

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2017 CHRT 18

Date: June 19, 2017

File Nos.: T1683/3811, T1684/3911

Between:

**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**

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member: Sophie Marchildon

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I. Motion for disclosure and payment of legal expenses

[1] This is the Tribunal's third ruling in relation to disclosure in this matter (see 2013 CHRT 3 [*Louitt 1*]; and, 2013 CHRT 27 [*Louitt 2*]). By way of motion, the Complainants argue the Attorney General (AG) has yet to disclose a complete set of relevant documents and seek further and better disclosure from the AG. They also seek an order that the AG reimburse them for legal expenses arising from an alleged failure to comply with the Tribunal's previous disclosure orders in *Louitt 1* and *Louitt 2*.

[2] These disclosure issues arise in the context of a complaint alleging the Complainants receive inferior policing services in comparison with non-First Nations in Canada. According to the Complainants, this amounts to discrimination on the basis of race pursuant to section 5 of the *Canadian Human Rights Act* (the *Act*).

[3] The Tribunal held a hearing with respect to the Complainants' motion. Two witnesses were called: Mr. Raymond Levesque, Senior Advisor, Countering Crime Division, Emergency Management Programs Branch, Public Safety Canada (PSC); and, Mr. Scott Merrithew, Director General, Strategic and Policing Agreements Branch, Royal Canadian Mounted Police (RCMP).

[4] Following the hearing, the AG undertook to make further inquiries to locate documentation identified by Mr. Levesque and Mr. Merrithew. On April 15, 2016, the AG provided an update thereon, including a description of the categories of documents that were subsequently produced to the Complainants. Further to this subsequent disclosure, the AG believes it has satisfied the Complainants' disclosure requests.

[5] However, the Complainants claim there are still a number of outstanding documents yet to be disclosed by the AG. According to the Complainants, the categories of documents disclosed by the AG do not match those they requested in their motion, and the AG's response did not indicate how its additional disclosure addressed the categories of documents requested. Aside from the terms and conditions of the First Nations Policing Policy and Programs, the Complainants claim the following items remain to be disclosed: emails and other files of key staff persons at PSC; documents outlining the process for setting staffing and funding levels in remote or isolated communities served by the RCMP;

materials relating to the process for setting staffing and funding levels for First Nation police services; materials relating to the negotiation of the Nishnawbe-Aski Police Service (NAPS) tripartite agreement; other documents for which Cabinet confidence privilege is claimed; documents outlining the standards governing the RCMP; documents containing redactions, missing pages and fragments; documents relating to the steps Canada has taken in relation to the recommendations of the Kashechewan inquest; and, documents regarding officer housing in the community of Norman Wells, Northwest Territories.

[6] Following further directions from the Tribunal on December 16, 2016, and the subsequent disclosure of additional documents, the parties were able to resolve some of the above disclosure requests.

[7] The Commission participated in the hearing of the disclosure motion and adopts the submissions of the Complainants. It also made its own request for further disclosure by the AG, which documents have now been produced.

II. Analysis

A. Preliminary issue: evidence on the motion

[8] At the hearing, there was some dispute with respect to the status of documents which were included in the Complainants' book of documents, but which were not specifically referred to during the hearing or put to the witnesses. It is the AG's position that those documents ought to be removed from the Complainants' book of documents. According to the AG, the Complainants had a full opportunity to question the witnesses on the documents in their book of documents. Therefore, permitting the Complainants to now rely on documents that were not put to the witnesses at the hearing would be unfair.

[9] The Complainants do not believe documents should be removed from their book of documents. According to the Complainants, motions are typically decided based on written evidence given they most often deal with procedural issues. Furthermore, it is not necessary that witnesses establish the authenticity of documents when the motion is about

the adequacy of the disclosure itself. The documents can be relevant merely as providing evidence to the Tribunal with respect to what has and has not been produced.

[10] The Tribunal sought clarification from the parties on what they considered to be the motion record and the parties made submissions on the documents that were in contention. Further to this request, the parties have provided additional information and now have indicated that the matter has been resolved. Consequently, I will consider the motion materials filed by the parties in their entirety.

B. Requests for disclosure

[11] Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case. The Tribunal must also conduct its proceedings as informally and expeditiously as the requirements of natural justice and its rules of procedure allow (see s. 48.9(1) of the *Act*).

