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

File No.: 2014 CHRT 2
Members: Sophie Marchildon, Réjean Bélanger and Edward P. Lustig
Date: January 16, 2014

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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 or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *Act*).

[2] 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. In agreement with the parties, the Tribunal set hearing dates for the week of February 25 to March 1, 2013, and set the remaining hearing dates starting in April 2013. The Tribunal also set, with the parties' 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 for its third and final set of disclosure.

[4] On February 19, 2013, the Tribunal held a case management conference call (CMCC) with the parties to discuss a number of outstanding matters prior to the beginning of the hearing. The Commission stated that regarding the filing of exhibits, it was their understanding that there would be no requirement to authenticate documents but that parties could decide to bring objections regarding their relevancy. The Commission expressed that its intent was to file a Book of Documents with the Tribunal and that each of the tabs would be addressed separately as the hearing progressed. Tabs that were not filed or found inadmissible would be removed at the end of the hearing. The Respondent agreed to this proposal.

[5] On February 20, 2013, the Tribunal provided parties with a summary of the CMCC. Paragraph i) of the summary pertained to the filing of exhibits. It read:

> Each binder submitted by the parties will be filed as exhibits and marked accordingly (C for Complainant, HR for the CHRC, R for Respondent, CO for Chiefs of Ontario). Tabs that are not referred to or objected and ruled on during the hearing will be removed from the binder and not form part of the official record.

[6] The hearing began on February 25, 2013. The Tribunal heard the testimony of Dr. Cindy Blackstock, Executive Director of Caring Society, from February 25 to March 1, 2013. On February 26, 2013, the Respondent raised several objections during Dr. Blackstock's examination in chief. The Respondent expressed concerns that, throughout her testimony so far, Dr. Blackstock had tendered out of court statements for the truth of their contents. The Respondent submitted that these statements constituted hearsay evidence and were inadmissible.

[7] Having heard the parties submissions on the objection, the Panel rendered the following ruling orally:

> The panel understands and acknowledges the question and concerns raised by the respondent regarding evidence being tendered in absence of supporting documents and sworn testimony. However, this issue must be balanced with the tribunal proceeding in an orderly and expeditious fashion and in accordance with this tribunal's general practice to receive hearsay evidence subject to giving it the appropriate weight.
>
> Given the fact that in the instance objected to, we have not seen the letters, it will be given limited amount of weight. This is how we intend to proceed in the future with evidence of this nature.

[8] The testimony of Dr. Blackstock, 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.

[9] On May 7, 2013, the Respondent advised parties and the Tribunal that it had just received notice from its client that over fifty thousand additional documents had been identified as potentially relevant as well as an unspecified number of email documents, which the client was in the process of gathering, and remained to be disclosed. Shortly thereafter, the Respondent filed a motion seeking an adjournment of the hearing dates until November 2013, so that it could complete its disclosure obligations.

[10] The Caring Society opposed the Respondent's motion and on May 21, 2013, filed its own motion to, notably, compel the Respondent to produce the documents relevant to the complaint. The Caring Society took the position that the impact of the Respondent's late disclosure remained speculative and did not justify the adjournment of nine weeks of hearings. Any fairness concerns arising as a result of witnesses testifying prior to full disclosure could be remedied by allowing the recalling of witnesses. The Caring Society argued that, when weighed against the concrete prejudice to the Complainants caused by further delays, these speculative future breaches of fairness did not warrant the adjournment sought by the Respondent.

[11] Mindful of its duty to provide parties with a full and ample opportunity to present their case and make representations, and also seeking to balance this duty with that of proceeding in an expeditious manner, the Tribunal opted for a middle ground solution, vacating the hearing dates originally scheduled in June of 2013 and setting aside additional hearing dates starting in July until January 2014 (2013 CHRT 16). The Tribunal specified that parties would have the right to recall witnesses, if needed and with the Tribunal's approval, determined on a case-by-case basis.

[12] On November 20, 2013, the Caring Society requested the issuance of a subpoena to recall Dr. Blackstock as a witness. The Tribunal issued the subpoena on November 25, 2013.

[13] On December 9, 2013, the Commission recalled Dr. Cindy Blackstock to the stand. At the beginning of her testimony, Dr. Blackstock noted that the last time she had testified before the Tribunal, in February 2013, she had only benefited from approximately 8% of the

Respondent's disclosure. Counsel for the Commission specified that over one hundred thousand documents were disclosed by the Respondent following Dr. Blackstock's initial testimony.

[14] The Commission proceeded to lead Dr. Blackstock to the Commission's Book of Documents, HR-13, Tab 275. Dr. Blackstock testified that she had become aware of the document, a service agreement between the province of British Columbia and Indian and Northern Affairs Canada (INAC), now Aboriginal Affairs and Northern Development Canada (AANDC) entitled "Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve" through the Respondent's disclosure.

[15] The Respondent filed an objection, stating for the record that while the witness could identify the document as one that she had received through the disclosure, it was their view that the document could not be admitted into evidence simply on this basis. The Respondent expressed that Dr. Blackstock was neither the author nor the recipient of the document and as such, the document could not be admitted in the manner proposed by the Commission. Furthermore, the Respondent stated that Dr. Blackstock lacked sufficient knowledge to provide commentary on the document and that her testimony would merely constitute opinion evidence. The Respondent noted that it anticipated that this would be a common theme with the other documents that the Commission wished to put to Dr. Blackstock.

