Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 1
Date: January 7, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon and Edward P. Lustig

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I. Context

[1] The Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amount to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act,* RCS 1985, c H-6 (the *CHRA*).

[2] In a decision dated March 14, 2011 (see 2011 CHRT 4), the Tribunal granted a motion brought by AANDC for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[3] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General*), 2012 FC 445 (Caring Society FC), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (Caring Society FCA).

[4] In July 2012, a new panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[5] The hearing began on February 25, 2013. The Tribunal heard the testimony of Dr. Cindy Blackstock, Executive Director of First Nations Child and Family Caring Society of Canada, from February 25 to March 1, 2013. This was followed by another five days of hearing, April 2, 3, 4, 8 and 9, 2013, during which the Tribunal heard the testimonies of Mr. Jonathan Thompson, Director of Health and Social Development of the AFN, Dr. Nicolas Trocmé, Director of the Centre for Research on Children and Families at

McGill University and Mr. Derald Dubois, Executive Director of the Touchwood Child and Family Services in Saskatchewan.

[6] On June 3, 2013 and July 3, 2013, the Tribunal concluded that Canada had failed in its disclosure obligations under the Canadian Human Rights Tribunal Rules of Procedure, delaying the hearing on the merits by three months, (see 2013 CHRT 16). The Complainants made a motion for costs related to the allegation that AANDC abused the Tribunal's process through its late disclosure of documents. The Panel took the matter under reserve.

[7] The Complaint was subsequently amended to add allegations of retaliation (see 2012 CHRT 24). In early June 2015, the Panel found the allegations of retaliation to be substantiated in part (see 2015 CHRT 14).

[8] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA*. The abuse of the Tribunal's process was not dealt with in the *Decision*.

[9] This Panel continues to supervise Indigenous and Northern Affairs Canada now Indigenous Services Canada's implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA* [see 2016 CHRT 2 (the Decision)].

[10] In August 2018, the Panel advised the parties that it would issue a ruling on the complainant's motion for costs shortly. The parties thanked the Panel and they advised the Tribunal that there were ongoing discussions occurring in an effort to settle the matter. The parties asked the Panel to hold off on its ruling. The Panel agreed.

[11] On November 27, 2018, the Caring Society and the AFN, the Respondent Attorney General of Canada representing the Minister of Indigenous Services Canada ("Canada"), and the interested party Chiefs of Ontario (COO) brought a motion in writing to the Canadian Human Rights Tribunal for an order, on consent, that Canada will pay the complainants and the interested party COO compensation as a result of Canada's obstruction of the Tribunal's process in 2013, as agreed-to between the parties.

II. Motion for a consent order

[12] In sum, the grounds of the motion are:

[13] The Tribunal found that Canada knowingly failed to disclose 90,000 documents, a number of which were prejudicial to Canada's case and highly relevant, and found that Canada failed to advise the Tribunal and the parties of this fact at the earliest opportunity.

[14] The complainant Caring Society, the complainant AFN, and the interested party COO incurred costs thrown away as a result of the late disclosure of 90,000 documents by Canada and the related three-month delay in the hearing on the merits.

[15] The complainants requested compensation from the Tribunal for their cost thrown away, pursuant to the Tribunal's implied statutory jurisdiction to control its process.

[16] Canada, the Caring Society, the AFN, and the COO have agreed that the costs incurred as a result of Canada's failure to disclose were in the following amounts:

a. Caring Society: $98,271.70;

b. AFN: $29,798.00; and

c. Chiefs of Ontario: $15,400;

[17] Canada has reviewed its practices and procedures regarding the disclosure of documents in the five years since the Tribunal concluded that Canada's conduct was far from irreproachable.

[18] Canada has advised all public servants working in the Department of Indigenous Services Canada that Canada's obstruction of process in this case was unacceptable and

that it should not occur again under any circumstances. Canada has acknowledged that its public servants have a responsibility to uphold the highest ethical standards in order to conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.

III. Law analysis

[19] When the Tribunal makes a determination to make an order on consent of the parties, it looks for a basis in the *CHRA*, the evidence before the tribunal and, the relevant case law applicable to the specific facts in the case.