[12] To fulfill these obligations, the Tribunal requires, among other things, the disclosure of arguably relevant information between the parties prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case it is up against and, therefore, to adequately prepare for the hearing. For that reason, if there is a rational connection between a document and the facts, issues or forms of relief identified by the parties in the matter, it should be disclosed pursuant to rules 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34 at para. 42).

[13] While the Tribunal requires arguably relevant information be disclosed prior to the hearing, this does not mean that this information will be admitted as evidence or that significant weight will be afforded to it in the decision-making process (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 at para. 4). Rather, it is a process that is meant to help parties prepare for the hearing and avoid delays in doing so [see Rule 9(3)(c) of the Tribunal's *Rules of Procedure (03-05-04)*].

[14] It is with these principles in mind that I will now examine each of the Complainants' requests for disclosure.

(i) Emails and other files of key staff persons at PSC

[15] Mr. Levesque testified that the email accounts of four staff people were searched at PSC. However, according to the Complainants, he mentioned other personnel who were involved in activities relevant to this complaint, but whose emails and documents were not searched, including policy analysts, various regional managers for Ontario, the program support unit managers and negotiators for the NAPS agreements.

[16] Furthermore, the Complainants indicate that 525 emails from the account of Mr. Levesque have been disclosed for the period of 2001 to 2005. Conversely, only 5 emails for the period of 2006-2007, from all staff, have been disclosed. The Complainants also note that, while emails of previous employees may have been disclosed through the search of Mr. Levesque and the other 3 employees' emails, there is no indication that the actual email accounts of these previous employees were searched. In the Complainants' view, this establishes that there has been an insufficient search of emails and documents of key staff persons in this matter. The Complainants are also concerned that the AG may have breached the Tribunal's order and general rules of fairness by failing to advise the parties and the Tribunal that, since the filing of the complaint, it deleted the email accounts of many PSC employees when they left the department.

[17] According to the AG, Mr. Levesque testified that an exhaustive search was conducted to locate all documents that were relevant to the complaint, including the hard copy and electronic files of the 4 key staff persons in the Aboriginal Policing Directorate. Furthermore, the AG states that numerous emails from previous employees at the Ontario regional office have been disclosed, which includes a substantial number of emails dating back to 2000.

[18] The AG does acknowledge that, during Mr. Levesque's testimony, it became aware that the email disclosure from employees in the policy branch of the Aboriginal Policing Directorate, along with the program support unit managers, may not be complete. It made

further inquiries to obtain any additional relevant emails, which it says have now been produced.

[19] According to the Complainants, the additional emails produced by the AG have not been categorized in relation to its motion and are organized in a confusing manner. As such, it has not been able to ascertain whether the additional documents actually address its request for disclosure.

[20] In *Louittit 1*, I indicated that while the Tribunal's *Rules of Procedure (03-05-04)* do not specify the manner or form by which production is to take place, their purpose and the principles of fairness in general dictate that any disclosure and production of documents be sufficient to allow each party the full and ample opportunity to be heard. In the context of that ruling, I found the AG's production of an unorganized CD, with unindexed and unsorted documents, inhibited the Complainants' ability to rely upon or address evidence that the AG found arguably relevant to the case. I indicated that any disclosed documents should be clearly titled or labeled to allow for easy identification and consultation by the opposing party (see *Louittit 1* at paras. 12-15)

[21] Similarly, in *Louittit 2*, I had to address the situation where the AG produced additional documents in response to a request for disclosure from the Complainants and a subsequent order from this Tribunal. The AG did not indicate how the additional documents addressed the different disclosure requests/orders and did not produce them in a manner that allowed the Complainants to determine whether the AG complied with the disclosure order. The AG was directed to indicate in writing how it had complied with the Tribunal's disclosure order. Specifically, it was directed to indicate how any additional disclosure responded to the Complainants' requests (see *Louittit 2* at paras. 22-27).

[22] In this third disclosure ruling, I must again address a situation where the AG is not producing documents in a manner that allows the Complainants to determine whether disclosure is complete. In following the principles outlined in *Louittit 1* and *Louittit 2*, and by way of a letter dated December 16, 2016, I directed the AG to indicate in writing to the Tribunal and the other parties how it has complied with the Complainants' request for disclosure of "emails and other files of key staff persons at PSC." Specifically, a written

response to paragraphs 7-12 of the Complainants' January 30, 2015 submissions was required. The AG was to indicate how the additional documents address those requests or, conversely, certify that no additional documentation exists to address the requests.