[16] The Respondent added that the Commission had decided not to call a witness from the province of British Columbia, a witness which could have been in a better position to comment on the service agreement between this province and INAC. In the Respondent's view, recalling Dr. Blackstock now so that she could speak to this document constituted an unfair and improper use of the right to recall a witness. A witness should not be recalled to enable the Commission and the Complainants to polish or fill a gap in their case.

[17] The Commission replied that in its view, the document was admissible as it formed part of the Respondent's disclosure. The Commission clarified that the purpose of recalling Dr.

Blackstock was to enable her to provide her opinion on the significance of some of the newly disclosed documents, on the basis of her professional experience and involvement in this case, as well as to allow her to explain the manner in which these documents impacted her previous testimony. The Commission noted that it had no intention of revisiting documents that were disclosed prior to Dr. Blackstock's initial testimony.

[18] The Caring Society supported the Commission's view, noting that the purpose of the recall was, in the interest of fairness, to place the witness in the same position she would have been in had the Respondent completed its disclosure prior to the start of the hearing. Nevertheless, the Caring Society stated that in its view, since the majority of the documents that were disclosed are government records, they are *prima facie* admissible.

[19] The Tribunal briefly adjourned the proceedings to consider the objection. The Tribunal advised the parties that, in light of the Commission's intention to put a number of other newly-disclosed documents to Dr. Blackstock in a similar manner, the Tribunal felt that it would be best to decide the issue of document admissibility now, rather than wait until the end of the hearing as had been initially agreed upon by the parties.

[20] The Caring Society advised the Tribunal that it would therefore file a motion regarding document admissibility with the Tribunal the following day, or soon thereafter. The Caring Society provided the Tribunal and parties with a Notice of Motion, entitled: Motion for an Order Admitting Documents as Evidence for the Truth of their Contents.

III. The Caring Society's Motion

[21] It is this motion that is the subject of the present ruling. With this motion, the Caring Society seeks:

> "an Order that all documents contained in HR Binders 1 to 13 which were obtained from the Respondent through the *Access to Information Act*, *Privacy Act*, or disclosure in these proceedings are hereby admissible as evidence for the truth of their contents, regardless of whether or not the author or recipient of the

document is called as a witness, and whether or not they are put to any other witness".

[22] The Caring Society lists the following grounds in support of its motion:

1. The Canadian Human Rights Commission and the Complainants have obtained a very large volume of documents from the Respondent through disclosure in this proceeding as well as requests pursuant to the *Access to Information Act* and the *Privacy Act*;

2. The Canadian Human Rights Commission has introduced many of these documents as exhibits in this proceeding on a preliminary basis, and these documents are contained in HR Binders 1 to 13;

3. There is no dispute between the parties about the authenticity or relevance of these documents;

4. All Government documents in the Commission's binders are admissible for the truth of their contents without the necessity of calling the author or recipient on <u>any or all</u> of the following exceptions to the traditional hearsay rule:

    a. The principled exception to the hearsay rule authorizes the admission of government documents for the truth of their contents;

    b. The documents contain declarations made in the course of business duty, and therefore are admissible pursuant to that exception; and

    c. Many of the documents contain statements that are admissions against the interest of the Respondent, and therefore are admissible as admissions;

5. The Respondent is not prejudiced by having its own documents admitted as evidence, as it still has the right to call witnesses to clarify or rebut the information contained in the documents;

6. Given the volume, scope and governmental source of the documents, the interests of justice will be served by admitting the documents as evidence

without the necessity of calling government officials to identify them as it would be highly impractical, costly, and would significantly delay the proceedings to require the Commission or the complainants to call witnesses for every document in question;

7. While the Complainant's position is that the documents are admissible in a Court of law in accordance with the previously noted exceptions to the hearsay rule, the Tribunal has the authority to accept documents as evidence whether or not they may be admissible in a Court; and

8. Rules 1(1), 3, 9(4), of the *Canadian Human Rights Tribunal Rules of Procedure* and section 50(3)(c) of the *Canadian Human Rights Act*.

[23] In a CMC in the afternoon of December 9, 2013, the parties agreed to argue the Motion on December 10, 2013. The parties also agreed to argue the question of the parameters of the recall of witnesses, as raised by the Respondent.

IV. Parties' Submissions

A. The Caring Society's Position

[24] The Caring Society submits that the rules of evidence are to facilitate truth-seeking, judicial efficiency and fairness in the adversarial process. While there is a presumptive exclusionary rule of hearsay evidence, there are many exceptions to this rule. The exclusionary rule of hearsay is not as strict as it once was.

[25] The Supreme Court of Canada broadened the exceptions to the hearsay rule in *Ares v. Venner*, [1970] S.C.R. 608, where the Court found that nurses' notes could be admitted for the truth of their contents without the necessity of the original makers of the notes being called as witnesses. The Court made a list of factors that should be considered in determining the admissibility of this type of evidence: the material convenience of calling the witnesses, the expense to the litigants of calling these witnesses, the cost to the public in length and time, and the likelihood that the record, made in the course of the witness' duties, was impartial and

trustworthy. Following this decision, a number of evidence acts were amended and some of these exceptions to hearsay became codified.

