Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

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 Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon, Réjean Bélanger and Edward P. Lustig
Date: July 3, 2013
Citation: 2013 CHRT 16

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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) have 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 *Act*). The complaint was referred to the Tribunal by the Canadian Human Rights Commission (the Commission) on October 14, 2008.

[2] On December 21, 2009, the Respondent filed a motion for the dismissal of the complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). The Tribunal ruled on the jurisdictional motion on March 14, 2011, in a decision reported at 2011 CHRT 4, and granted the motion, thereby dismissing the complaint. This decision was subsequently the subject of an application for judicial review before the Federal Court. On April 18, 2012, the Federal Court set aside the Tribunal's decision and remitted the matter to a differently constituted panel of the Tribunal for re-determination in accordance with its reasons (2012 FC 445). On July 10, 2012, a Panel composed of Members Marchildon, Lustig and Bélanger, was appointed to hear this case (2012 CHRT 16).

II. Relevant Facts

[3] On September 26, 2012, the Tribunal held an in-person case management conference (CMC) to canvass parties' availabilities to schedule dates for the hearing on the merits. The Respondent requested an adjournment of the proceedings, pending the outcome of the appeal of the Federal Court's decision 2012 FC 445 that was scheduled to be heard by the Federal Court of Appeal in March 2013. The Panel ruled, dismissing the adjournment request. In agreement with the parties, the Tribunal set hearing dates for the week of February 25 to March 1, 2013, as requested by the Complainant, and set the remaining hearing dates starting in April 2013, as requested by the Respondent. The Tribunal also set, on consent, a timeline for ongoing filing of disclosure materials, including revised witness lists. The Respondent was to file three sets of disclosure on the following dates: October 31, 2012; December 28, 2012; and February 25, 2013.

[4] The Respondent submitted its first set of disclosure and its Second Supplemental List of Documents on October 29, 2012, and its Third Supplemental List of Documents on December 20, 2013.

[5] On January 22, 2013, the Tribunal held a Case Management Conference Call (CMCC). During the call, the Commission stated that it would provide its additional disclosure as soon as possible, most likely by the end of February 1, 2013. The Respondent confirmed that, for its part, it would be able to abide by the February 25, 2013 deadline, as set out during the September 26, 2012 Case Management Conference (CMC), for its third and final set of disclosure.

[6] The Commission and the Respondent filed their Fourth Supplementary Lists of Documents on February 4, 2013 and February 21, 2013, respectively.

[7] 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.

[8] On March 6, 2013, the Federal Court of Appeal heard the appeal of the Federal Court's decision 2012 FC 445, which had remitted the present matter back to the Tribunal for re-determination. The Federal Court of Appeal rendered its decision 2013 FCA 75 shortly thereafter, on March 11, 2013, affirming the Federal Court's decision.

[9] On April 24, 2013, the Tribunal received a letter from Mr. Champ, Counsel for the Caring Society, disclosing a CD-ROM containing information received by his client, Dr. Blackstock, on April 9, 2013, following a request for "information on the enhanced funding approach/model for First Nations Child and Family Services dated, or likely to be dated, between

November 1, 2011 and October 31, 2012" made pursuant to the *Access to Information Act* (*ATIA*). The Caring Society alleges that the package of documents received as a result of this request, totaling around 4000 pages, contained highly relevant documents for the complaint that should have been disclosed by the Respondent. The Caring Society further contends that some of these documents reveal the existence of additional documents that have not been disclosed by the Respondent and of documents that were withheld under a number of exemptions under the *ATIA*, which are not applicable to disclosure obligations in legal proceedings such as this one.

[10] On May 7, 2013, the Respondent replied to the Caring Society's correspondence of April 24, 2013, stating that, as it had expressed throughout the CMCCs since the reconvening of this matter in 2012, it possessed a substantial number of documents that have yet to be disclosed and that this disclosure is ongoing. The Respondent also advised that it had just received notice from its client that over 50,000 additional documents that have been identified as potentially relevant, which the client is in the process of gathering, remain to be disclosed. In addition, the Respondent stated that it had been advised that there are an unspecified number of email documents that are also subject to disclosure and that the expected date of completion of gathering, indexing and providing these documents is between September and December 2013. Included in this number are, allegedly, documents which originate from the regions, as well as from headquarters. The Respondent stated that it believed it had now disclosed most of the documents up to 2010.