[23] After a number of extensions, the AG filed its response on May 19, 2017. On May 31, 2017, the Complainants confirmed their understanding that the AG's most recent response completed the matters that the Tribunal directed the parties to attend to on December 16, 2016. Moving forward, the principles outlined in *Louffit 1* and *Louffit 2* should guide the parties in responding to requests or orders for disclosure.

[24] Finally, the Complainants believe that an important number of arguably relevant emails may have been deleted by the PSC following the filing of the complaint. This is a serious allegation and it is unclear from the parties' latest correspondence whether it has been resolved. The parties will be asked to address this issue at the next case management conference call.

(ii) Documents outlining the process for setting staffing and funding levels in remote or isolated communities served by the RCMP

[25] In *Louffit 1*, I found the Complainants' request for general policy documents relating to the RCMP's process for setting staffing and funding levels in remote communities to be arguably relevant to this matter and subject to disclosure (at para. 26). In response to that ruling, the AG disclosed three documents. According to the Complainants, those documents do not explain in any significant detail how staffing and funding levels are set in remote or isolated communities served by the RCMP.

[26] At the hearing of this motion, the Complainants contend Mr. Merrithew acknowledged that the RCMP uses a Police Resourcing Model (PRM) to help determine the general staffing needs in a detachment. However, the Complainants claim the PRM and its corresponding Instruction Manual have not been disclosed. The Complainants also submit that a presentation disclosed by the AG lists 7 other models the RCMP uses to determine staffing levels, and that those models have also not been disclosed. If these 7 models were used to determine staffing levels for the RCMP, then in the Complainants'

view, they are relevant to determining what staffing levels are needed in the Mushkegowuk First Nations.

[27] The AG asserts the PRM has been disclosed, along with a completed PRM for a remote and isolated First Nations community in the Northwest Territories: the Norman Wells Community. With regard to the PRM Instruction Manual, the AG submits it can be disclosed through a confidentiality order.

[28] As to the other models requested by the Complainants, the AG submits these methodologies were created by various private sector contractors, are not necessarily specific to the RCMP, and, were not consistently applied across the RCMP. In fact, the AG states the PRM was developed as a direct result of deficiencies identified with these other models. Therefore, according to the AG, the other models are not relevant for the purposes of this complaint. Otherwise, the AG submits there is no document that sets out the precise manner in which resource levels are set by the RCMP in remote or isolated communities. Rather, according to the AG, Mr. Merrithew testified that staffing levels are set on a detachment-specific basis based on a dialogue between the RCMP and the contracting jurisdiction, with the latter deciding what the ultimate level of resource will be.

[29] Indeed, Mr. Merrithew's affidavit indicates "[p]olice service resource determination is done collaboratively between the contracting jurisdiction and the RCMP" and that "[t]his determination is an ongoing process that is unique to each contracting jurisdiction" (at para. 7). He also indicated at paragraph 8 of his affidavit that there are many factors to consider when establishing policing resource levels, including operational requirements, officer safety, provincial/municipal policing priorities and affordability.

[30] However, Mr. Merrithew also identified certain standard articles that appear in Police Service Agreements. Article 5 addresses the level of policing in communities served by the RCMP. According to paragraph 9 of Mr. Merrithew's affidavit, "[t]his Article states that the level of policing, determined by the RCMP and the contracting jurisdiction, will meet the minimum level that is required to maintain public or officer safety."

[31] Furthermore, article 18 of the Police Service Agreement stipulates that each year the RCMP will submit to the contracting jurisdiction a projected Multi-Year Financial Plan

for consideration. Mr. Merrithew also indicates at paragraph 11 of his affidavit that, “[a]t a minimum, the Multi-Year Plan will address the number of positions required for the police service, budgetary considerations, infrastructure and equipment plans, previous year budget deviations and other information as agreed upon by the parties.” This plan is submitted to the contracting jurisdiction on or before June 1st of each year.

[32] By June 15th of each year, the contracting jurisdiction then will provide the RCMP with the projected annual budget for the next fiscal year’s police service. In addition, the contracting jurisdiction provides any updates to the projected annual budget for the police service as they become available. As Mr. Merrithew states at paragraph 13 of his affidavit: “[t]his ongoing process, which takes place at the local level, is a key element of setting resource requirements throughout the various contract jurisdictions and is unique to each jurisdiction.”

