Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 75
Date: July 31, 2025
File No.: T18410/4012

Between:

Mississaugas of the Credit First Nation

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member: Edward P. Lustig

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I. OVERVIEW

[1] This ruling concerns a motion by the Respondent, the Attorney General of Canada, on behalf of Indigenous Services Canada (ISC). It arises out of a complaint by the Complainant, Mississaugas of the Credit First Nation (MCFN), that alleges that ISC underfunds children's education for First Nations in Ontario on reserves as a result of its funding formula being based on assumptions and/or premises that are discriminatory.

[2] The Respondent contends that MCFN's complaint and its Statement of Particulars (SOP) do not allege that it or any other First Nation in Ontario has suffered adverse impacts as a result of the formula but rather that the design of the formula is discriminatory. The Respondent objects to the admissibility of certain evidence that has been filed by MCFN and the Canadian Human Rights Commission (the "Commission"). It submits that this evidence is outside of the scope of the complaint as it is MCFN-specific. The Respondent also submits that MCFN had assured the Respondent that its case was not MCFN-specific and refused to provide the Respondent with MCFN-specific documents on the grounds that they were irrelevant to its case as framed by its complaint. As such, this evidence should be removed from the record, according to the Respondent.

[3] The Respondent also objects to significant portions of the reply evidence filed by MCFN and the Commission, as they constitute unfair, impermissible case splitting. The Respondent contends that this MCFN-specific evidence is not responsive to a new issue raised by the Respondent for the first time in its responding evidence and should have been part of MCFN's and the Commission's cases in-chief rather than submitted in reply. According to the Respondent, this is prejudicial to it in that it denies the Respondent an opportunity to respond to the entirety of the case against it and should be removed from the record.

[4] The Respondent requests leave to file further responding evidence: 1) to respond to evidence produced by MCFN after the Respondent had delivered its responding evidence and 2) to respond to any reply evidence that should have been introduced in-chief, if the Tribunal decides not to remove the evidence objected to by the Respondent.

[5] The Respondent requests that it should not be further prejudiced in its ability to meet the case against it by having unfair and unreasonable expedited timelines for its supplementary and sur-reply evidence imposed by the Tribunal in the event that the leave requested is granted.

[6] MCFN and the Commission oppose the requested removal of evidence. They submit that none of the evidence is irrelevant or an improper reply as it was filed in response to evidence provided and/or filed by the Respondent. They argue that the Respondent's position wrongly elevates form over substance and promotes inappropriately stringent evidentiary rules of the courts over the more informal and fairness-based evidentiary rules mandated by the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA).

[7] MCFN and the Commission feel that there is no prejudice to the Respondent by not removing the evidence requested by the Respondent, as it will have the opportunity at the hearing to make submissions to the Tribunal on the weight of the evidence.

[8] MCFN and the Commission both consent to the Respondent having the right to file supplementary and sur-reply evidence on an expedited basis. This would allow the Tribunal to get to the truth of the real issue in dispute between the parties in the complaint so that a complete record of evidence is before the Tribunal when it makes its decision on the merits of the complaint.

II. DECISION

[9] The motion is allowed in part.

[10] Given the need, recognized by the CHRA, to be less formal in its proceedings and less strict in evidentiary matters than the courts, in order to get to the truth about the real substance of the complaint, none of the evidence requested by the Respondent will be removed, as it is within the scope of the systemic complaint. The Respondent can make submissions as to the weight of the evidence at the hearing.

[11] In order to avoid the Respondent being prejudiced in its ability to properly respond to the complaint, given its understanding that the complaint had a more limited scope, leave is granted to the Respondent to file further responding evidence as described in paragraph 4 above.

[12] Despite voluminous materials that were filed in this motion by the parties, including the Respondent's reply filed on June 30, 2025, the Tribunal has endeavoured to provide this ruling in as expeditious a manner as possible. It is the hope and expectation of the Tribunal that the parties can start the hearing as tentatively scheduled on September 15, 2025, in order to achieve the stated objective of all of the parties of achieving a result in this long-standing complaint that is fair, expeditious and just.

III. ISSUES

[13] The issues in this motion are 1) whether the evidence filed by MCFN and the Commission objected to by the Respondent referred to in paragraphs 2 and 3 above should be removed from the Tribunal's record and 2) whether leave to file supplementary evidence and sur-reply evidence referred to in paragraph 4 above should be granted.

IV. BACKGROUND

[14] The complaint in this matter was commenced on September 25, 2009, and referred by the Commission to the Tribunal for an inquiry on March 30, 2012. The complaint included both a personal claim for special education costs for two MCFN children and a province-wide claim of discrimination against First Nations children in the provision of special education needs. The personal claim was settled under a partial settlement agreement between the parties approved by the Commission on October 26, 2016, and the province-wide claim was adjourned indefinitely under the agreement to allow the parties to try to settle that claim as well.

