amount of time and resources. It proposes April 30, 2014 as a deadline for the production of these documents.

[12] The Respondent adds that the Complainant and Commission have both requested the production of Treasury Board submissions and decisions. According to the Respondent, these documents are subject to Cabinet Confidence and cannot be disclosed or produced. Six such documents have been identified and have been forwarded to the Privy Council Office for a certificate pursuant to section 39 of the *Canadian Evidence Act*.

[13] As the Respondent is prepared to provide the disclosure requested in the Complainant's motion, its position is that it is unnecessary for the Tribunal to issue an Order in this matter.

IV. Reply

[14] Both the Complainant and the Commission say that, despite the Respondent's willingness to provide the documents requested in the motion, a formal Order is still required in this case.

[15] The Complainant reiterates that the vast majority of the materials that are the subject of this motion were requested from the Respondent previously. Despite committing to provide

those materials on January 23, 2013, the Respondent still has not done so. In the Complainant's view, a commitment by the Respondent to provide materials has clearly not proven sufficient.

[16] The Commission submits that, as there have already been a number of requests and a series of productions over the past year, making a formal order will have the advantage of providing clarity as to (i) what exactly is to be produced; and, (ii) by what date.

[17] Both the Complainant and Commission also point out that the motion not only asks the Respondent to produce the requested documents, but also provide an explanation of how any materials produced satisfy the requests made. In their view, the Respondent's submissions provide no assurances that any such explanation will be provided. According to the Complainant, this information is necessary for the Tribunal, the Complainant, and the Commission to: (a) understand which materials the Respondent cannot locate, as opposed to those materials it refuses to provide (e.g. for privilege); (b) understand how the Respondent has complied with the production order; (c) verify compliance with the production order; and, (d) assess whether an adequate search for materials has been conducted.

[18] On the Respondent's proposal to provide documentation relating to the yearly overall national budget for the First Nations Special Education Program by April 30, 2014, neither the Complainant nor the Commission believe this deadline is reasonable. In their view, there has already been too much delay in these proceedings due to disclosure issues. With regard to the latest request for documents, the Respondent has been aware of it since at least the August 1 and 9, 2013 letters. Granting the Respondent until April 30, 2014 to produce these documents would mean that it will have had nearly nine months to respond to the request. Seeing as the complaint was filed in 2009, and involves alleged ongoing discrimination, the Complainant submits that further delay may lead to irreparable harm for some First Nations children and also threatens to bring the administration of justice into disrepute.

[19] According to the Complainant, if sufficient resources are devoted to the task, granting the Respondent until the end of the year to comply with the request should be enough. However, in

light of vacation schedules and other commitments, the Commission says it would likely be mid-to-late January before it could begin its review of the materials. Therefore, it would be satisfied with a direction that the requested documents be disclosed by January 31, 2014.

V. Ruling

[20] Pursuant to s. 48.9(1) of the *Act*, proceedings before the Tribunal are to be conducted as expeditiously as possible. Furthermore, under s. 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case. This requires the disclosure of arguably relevant information between the parties.

[21] Since the filling of Statements of Particulars in October and November 2012, over a year ago, the parties have been unable to proceed past the disclosure stage of these proceedings. This is because the Complainant and Commission have requested the disclosure of additional information from the Respondent, which they claim they have yet to receive. The Respondent does not dispute the relevance of the additional information, and has agreed to disclose it. While the parties have attempted to work out these disclosure issues informally, this has not resulted in moving these proceedings forward expeditiously. Furthermore, the Complainant and Commission do not feel as though they can fully and amply present their case without the disclosure of this additional information. Therefore, I believe a direction from the Tribunal is necessary to ensure that these proceedings move forward expeditiously and fairly.

[22] As it does not dispute the arguable relevance of the documents requested in the Complainant's August 1, 2013 letter and the Commission's August 9, 2013 letter, I direct the Respondent to disclose those documents pursuant to Rules 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)*. Taking into account the parties' submissions, I believe a reasonable deadline for complying with this direction is January 17, 2014 for all documents except those relating to the yearly overall national budget for the First Nations Special Education Program. The deadline to provide those latter documents will be March 7, 2014.

[23] In responding to the Tribunal's direction to disclose the additional materials, the Complainant and Commission also ask the Respondent to indicate: (i) which of the additional requested documents can and cannot be located; (ii) which of the requests in the Complainant's August 1, 2013 letter and the Commission's August 9, 2013 letter each of the additional documents are intended to respond to; and, (iii) for those materials that cannot be located, a description of the search conducted by the Respondent. This is a reasonable request considering the large amount of additional documentation to be disclosed. Proceeding in this manner will also provide an assurance that the disclosure and production of any additional documentation is sufficient to allow the Complainant and the Commission the full and ample opportunity to be heard.

[24] The Tribunal took a similar approach in *Grand Chief Stan Louttit et al. v. AGC*, 2013 CHRT 27 [*Louttit*]. In order to avoid the situation the Tribunal had to address in *Louttit*, and in order to avoid any further delay in these proceedings due to disclosure issues, I direct the Respondent to provide an explanation of how it has responded to the Complainant and Commission's disclosure requests.

[25] Therefore, the Tribunal rules and directs as follows:

1. That the Respondent conduct a diligent search for the documents listed in the Complainant's letter dated August 1, 2013, provide a revised document list that includes the additional documents, and produce the additional documents for which no privilege is claimed.
2. That the Respondent conduct a diligent search for the documents listed in the Commission's letter dated August 9, 2013, provide a revised document list that includes the additional documents, and produce the additional documents for which no privilege is claimed.

3. That the Respondent indicate, in writing to the Tribunal and all parties, (i) which of the additional requested documents can and cannot be located; (ii) which of the requests in the Complainant's August 1, 2013 letter and the Commission's August 9, 2013 letter each of the additional documents are intended to respond to; and, (iii) for those materials that cannot be located, a description of the search conducted by the Respondent.
4. The Respondent is to comply with direction 1, 2 and 3 above, for all documents except those relating to the yearly overall national budget for the First Nations Special Education Program, by January 17, 2014.
5. The Respondent is to comply with direction 1, 2 and 3 above, for documents relating to the yearly overall national budget for the First Nations Special Education Program, by March 7, 2014.
6. Within four (4) weeks of receiving the Respondent's response to direction 5 above, the Complainant and Commission are directed to indicate, in writing to the Tribunal and all parties, whether there are any outstanding issues with respect to disclosure in this matter.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
December 9, 2013