[33] Therefore, as I understand it, there is a back and forth between the RCMP and the contracting jurisdiction before agreements and budgets are put in place. This back and forth negotiation is not only done orally. Rather, various documents are exchanged throughout the process.

[34] Hence, while there may not be documents that describe or detail the process undertaken by the RCMP and a contracting jurisdiction in concluding a Police Service Agreement, there are however, as indicated in Mr. Merrithew’s affidavit, arguably relevant documents related to that process that can be disclosed, such as Police Service Agreements and Multi-Year Financial Plans. That said, as I understand the Complainants’ request, not every Police Service Agreement and Multi-Year Financial Plan will be arguably relevant to this complaint. Only those for communities or jurisdictions that are comparable to the Nishnawbe-Aski Police Service or, as the Complainants have worded it, “remote or isolated communities.” Therefore, the AG shall disclose all Police Service Agreements, Multi-Year Financial Plans and any other related documents for remote and isolated communities served by the RCMP.

[35] With respect to the PRM Instruction Manual, the AG shall disclose the manual subject to the following restrictions: (1) it shall be disclosed to counsel for the

Complainants and the Commission only; (2) counsel for the Complainants and the Commission shall only use it to prepare for the hearing of this matter and to communicate with their clients to seek any instructions necessary; (3) counsel for the Complainants and the Commission shall not disclose it to any other individuals without prior permission from the Tribunal and notification to the AG; and, (4) counsel for the Complainants and the Commission shall not use it for any other purpose outside of the present inquiry. If the PRM Instructions Manual is to be used at the hearing of this matter, these confidentiality measures can be revisited pursuant to section 52 of the *Act*.

(iii) Materials relating to the process for determining the overall budget for the First Nations Policing Program and the process for setting staffing and funding levels for First Nation police services

[36] In *Louffit 1*, I found the Complainants' request for general policy documents relating to the process for setting staffing and funding levels for First Nations police services, under the First Nations Policing Policy administered by PSC, to be arguably relevant to this matter and subject to disclosure (at para. 26). In response to that ruling, the Complainants state only one document was disclosed by the AG. The Complainants believe there are other documents under this heading that are arguably relevant to this matter and subject to disclosure by the AG.

[37] According to the Complainants, Mr. Levesque described numerous instances where arguably relevant materials would have been produced as part of the budget-setting process for a First Nations police service, but which have not been disclosed by the AG:

- Preliminary budgets are prepared by analysts in the policy branch.
- The budgets prepared by the analysts are based on consultations with provincial and territorial counterparts, funding partners, finance staff and corporate managers.
- Draft budgets prepared by analysts are reviewed by the director of the policy area, by the corporate management branch, and by finance staff.

- The needs of the program are communicated to the analysts in the policy area by staff in the program area through various documents, including emails and spreadsheets.
- One of the documents the program area provides to the policy area is a spreadsheet listing the different First Nation police forces and how much funding should be going to each, roughly over a 5 year period.
- Within the program area, the regional managers provide an initial estimate of the needs for First Nations policing to the program support manager(s) through various documents, such as spreadsheets. The program support manager(s) “roll up” the information from the regional managers to be shared with the policy analyst in the policy area.

[38] The AG maintains that all relevant documents relating to staffing and funding have been disclosed and that this was confirmed by Mr. Levesque during his testimony. With regard to budgets prepared at the analyst level, the AG submits that Mr. Levesque indicated that those budgets form part of the materials that are covered by Cabinet confidence privilege (discussed below). Otherwise, the AG states Mr. Levesque confirmed that hard copy files of documents from the policy area were searched. The AG adds that, through Mr. Levesque’s testimony, it became aware that there may be some documentation leading up to the 2013 budget that has not been disclosed. It states the emails and hard copy files of relevant employees were searched and additional documents were located and disclosed.

[39] In reply, the Complainants acknowledge that twelve new documents have been disclosed and listed as “relating to the 2013 budget.” According to the Complainants, at least half of these documents appear to be media-related documents such as news releases or documents detailing media lines. None of the documents appear to be the kind of documents relating to the setting of the funding and staffing levels that were requested and that appear to exist based on Mr. Levesque’s testimony. The Complainants further note that the AG’s submissions only address the budgets prepared by policy analysts and

not other budget-setting documents that have not been disclosed, such as spreadsheets created by staff in the program area.