[15] The complaint was brought under section 5 of the CHRA which includes the requirement that an **impact** of the alleged discriminatory practice regarding the provision of

services must be either the denial of services **to any individual** or the adverse differentiation of services **to any individual.**

[16] On May 15, 2020, MCFN advised the Tribunal that it wished to resume the proceeding with respect to province-wide discrimination and to expand the scope to alleged discrimination against First Nations children in Ontario with respect to education services generally under the new funding formula of the Respondent, not just for special education services. Thereafter, MCFN served a fresh and amended SOP dated June 25, 2020, and thereafter the other parties filed further SOPs and MCFN filed a reply.

[17] MCFN's amended SOP and its reply allege that the federal funding formula known as the Interim Regional Funding Formula for the Ontario Region (IRFF), which is the mechanism that ISC uses to allocate core elementary and secondary education funding to First Nations in Ontario on reservations, has been designed based on discriminatory assumptions and/or premises.

[18] MCFN's SOP alleges that the federal funding formula for First Nations education does not adequately account for the much higher need for services on reserves, does not adequately account for the much higher costs to provide educational services on reserves, and does not even provide comparable funding levels because of methodological problems that greatly diminish the amount of funding that would otherwise be provided to First Nations. Its pleadings assert that First Nations children are not receiving equitable education services because of the inadequate funding, causing harm to children. The complaint is brought on behalf of itself and First Nations children on reserves in Ontario and supported by the Ontario Chiefs-in-Assembly.

[19] However, MCFN's pleadings are framed in more general terms rather than with specific, detailed evidence about the adverse impacts that the alleged design flaws in the funding model have caused to its own community, its school or its students or to other First Nations.

[20] The Respondent's responding particulars assert that the lack of specific evidence by MCFN fails to establish a factual foundation for the claim by MCFN that the funding model's design is discriminatory in its impact on First Nations including MCFN.

[21] The Respondent's responding particulars also assert that the IRFF cannot be viewed in isolation as it is a part of a larger system of funding supports and that narrowly focusing on the alleged discriminatory design of the IRFF is misleading about the total system of education-related funding supports that ISC provides.

[22] The Respondent argues that in MCFN's SOP there is no evidence that the IRFF is adversely impacting First Nations children. To which the MCFN in its reply states that adverse impacts can be presumed, as an "inevitable consequence" based upon how the IRFF has been designed and that "[w]e know the formula is based on discriminatory premises and will not address higher needs and higher costs".

[23] Subsequent to the filing of their amended SOPs, the Respondent and MCFN have engaged in disputes over the scope of disclosure and the nature of the complaint that have led to three previous motions for documents that were all settled by the parties. Two of the motions were brought by MCFN, and one was brought by the Respondent.

[24] The motion brought by the Respondent on August 31, 2022, was for disclosure of MCFN-specific documents respecting operational, planning and financial documents that it claimed it needed to be able to properly respond to the complaint, including the expert report of Gabriel Sékaly that was served on the parties by the Commission in February of 2022. MCFN initially responded that the documents were irrelevant and of no "bearing to the case being made by MCFN". In an email dated November 18, 2022, it wrote that "…the case we are making is entirely based on a critique of the IFF…on the flaws in the formula, not on the results of the formula on one First Nation…". The email concludes with the statement that "my client is seeking to show that the overall formula for all First Nations is deeply flawed in ways that will result in underfunding across the board".

[25] The motion was settled by the parties by the disclosure of a limited number of MCFN documents requested that satisfied the Respondent at the time. However, following the

resolution of the motion, the Respondent felt compelled to write a number of emails to the parties to confirm its understanding of the scope of the complaint.

[26] In its email of January 16, 2023, the Respondent wrote that its understanding of the complaint was that MCFN "will be arguing that the MCFN-specific information in question is irrelevant because the MCFN is not advancing an MCFN-specific case". In the same email, it wrote "[i]f at any point you seek to advance an MCFN-specific case then this would create new disclosure obligations".

[27] In its email on January 27, 2023, the Respondent stated that "[s]ettling the motion based on a very limited production of relevant documents is premised on the understanding that an MCFN-specific case is not being advanced". In a further email also dated January 27, 2023, it wrote that the resolution of the disclosure motion "…is made on the understanding that a MCFN-specific case is not being advanced…".

[28] MCFN responded in an email dated April 14, 2023, wherein it reiterated its view that the documents requested by the Respondent "are irrelevant to the claims of the parties outlined in the statement of particulars" and that the disclosure that resolved the motion was based on the disclosure of a more limited range of documents than requested.

[29] The Respondent responded in an email dated April 14, 2023, in which it stated that

> "…I think we are fine with what you have produced thus far, subject to your confirming that my understanding outlined above is correct—ie., that neither the MCFN nor the Commission will be advancing an MCFN-specific case or arguing that LSK students do not have access to educational services of the same quality as students attending provincial schools".