[20] The Federal Court of Appeal decision in *Canada (Attorney General) v. Tipple*, 2012 FCA 158 (Tipple), rendered May 29, 2012, is instructive in this case. In that case, the Public Service Labour Relations Board (PSLRB) adjudicator found that the termination of Mr. Tipple's employment as Special Advisor to the Deputy Minister, Real Property Business Transformation, Public Works and Government Services Canada (PWGSC) was a sham that was unjustified under the terms of his contract. The adjudicator awarded damages for lost wages, bonuses, benefits and interest, psychological injury and loss of reputation and also, notably, an award for damages for obstruction of process which included legal costs due to the Deputy Minister's continued failure to comply with disclosure orders on a timely basis. This failure to fully disclose relevant documents in a timely manner required Mr. Tipple's counsel to engage in correspondence and case management conferences that should not have been necessary and resulted in additional legal expenses to Mr. Tipple.

[21] This last award, initially overturned by the Federal Court on judicial review on the basis that it constituted a disguised cost award, contrary to *Canada (Attorney General) v. Mowat,* 2009 FCA 309 (later upheld by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53), was upheld by the Federal Court of Appeal in *Tipple*. The Court recognized that, by virtue of the *Mowat* decision, the PSLRB did not possess jurisdiction to award "costs" within its usual legal meaning. However, the Federal Court of Appeal noted that the adjudicator's

decision to require PWGSC to compensate Mr. Tipple for legal expenses that he was forced to incur because of PWGSC's obstruction of the adjudication process "stands on a different legal footing" (para. 27). Paragraphs 28 to 31 of the decision read as follows:

> [28] I note that an award of legal costs by a court can and sometimes does include an amount for costs thrown away because of obstructive conduct by an opposing party. However, a court does not necessarily need to rely on its authority to make a traditional award of costs in order to ensure that a party is compensated for financial losses incurred as a result of the obstructive conduct of an opposing party in the course of the proceedings.
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> [29] As a general rule, courts and adjudicative decision makers have the inherent authority to control their own process and to remedy its abuse. This inherent authority includes, in an appropriate case like this one, the right to require the reimbursement of expenses necessarily incurred by a party as the result of abusive or obstructive conduct by an opposing party.
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> [30] In this case, the adjudicator found that PWGSC had engaged in obstructive conduct by failing repeatedly to comply with orders for the disclosure of information, causing Mr. Tipple to incur unnecessary legal expenses to enforce the adjudicator's orders. PWGSC argued in this Court that it did comply, and so it did, eventually. However, the record justifies the adjudicator's conclusion that PWGSC displayed a pattern of late and insufficient compliance, which was remedied only after constant pressure from Mr. Tipple's counsel.
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> [31] In my view, it was reasonable for the adjudicator to find as a fact that the failure of PWGSC to comply on a timely basis with the adjudicator's disclosure orders resulted in an unwarranted financial burden on Mr. Tipple, and to conclude that the burden should in fairness be borne by PWGSC. In the highly unusual circumstances of this case, the adjudicator's award of damages for obstruction of process was a lawful and reasonable exercise of the adjudicator's authority to control the adjudication process.

[22] The circumstances in the present case, much like those in the *Tipple* decision, are highly unusual.

[23] In fact, in 2013 CHRT 16 paras 53-56, the Tribunal found:

> [53] We note that the Respondent's conduct here is far from irreproachable. As demonstrated by the evidence brought by the Caring Society as a result of Dr. Blackstock's ATIA request, the Respondent knew of the existence of a number of these documents, prejudicial to its case and highly relevant, in the summer of 2012 and yet failed to disclose them. The evidence also showed that the Respondent knew that it would be unable to complete its disclosure

by February 25, 2013, as had been agreed upon since October of 2012. There were numerous occasions, including two CMCCs prior to the beginning of the hearing, when the Respondent could have raised the fact that there was a strong possibility that it would be unable to meet its disclosure obligations. The Tribunal, at every CMCC and in all communications sent to the parties, repeatedly expressed that if any issues or concerns were to arise in between meetings and calls, the parties should contact the Tribunal. No such contact was ever made. The Respondent attended the hearing dates in April 2013 knowing full well that its disclosure requirement was incomplete. Furthermore, it had just entered into a contract with CDCI to assist in completing its disclosure requirement and had been informed by this company that it would take until the end of September 2013, at the earliest, to complete the production of the large amount of material that was still undisclosed. The Respondent withheld this information from the parties and the Tribunal. Only following the Caring Society's letter regarding the ATIA request, in a letter dated May 7, 2013, shortly before the third week of the hearing was scheduled to commence, did the Respondent inform the parties and the Tribunal of the existence of 50,000 additional outstanding disclosure documents.