[40] With regard to the budgets that the AG claims form part of the materials that are covered by Cabinet confidence privilege, the Complainants contend that the AG provided them with a list of documents submitted to the Privy Council Office for review. Budgets prepared at the analyst level do not appear on that list. Therefore, the Complainants submit the AG's statement is false or that there are additional Cabinet confidence documents yet to be disclosed.

[41] Again, while there may be no documents that describe or detail the process for setting staffing and funding levels for First Nations police services, it is clear from Mr. Levesque's testimony that there are arguably relevant documents related to that process that are subject to disclosure, including preliminary and draft budgets, supporting spreadsheets and communications, such as emails, that gather input from various people with respect to those budgets and spreadsheets. As the Complainants also indicate, their request includes other budget-setting documents created by staff in the program area, such as budget projections for the First Nations Policing Program as a whole and other initial estimates of the needs for First Nations policing by regional managers. The Complainants submit this request is central to their complaint and that proceeding without this evidence may prejudice their case. Therefore, where these documents are not subject to Cabinet confidence, the AG is ordered to disclose them. Where the AG claims Cabinet confidence over documents, it shall clearly identify those documents in its list of documents.

(iv) Materials relating to the negotiation of the NAPS tripartite agreement

[42] According to the Complainants, the AG has provided correspondence from the NAPS requesting additional funding as well as the federal government's correspondence responding to some of those requests. However, the Complainants claim the disclosure materials are missing internal federal government documents assessing funding requests and proposals and any responses thereto, documents formulating budget negotiating

positions whether justifying proposed budgets or refusing to increase resources, or other documents analyzing what resources are truly needed by the police service. The Complainants believe these materials would likely be found in the emails or files of regional managers who were not fully included in the AG's initial search for documents, as discussed above. The Complainants also point to Mr. Levesque's testimony wherein he noted that there would be emails back and forth between the provincial negotiator and the federal negotiator, and formal or informal notes of meetings.

[43] Following the hearing of their motion, the Complainants indicate that a number of new documents have been disclosed under this category. However, the Complainants claim these new documents do not appear to actually relate to the NAPS agreement negotiations, or to NAPS in general. Therefore, they submit this category of documents remains outstanding.

[44] A detailed funding request by NAPS to the federal government is found at tab 6 of the Complainants' book of documents. However, as the Complainants indicate, no documents indicating the government's assessment of this proposal, or responding thereto, have been disclosed. Consistent with Mr. Levesque's testimony, I accept the Complainants' assertion that there are likely memos, notes, emails or other arguably relevant documents pertaining to the government's review, discussion and analysis of this proposal and the negotiation of the NAPS tripartite agreement in general. The AG is ordered to disclose and produce all arguably relevant documents related to this request, with specific regard to the types of documents identified by Mr. Levesque and, as specified by the Complainants, up to December 31, 2013. It shall disclose and produce those documents to the Complainants and Commission.

(v) The terms and conditions of the First Nations Policing Policy and Programs

[45] The AG has disclosed the terms and conditions of the First Nations Policing Policy and Programs expiring March 31, 2014, as well as those expiring March 31, 2018. However, the Complainants also requested the disclosure of earlier versions of the terms

and conditions, including those that were in place for the period covered by the complaint and when the complaint was filed.

[46] On May 2, 2016, the Complainants indicated that disclosure of this category of documents has now been completed.

(vi) Other documents over which Cabinet confidence privilege is claimed

[47] Pursuant to section 39 of the *Canada Evidence Act*, documents cannot be withheld from disclosure on the basis that they are covered by Cabinet confidence privilege unless the Clerk of the Privy Council certifies in writing that the information does indeed constitute a Cabinet confidence. The AG has withheld the disclosure of some documents pursuant to section 39 of the *Canada Evidence Act*, but has not produced a certificate from the Clerk of the Privy Council. That said, the parties have agreed to an alternative process. Pursuant to that alternative process, the AG provided the Complainants with the Clerk of the Privy Council Office's determination on 138 documents identified by the AG as potentially containing Cabinet confidence, including the statutory authority upon which each determination was based and a brief description of each document. Five documents were disclosed on a severed basis to the Complainants.