[11] On May 9, 2013, the Caring Society replied to this letter, stating that while it was recognized that there would always be ongoing disclosure, it was never contemplated or understood that the Respondent had yet to disclose such a large number of relevant documents. Rather, the Caring Society understood that disclosure obligations had largely been met by February 25, 2013. The Caring Society also stated that it finds the September to December 2013 timeframe projected by the Respondent unacceptable as this would result in the disclosure of a large number of relevant documents after all the witnesses had testified. The Caring Society advised of its intention to address the issue with the Tribunal on May 13, 2013, and to seek an order that the Respondent be required to produce all of its disclosure by June 14, 2013.

[12] On May 13, 2013, the Tribunal reconvened for a third week of hearings. In light of the latest exchanges regarding the issues with disclosure, the Tribunal asked the parties if they would benefit from additional time to discuss these issues amongst themselves and try and come to an agreement. The parties consented and the Tribunal adjourned for the day. The following day, in a letter dated May 14, 2013, the Caring Society advised the Tribunal that despite their discussions, the parties had not come to an agreement.

III. The Respondent's Motion for an Adjournment and the Complainant's Motion for an Order for Production

[13] On May 15, 2013, the Respondent filed a motion seeking an order under Rules 1(6), 3(2)(d), 5(3)(d) and (f) of the *Canadian Human Rights Tribunal Rules of Procedure* (the *Tribunal Rules*), for an adjournment of the hearing dates scheduled in the present matter until after such time as the Respondent could complete its disclosure obligations. These Rules read as follows:

1(6) The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules.	**1(6)** Le membre instructeur conserve le pouvoir de se prononcer sur toute question de procédure non prévue par les présentes règles.
3(2) Upon receipt of a Notice of Motion, the Panel	**3(2)** Dès réception de l'avis de requête, le membre instructeur
(*d*) shall dispose of the motion as it sees fit.	*d)* doit disposer de la requête de la façon qu'il estime indiquée.
5(3) At the case conference the Panel,	**5(3)** À la conférence préparatoire, le membre instructeur
(*d*) may set dates for the hearing of the inquiry;	*d)* peut fixer les dates d'audience;
(*f*) may deal with any other matters necessary for the conduct of the proceeding.	*f)* peut traiter de toute autre question ayant trait au déroulement de la procédure.

[14] The Respondent submits that an adjournment in this case would be appropriate as Aboriginal Affairs and Northern Development Canada (AANDC) has retained two independent, third-party companies, namely Public History Inc. (PHI) and Canadian Development Consultants Inc. (CDCI), which have identified approximately 50,000 documents that are potentially relevant to the hearing of the complaint and that will not be disclosed to the Respondent before September 30, 2013. The Respondent submits that once it has received these documents, it will have to review them for relevance and privilege prior to disclosing them to the other parties, which will require additional time.

[15] Because these documents may contain information that is relevant to the complaint, the Respondent notes that they may also be relevant to the questioning of the witnesses called by all parties. The Respondent submits that, having regard to the principles of natural justice, an adjournment would ensure that the record before the Tribunal is complete and that all parties have the opportunity to receive and review the documents and fully canvass the issues before the Tribunal. This would ensure the best use of judicial resources as, in the event the hearing proceeds as presently scheduled, witnesses may have to be recalled to address new information that was not available at the time they testified.

[16] On May 21, 2013, the Caring Society filed its own Notice of Motion, seeking an order:

> [C]ompelling the Respondent to produce documents relevant to the complaint, provide summaries of anticipated testimony of each of the Respondent's witnesses, legal costs for obstruction of the Tribunal process, and such further and other relief as counsel may request and this Honourable Tribunal may permit.

[17] The Caring Society submits that despite the fact that the hearing on the merits of the present case has been ongoing since February 25, 2013, the Respondent has only recently admitted that it has in its possession tens of thousands of arguably relevant documents that it has failed to disclose to the parties. Combined with the Respondent's failure to produce summaries of the anticipated testimony of its witnesses as per its obligations under Rule 6(1)(f) of the *Tribunal Rules*, the Caring Society contends that the Respondent is in breach of Rules 1(1), 6(1) and 6(5)b) of the *Tribunal Rules*. The Caring Society also notes that the Respondent has

repeatedly breached time limits set out by the Tribunal for the disclosure of documents, as well as for providing witness lists and expert reports.