[54] The efforts of all involved in a case of this magnitude should be noted. The Commission, who has carriage of the case, has devoted three lawyers to the file, the AFN has devoted two lawyers and the Caring Society's Executive Director, Dr. Blackstock or her counsel, Mr. Paul Champ, have been present throughout the proceedings so far. The Respondent itself has assigned four lawyers to the matter. In addition, a number of interveners have devoted significant time and resources to their involvement in the case. The Tribunal assigned a three-Member Panel, noting that this was a challenge in light of the Tribunal's workload and Member availability: *First Nations Child and Family Caring Society et al. v. Attorney General of Canada,* 2012 CHRT 16 (CanLII) at paragraph 29. As pointed out by the Caring Society, the three Members assigned would all have otherwise been hearing three separate sets of cases as per the Tribunal's usual single Member practice. Thirteen weeks in everyone's schedules were set aside, witnesses were scheduled to appear and hearing facilities were booked.

[55] As stated by Member Karen Jensen (as she then was) in *Zhou* at paragraph 8:

> The Tribunal must run an efficient hearing system in order to achieve its legislative mandate to hear and resolve complaints expeditiously (s. 48.9(1) of the *CHRA*; *Canada Post Corporation v. PSAC* and the CHRC, 2008 FC 223 (CanLII) at para. 274; *Nova Scotia Construction Safety Association, Collins and Kelly v. Nova Scotia Human Rights Commission and Davidson,* 2006 NSCA 63 (CanLII) at para. 76. A hearing requires the dedication of considerable financial and human

> resources. Those resources cannot be reallocated without significant disruption to the whole system, especially at this stage in the process. Such disruptions have an impact on the timeliness not only of the present case, but also of other cases in the system. For those reasons, an adjournment is granted only in cases where proceeding will clearly have an impact on the fairness of the hearing.
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> [56] Had the Respondent communicated the challenges it faced in obtaining these large amounts of disclosure, the Tribunal, with the parties, could have worked together to come to a solution that would have minimized the impact to the proceedings and on all parties involved. By advising parties and the Tribunal of this at, what is now well past the last hour, the Respondent has denied this opportunity to everyone and forced the Tribunal, to put it bluntly, into a mode of damage control. It is also worth mentioning that the Respondent is the one who has failed to comply with its disclosure obligations, causing prejudice to the opposite parties, and yet is the one seeking an adjournment.

[24] While the *Tipple* decision was rendered pursuant to the Public Service Labour Relations Act, S.C. 2003, c. 22, the wording in the decision makes clear that the inherent authority of a decision-maker to control its process and to require the reimbursement of expenses incurred by a party due to abusive or obstructive behaviour by an opposing party is not limited to the PSLRB adjudicators.

[25] Moreover, paragraph 28 states that “a court does not necessarily need to rely on its authority to make a traditional award of costs” and paragraph 29 refers to “a general rule” when describing the inherent authority possessed by “courts and adjudicative decision makers” to control their own process and to remedy its abuse. It would therefore seem that in appropriate cases, the Tribunal, like other courts and adjudicative bodies, possesses the jurisdiction to award costs insofar as they constitute “expenses necessarily incurred by a party as the result of abusive or obstructive conduct by an opposing party”.

[26] The Tribunal recognizes that it remains bound by the Supreme Court’s decision in *Mowat* which found that the Tribunal did not have the jurisdiction to award successful complainants recovery of their legal costs under the head of “expenses resulting from the discriminatory practice” pursuant to section 53(2)(c) of the *CHRA*. The costs requested in the present instance however do not emanate from the Tribunal’s authority to award

expenses pursuant to section 53(2)(c) of the *CHRA* but rather, from what the Federal Court of Appeal describes as an inherent authority for a Tribunal to control its process.

[27] Furthermore, although not specifically related to an award of costs, in *Canada (Human Rights Commission) v. Canada Post Corp.,* 2004 FC 81 [Canada Post Corp.], at paras. 13-15, the Federal Court discussed the Tribunal's ability to control its process and protect it from abuse:

> [13] Administrative tribunals are masters of their own procedure. As Sopinka, J. stated in *Prassad v. Canada (Minister of Employment and Immigration),* [1989] 1 S.C.R. 560, at para. 16,
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> > In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.
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> [14] A Consequently, it would seem to be perfectly proper for the Tribunal, at the outset of an inquiry, to entertain preliminary motions so as to clear the procedural underbrush. That is precisely what the Tribunal did in this case. It considered the preliminary motion by CPC which argued that it would be an abuse of the Tribunal's process to hold an inquiry into a matter over eight years old that had been subject to two arbitrations and a separate complaint to the Commission. Tribunal member Groarke, on the basis of a motion explicitly addressing the issue of abuse of process, came to the conclusion that an inquiry into that part of the matter related to the transfer request would indeed be an abuse of the Tribunal's process. This was not a review of the decision to refer by the Commission. Rather, it was a de novo decision in which the member was determining how best to deal with the issues which had been referred to the Tribunal.
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> [15] It strikes me as evident that one cannot maintain that the Tribunal is the "master in its own house" if it cannot protect its own process from abuse.