[30] MCFN's responding email dated April 18, 2023, stated,

> "…I can confirm that MCFN will only need to put forward MCFN-specific evidence to any MCFN-specific arguments that Canada is raising, as outlined in MCFN's tentative hearing outline. Aside from any such responding evidence, MCFN's case focuses on flaws in the funding formula that impact all First Nations in Ontario".

[31] At this point, it is important to note that there is a fundamental difference of opinion between MCFN and the Respondent about the scope of the case that is going to a hearing. The difference between the parties goes to the heart of the current motion, as set out in their submissions in the current motion. This difference of opinion about scope and disclosure continued after the settlement of the August 31, 2022, motion by the Respondent and has led to the current motion.

[32] The Respondent submits that it assumed or understood, as noted above, that MCFN had confirmed that MCFN-specific documents were irrelevant to its case as it would not be advancing an MCFN-specific case and that MCFN had also confirmed that it was not going to argue that MCFN was not impacted by alleged underfunding by the model in its ability to meet the needs of its students. It further understood that the settlement of the August 31, 2022, motion on the basis of a limited disclosure of documents did not end MCFM's disclosure obligations if at any point it sought to advance an MCFN-specific case.

[33] MCFN submits that its email of April 18, 2023, does not use the terminology that "it was not advancing a MCFN-specific case" as that term is vague. It submits that

> "…MCFN-specific evidence is not necessary because MCFN alleges that First Nations in Ontario do not receive adequate education funding because of the inadequate and inequitable funding model. The MCFN's case is based on that analysis, not based on a comparison between the outcome of that model for one First Nation (i.e. the funding MCFN receives) and an assessment of MCFN's funding needs."

[34] MCFN submits that this email as well as its email of November 18, 2022, referred to in paragraph 24 above, does not narrow the scope of the complaint as suggested by the Respondent. Rather, it confirms that MCFN is seeking to show that all First Nations are underfunded, which would include MCFN.

[35] In May of 2023, after receiving the disclosure from MCFN that it had felt it needed to respond to the Sékaly Report of February 2022 that led to the settlement of its August 2022 motion, the Respondent filed a responding expert report by Barry Anderson. He assessed MCFN's "funding and staffing levels as very good in comparison to the nearby public school" but also noted that he had limited information available to him and could not "assess the

adequacy of funding or staffing in relation to results". The Sékaly Report does not address the specific circumstances or needs of MCFN but uses MCFN to illustrate how the IRFF generates funding allocations, and it makes a number of assumptions as to the type of services that MCFN could afford with its allocation.

[36] Mr. Sékaly also prepared a response to the Anderson Report that was not filed with the Tribunal as the Anderson Report was also not filed with the Tribunal.

[37] MCFN submitted an affidavit of its Director of Lifelong Learning, Patti Barber, dated August 1, 2024, as part of its evidence in-chief in support of its complaint that included three documents attached as exhibits which had not previously been produced. This evidence was purported to be, in part, in response to the Anderson Report and indicated that MCFN had insufficient funding to meet the needs of its students and to eliminate gaps between MCFN students and other students in Ontario.

[38] The Respondent delivered responding evidence from Jonathan Allen dated December 11, 2024, in part, responding to the MCFN-specific evidence in the Barber Affidavit. It included at paragraph 471 the following:

> "As noted above, the MCFN has not produced all relevant documents with respect to the needs of its students and the types of education programming it provides and is able to afford with its IRFF funding allocation. I understand that these documents have not been produced because the MCFN is not advancing an MCFN-specific discrimination complaint. Without this information, it is impossible to assess and respond to Ms. Barber's statements in these paragraphs".

[39] MCFN delivered a further affidavit from Ms. Barber in reply to the Respondent's affidavit of Mr. Allen, which provided additional evidence pertaining to MCFN. In addition, Ms. Barber describes MCFN's response to document requests involving many documents it disclosed and the significant efforts that were made to produce all of the documents requested that it was able to find.

[40] In addition, subsequent to the Respondent's responding evidence, MCFN and the Commission have filed a significant amount of additional evidence in reply to Mr. Allen's

affidavit and in response to the Respondent's responding evidence, including a reply report of Mr. Sékaly dated January 14, 2025 (the "Sékaly Reply Report"), a reply affidavit of Julia Candlish dated January 31, 2025, a reply affidavit of Neil Debassige dated February 3, 2025, production of a number of additional MCFN-specific documents on January 30, 2025, an email dated February 19, 2025, attaching a report MCFN intends to rely on concerning ISC's elementary and secondary education funding prepared by a consulting firm hired by the Assembly of First Nations.

