

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2017 CHRT 10

**Date:** April 13, 2017

**File Nos.:** T1726/8111 & T1769/12411

**Between:**

**Chris Hughes**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canada Border Services Agency**

**Respondent**

**Ruling**

**Member:** George E. Ulyatt

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## **I. Background**

[1] This Motion brought by the Complainant, Chris Hughes for the right to call reply evidence with respect to newly presented evidence after his testimony was completed and with respect to evidence that was called by the Respondent that he could not have anticipated when he gave his direct evidence.

[2] In support of his position the Complainant filed an Affidavit affirmed on the 17<sup>th</sup> day of January, 2017. This document sets forth the issues relating to evidence tendered by exhibits by the Respondent's witnesses and testimony at the hearing by the Respondent's witnesses.

[3] The Complainant sets forth in his Affidavit that the hearing before this Tribunal which commenced on June 15, 2015 which continued on and off for May, June, October and November, 2016. The Complainant's evidence was completed on May 20, 2016 save for a minor issue which Mr. Hughes was recalled on June 20, 2016 following two witnesses for the Complainant, Levan Turner and Eric Christou.

[4] The Complainant's issues arose with respect to the introduction of handwritten notes concerning the Public Service Commission proceedings dated October 12, 2005 and February 15, 2006 which were produced on June 13, 2016 and set forth eleven issues which were raised in these notes (Complainant's Factum paragraph 5(i)). Secondly, the Complainant takes issue with production of additional notes dated February 6, 2006 and August 29, 2006 before the Public Service Commission and were produced on October 18, 2016 (Complainant's Factum paragraph 5(i)(ii)).

[5] The second area of complaint arises out of evidence given by the Respondent's witnesses during the course of the hearing.

[6] The witnesses who the Complainant wishes to give reply evidence to are in respect of the following individuals:

- a. Barb Lennax: there are two issues with respect to her evidence identified at page 2 of the Notice of Motion and at pages 125 and 126 of the Complainant's Factum (Section 6(b)(i)(ii)(iii)).

- b. Robert Farrell and Catherine Black: there is one issue with respect to his or her evidence identified at page 2 of the Notice of Motion 6(c)(i)(ii)(iii) and at pages, 126 and 127 of the Complainant's Factum.
- c. Mark Northcote: there is one issue with respect to his evidence identified at page 3 of the Notice of Motion page 6(d) and at page 27 of the Complainant's Factum.
- d. Robert Farrell: there are three issues with respect to his evidence identified at page 3, 6(e)(i)(ii)(iii) of the Notice of Motion and at page 128 of the Complainant's Factum.
- e. Catherine Black: there is one issue with respect to her evidence at page 5 of the Notice of Motion 6(f) and at page 129 of the Complainant's Factum.
- f. Holly Stoner: there is one issue with respect to her evidence at page 5 of the Notice of Motion 6(g) and at page 129 of the Complainant's Factum 6(f).

[7] Counsel for the Complainant and the Respondent did agree that the principle authorities by the Complainant cite in the Complainant's Factum the governing principles with respect to reply evidence.

*R v. Campbell* (1977), 17 OR (2d) 673 (ONCA) at 17-18, CMR, Tab 11

*R v. Chaulk*, [1990] 3 SCR 1303 at para 118, CMR, Tab 9

*R v. GP* (1996), 31 OR (3d) 504 (ONCA) at 8, CMR, Tab 12

[8] Also *the Canadian Human Rights Act* Section 50(1) and 50(3c) states:

Conduct of inquiry

**50 (1)** After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through

counsel, to appear at the inquiry, present evidence and make representations.

(3) In relation to a hearing of the inquiry, the member or panel may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;

(b) administer oaths;

(c) subject to subsections (4) and (5), 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;

(d) lengthen or shorten any time limit established by the rules of procedure; and

(e) decide any procedural or evidentiary question arising during the hearing.

[emphasis added]

[9] The Complainant filed his materials and Notice of Motion, Affidavit and supporting documents. The Respondent filed a Reply in response and the Reply was followed by the Complainant. Oral omissions by counsel were made in Victoria on March 7, 2017.

[10] In the present case the parties, whilst agreeing in principle as to the law, take a different view as to the facts at hand and how it ought to be applied. Thus it is not surprising that the cases referred support both positions and were argued in such a manner.

[11] The Complainant argues that the matters raised were after the Complainant had closed his case or it was evidence not anticipated by the Complainant, or that the evidence took on a greater significance as a result of the Respondent's witness's evidence.