[18] For ease of reference, we have reproduced the above-mentioned *Tribunal Rules.* They read as follows:

1(1) These Rules are enacted to ensure that	**1(1)** Les présentes règles ont pour objet de permettre
(*a*) all parties to an inquiry have the full and ample opportunity to be heard;	*a)* que toutes les parties à une instruction aient la possibilité pleine et entière de se faire entendre;
(*b*) arguments and evidence be disclosed and presented in a timely and efficient manner; and	*b)* que l'argumentation et la preuve soient présentées en temps opportun et de façon efficace;
(*c*) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.	*c)* que toutes les affaires dont le Tribunal est saisi soient instruites de la façon la moins formaliste et la plus rapide possible.
6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,	**6(1)** Chaque partie doit signifier et déposer dans le délai fixé par le membre instructeur un exposé des précisions indiquant :
(*a*) the material facts that the party seeks to prove in support of its case;	*a)* les faits pertinents que la partie cherche à établir à l'appui de sa cause;
(*b*) its position on the legal issues raised by the case;	*b*) sa position au sujet des questions de droit que soulève la cause;
(*c*) the relief that it seeks;	*c)* le redressement recherché;

(*d*) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

(e) a list of all documents in the party's possession, for which privilege is claimed, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

(*f*) a list identifying all witnesses the party intends to call, other than expert witnesses, together with a summary of the anticipated testimony of each witness.

d) les divers documents qu'elle a en sa possession – pour lesquels aucun privilège de non-divulgation n'est invoqué – et qui sont pertinents à un fait, une question ou une forme de redressement demandée en l'occurrence, y compris les faits, les questions et les formes de redressement mentionnés par d'autres parties en vertu de cette règle;

e) les divers documents qu'elle a en sa possession – pour lesquels un privilège de non-divulgation est invoqué – et qui sont pertinents à un fait, une question ou une forme de redressement demandée en l'occurrence, y compris les faits, les questions et les formes de redressement mentionnés par d'autres parties en vertu de cette règle;

f) les noms des divers témoins – autres que les témoins experts – qu'elle a l'intention de citer ainsi qu'un résumé du témoignage prévu de chacun d'eux.

6(5) A party shall provide such additional disclosure and production as is necessary

(*b*) where the party discovers that its compliance with 6(1)(*d*), 6(1)(*e*), 6(1)(*f*), 6(3) or 6(4) is inaccurate or incomplete.

6(5) Une partie doit divulguer et produire les documents supplémentaires nécessaires

b) si elle constate qu'elle ne s'est pas conformée correctement ou complètement aux alinéas 6(1)*d*), 6(1)*e*) et 6(1)*f*) ou aux paragraphes 6(3) ou 6(4).

[19] The Tribunal heard the two motions on May 21-22, 2013.

[20] The Tribunal first heard the Respondent's motion to adjourn and the evidence of Ms. Pia Newell Santiago, Co-President of PHI, Ms. Laurie Howe, Project Manager at CDCI and Ms. Janice Mah, Paralegal at the Department of Justice Canada.

[21] The evidence revealed that PHI has been conducting research and document management services for AANDC for the purposes of disclosure in the present proceedings since 2008 and that it began its current stage of research and document management in October 2012. At the time, PHI informed the Respondent that its projected date of completion was the end of March 2013, but that there was a risk that this deadline would have to be pushed back into the summer months. The Tribunal heard evidence regarding the large number of documents that have been (and those that remain to be) reviewed due to the broad scope of the issues at stake. While the Respondent narrowed the scope of relevance in 2012, Ms. Newell Santiago testified that the research and document management requirements remained labour-intensive as the scope of relevance was expanded so as to include the records of all the AANDC regional offices, in addition to AANDC headquarters.

[22] Ms. Newell Santiago testified that in January or February 2013, PHI held discussions with the Respondent regarding the fact that processing material from the AANDC regional offices would be too much work for the company. PHI recommended that, with the exception of the emails emanating from the regional offices, the research and preparation of documents from the regional offices be assigned to another firm. PHI confirmed that the current anticipated completion date for its part of the work is August 31, 2013; a date which Ms. Newell Santiago testified was communicated to the Respondent no later than the middle of the month of March 2013. However, under cross-examination by the Commission, Ms. Newell Santiago noted that if the processing of the regional emails was removed from their task list, the projected August 31, 2013 end date could perhaps be advanced to mid-July, 2013.