V. SUMMARY OF THE POSITION OF THE RESPONDENT (MOVING PARTY)

[41] The Respondent submits that Ms. Barber's community-specific affidavit evidence that MCFN has insufficient funding to meet the needs of its students is outside the scope of the complaint and is therefore irrelevant and inadmissible, and as a result various paragraphs of the affidavit cited by it should be removed.

[42] The Respondent argues that, by virtue of section 37(a) of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules of Procedure"), MCFN may only raise issues at the hearing if those issues were raised in its SOP. The Respondent submits that the SOP of MCFN did not plead an MCFN-specific case that MCFN students do not have equal access to educational services and programs as a result of inadequate funding. Nor did it produce sufficient documents or evidence that were MCFN-specific in its in-chief case. As a result, it would be unfair to the Respondent to allow MCFN to advance an MCFN-specific case now, after the Respondent has already responded, as it must be given a fair opportunity to know the case against it and be able to properly respond to it.

[43] Further, the Respondent claims that MFCN repeatedly assured the Respondent that it would not be advancing an MFCN-specific case and that it would not be arguing that its students have suffered adverse impacts as a result of the IRFF. The Respondent says it relied on these assurances to its prejudice, as it would have marshalled additional responding evidence, including expert evidence, if it had known that MCFN was going to

advance an MCFN-specific case. It also would have demanded that additional documents be produced. It would be unfair to permit MCFN to change the nature of its case and resile from its assurances.

[44] The scope of reply evidence is narrow and is only appropriate where it responds to a new issue that has been raised for the first time by the Respondent in its responding evidence, and which the Complainant could not reasonably have anticipated when it advanced its case in-chief.

[45] The Respondent argues that MCFN knew that the Respondent's defence would be that there was no evidence of adverse impact of the IRFF on MCFN students or on other First Nation students before it advanced its in-chief case. It should have pleaded that and disclosed all documents related to an MCFN-specific case through its case in-chief.

[46] The Respondent submits that the Anderson Report is not responsive to an MCFN-specific complaint because that is not the complaint that MCFN assured the Respondent that it was advancing. The Respondent is not advancing an affirmative defence under section 15 of the CHRA, rather it is responding to a general systemic case by MCFN. The Anderson Report is responsive to a general case and to the Sékaly Reply Report to demonstrate that Mr. Sékaly's line by line methodology paints a misleading picture of the funding supports provided through the IRFF.

[47] The Respondent submits that the evidence that it objects to is impermissible and that inadmissible case-splitting should not be allowed as reply evidence. A complainant must advance the evidence it wants to bring forward in the first instance to support its case in-chief; it should not be allowed to make up for its failure to do so in its reply. The scope of the reply evidence is limited and is not meant to give the complainant the last word or to supplement deficiencies in its evidence in-chief, rather its purpose is to respond to unanticipated issues that arise from the respondent's evidence.

[48] While the Respondent acknowledges that the Tribunal is not bound by the strict rules of evidence of the courts, it argues that the limitations on reply evidence are not merely rules

of evidence. They are the principles that flow from the requirements of procedural fairness, and those requirements do bind the Tribunal.

[49] On the basis of the positions taken by the Respondent referred to in paragraphs 40–47 above, it submits that specific paragraphs of the following documents should be removed from the record, namely; a) paragraphs 11–31 of the Barber Affidavit; b) paragraphs 3–41 of the Barber Reply Affidavit; c) paragraphs 3–17, 21, 23–26, 30 and 32 of the Candlish Reply Affidavit; d) paragraphs 3 and 4 of the Debassige Reply Affidavit and the entirety of the Sékaly Reply Report.

[50] The Respondent also requests an order for leave to file further responding evidence to address a) the documents that were produced by MCFN after the Respondent delivered its evidence and b) any reply evidence that should have been introduced in-chief, but which the Tribunal decides, in the exercise of its discretion, not to remove from the record.

VI. SUMMARY OF THE POSITION OF MCFN

[51] MCFN submits that the disputed evidence should not be struck as it is relevant.

[52] The disputed paragraphs from Ms. Barber's in-chief affidavit, which predate the responding evidence of the Respondent, are directly responsive to and attempt to refute the Anderson Report allegations of funding sufficiency for MCFN.

[53] The disputed paragraphs from Ms. Barber's Reply affidavit are also directly responsive to Mr. Allen's affidavit and attempt to refute the allegations contained in it.

[54] MCFN denies the Respondent's assertion that its SOP and reply do not allege insufficient funding, insufficient services or adverse impacts. The disputed paragraphs are clearly within the scope of the proceeding and extremely relevant, including as a direct response to allegations from the Respondent. Striking the relevant paragraphs, as the Respondent has requested, would be a clear breach of procedural fairness, according to MCFN.