[26] *R. v. Khan*, [1990] 2 S.C.R. 531 [*Khan*] and *R. v. Smith*, [1992] 2 S.C.R. 915 [*Smith*] further clarified and simplified the law of hearsay by creating the principled exception to the hearsay rule. Pursuant to this stand alone exception, hearsay evidence became admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity. As such, if the trier of fact is satisfied that the documents are reliable and necessary and the probative value outweighs any prejudicial affect to the opposing party, the documents can be admitted despite hearsay.

[27] The Caring Society submits that the principled exception to hearsay is applicable in the present case. The Caring Society relies, in this regard, on the *Éthier v. Canada (RCMP Commissioner) (C.A.)*, [1993] 2 F.C. 659 [*Éthier*], the *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2005] O.J. No. 5775 [*PIPS*], and the *Ault v. Canada (Attorney General)*, [2007] O.J. No. 4924 [*Ault*] decisions, which have applied the principled exception to hearsay.

[28] In *PIPS*, Panet J. stated the following in regard to the criteria of reliability and necessity:

> As to the criterion of reliability, it is evident that these documents were prepared by senior or knowledgeable officials within departments or agencies of the federal government. They describe or explain the operation of the Superannuation Plans and these accounts. In many cases, they were for the purpose of conveying information to Ministers and senior government officials or other departments of government. In my view, it is reasonable to expect that a high premium would be placed on their accuracy. There is also the expectation of candor, given the circumstances and the fact that there was no litigation existing at the time. This evidence has the "circumstantial guarantee of trustworthiness".
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> […]
>
> In the present circumstances, given the range of the documents and the lengthy period over which they were created it may be difficult, or indeed impossible, for

> the Plaintiffs to locate all of the authors of the documents. In such event, those documents or some of them might never be made available at the trial of these actions. In some cases, even if the author was available, the attendance in court would be needless and a waste of the court's time where that person's evidence would be simply to give evidence on a matter that could reasonably be confirmed by hearsay evidence.
>
> There is therefore the advantage of efficiency and expediency with respect to the proposed evidence.
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> Further, in all cases, these are Crown documents that were prepared contemporaneously and at times when the Plaintiffs were not present. It would be somewhat unfair to require the Plaintiff to call witnesses to tender in evidence these documents prepared by them, who it may be expected, might be witnesses adverse to the position of the Plaintiffs. It is open to the Defendant to call the authors of the documents or other officials to explain the statements made in these documents.
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> *PIPS* at paras. 70, 73-75

[29] The Caring Society submits that in the present case, the documents satisfy the principled exception test as detailed in *PIPS*. As was the case in *Éthier* and *PIPS*, the majority of the documents at issue in the present case are government documents, which are inherently reliable and can be admitted for the truth of their contents. In terms of necessity, the documents in the present case originate from all parts of the country and cover a lengthy period of time. In addition, not all of the documents clearly indicate the names of their authors. Combined with the fact that these witnesses would be testifying against their employer and may be hostile, the Caring Society is of the view it would be difficult and onerous to require that the Complainants call them. Furthermore, calling the numerous authors of these documents simply so that they can reiterate what the documents contain would be highly inefficient and risk unnecessarily prolonging these proceedings.

[30] The Caring Society notes that these documents are the government's own documents and as such, they are in the best position to provide explanations, clarifications and to rebut this evidence by calling witnesses to do so if needed. In light of the Respondent's ability to provide

this defence, the Caring Society is of the view that the admission of these documents in the manner proposed causes no unfairness or prejudice to the Respondent.

[31] In addition to the principled exception to the hearsay rule, the Caring Society also relies on the common law exception relating to declarations made in the course of business duty. Pursuant to this exception, declarations of this kind are admissible in evidence: *Ault* at paras. 24-25. The Caring Society submits that many of the documents at hand contain declarations that have been made by public servants in the course of their duty and which fall under this exception.

[32] Finally, the Caring Society relies on the common law exception of admissions made against interest: *Ault* at paras. 27-28. The Caring Society contends that many of the documents at issue in the present case contain admissions on the part of the government to some of the key issues before the Tribunal: namely, that children on reserve do not receive the same services as children off reserve. In light of this, the Caring Society submits that these documents fall under this exception and should be admitted.

[33] Pursuant section 50(3)(c) of the *Act*, the Tribunal possesses a wide discretion to admit evidence regardless of whether or not it is admissible in a court of law. The Tribunal is master of its procedure and, provided there is no real unfairness to the Respondent, the Caring Society submits that the documents should be *prima facie* admissible for the truth of their contents, regardless of whether or not they were put to a witness. Like any other evidence, they would then be subject to weight. The Caring Society is mindful that, in bringing into evidence a document for the truth of its contents in this manner, it runs the risk that the Respondent bring forward contradictory evidence and that the Tribunal weigh the evidence without the benefit of *viva voce* testimony supporting the Caring Society's position. The Caring Society is aware that this approach runs contrary to Rule 9(4) of the Tribunal's Rules of Procedure and requests an exception to the Tribunal's usual procedure in this regard.