[23] Ms. Howe testified that the Respondent contacted CDCI on March 14, 2013, which the Tribunal notes is three days after the decision of the Federal Court of Appeal 2013 FCA 75. On that same date, the Respondent requested their assistance and by way of a finalized contract, retained their services on April 15, 2013. Pursuant to this contract, CDCI was to undertake the electronic document collection for the AANDC regional offices from April 2009 to present; the Quebec Regional Office email collection; and any small paper document collections from the regional offices. Ms. Howe highlighted the challenges in completing the production of such a large volume of material within such a short timeline, stating that CDCI's projected completion date is September 30, 2013, at the earliest.

[24] The evidence also revealed that neither PHI nor CDCI had carriage of the research and preparation of documents emanating from the Audit and Evaluations branch of AANDC, an area which the Complainants expressed was of particular relevance to their case. The Respondent subsequently confirmed that a third, unknown firm, has recently been hired by the Respondent to obtain all relevant documentation from this branch. The Respondent was, however, unable to provide greater details on this service contract.

[25] The Tribunal subsequently heard, in support of the Caring Society's motion for production, the evidence of Dr. Blackstock, Executive Director of the Caring Society. Dr. Blackstock emphasized the extent to which reviewing the large amount of disclosure in the present case constituted a heavy burden for their small organization and also the surprise and inconvenience caused upon learning, as a result of her latest *ATIA* request, that two thirds of the Respondent's disclosure was still outstanding. Dr. Blackstock explained that parts of this outstanding disclosure, such as the evaluations and audits of the implementation of the Enhanced Formula in the provinces of Saskatchewan, Nova Scotia, Manitoba, Alberta, Prince Edward Island and Quebec, was of particular relevance to their case, especially in light of the fact that the witnesses from Manitoba were initially scheduled to testify during the hearing dates scheduled in May 2013. Dr. Blackstock alleged that, furthermore, the documents disclosed as a result of the *ATIA* request indicated that the Respondent's litigation team was in possession of these documents well into the summer of 2012, begging the question as to why these documents were

not previously disclosed. Dr. Blackstock also highlighted that, to date, the Caring Society has only received an incomplete list of witnesses and will-says.

[26] In response to the Respondent's motion for an adjournment, Dr. Blackstock highlighted the prejudice that has already been caused to the 161 000 children served by this complaint as a result of the delays in the present case. Dr. Blackstock submitted that an adjournment, which would cause additional delays, would only exacerbate this prejudice.

IV. Parties' Submissions

A. Respondent's position

[27] The Respondent asks for an adjournment until all of the disclosure has been completed, which, taking into account the evidence submitted by the third-party companies hired for this purpose and the time needed for the Respondent to review the disclosure provided, it estimates would be until early November 2013.

[28] While the Respondent appreciates the parties' desire to proceed with the inquiry as expeditiously as possible, it highlights that this must be balanced with maintaining the fairness and integrity of the process, particularly in light of the important nature of the present case. The Respondent submits that at this stage of the proceedings, the testimonies of the majority of witnesses who have already been heard would not be affected by the late disclosure. However, in its view, proceeding with the hearing as it is currently scheduled, where witnesses would be testifying prior to the completion of the documentary disclosure, could create a situation where the testimonies are impacted, thereby raising issues of fairness.

[29] Relying on its own notes of the September 26, 2012 CMC (due to a technical glitch, this conference was unfortunately not recorded), the Respondent further notes that it communicated to all parties on this date that it would provide ongoing disclosure and that it expected to disclose an estimated 30,000 documents. The Respondent admits that while there may have been a misunderstanding regarding the amount of outstanding disclosure, the Respondent brought this

issue to the attention of the parties as soon as it was made aware of the existence of additional potentially relevant documents.

[30] The Respondent expressed a willingness to work with the parties in order to establish a reasonable schedule to ensure the completion of the disclosure so as to proceed in the most just and efficient manner.