[55] MCFN argues that none of the evidence requested by the Respondent to be struck is improper even by the legal test suggested by the Respondent as the applicable legal test simply requires the Tribunal to ensure that procedural fairness is respected, which can only be achieved if the evidence is allowed to remain on the record. The question before the Tribunal in this case is how to balance the interests of all parties to ensure that the proceeding is fair.

[56] MCFN submits that all of the disputed evidence should be admitted based on the fairness test that applies because the disputed evidence is relevant and the Respondent will have a chance to respond to and cross examine on that evidence. The Respondent does not dispute relevance for the majority of the evidence that it believes is improper (i.e., the disputed portions of the Candlish Reply Affidavit, the Debassige Reply Affidavit, and the Sékaly Reply Report).

[57] MCFN argues that the Respondent's responding evidence raised many new factual issues. Although MCFN and Commission were aware of the broader questions raised by the Respondent's SOP, they cannot be expected to have anticipated all of the factual issues raised by the responding evidence. The Tribunal would certainly benefit from the evidence-based reply on these specific new issues as they all directly respond to the Respondent's evidence and are proper replies.

[58] MCFN consents to the order requested by the Respondent as referred to in paragraph 49 above but retains the right to object to specific aspects of the evidence and/or seek permission to provide evidence in response thereto. This is particularly important with respect to the supplementary evidence on the ongoing disclosure, with respect to which its right of reply has not yet been exercised.

VII. SUMMARY OF THE POSITION OF THE COMMISSION

[59] The Commission's submissions speak solely to the Respondent's arguments regarding the independent expert evidence of Mr. Sékaly that he provided in reply to the Respondent's evidence.

[60] The Commission supports MCFN's submissions, in particular, that the Sékaly Reply Report was filed in direct response to Mr. Allen's affidavit that was part of the Respondent's responding evidence. As such, it is proper and relevant evidence that should not be struck.

[61] The Commission argues that the Tribunal is not bound by formal rules of evidence of the courts. The statutory mandate of the CHRA provides for an informal, quick and fair way to proceed. As human rights legislation, it has quasi-constitutional status and is supposed to be interpreted liberally and in a broad and purposeful manner to enable rather than diminish the rights of individuals.

[62] The Tribunal is the master of its own proceedings and possesses a wide discretion when it comes to determining the admissibility of evidence. Objecting to unspecified repetition and the timing of a response, as the Respondent is doing in this motion, is nothing more than a complaint about form rather than substance and should be rejected by the Tribunal. This cannot be used to prohibit a party from submitting evidence that is relevant and necessary for the Tribunal to make a fully informed decision on the merits of the complaint.

[63] The Respondent's objection to the Sékaly Reply Report on the basis that it is improper because of the repetition of some parts of the original report is not valid according to the Commission. It is inevitable that there will be some overlap between the main report and the reply report, and this should not disqualify it.

[64] Mr. Sékaly's reply report is focused on replying to Mr. Allen's over 2000-page affidavit, including exhibits, which was entirely unknown to Mr. Sékaly until it was filed and therefore could not have been anticipated, according to MCFN.

[65] According to MCFN, Mr. Allen's report was a critique of Mr. Sékaly's original report using a non-Indigenous comparability lens rather than a needs-based lens. Mr. Allen raised issues regarding the reallocation of funds argument, the funding gap analysis and special education needs—all of which is addressed in Mr. Sékaly's reply report that falls within the parameters of proper reply evidence.

[66] According to MCFN, the Respondent's concerns can be dealt with at the hearing through submissions on the weight of the evidence and through the requested supplementary and sur-reply evidence the Respondent seeks to introduce. MFCN consents to the introduction of this evidence, provided it is filed in a timely way. MCFN retains the right to object to specific aspects of the evidence supplementary and sur-reply evidence and/or to seek permission to provide evidence in response thereto.

VIII. SUMMARY OF POSITION OF THE RESPONDENT IN REPLY

[67] The Respondent submits that MCFN has not pleaded an MCFN-specific case, and such a case would not by implication be included in a general systemic discrimination claim. MCFN chose not to plead an MCFN-specific case and produce all relevant documents in its possession while assuring the Respondent that it would not be advancing such a case. It would be unfair for MCFN to now resile from these assurances.

[68] The Respondent argues that its understanding of the context of various emails between the parties regarding the complaint was that MCFN would not be advancing an MCFN-specific case and would not be arguing that it receives insufficient funding to meet its student needs. The Respondent wrote to MCFN repeatedly that this was its understanding of the case being advanced against it and that it was responding to. MCFN did nothing to advise the Respondent that its understanding was mistaken or that the term MCFN-specific case was vague during the course of these emails going back and forth. The fact that MCFN indicated that it would only bring MCFN-specific evidence in reply further confirms this understanding. This is why the Respondent argues that MCFN confirmed its understanding that this would not be an MCFN-specific case.