[34] As to the question of the recall of Dr. Blackstock, the Caring Society reiterates its position that she should be placed in the same position that she was in when she was called in February 2013. This means that she should be able to address the documents that were subsequently disclosed and any issues arising as a result. The Caring Society is of the view that this causes no prejudice to the Respondent.

B. The Commission's Position

[35] The Commission supports the Caring Society's motion and is also of the view that these documents should be admitted.

[36] The Commission agrees with the Caring Society's submission that there is an exception to the hearsay rule for business records. The Commission submits that this exception has received a broad interpretation (*Canada (Minister of Citizenship and Immigration) v. Skomatchuk*, 2006 FC 730) and that the newly-disclosed documents in the present case were created in the "usual and ordinary course of business", as defined pursuant to section 30 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, falling under this exception, and should therefore be admitted.

[37] The Commission submits that admitting a document for the truth of its contents does not signify that it must be afforded absolute weight. Rather, this means that the document does not need to be authenticated by a witness. While this type of evidence may not respect the "best evidence rule", this is a consideration that can be taken into account by the Tribunal at the weighing stage, once the documents are admitted: *Canadian Federation of Students v. Natural Sciences and Engineering Research Council of Canada*, 2008 FC 493 at para. 44.

[38] Moreover, administrative tribunals are not bound by the strict rules of evidence to which courts must adhere. This was recognized by the Federal Court in *Telus Communications Inc. v. T.W.U.*, 2005 FCA 262 [*Telus*] at paragraph 28, a case cited in this instance by the Respondent. Section 50(3) of the *Act* provides that the Tribunal can receive evidence in a multiple ways,

including by admitting hearsay. The Commission submits that it is in the public interest that these documents be entered in the evidentiary record so that it can be as complete as possible. None of the parties are served if documents relevant to the case are not before the Tribunal.

[39] The Commission wishes to distinguish the Tribunal's decision in *Jeffers v. Canada (Citizenship and Immigration),* 2008 CHRT 25 [*Jeffers*], decided by Member Jensen, from the present case. In this decision, Member Jensen refused to admit a report into evidence as proof of the truth of the contents on the basis that it constituted hearsay evidence and did not satisfy the factors of reliability and necessity as per the *Khan* and *Telus* decisions. The Commission notes that at the time, Member Jensen did not have the benefit of the jurisprudence cited today by the Caring Society and that the Commission in this case had failed to indicate why it was necessary to introduce this evidence: *Jeffers* at para. 11. The Commission contends that in the present case, the Complainants have clearly indicated why the admission of the documents at issue meets the test for necessity.

[40] Turning to the issue of witness recall, the Commission notes that it is not aware of any jurisprudence dealing with witness recall and that the only jurisprudence of relevance pertains to the re-opening of a case. As such, the Commission relies on *Varco Canada Limited v. Pason Systems Corp*, 2011 FC 467, where the Court establishes five factors to consider in deciding to reopen a trial: relevance, necessity, reliability, due diligence and prejudice. The Commission submits that these factors are applicable to the present case.

[41] Looking at the issue of relevancy, the Commission contends that, since the documents are part of the Respondent's disclosure, they have already recognized that they are potentially relevant. As such, it is difficult for them to now state that these same documents do not meet the test for relevancy. The Commission submits that the admission of the documents also meets the test for necessity. As this factor encompasses a practical component, the Commission contends that if it were to call a witness for every document, this would result in lengthy and unnecessary delays to the present proceedings. Since these documents emanate from the Respondent, the

provinces or from other established sources, the Commission submits that they are inherently reliable. As for the due diligence factor, the Commission has made best efforts to review all of the documents since their disclosure. Finally, the Complainants would be prejudiced if Dr. Blackstock was not able to comment on these documents and indicate how they impact her testimony. These documents were not available to Dr. Blackstock when she first testified, through no fault of the Commission or the Caring Society.

[42] The Commission also relies on *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716 [*S.G.G.*], a criminal law case dealing with the reopening of evidence. In particular, the Commission notes the Court's finding that the ability to allow the reopening of a case "becomes narrower as the trial proceeds because of the increasing likelihood of prejudice to the accused's defence as the trial progresses". The Court states, however, that where the Crown has not yet closed its case, the discretion is quite broad: *S.G.G.* at p. 733. The Commission submits that in the present case the Complainants have not yet closed their case and the Tribunal therefore possesses a wide discretion to allow the recall of a witness so that she can testify to documents she did not previously have in her possession.

[43] The Commission submits that the purpose of recalling Dr. Blackstock is have her testify to documents that she did not have the benefit of seeing previously, as well as to discuss the impact that these documents may have had on her testimony. As the main complainant in this case, Dr. Blackstock has a breadth of knowledge of the issues along with relevant wide-ranging professional experience. She possesses a unique understanding of the issues and how to interpret these documents and should be afforded the chance to speak to these documents.