[28] Similarly, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2006 SCC 4 [ATCO], at para. 51, a majority of the Supreme Court of Canada explained the "doctrine of jurisdiction by necessary implication":

> [51] The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu,* at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.,* at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see *Brown*, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
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> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.
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> Re *Dow Chemical Canada Inc. and Union Gas Ltd*. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission,* [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

[29] In the Panel's view, the decisions in *Canada Post Corp*. and *ATCO* (see also *R v. Caron*, [2011] 1 SCR 78, 2011 SCC 5, at paras 51 and 54), support the costs approach taken in *Tipple*. Pursuant to subsection 48.9(1) of the *CHRA*, proceedings before the Tribunal are to be conducted as expeditiously as possible. If a party abuses the Tribunal's process and inhibits the Tribunal from fulfilling its mandate under subsection 48.9(1) of the *CHRA,* then the Tribunal may take action to protect its process from abuse. As explained in *Tipple*, reimbursing the expenses incurred by other parties as result of abusive or obstructive conduct may be a remedy which is practically necessary for the accomplishment of the object intended by subsection 48.9(1) of the *CHRA*.

[30] In *Tipple*, the obstruction amounted to a number of PSLRB orders being breached, which is not the case in this instance. However, the Tribunal concludes that Canada's lack of transparency and blatant disregard for its process coupled with the serious impacts it had on the proceedings, in these circumstances, amount to an obstruction of process as per the *Tipple* decision, thereby warranting an award for damages for any unnecessary costs incurred as a result.

[31] For the above mentioned reasons, the Panel believes that issuing the consent order as requested by the parties falls within the Tribunal's inherent authority to control its process under the *CHRA*.

IV. Order

[32] THIS MOTION brought on consent by the complainants, First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, the respondent Attorney General of Canada, and the interested party Chiefs of Ontario, for an order to resolve the outstanding issues following on this Tribunal's decision dated July 3, 2013 regarding Canada's obstruction of process, was heard in Ottawa, Ontario.

UPON reading the Notice of Motion dated November 27, 2018.

AND UPON READING the Department of Justice presentation attached to this Order as Annex "A".

AND UPON receiving the consent of the Caring Society, the Assembly of First Nations, Canada, and the Chiefs of Ontario.

1. THIS Panel ORDERS pursuant to section 48.9(1) of the *CHRA* that the outstanding issues following on this Tribunal's decision dated July 3, 2013 regarding Canada's obstruction of process are resolved on the following basis: Canada will pay the complainants and the interested party Chiefs of Ontario compensation as a result of Canada's having knowingly failed to disclose 90,000 documents, a number of which were prejudicial to Canada's case and highly relevant, and Canada's having

failed to advise the Tribunal and the parties of this fact at the earliest opportunity, in the following amounts:

a. First Nations Child and Family Caring Society of Canada: **$98,271.70**;

b. Assembly of First Nations: **$29,798.00**; and

c. Chiefs of Ontario: **$15,400.00**.

2. Canada, the complainants and the interested party Chiefs of Ontario have agreed that the Deputy Minister of Indigenous Services Canada would send correspondence to all Indigenous Services Canada employees regarding Canada's disclosure processes and obligations, which email was sent on November 20, 2018 and is attached to this Order as Annex "B".

ORDER signed this 7th day of January, 2019.

NOTICE TO READERS :	AVIS AUX LECTEURS :
Annex « A » mentioned in paragraph 3 of this order is not included in the version of the document posted on the website of the Canadian Human Rights Tribunal. To obtain a copy, please contact the Registry: Registrar@chrt-tcdp.gc.ca / tel. (613) 995-1707	L'annexe « A » mentionné au paragraphe 3 de cette ordonnance n'est pas inclus dans la version du document affichée sur le site Web du Tribunal canadien des droits de la personne. Pour obtenir une copie, prière de communiquer avec le greffe au Registraire@chrt-tcdp.gc.ca / tél. (613) 995-1707

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 7, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: January 7, 2019

Motion dealt with in writing

Written representations by:

David Taylor, Sarah Clarke and Barbara McIsaac, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, David Nahwegahbow and Thomas Milne, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

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Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party