[69] The Respondent submits that the November 18, 2022, email from MCFN referred to in paragraph 24 above further confirms that MCFN was then taking the position that MCFN-specific evidence was irrelevant to their case as pleaded and that its case was exclusively concerned with the design of the formula "not the results of the formula on one First Nation". Further, that any MCFN-specific defence advanced by the Respondent would not be "valid" as it "would be a defence to an argument we are not making".

[70] The Respondent contends that the MCFN-specific evidence included in the Barber Affidavits goes far beyond permissible rebuttal evidence. Instead of being a “shield”, as alleged by MCFN, it is a “sword” advancing an affirmative claim and being used to bolster its case after it submitted its evidence in-chief. MCFN could have and should have submitted the evidence in-chief together with fulsome document disclosure that would have allowed the Respondent to know the case against it and would have allowed it to properly and fairly respond. MCFN deliberately decided not to submit MCFN-specific evidence as its case in-chief, and it is not now appropriate as reply evidence.

[71] The Respondent argues that MCFN’s disclosure is insufficient if the complaint now includes a community-specific case concerning the impacts of the IRFF on MCFN students.

[72] The Respondent acknowledges the Tribunal’s wide discretion to admit reply evidence. However, there is always a need to be balanced in exercising the flexibility that the Tribunal possesses to admit evidence whether or not the case involves motions and applications. Reply evidence that is irrelevant, argumentative or simply confirmatory will generally be inadmissible and that remains true in the context of motions and applications. Evidence of this nature will not serve the interests of justice and will not assist the court or Tribunal in reaching a fair determination of the proceeding on its merits.

[73] Ms. Barber’s MCFN-specific evidence concerning other funding programs is not, according to the Respondent, responsive to the limited MCFN-specific evidence filed by the Respondent. Further, this evidence could not have been anticipated based on the Respondent’s evidence, as MCFN was already aware of the Respondent’s defence about the availability of programs other than the IRFF when it filed its case in-chief. This is new evidence that Mr. Allen did not provide and that he has not had an opportunity to respond to.

[74] The Respondent argues that Ms. Candlish’s reply evidence concerning funding is not responsive to any new evidence provided by Mr. Allen in his responding evidence. Instead, it is new evidence that could have been anticipated by MCFN when it advanced its case in-chief and should have been provided then not as a reply.

[75] The Respondent placed significant reliance on MCFN's assurances that it would not be advancing an MCFN-specific case. For instance, if an MCFN-specific case had been pleaded, the Respondent would have prepared an entirely different evidentiary record, including additional expert evidence. It would have sought further disclosure from MCFN. In this context, the Respondent argues that the resulting prejudice to the Respondent cannot be remedied by allowing an abbreviated timeline for the delivery of further responding or sur-reply evidence.

IX. ANALYSIS

[76] I agree with a submission made by MCFN that, ultimately, the question before the Tribunal in this motion is how to balance the interests of all parties to ensure the proceeding is fair.

[77] The Commission requested that the Tribunal institute an inquiry into the complaint in this matter under section 49(1) of the CHRA. The purpose of an inquiry by the Tribunal is to search for the truth in order to determine the issue raised by the complaint that is in dispute.

[78] The inquiry mandate is a broader mandate than exists in the realm of civil or criminal proceedings owing to the well-recognized notion that human rights laws in a free and democratic society are the bedrock of the society itself in every sense. As such, where the basic rights of citizens are involved, it is of fundamental importance that justice is done and that the parties and the adjudicator are not tied down unnecessarily from getting to the truth by procedures and practices that favour form over substance in carrying out an inquiry under the CHRA.

[79] The area of law within which the CHRA and its legislative mandate exist is recognized as quasi-constitutional within the judicial legal hierarchy because it deals with basic human rights upon which freedom and justice rely. This provides a complainant, who may be self-represented and inexperienced and may not have a great deal of money to spend on disputes of this nature, some leeway from the stricter rules of procedure and evidence of the courts. This is done in order to allow complainants, without unnecessary formalities, to

plead and advance their cases in a meaningful and expeditious way so that an adjudicator can get to the point of what is really at issue and ultimately produce a fair and just decision about whether the complainant's basic rights have been violated.

[80] This leeway, however, does not operate to provide a complainant with a way to avoid the requirements of section 5 of the CHRA, referenced in paragraph 15 above, to prove, on the balance of probabilities, that there is a real negative or adverse impact upon an individual caused by alleged act(s) of discrimination. Nor should it deprive a respondent of the right to know the case it has to meet in order to properly and fairly defend its rights.

[81] A respondent in CHRA cases is usually a large corporation or a government agency with vastly greater resources than the complainant. However, it too needs to be able to put forward its best defence to allegations of discrimination—something that nobody wants to be found to have committed. The law recognizes the fundamental right for a person accused of a violation of the CHRA to know the case that it has to meet to properly be able to defend itself from unfounded allegations and to clear its name and avoid potentially serious penalties.