[44] In the Commission's view, she should be placed in the same position she would have been when she first took the stand. The Commission notes that, at this time, the only parameter to her testimony was that it be relevant to the complaint. This same parameter should apply now. However, if the Tribunal determines that additional parameters must be placed, then the Commission proposes that Dr. Blackstock's testimony should extend to anything that arises from the newly-disclosed documents and any issues arising from them. This would include subject-

matter that she could not previously comment upon because the evidence was not present or insufficient. This would include, for example, evidence regarding the Yukon.

C. The AFN's Position

[45] The AFN supports the interventions by the Caring Society and the Commission and adopts their position.

[46] Regarding the issue of witness recall, the AFN agrees with the Commission's submission that, pursuant to the *S.G.G.* decision, as the Complainants have not yet closed their case, the Tribunal has a wide discretion to allow re-opening the evidence particularly since it is still possible for the Respondent to respond. There is no prejudice to the Respondent as they may cross-examine Dr. Blackstock and bring forward other witnesses and documents in support of their position, should they desire. The AFN shares the Commission's view that Dr. Blackstock should testify to the newly-disclosed documents as if she had them in her possession when she first testified.

[47] The AFN agrees with the Caring Society's interpretation of the *Ault*, *PIPS* and *Éthier* decisions. At paragraph 22 of the *Ault* decision, the Court notes that public documents are a common law exception to the hearsay rule and, at paragraph 25, that they are deemed to be reliable. The Court later, citing the *PIPS* decision, highlights that the criterion of reliability includes consideration for the fact that the documents were prepared by senior officials of the federal government and, as a result, that it is reasonable to place a high premium on their accuracy particularly since there was no existing litigation at the time: *Ault* at para. 36. The Court also notes at paragraph 50 that since the documents were prepared by the Respondent, it is difficult to identify any prejudicial effect. The AFN submits that this is comparable to the case at bar and that it would be unrealistic to ask the Caring Society and the Commission to call witnesses to speak to every one of these documents to authenticate them. The AFN is in agreement with the position that many of these documents can be taken at face value and that in the end, the absence of authentication will go to weight.

[48] The AFN concludes by stating that it would like this case to proceed as expeditiously as possible. An entire generation of children has already been impacted by the longevity of this case.

D. The Respondent's Position

[49] The Respondent notes that when it first raised its objection to Dr. Blackstock's testimony on December 9, 2013, it was with the belief that in light of time constraints, this objection would form part of their general outstanding objection to documents being admitted for the truth of their contents, an issue that parties had agreed to argue at the end of the proceedings.

[50] The Respondent states that it does not take issue with the authenticity of the documents that come from the Respondent's disclosure, nor does it take the view that it is necessary for the Commission and the Caring Society to call all of the originators of the documents as witnesses. The Respondent has no objection to these documents being brought forward for the fact that they were created, that an opinion was expressed, or that, for example, an exchange took place between two public servants. The Respondent submits, however, that this is not the same as accepting these documents "for the truth of their contents" as requested by the Caring Society. In the Respondent's view, to admit a document for the truth of its contents, the Tribunal must examine whether the document meets the twin components of reliability and necessity as set out in *R. v. Khelawon,* 2006 SCC 57 [*Khelawon*]. This modern approach to the hearsay exception is also the approach that was followed in the cases that the Caring Society and the Commission have relied on. The Respondent submits that following this approach supports the Tribunal's ultimate goal of truth-seeking and supports the Tribunal's method of admitting documents on a case-by-case basis as it has done until now in these proceedings.

[51] In conducting this analysis, the Respondent is of the view that when documents are being introduced by a witness who has neither created nor received the document, this creates problems with regard to reliability and could, in this way, impact the admissibility of this

evidence for the truth of its contents. This does not, however, prohibit the witness from providing his or her opinion on the evidence.

[52] The Respondent objects to the Caring Society's request for a blanket ruling which would have all these documents admitted without having conducted this analysis. Not all of the documents emanate from the Respondent's disclosure. Without having seen the documents, the Tribunal cannot adequately determine whether they are all government documents and contain other elements, such as admissions, which would support their admission pursuant to exceptions to the hearsay rule.

[53] The Respondent does not interpret the jurisprudence in the same manner as the Caring Society and the Commission. The *Ault* and *PIPS* cases were both actions before the Ontario Superior Court and as such, were decided pursuant to a different structure. In both of these decisions, the Court did not make a blanket ruling on the admissibility of the documents but rather, examined them individually in the context of the case and in light of the exceptions to the rule against hearsay. The Federal Court of Appeal also proceeded in this manner in the *Éthier* decision. In other words, the Respondent is of the view that these decisions are in conformity with the principles set out in *Khelawon* and support an approach where documents are admitted on a case-by-case basis.

[54] The Respondent further objects to the Caring Society's submission that a document should be admitted, for the truth of its contents, despite the fact that no witnesses had testified to it, contrary to Rule 9(4) of the Tribunal's Rules of Procedure. This would put the Respondent in an untenable position of not knowing the case that it needs to meet. If the Complainants do not indicate to the Panel and to the Respondent what parts of the documents they are relying on and on what basis, the Respondent cannot adequately respond and clarify any misinterpretations. Furthermore, the Respondent submits that if the Complainants only do this at the arguments stage, as suggests the Caring Society, this would raise issues of fairness as the Respondent would no longer be in a position to call evidence in its defence.