[48] As a result, the AG believes this issue is resolved. However, as indicated above, the Complainants are concerned by the AG's assertion that the budgets for the First Nations Policing Program prepared at the analyst level are Memoranda to Cabinet and have been submitted to the Privy Council Office. According to the Complainants, these budgets were not previously included in the list of PCO documents provided by the AG. Other categories of documents over which Cabinet confidence privilege is claimed include documents related to the Comprehensive Review of the First Nations Policing Program, including any policy options created as a result of the review, and any Treasury Board documents discussing the quality of policing in the Mushkegowuk First Nations or in First Nations generally.

[49] As indicated by the Complainants and addressed above at paragraph 38, there is still some uncertainty with respect to some documents over which Cabinet confidence is

claimed. As such, I will reserve issuing a ruling on this issue until the further disclosure ordered in this ruling is complete.

[50] However, in the AG's consolidated list of documents, all documents over which Cabinet confidence is being claimed should be clearly identified. At the next case management conference call, the Complainants shall indicate whether the issue of Cabinet confidence documents remains a live issue.

(vii) Documents outlining the standards governing the RCMP

[51] In *Louitt 1*, the Tribunal directed the AG 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.

[52] The AG is concerned with the voluminous nature of the Complainants' request for documentation on this issue. According to the AG, Mr. Merrithew testified as to the extensive and inter-related nature of the various manuals containing the national RCMP standards and operating procedures. Given this, the AG claims the blanket disclosure of RCMP standards requested by the Complainants would lead to an endless stream of document production, consuming many months of time to complete.

[53] The AG is also concerned with the lack of probative value of such all-encompassing disclosure. It submits that if all RCMP documents relating to standards were disclosed, there would be tens of thousands of documents, with the vast majority being irrelevant. It says this amounts to a fishing expedition. As a result, the AG has produced a copy of the Tables of Contents for the RCMP Operation, Administration and Subsidiary Manuals. With those Table of Contents, it suggests the Complainants identify specific standards that they believe are relevant to the complaint.

[54] The Complainants submit that the AG's arguments for withholding the documents under this heading are not valid given the Tribunal has already ordered they be disclosed. They submit that the volume of documents can be dealt with through electronic disclosure and that they are willing to sign a confidentiality undertaking and work with the AG on any other measures that would allow for a more efficient and expeditious disclosure of these

materials. Subject to the Tribunal's ruling on the most expedient way to proceed with respect to these materials, the Complainants indicated that they may need to follow up with a request for specific materials listed in the Tables of Contents provided.

[55] In a letter dated December 16, 2016, the Complainants were directed to review the index and to indicate to the AG which materials would need to be disclosed. The Complainants did so on January, 10, 2017. On May 30, 2017, the AG indicated that it provided the required disclosure. On May 31, 2017, the Complainants indicated their understanding that the AG's most recent response completed the matters that the Tribunal directed the parties to attend to on December 16, 2016. Therefore, it is my understanding that this disclosure request has now been resolved and I no longer need to rule on this issue.

(viii) Illegible documents, missing pages and additional information

[56] The Complainants claim certain disclosed documents are illegible and/or are missing pages. They also request further information regarding a document that it describes as outlining deficiencies with NAPS (author, cover pages, related emails). The Complainants claim Mr. Levesque acknowledged that it would be possible to search for further details relating to this document. Following the motion hearing, the Complainants state no new documents have been provided in relation to this category.

[57] The AG contends it already made further inquiries regarding the documents identified by the Complainants and provided a response to each document. With regard to Mr. Levesque's comments, the AG submits he was not aware at the time of his testimony that the document, and other documents, had already been followed up on for missing information. As such, the AG argues there are no further items to be disclosed under this heading.

[58] Insofar as the AG can rectify any documents that are illegible or are missing pages, it shall do so as part of its disclosure obligation (see paras. 20-23 above). That said, I accept the AG's assertion that it made further inquiries regarding the documents identified by the Complainants and provided a response to each document. However, the AG is

reminded that it has an ongoing disclosure and production obligation pursuant to Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*. If it subsequently determined that the AG has failed to disclose documents, the Tribunal has the power to summon witnesses and compel them to produce documents (see s. 50(3)(a) of the *Act*).