[82] My decision in this case is intended to recognize the interests of both parties in a fair, practical and expeditious manner to continue with the journey of inquiry to find the truth in this dispute. In reaching the decision in this motion, I recognize the validity of both sides' arguments. I also recognize both sides' differing strategies in advancing and defending their positions. They are entirely entitled to adopt whatever strategy in advancing their cases as they feel is legally appropriate at this stage.

[83] MCFN's strategy in advancing its case appears to involve advancing a systemic general case of discrimination. It views its complaint through the lens of substantive equality considerations, having regard to the history and culture of First Nations in Canada and the impact on them of past discrimination that has put them in an unequal position that increases their needs compared to students who do not attend schools on reserves.

[84] This strategy is captured in the following quotation from MCFN's Reply:

> "The Interim Funding Model is premised on the comparable funding levels based on the application of standard provincial funding formulas. However, the need for services and cost of providing services are much higher on reserve. An inevitable consequence, children are not receiving equitable services, including services that account for historic disadvantages and the and the need for culturally-based services. Children are suffering now as a consequence and in many cases the impacts will last a lifetime."

[85] The Respondent's strategy in defending the case against it appears to involve challenging MCFN to actually prove, in accordance with section 5 of the CHRA, that there has been or is a real, not just a hypothetical, adverse impact on First Nations students on reserves in Ontario by virtue of the use by the Respondent of the IRRF for funding these students' educational needs. The Respondent has been relying in its defence on its understanding that the case being advanced by the other parties was based on flaws of the system rather than specific impacts on individuals. It argues that it was given assurances by MCFN that its case was not community-specific but that now has changed as a result of the filing of the disputed evidence.

[86] The Respondent argues that it needs further disclosure by MCFN of community-specific evidence that has been denied by MCFN on the basis that it is irrelevant to the case in order to fairly defend the case the MCFN is now making. It also questions the validity of MCFN affiant statements that it has made full searches of the requests for further information and is unable to produce anything more that is available and relevant. At the same time, the Respondent argues that failure to produce a systemic case based on actual evidence of harm caused by the alleged discrimination may not satisfy the requirements of section 5 of the CHRA.

[87] I accept that MCFN is well aware of the requirements of section 5 of the CHRA on a complainant to prove, on the balance of probabilities, that there are adverse impacts on individuals of the alleged discriminatory actions. I also have no reason to believe that MCFN will intentionally hold back any available relevant evidence at this stage or to use in a possible future bifurcated remedial stage, thereby weakening the Respondent's opportunity to properly and fairly defend itself from liability under the CHRA.

[88] I also accept that the Respondent has genuinely been surprised by the community-specific evidence that the other parties have submitted that it wishes to have removed. Clearly, it consistently and continually advised the other parties that it was assuming a non-community-specific case was being advanced against it by MCFN based on the design of the formula rather than its specific negative impacts on First Nations students on reserves. It contends that it received confirmation of this even though it does not appear that any explicit confirmation was ever sent. It contends it prepared its defence in reliance of the confirmation it felt it had. It argues that its defence now has to be changed as it has been prejudiced by the submission by the other parties of the new community-specific evidence that it objects to. As a result, it feels that it needs to be permitted to submit the supplementary and sur-reply evidence it has requested in order to properly and fairly respond to the allegations of discrimination, given that much of the disputed evidence was filed after its responding evidence. I fully understand the concern of the Respondent in this regard and am attempting to address it fairly with the decision in this case.

[89] The parties submitted extensive information for me to review concerning the affidavits and the report that are in dispute. I have reviewed the information and the parties' arguments as outlined above. Generally, MFCN points out that in many instances its affidavits specifically mention that they are in response either to the original Anderson Report that was filed before its in-chief case was put forward or in response to the Respondent's responding evidence. And to the extent that it is new evidence, it could not have been contemplated as being required when it filed its evidence in-chief. In other words, even by the stricter civil and criminal court rules, the evidence filed by MCFN is proper and relevant and within the scope of the complaint and pleadings. It would not be fair to MCFN to have the disputed evidence removed and would not be helpful to the Tribunal in determining the case on its merits to do so without considering the disputed evidence, according to MCFN.

[90] The Commission takes essentially the same approach as MCFN with specific reference to the Sékaly Reply Report. The Commission says that it is well within appropriate reply evidence in its response to the critique of its original report by the Respondent's affiant Mr. Allen and is relevant to the case as it was not contemplated to be required in chief but is now needed to be considered by the Tribunal in inquiring into whether the discrimination

alleged is taking place. The Commission also notes that the Tribunal has the authority under the CHRA, in any case, to determine the motion on the basis of what it thinks is relevant to the issue in the case, regardless of when it was submitted and whether it was directly in reply or contemplated at the time of the submission of evidence in-chief. The Tribunal need only to find that the evidence is relevant enough in its search for the truth in this inquiry to be admitted at this stage in order to get to the truth, while giving the Respondent the opportunity to respond with further supplementary and sur-reply evidence and with the right to raise issues of weight at the hearing.