[55] As to the issue of recall, the Respondent is of the view that the purpose of recalling witnesses is, out of procedural fairness, to provide a witness with the opportunity to clarify their testimony if they misspoke because they did not possess a certain document at the time. The purpose is not to enable the Complainants to polish their case. Dr. Blackstock's evidence last February dealt with her experience as a front line social worker and did not touch upon policy. The Commission originally expressed that it would call a witness from the province of British Columbia but did not do so in the end. The Respondent submits that to call Dr. Blackstock to speak to these issues instead is not an appropriate use of the recall.

[56] The Respondent submits that the Tribunal possesses discretion in allowing the recall of a witness, but that this discretion is not unlimited and it must be exercised with fairness to all parties. Pursuant to the *Telus* decision, the Tribunal can allow hearsay evidence to be introduced through the testimony of Dr. Blackstock if it believes that this is the only way to admit it. The Respondent notes however, that this would expand the rule of recall.

V. Point Form Decision

[57] Concerned with the practical implications of a decision on the hearing 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 point form decision in the form of a letter on January 6, 2014, with reasons to follow.

[58] This point form decision reads as follows:

> On December 9, 2013, the Caring Society filed a Notice of Motion indicating that they intended to file a motion to the Tribunal on December 10, 2013, or soon thereafter. The Notice of Motion is entitled: Motion for an Order Admitting Documents as Evidence for the Truth of their Contents. With this Motion, the Caring Society seeks:
>
> > "an Order that all documents contained in HR Binders 1 to 13 which were obtained from the Respondent through the *Access to Information Act*, *Privacy Act*, or disclosure in these proceedings

> are hereby admissible as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document is called as a witness, and whether or not they are put to any other witness".

The Caring Society made the motion before the Tribunal on December 10, 2013. Parties made submissions on the motion on this date. In seeking the admission of HR Binders 1 to 13, the Caring Society asks the Tribunal to declare Rule 9(4) of the *Canadian Human Rights Tribunal Rules of Procedure* (the Rules of Procedure) inapplicable during the present proceedings. Rule 9(4) of the Rules of Procedure reads:

> Admission of documents from books of documents
>
> **9(4)** Except with the consent of the parties, a document in a book of documents does not become evidence until it is introduced at the hearing and accepted by the Panel.

The Commission made submissions in support of the Caring Society's Motion. The Respondent, on the other hand, opposes the Motion. The Respondent has also requested that the Tribunal take this opportunity to define the parameters of witness recall.

The Tribunal has reviewed the parties' submissions and the supporting evidence on both the Motion and the question of witness recall. Concerned with the practical implications of a decision on the present motion and with the desire to provide the parties with greater certainty in moving forward with this case as quickly as possible, the Tribunal issues the following decision with reasons to follow:

Considering that:

- the Tribunal is master of its own procedure;

- paragraph 50(3)(c) of the CHRA provides that the Panel may "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit whether or not that evidence or information is or would be admissible in a court of law";

• the Tribunal is not bound by traditional rules regarding the admissibility of hearsay evidence; and

• paragraph 48.9(1) of the *CHRA* provides that "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow";

The Tribunal determines the following:

a. Rule 9(4) of the Tribunal's Rules of Procedure will continue to apply. As such, documents will continue to be admitted into evidence, on a case-by case basis, once they are introduced during the hearing and accepted by the Panel;

b. There will be no need to call witnesses for the sole purpose of authenticating documentary evidence. Any issues raised relating to authentication will be considered by the Panel at the weighing stage;

c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:

i. which portions of the document are being relied upon; and

ii. how these portions of the document relate to an issue in the case.

d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

With regard to the recalling of witnesses, the Tribunal determines the following:

> e. In the circumstances of this case, the purpose of recalling a witness is to place him or her in the same position they would have been in, had they benefitted from the entirety of the Respondent's disclosure. The witness will therefore be entitled to speak to the newly disclosed documents and to any issues arising as a result.

[59] The reasons for this decision follow in the analysis below.

VI. Clarification Decision

[60] On January 14, 2014, the Commission recalled Dr. Blackstock. Dr. Blackstock testified that the documents that she intended to discuss in the following days consisted of documents emanating from the Respondent's disclosure which she did not possess at the time of her initial testimony, documents obtained via the Internet not available at the time of her initial testimony, as well as documents from the ATIA received on April 9, 2013. Dr. Blackstock testified that, unless she indicated otherwise, she was not the author of any of the documents emanating from the Respondent's disclosure. Counsel for the Commission then proceeded to lead Dr. Blackstock once again to the Commission's Book of Documents, HR-13, Tab 275.

[61] The Respondent intervened, asking by way of clarification if, in light of the Tribunal's ruling, the Commission's intention was to rely on the entirety of the document or simply on the sections mentioned by Dr. Blackstock.

[62] The Caring Society added to the Respondent's intervention, stating that they also required clarification regarding the Tribunal's ruling, particularly with regard to the meaning of the term "portions" found at paragraph c. of the point form decision. The Caring Society expressed that the degree of specificity required by the Tribunal, in terms of leading witnesses to the evidence, remained unclear. It also stated that, pursuant to the Tribunal's ruling, it would be in a position to provide the Respondent and the Panel with a comprehensive table indicating what portions of the documents they intended to rely on during final argument, prior to the beginning of the Respondent's case.