(ix) Documents relating to the steps Canada has taken in relation to the recommendations of the Kashechewan inquest

[59] The Kashechewan inquest concerned the deaths of two young First Nations men in a police station fire in one of the Mushkegowuk communities. According to the Complainants, the recommendations coming out of that inquest included that resources be provided to ensure equality in policing, as well as other recommendations to improve NAPS. The Complainants request documents relating to the steps Canada has taken in relation to the Kashechewan inquest recommendations. To date, the Complainants claim the AG has only provided one document in relation to this request. It finds it highly unlikely that there is only one document on this issue. The Complainants contend Mr. Levesque acknowledged that there would be notes from meetings between federal staff about the inquest recommendations, along with materials relating to calls, meetings and correspondence with provincial partners about certain key recommendations. However, these materials have not been disclosed.

[60] The AG indicates that it made further inquiries to locate any additional relevant materials relating to the Kashechewan inquest, but that no further documents were located.

[61] Given Mr. Levesque's testimony, I also find it difficult to believe that there are no other documents related to this issue. The AG is ordered to disclose all arguably relevant documents related to this request, with specific regard to the types of documents identified by Mr. Levesque. The AG is ordered to disclose and produce those documents to the Complainants and Commission.

(x) Documents regarding officer housing in the community of Norman Wells, Northwest Territories

[62] According to the Complainants, Norman Wells is a largely non-Aboriginal community in the Northwest Territories without road access, which is policed by the RCMP. The Complainants may use this community as part of a comparison between policing for Aboriginal and non-Aboriginal communities. While the AG has disclosed a number of documents regarding Norman Wells, the Complainants request additional documentation regarding officer housing in the community. More specifically, the Complainants want to know whether the information already provided covers all of the units rented by the RCMP for its officers in Norman Wells, and are requesting information regarding the construction costs of the three properties used by the RCMP in Norman Wells.

[63] The AG submits the three properties used by the RCMP in Norman Wells were purchased in 1977. The construction of the units is estimated to have taken place in the 1970s, and the AG states any documentation relating to construction costs no longer exists. Also, no information exists as to the current market appraisal of the properties.

[64] I accept the AG's submissions regarding the construction costs of the three properties used by the RCMP in Norman Wells.

[65] I note the AG has not addressed the Complainants' question as to whether the information already provided covers all of the units rented by the RCMP for its officers in Norman Wells. The AG shall provide a response to the Complainants' question. Again, the AG is reminded that it has an ongoing disclosure and production obligation pursuant to Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*. If it subsequently determined that the AG has failed to disclose documents, the Tribunal has the power to summon witnesses and compel them to produce documents (see s. 50(3)(a) of the Act).

C. Payment of legal expenses

[66] The Complainants also seek an order that the AG pay their expenses arising from what they claim is the AG's failure to comply with the Tribunal's disclosure order of

December 21, 2012 (see *Louttit 1* at para. 8). They argue this has resulted in unwarranted costs and delays in this matter. Furthermore, the Complainants submit that an award of legal expenses will help ensure procedural fairness in this case. The Commission supports the Complainants' submissions, but does not seek reimbursement of any expenses it incurred.

[67] Relying on *Tipple v. Canada (Attorney General)*, 2012 FCA 158 [*Tipple*], the Complainants argue that administrative tribunals have the jurisdiction to award costs to control their own process. They contend this is a separate and distinct power from an order of legal costs to the winning side of a dispute, which the Supreme Court of Canada found the Tribunal did not have the power to award in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (*Mowat*).

[68] The Tribunal's disclosure order of December 21, 2012 required the disclosure of 11 categories of documents. The Complainants claim only one category of documents was provided by the deadline set by the Tribunal. They submit as follows: 3 categories of documents were provided after the deadline and only because they continued to pursue them; 1 category of documents was never provided, but they have located the information through other means; and, 6 categories of documents are the subject of the present motion. The Complainants also note the Tribunal had to issue a second ruling on disclosure in this matter, *Louttit 2*, to direct the AG to indicate how it had complied with the Tribunal's initial disclosure order in *Louttit 1*. In this regard, they further note that the Tribunal found the AG's position on that motion was "...not in line with the spirit of the Tribunal's order or disclosure in general" (*Louttit 2* at para. 24).

[69] The Complainants submit the AG's failure to comply on a timely basis with disclosure orders in this matter has resulted in unwarranted costs and delay. That is, this is the third disclosure motion filed to obtain documents that were requested over two years ago; counsel for the Complainants have drafted a considerable amount of correspondence regarding disclosure and have had to review and compare multiple disclosure packages; and, numerous case management conference calls have been held regarding disclosure. In the Complainants' view, none of these additional steps should have been necessary.