[91] Not surprisingly, the Respondent's approach is the opposite of what the other parties' approach is to the relevance of the disputed evidence and the fairness of admitting it into the record. The Respondent argues that it is outside of the scope of the complaint because a community-specific case was not what was pleaded. It is not proper reply evidence as it is essentially new evidence and not responsive to the responding evidence provided by the Respondent. It is also evidence that could and should have been contemplated by the other parties and advanced when they were presenting their in-chief cases as they knew what the Respondent's defence was going to be. As such, it is unfair to allow it as a reply because it gives the other parties the chance to present evidence that the Respondent cannot respond to. It should therefore be removed according to the Respondent.

[92] Ultimately, it is for me, after a hearing of the evidence, to determine the merits of the case based on the evidence and on the law. In order to make the most fair and just decision, I need and am entitled to receive through this inquiry all of the evidence that is available, bearing on the matter in dispute. I will then be able to assess the relative weight of the evidence after both sides have been given a fair opportunity to put their best case forward.

[93] In accordance with section 48.9(1) of the CHRA, the Tribunal is to conduct proceedings as informally and expeditiously as the requirements of natural justice and the Rules of Procedure allow.

[94] In accordance with section 50(1) of the CHRA, the member of the Tribunal conducting the inquiry shall give the parties to whom notice of the inquiry was given a full and ample opportunity to appear at the inquiry, present evidence and make representations.

[95] In accordance with section 50(2) of the CHRA, the member may decide all questions of law or fact necessary to determine the matter.

[96] In accordance with section 50(3)(c) of the CHRA, the member may accept any evidence or other information that the member sees fit, whether or not that evidence or information is or would be admissible in a court of law.

[97] In accordance with section 50(3)(e) of the CHRA, the member may decide any procedural or evidentiary question arising during the hearing.

[98] Clearly, the sections of the CHRA referred to above provide for a great deal of flexibility for the Tribunal to conduct an inquiry in order to get to the truth of the matter that is in dispute, as informally and expeditiously as possible, so that it can properly and fairly determine the issue raised by the complaint. The Tribunal is the master of its own house concerning issues of procedure and evidence.

[99] The issue raised by the complaint is whether the Respondent's funding model for the education of First Nations children attending primary and secondary schools on reserves in Ontario is discriminatory. In order to properly inquire into the issue raised in the complaint and make a sound decision, I want to receive and consider the best evidence available. To obtain that evidence the parties must be given a fair opportunity to present the best evidence for their cases so that I can make the best possible decision after weighing the evidence and applying the law.

[100] In my opinion, having reviewed all of the evidence that is in dispute in this motion and the parties' submissions respecting the evidence, it would best serve the interests of justice if all of the disputed evidence was admitted at this stage and the Respondent was given an opportunity to provide additional responding evidence to fairly respond to it.

[101] I find that the disputed evidence is relevant to the issue as described in paragraph 99 above, despite when it was filed, and that it is also a proper reply given the Respondent's responding evidence. In any case, I am willing to use the flexible approach that the above-noted sections of the CHRA provide, rather than stricter court rules, to admit the disputed evidence to get to the truth in this inquiry, as informally and expeditiously as possible, in

order to be able to make a fair, just and well-reasoned decision. The parties deserve no less.

[102] At the same time, I find that the Respondent would be prejudiced in properly defending itself by knowing the case it has to meet if it were not given the relief it seeks in its request for leave to file further supplementary and sur-reply evidence, provided it does so in a timely manner. I acknowledge and accept the other parties' request to be able to review and respond to the further supplementary and sur-reply evidence produced by the Respondent pursuant to the order in this matter.

X. ORDER

[103] The motion is allowed in part as follows:

a) The request of the Respondent to remove from the record evidence filed by MCFN and the Commission, described in paragraph 49 above, is not allowed;

b) The request of the Respondent for leave to file further responding evidence in the form of supplementary and sur-reply evidence, described in paragraph 50 above, is allowed, provided it is done in a timely manner and the opposing parties retain their right to respond to it if necessary.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
July 31, 2025

Canadian Human Rights Tribunal

Parties of Record

File No.: T18410/4012

Style of Cause: Mississaugas of the Credit First Nation v. Attorney General of Canada

Ruling of the Tribunal Dated: July 31, 2025

Motion dealt with in writing without appearance of parties

Written representations by:

Kent Elson, for the Complainant

Anshumala Juyal, Christine Singh and Khizer Pervez for the Canadian Human Rights Commission

Dan Luxat, for the Respondent