[63] The Tribunal deliberated on the matter and following a brief adjournment, orally issued the following clarification decision:

1. Portion means "a part". The use of the term portion in the point form ruling means the part that the witness is testifying about or that Counsel directs the Panel to. For example, Dr. Blackstock testified to several portions of the BC service agreement found at tab 275;

2. The Panel's intention is to ensure that the opposing party knows the case to be met in response to the party adducing evidence;

3. In dispensing of the requirement to authenticate documents through a witness, the Tribunal did not intend to permit the party adducing evidence to rely on evidence during its final argument that wasn't introduced during the evidence phase of the hearing according to the procedure set out in paragraph c of the point form ruling without giving the opposing party an opportunity to adequately prepare a response, if need be;

4. If a party intends in argument to rely on portions of documents that were not introduced during the hearing phase in accordance with paragraph c), it runs the risk of the Panel allowing the opposing party additional time to adequately prepare a response.

   The Tribunal takes note of Mr. Champ's suggestion that prior to the Respondent commencing its case, he will provide a clear indication of portions of documents not introduced during the evidence phase of the hearing that he intends to rely on in argument.

   This may help to allow the Respondent to prepare its own evidence during the hearing phase and may avoid the need for the Panel to provide the curative measures set out in paragraph d) of the point form decision.

VII. Analysis and Decision

[64] The parties in this instance provided the Tribunal, on very short notice, with a thorough overview of the law regarding the admissibility of hearsay evidence and it is worth noting their efforts in this regard. Having said this, the majority of the jurisprudence provided emanated from

the civil and criminal law contexts which, particularly with respect to the rules of evidence, differ from the human rights context.

[65] Parties agree, the Tribunal is master of its proceedings and possesses a wide discretion when it comes to determining the admissibility of evidence. This is explicitly stated at paragraph 50(3)(c) of the *Act*. This paragraph provides that, subject to subsections (4) and (5), the Panel may "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit whether or not that evidence or information is or would be admissible in a court of law".

[66] Pursuant to the contextual approach to statutory interpretation, adopted by the Supreme Court in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.), we are to "look at the words in the legislation in light of their grammatical and ordinary sense, as construed in accordance with the scheme of the legislation, the object of the legislation, and the intention of the legislature". In light of this, it is useful to consider paragraph 50(3)(c) alongside subsections 50(4) and 50(5) of the *Act*, which read as follows:

> Limitation in relation to evidence
>
> (4) The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.
>
> Conciliators as witnesses
>
> (5) A conciliator appointed to settle the complaint is not a competent or compellable witness at the hearing.

[67] The legislature has, in these provisions, provided explicitly for the limitations to the Tribunal's ability to admit evidence and to compel witnesses. With the exception of these limitations, paragraph 50(3)(c) allows the Tribunal to "receive and accept any evidence and other information" which is limited only by the Tribunal overarching duty of procedural fairness

pursuant to paragraphs 48.9(1) and 50(1) of the *Act* and the relevancy of the evidence: *Dhanjal v. Air Canada*, [1996] C.H.R.D. No. 4 at paras. 21-22; *Warman v. Kouba*, 2006 CHRT 50 at para. 124 [*Warman*].

[68] As a creature of statute, the Tribunal derives its powers solely from its enabling legislation. In the context of the present motion, the jurisprudence has recognized that the wide discretion provided at paragraph 50(3)(c) allows the Tribunal to receive and accept hearsay evidence: *Canada (Attorney General) v. Mills (F.C.A.)*, [1984] F.C.J. No. 917. The parties' submissions pertaining to the principled approach of reliability and necessity along with the common law exceptions to hearsay are of little help in this regard.

[69] The Tribunal agrees with the Caring Society and the Commission that it would be onerous and unhelpful to require that they call the authors of the documents for the sole purpose of authenticating them. The parties agreed that this would not be a necessary step at the February 19, 2013, CMCC prior to the beginning of this hearing. The Tribunal's practice in this case so far has been to admit relevant documents, regardless of hearsay, on a case-by-case basis as the parties introduce them into evidence, and to consider any issues regarding their reliability at the weighing stage. This enables the Tribunal to clearly identify the record which will form the basis for its final decision. The Tribunal informed the parties that this is the approach that it would follow in its oral ruling of February 26, 2013. This approach is also supported by the jurisprudence: *Canada (Attorney General) v. Brooks*, 2006 FC 1244 at paras. 36 – 38; *Warman, supra*, at para. 124. Contrary to the submissions of the Complainants and the Commission, the Tribunal is not of the view that the decisions in *Ault*, *PIPS* and *Éthier* support the admission of documents in a blanket manner. The Tribunal sees no reason to now depart from its practice and admit at once "all documents contained in HR Binders 1 to 13 which were obtained from the Respondent through the *Access to Information Act*, *Privacy Act*, or disclosure in these proceedings", as requested in the Caring Society's motion.