B. The Caring Society's position

[31] The Caring Society submits that there has already been a breach of procedural fairness as there have already been two weeks of hearings and the parties have only recently been made aware of the Respondent's large amount of outstanding disclosure documents. The Caring Society also submits that its understanding regarding any ongoing disclosure referred to documents and evidence that came into existence *after* the beginning of the proceedings and did not contemplate, contrary to what the Respondent's submits, the disclosure of large amounts of documents produced prior to February 25, 2013.

[32] That said, the Caring Society submits that the impact of the Respondent's late disclosure remains speculative and does not justify the adjournment of nine weeks of previously scheduled hearings. The Caring Society is of the view that any fairness concerns arising as a result of witnesses testifying prior to full disclosure may be remedied in a variety of ways, including by requests to recall witnesses to address previously undisclosed documents. The Caring Society recognizes that having all the documents prior to moving forward with the proceedings is undoubtedly ideal. However, when weighed against the very concrete prejudice to the Complainants caused by further delays, these speculative future breaches of fairness do not warrant the adjournment sought by the Respondent. Indeed, the First Nations children who are adversely affected by the Respondent's allegedly discriminatory practices can never regain those primary years spent away from home.

[33] The Caring Society notes that the evidence of Ms. Newell Santiago revealed that the Respondent knew in January or February of 2013 that a large amount of documents would not be

available for disclosure until the summer and yet failed to inform the parties of this fact until recently. The evidence of Ms. Howe also revealed that, when CDCI was initially contacted by the Respondent in mid-March of 2013, she gave a projected completion date of end of July 2013, a fact which the Respondent also failed to communicate to the other parties. The Caring Society submits that this evidence, combined with the Respondent's failure to offer an explanation as to why it only began processing these relevant documents very recently, should lead to a negative inference; these documents may have never been disclosed were it not for Dr. Blackstock's *ATIA* request. It is the Caring Society's view that granting the adjournment request would only accommodate what it describes as the Respondent's "own knowing breach of the Tribunal Rules". The Caring Society states that it was unable to find a single case where a party had failed to disclose and then sought an adjournment on this basis.

[34] The Caring Society also argues that the adjournment requested in the present case would impact the functioning of the Tribunal as it will have to vacate all of the current dates and set aside future dates that could otherwise have been available to other complaints. The Caring Society relies on *Zhou v. National Research Council*, 2009 CHRT 11, wherein the Tribunal stated that in deciding to grant an adjournment, the Tribunal should have consideration for the prejudice caused to the whole Tribunal system (at paragraphs 7 and 8).

[35] Finally, the Caring Society notes that the Respondent has also failed to provide a full list of witnesses with will-say statements despite repeated requests and contrary to Rule 6(1)(f) of the *Tribunal Rules* and should be ordered to produce this information.

C. The Commission's position

[36] The Commission is of the view that the need to proceed in an expeditious manner must be balanced with the need to ensure that the process moves along fairly and with the best evidence. While there may be some initial savings of time in refusing to adjourn the hearing dates as they are currently set, the Commission notes that these savings are likely to be offset by the delays caused by recalling witnesses and also create the risk of compromising the quality of the case and the testimony of the witnesses. Proceeding without having concluded the disclosure

could also result in the creation of flaws within the record which could be problematic in the event of a judicial review.

[37] That said, the Commission is not in agreement with the Respondent's proposal of commencing hearings in November or December 2013. As such, the Commission has adopted what it describes as a middle ground position. According to the evidence brought forward by Ms. Newell Santiago and Ms. Howe, if parties agree to dispend PHI and CDCI with the obligation of conducting *ATIA* cross-referencing and coding the disclosure, then PHI would be in a position to provide the disclosure to the Respondent at the end of June and CDCI could do the same at the end of July 2013. The Commission therefore proposes that:

a. the motion on the issue of retaliation be heard in June;

b. the Respondent provide a rolling disclosure until July 26, 2013; and

c. the Commission proceed with its case on the merits in early August and conclude its witnesses by mid-September.

[38] The Commission requests that, in order to avoid a situation where parties are faced with further adjournment requests down the line, the Tribunal render an order detailing the documentary disclosure schedule proposed and provide a deadline for the production of the witness list and will-say statements.

[39] While the AFN notes that it shares the same concerns as the Caring Society in respect of the conduct of the Respondent regarding the handling of the documentary disclosure and the frequent breaches of timeframes, it nonetheless supports the position and schedule proposed by the Commission. The Commission's position was also supported by the Chiefs of Ontario (the COO).