[70] Finally, the Complainants argue an award of legal expenses can help ensure procedural fairness in this case. If the Tribunal does not intervene, the Complainants claim that parties with more funds and legal resources can use attrition to wear down the other side. By refusing to disclose materials, delaying the process, not responding to correspondence, raising repeated objections, and refusing to abide by Tribunal orders, the stronger party can force the other party to incur legal costs until they can no longer push the case forward. Therefore, in the Complainants' view, an award of legal expenses is a way for the Tribunal to control its process, ensure compliance with its orders and maintain a level procedural playing field.

[71] It is the AG's position that the Tribunal does not have jurisdiction to make an award of costs. Neither the *CHRA*, nor the Tribunal's *Rules of Procedure (03-05-04)*, contain any provision that would empower the Tribunal to impose the penalty requested by the Complainants. It notes the Supreme Court of Canada in *Mowat* determined the Tribunal does not have authority to award "legal costs." Also, the AG argues the Tribunal does not have jurisdiction to directly enforce its orders. Rather, it is a matter for the Federal Court.

[72] Further, even if the Tribunal had jurisdiction to make an award of costs, the AG submits the circumstances of this case do not warrant the granting of such an award. In *Tipple*, the AG contends there were unusual and exceptional circumstances warranting an award of damages for obstruction of process. In this case, the AG advances its conduct has not been obstructive and it has diligently and consistently produced relevant documents in its possession. According to the AG, it is inevitable that, in a case of this size and complexity, involving thousands of pages of documents and multiple client departments in various locations, some documents will get overlooked. In order to address any perceived deficiencies in its disclosure, the AG notes it provided affidavits and facilitated the cross-examination of its witnesses on the issue of disclosure, even though neither of those steps were required by the Tribunal. In the AG's view, this level of transparency in disclosure belies the Complainants' assertion that there has been obstructive conduct.

[73] Given there are still ongoing disclosure issues in this case, I am of the view that the Complainants' motion for the payment of legal expenses is best considered following the hearing of the merits of this matter. At that time, the parties and the Tribunal will have a more complete understanding of how any disclosure issues may have affected these proceedings, including the above concerns raised by the Complainants and any additional issues that may arise in completing this inquiry. In this regard, I note the Complainants' assertions throughout this motion that they believe that further arguably relevant documents have yet to be disclosed by the AG. While I've accepted some of the AG's statements regarding the sufficiency of its disclosure at this time, the grounds for the motion for the payment of legal expenses could evolve if those statements turn out to be inaccurate. As a result, pursuant to Rule 3(2)(c) of the Tribunal's *Rules of Procedure (03-05-04)*, any argument or evidence on the Complainants' motion for the payment of legal expenses can be made during the hearing of the merits of the complaint.

III. Ruling

[74] The AG shall complete the disclosure ordered in this ruling by **August 21, 2017** and provide an updated consolidated list of documents to the Tribunal and the other parties. By the same date, the AG shall indicate to the Tribunal and the other parties, in writing, what actions it undertook to comply with this ruling and any new documents disclosed as a result. If no new documents are being disclosed in response to a particular order, the AG shall also clearly indicate this. The AG's written submissions shall be accompanied by a supporting affidavit or affidavits. Upon request, the AG will make the affiant(s) available for cross-examination. In addition, the affiant(s) will answer any clarification questions from the Tribunal, if any.

[75] A case management conference call shall be scheduled following the completion of the AG's disclosure and written submissions to discuss any issues arising therefrom and to address some of the other issues outlined in this ruling. In working with the parties through case conferencing, I hope to avoid having to issue a fourth disclosure ruling in this matter and to move this matter towards a hearing as expeditiously as possible.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
June 19, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1683/3811 & T1684/3911

Style of Cause: Grand Chief Stan Louttit in a representative capacity on behalf of the First Nation of Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada

Ruling of the Tribunal Dated: June 19, 2017

Date and Place of Hearing: Ottawa ON

December 12, 2014

Appearances:

Kent Elson, counsel for the Complainants

Daniel Poulin, counsel for the Canadian Human Rights Commission

Sean Gaudet and Victoria Yankou, counsel for the Respondent