[70] The motion goes even further and as such, has highlighted the importance for the Tribunal to take this opportunity to further clarify its rules of procedure regarding the

introduction of evidence. In its motion, in addition to seeking a blanket admission of the documents, the Caring Society requests that the documents be "admissible as evidence for the truth of their contents, regardless of whether or not they are put to a witness". It seeks, in this regard, an exception to the Rule 9(4) of the Tribunal's Rules of Procedure. Pursuant to Rule 9(4), the Tribunal's usual practice at the end of a hearing is to remove from the Books of Documents any document which parties have not referred to during the proceedings. The Commission confirmed its understanding of this rule and its applicability in the February 19, 2013, CMCC and the Tribunal informed all parties of this procedure in the summary of this CMCC.

[71] If the Tribunal were to allow this request, this would mean that documents which were never discussed by a witness during the hearing would be admitted into evidence and form part of the record. The Caring Society does not state that it would instead refer to these documents in final argument, although Counsel for the Caring Society expressed in oral argument that it was their intention to do so as much as possible. The result is that documents, never discussed at any point during the hearing, could conceivably form part of the evidence on which the Tribunal is to rely to render its final decision.

[72] This request raises a number of issues. The Complainants have already tendered several hundred documents and recently reiterated their wish to reserve their right to introduce an unknown amount of additional documents as they complete their review of the Respondent's disclosure. Allowing this request would put the Tribunal in the position of having to examine and even interpret potentially lengthy and even technical documents without the benefit of any *viva voce* evidence or oral argument. While the Tribunal recognizes that the amount of evidence introduced is significantly less than the hundred thousand plus documents that formed part of the disclosure that the parties had to review, this does not discharge the Complainants of the onus of making their case.

[73] Moreover, to proceed in this manner also raises a serious issue of fairness for the Respondent. In both the point form decision and the clarification decision, the Tribunal expressed the necessity for a party to know the case that it needs to meet. In admitting documents

without requiring that the Complainants specify their relevance to the case and the manner in which they support their position, the Tribunal may place the Respondent in a position where it is unable to adequately respond or rebut this evidence.

[74] In light of this, as stated in the Tribunal's point form decision, the Tribunal denies the request for an exception to Rule 9(4) and will, at the end of the hearing, proceed with the removal of documents that have not been properly introduced and accepted by the Tribunal, which would have thereby completed their admission into evidence. The Tribunal clarified the necessary steps to follow to ensure the introduction of documents at paragraph c. of its point form decision. In doing so, the Tribunal has relaxed the application of Rule 9(4). This paragraph reads as follows:

> c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
>
> i. which portions of the document are being relied upon; and
>
> ii. how these portions of the document relate to an issue in the case.
>
> [Emphasis ours]

[75] The witnesses who have previously given evidence, to the extent that they testified with respect to portions of documents tendered in evidence and to their relevance to the issues in this case, have done so in a manner consistent with this paragraph of the Panel's point form ruling. The documents that will be removed at the end of the hearing will be all documents where no portion has been referred to by a witness in testimony or by Counsel during oral argument. In rendering its final decision, the Tribunal will be relying on the portions of documents tendered that have been referred to in this manner.

[76] Counsel for the Commission and the Caring Society have indicated that it is their intention to lead the Panel in their closing submissions to portions of the documents tendered

into evidence in this case that they feel are relevant to the proceedings. To the extent that they do so in respect to portions of documents not testified to by witnesses, this is a departure from normal practice and the Tribunal's usual procedure with regard to leading evidence. While, in light of its flexible Rules of Procedure, the Tribunal has allowed this request, this departure from usual practice requires that the Tribunal ensure the observance of natural justice principles.

[77] .Parties are free to decide their strategy to present their case, however fairness dictates that parties must also know the case they have to meet and can adequately prepare a response. If the Complainants or any other party wishes to introduce during its final argument evidence which was not introduced during the evidence phase of the hearing, the Tribunal provided for a curative provision that may be invoked to remedy any unfairness caused to the opposing party. This is found at paragraph d. of the point form ruling which reads:

> d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

[78] The Complainants and the Commission have not yet closed their case and may still decide to call additional witnesses. The Complainants and for the Commission have also communicated their intent to provide the Tribunal and the Respondent with a chart in which they will detail the portions of the documents on which they will rely during final argument. They have indicated that they would provide this chart in advance of the beginning of the Respondent's case so as to allow the Respondent to adequately respond. In as much as the Respondent will receive this chart in advance of the beginning of the presentation of its case it may be helpful to the Respondent in presenting its case and avoid the need to invoke the curative provisions of paragraph d. of the point form ruling. This, of course, will depend on what the

chart actually includes in describing the portions of relied on and the time that the Respondent will have to review the document in advance of having to present its case.

[79] Finally, regarding the purpose of the recall of Dr. Blackstock, as stated in the point form decision, the Tribunal agrees with the Caring Society and the Commission that it is to place the witness in the same position that she would have been in, had she benefited from the entirety of the Respondent's disclosure. This is to remedy to any prejudice caused to the Complainants and the Commission as a result of the Respondent's late disclosure. Dr. Blackstock, and any other witnesses the Complainants wish to recall, will be entitled to speak to any documents disclosed after their initial testimony and to any issues arising as a result.

Signed by

Sophie Marchildon
Panel Chairperson

Signed by

Réjean Bélanger
Tribunal Member

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 16, 2014