V. Events since the Motions Hearing

[40] In a letter dated May 24, 2013, the Respondent indicated that following further communications with the independent companies contracted to obtain the disclosure, PHI had advised that they could provide the disclosure documents to the Respondent by July 2, 2013 and CDCI had indicated that they could do so by July 31, 2013. As a result, the Respondent stated that it would be in a position to provide a rolling disclosure at intervals throughout June, July and August, completing its disclosure by August 31, 2013. The Respondent indicated that it would therefore be in a position to proceed with hearings on the retaliation complaint in July or August 2013 and, to resume hearings on the merits of the case, in September 2013. While the Respondent initially noted that this was contingent upon the parties waiving the disclosure of emails, it subsequently confirmed that it would be in a position to complete the disclosure, including emails, by August 31, 2013. The Respondent also advised that the regional documents could be disclosed in the following order: Atlantic, Manitoba, Saskatchewan, Ontario, Quebec, Alberta, British Columbia and Yukon.

[41] In a letter dated May 28, 2013, the Commission, without waiving any rights, consented to the Respondent's latest proposal, given the caveat that the Respondent's emails would be included in the disclosure. The Commission also noted that the third unknown company, with whom the Respondent has contracted to deal with the production of documents pertaining to audits and evaluations, would also have to abide by the proposed timeframes. The Commission proposed that the hearing on the merits resume on September 3, 2013.

[42] The COO sent an email that same day, supporting the position of the Commission. The AFN also sent a letter dated May 28, 2013, supporting the Commission's position, subject to the right of the Commission and the Complainants to recall witnesses. The AFN also highlighted the importance of scheduling dates through December 2013 so as to ensure that the Respondent is able to complete its case and that the hearing is completed with the least amount of delay possible.

[43] The Caring Society also responded to the Respondent's letter, having reviewed the Commission's response. The Caring Society continued to express its objection to the adjournment, noting that the impact of the late disclosure remained highly speculative and did not warrant adjourning nine weeks of previously scheduled hearings particularly in light of the continued prejudice suffered by First Nations children adversely affected by the Respondent's allegedly discriminatory practices.

[44] On May 29, 2013, the Respondent replied to these communications, expressing satisfaction at the agreement of the Commission, the Chiefs of Ontario and the AFN to the timelines for disclosure that the Respondent proposed in its last communication. In response to the Caring Society's objection, the Respondent stated that it felt that the evidence presented by the witnesses clearly indicates that important and relevant documents remain to be disclosed, supporting the request for an adjournment.

[45] On May 30, 2013, the Tribunal held a CMCC, during which the Commission provided an updated proposed timeline. This proposal included the following:

a. setting dates for the retaliation issue anytime in the hearing weeks already scheduled in June, July and August;

b. August 30, 2013, as the Respondent's disclosure deadline; and

c. the hearing on the merits scheduled to start September 3, 2013.

[46] This proposal was supported by the AFN and the Chiefs of Ontario. The Caring Society maintained its objection to the adjournment, referring to its submissions of May 28, 2013.

VI. Letter Decision

[47] Concerned with the practical implications of a decision on the two motions and with the desire to provide the parties with greater certainty in moving forward with this case as quickly as

possible, the Tribunal issued a decision in the form of a letter on June 3, 2013, with reasons to follow. The letter decision reads as follows:

> This is a point form decision on the Respondent's adjournment motion and the First Nations Child and Family Caring Society's motion for a production order and costs with reasons to follow. The costs issue is taken under reserve and will be the subject of a further, subsequent ruling.
>
> The Respondent's adjournment motion is allowed in part; The First Nations Child and Family Caring Society's motion for a production order is allowed in part.
>
> The CHRC, AFN and the Chiefs of Ontario consent to the Respondent's request to adjourn the hearing in the above-noted matter and to reconvene on September 3, 2013 pending the Respondent's full and complete disclosure, which is to be completed by no later than August 31, 2013. The CHRC, AFN and the Chiefs of Ontario also consent to proceeding with the allegations of retaliation during the hearing weeks currently scheduled in July or August, 2013, The Caring Society, AFN, CHRC, and the Chiefs of Ontario are reserving the right to recall witnesses if needed. The Caring Society does not consent to the adjournment of the hearing dates.
>
> The Panel's decision is as follows:
>
> The hearing dates in June 2013 are adjourned. The hearing will reconvene on July 15, 2013, continuing until July 26, 2013, and will cover the allegations of retaliation. In addition, three days in August 2013 will be set aside to complete the hearing on the allegations of retaliation, should the July two-week period prove to be insufficient. These days are August 6 to 8, 2013.
>
> The hearing on the merits will resume on the remaining dates already scheduled from August 12 to 16, 2013 and August 26 to 30, 2013. The hearing will continue in September and into the fall until the completion of the hearing on the merits and in accordance with the Panel's and the parties' availabilities which will be discussed during the June 6, 2013, conference call. Please find enclosed a letter detailing the Panel's availabilities in this regard.
>
> The Respondent's disclosure will be completed by no later than August 31, 2013. The Respondent will provide the disclosure to the parties, in accordance with the schedule provided by the Commission, dated May 28, 2013. The parties are requested to further detail the content of the disclosure as per the schedule at the

> June 6, 2013 conference call. In the event that the parties do not reach an agreement in this regard, the Panel will render a ruling on this issue at the same time as it renders its reasons on the two motions.
>
> The parties will have the right to recall witnesses if needed and with the Panel's approval. This will be determined on a case-by-case basis, following an assessment of each situation.
>
> The Respondent will file its list of witnesses and detailed will-says for the hearing on the allegations of retaliation by no later than July 2, 2013. The Respondent will file its list of witnesses and detailed will-says for the hearing on the merits of the case by no later than August 31, 2013.

[48] The reasons for this decision follow below.

VII. Analysis and Decision

[49] The two motions in the present case, as recognized by the parties themselves, represent essentially two sides of the same coin. The Tribunal must determine, in light of the evidence presented and the risks of proceeding without the benefit of full disclosure, whether or not circumstances warrant granting the adjournment requested by the Respondent and if so, for how long. Should the Tribunal decide that an adjournment is not warranted and, as contended by the Caring Society, that principles of fairness and efficiency support the position that the proceedings should continue as currently scheduled, then the Tribunal must determine the most appropriate manner to maintain the integrity of its process in light of the large amount of outstanding documents to be disclosed by the Respondent.

[50] It is well established that the Tribunal is the master of its own procedure and the adjournment of proceedings falls within its discretion. This discretion must be exercised with consideration for section 48.9(1) of the *Act* and the requirement that proceedings be conducted informally and expeditiously, subject to the rules of natural justice: *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 at paras. 14, 15, 16 and 17; *Zhou v. National Research Council*, *supra* at para. 4; *Léger v. Canadian National Railway Company*, Interim

Ruling, November 26, 1999 (CHRT) at para. 6; *Marshall v. Cerescorp Co.,* 2011 CHRT 5; *Blain v. Royal Canadian Mounted Police,* 2012 CHRT 13.

[51] The considerations which the Tribunal must weigh in deciding to exercise this discretion in the present case include:

a. the prejudice caused to the Commission, the Complainants and the children they represent in delaying this matter for several weeks;

b. the prejudice caused to the Commission, who is leading the evidence, in proceeding without delay and hearing the testimony of its witnesses without the benefit of the Respondent's full disclosure, creating the risk of not having all relevant documents;

c. the prejudice caused to the Respondent if required to review the disclosure and prepare its case in a short timeframe during the summer months;

d. the impact to the Tribunal system in delaying the proceedings and having to find additional hearing dates suitable to all Tribunal members and parties; and

e. the impact to the integrity of the Tribunal process in continuing with the proceedings without the benefit of the Respondent's full disclosure.

[52] As these considerations demonstrate, there is no obvious solution to the issue at hand. At least one, if not all parties, will suffer a prejudice regardless of the decision taken.

[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 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 at para. 274; *Nova Scotia Construction Safety Association, Collins and Kelly v. Nova*

> *Scotia Human Rights Commission and Davidson*, 2006 NSCA 63 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.

[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.

[57] The Respondent argues that it informed the parties that the disclosure would be ongoing and that it expected its disclosure to contain approximately 30,000 documents in the September 26, 2012 CMC, implying that the recent adjusted estimate of 50,000 documents is not so far off and should therefore not come as a complete surprise to the parties.

[58] With respect, we do not share this position. The projection of the disclosure of 30,000 documents was set to be made in three sets until February 25, 2013, and many thousands have indeed been disclosed to date. The 50,000 documents referred to in the Respondent's letter dated May 7, 2013, are *additional* documents and are referred to as such by the Respondent itself. It cannot be said that the Respondent previously advised the parties of this fact. Moreover, an ongoing duty to disclose cannot be interpreted as including 50,000 outstanding documents amounting to two thirds of the remaining disclosure. The Commission and the Complainants, like the Tribunal, understood that with the exception of newly-created documents, the Respondent's disclosure obligations would be met by February 25, 2013. It bears highlighting that the Tribunal explicitly confirmed with the Respondent during the September 26, 2012 CMC

that the established disclosure timeline provided for sufficient time for the Respondent to meet its disclosure obligations.

[59] The Tribunal shares the concerns of the Caring Society in granting an adjournment which will cause delays to the proceedings. The present complaint, filed in February of 2007 and referred to the Tribunal by the Commission on October 14, 2008, has already been marked by a number of significant delays. However, the Tribunal must also be mindful of its duty to provide parties with a full and ample opportunity to present their case and make representations: *Léger v. Canadian National Railway Company*, Interim Ruling, November 26, 1999 (CHRT) at para. 6. See also *Zhou v. National Research Council*, *supra* at para. 4. Once the companies hired by AANDC have completed their disclosure work and the Respondent has completed its review, the Complainants and the Commission will also need time to complete their own review of the documents and to prepare their case accordingly. The Commission, who, as previously stated, is leading most of the evidence, expressed the desire to move expeditiously without compromising the quality of the evidence. The Tribunal shares the Commission's desire.

[60] It is for these reasons that the Tribunal has decided to allow, in part, both the Respondent's adjournment motion and the Caring Society's production motion. As stated in the Letter Decision reproduced above, the Tribunal is vacating the dates originally scheduled in June of 2013. The following weeks are set aside for the hearing of the allegations of retaliation:

a. July 15 to 19, 2013

b. July 22 to 26, 2013

c. August 6 to 8, 2013

[61] The hearing on the merits, as per the parties' availabilities stated during the June 6, 2013 CMCC, is scheduled for the following weeks:

a. August 12 to 16, 2013

b. August 26 to 30, 2013

c. September 3 to 6, 2013

d. September 9 to 13, 2013

e. September 23 to 27, 2013

f. October 28 to November 1, 2013

g. November 4 to 9, 2013

h. November 12 to 15, 2013

i. December 2 to 6, 2013

j. December 9 to 13, 2013

k. January 6 to 10, 2014

l. January 13 to 17, 2014

[62] The parties will have the right to recall witnesses if needed and with the Panel's approval. This will be determined on a case-by-case basis, following an assessment of each situation.

[63] The Respondent is to file its list of witnesses and detailed will-say statements for the hearing on the allegations of retaliation by no later than July 2, 2013.

[64] The Respondent is to file its list of witnesses and detailed will-say statements for the hearing on the merits of the case by no later than August 31, 2013.

[65] The Respondent's disclosure is to be completed by no later than August 31, 2013. As agreed upon by the parties in the June 6, 2013 CMCC, the Respondent is to provide an ongoing,

rolling disclosure to the parties approximately every three weeks, so as to avoid the disclosure of documents in bulk on the last day of the disclosure schedule.

[66] The parties have also agreed that the cut-off date for the Respondent's disclosure is December 5, 2012, for searches relating to documents from AANDC Headquarters and February 22, 2013, for documents in the audit and accountability section. This agreement is subject to other documents of relevance that might come to the Respondent's attention outside of this timeframe, which the Respondent would also have to disclose.

[67] The costs request made by the Caring Society and the AFN is taken under reserve.

Signed by

Sophie Marchildon
Panel Chairperson

Signed by

Réjean Bélanger
Tribunal Member

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
July 3, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

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

Ruling of the Tribunal dated: July 3, 2013

Appearances:

Paul Champ, for the Complainant First Nations Child and Family Caring Society of Canada

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

Philippe Dufresne, Daniel Poulin & Sarah Pentney, for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee & Nicole Arsenault, for the Respondent

Michael Sherry, for the Interested Party Chiefs of Ontario

Justin Safayeni, for the Interested Party Amnesty International