[12] The Respondent disagrees with the Complainant's characterization and submits that the evidence was not complicated and ought to have been anticipated, and that the intent of the request to reply to evidence of the Complainant is only to reinforce the

Complainant's testimony, and the evidence submitted by the Respondent's witnesses did not take on additional significance.

[13] Counsel for the Complainant argued that a Tribunal must be keenly aware of the "subtle scent" of discrimination and the Complainant's counsel stated in his reply factum page 4 "At every stage of the analysis, including the respondent's explanation, the Tribunal must carefully consider the entire circumstances of the complaint for the "subtle scent" of discrimination."

[14] Furthermore the Respondent states that the reply evidence is not a right but is a limited discretionary opportunity.

[15] The present matter before the Tribunal arose of complaint filed by the Complainant on July 9, 2008 and on December 19, 2011. The matters referred to the Tribunal on June 27, 2012 as a result of the referral to the Tribunal this matter have been motions respecting disclosure, redaction of documents, numerous Case Management Conference Calls and adjournments of the hearing based upon late disclosure. Ultimately there has been approximately six weeks of evidence.

[16] At present it appears the Respondent only has one witness to complete and once this witness has completed her testimony the case is completed subject to any reply evidence and ultimate arguments.

[17] What is concerning is that the parties did not fully address disclosure with respect to what was in their domain or what ought to have been in possession of the other party. As a result of the request by the Complainant the Respondent did produce PSC notes of October 12, 2005, February 15, 2006, February 6, 2006 and August 29, 2007. This documentation was completed after the Complainant had finished giving his testimony but prior to closing his case.

[18] It is well settled that a Canadian Human Rights Tribunal is not bound by the strict rules of evidence but is bound by the concept of fairness. The case of *Shoppa v. Canada* (Department of National Health and Welfare 2001 CHR 20) (Tab 8 of the Complainant's Motion Record) adopts *Barnasky v. Human Resources and Development Canada*:

The Canadian Human Rights Act makes it clear that the Tribunal is not bound by the strict rules of evidence. The Tribunal is, however, bound by principles of fairness. It is these principles of fairness to all of the parties which forms the scope and admissibility of reply evidence.

The Respondent should not be prejudiced by the late introduction of evidence which only confirms or supports the Complainant and Commission's case. Fairness to the Respondent requires that the Complainant call her evidence or call the evidence she seeks to rely on to provide her case in the initial presentation of that case so that the Respondent can fully respond to it.

The Complainant is entitled to adduce further evidence in reply to respond to new matters or defences raised by the opposing party and which the Complainant could not have reasonably anticipated.

[19] The issues presently before the Tribunal are difficult and are compounded by the fact that matters commenced in June, 2015 and all the transcripts of the proceedings are not available. However, any further delay would be unacceptable.

[20] In considering the law respecting reply evidence as submitted, the authority under the *Canadian Human Rights Act* not be bound by the strict rules of evidence and applying the doctrine of fairness of parties it is ordered:

**A. Issues Respecting Written Notes**

[21] Handwritten notes concerning the Public Service Commission proceedings:

- i. On June 13, 2016, the Respondent produced notes dated October 12, 2005, and February 15, 2006, taken by its representatives during the Public Service Commission proceedings; and
- ii. On October 18, 2016, the Respondent produced additional notes taken by its representatives at Public Service Commission proceedings dated February 6, 2006, and August 29, 2006.

[22] The Complainant will be allowed to give reply evidence with respect to matters raised in the Complainant's Notice of Motion. It is being so allowed because the notes

were produced late in the proceedings and were documents which ought to have been produced to the Complainant prior to his evidence.

[23] Counsel will be directed in examining the Complainant that the issues to be addressed by the Complainant shall be done by way of direct questions and not open ended statements. The Complainant and his Counsel are directed and will be reminded at hearing that this will not be an opportunity to expand theories of the case or lengthy versions of evidence not related to specific points.

## **B. Evidence of Specific Witnesses**

### **a. Barb Lennax**

[24] Matters identified as 6(b)(i)(ii) of the Notice of Motion at page 125 of the Complainant's factum will not be subject to reply evidence as a tests respecting reply evidence have not been met and it is noted that there was extensive evidence by the Complainant on these matters before the Tribunal.

[25] With respect to issue 6(b)(i)(ii) the document being the decision of The Public Service Commission will be tendered by consent as an Exhibit.

### **b. Robert Farrell and Catherine Black**

6(c) Testimony of Robert Farrell and Catherine Black identified as section 6(c) of the Complainant's Motion and at page 126 of the Complainant's factum being has not met the standard to justify reply evidence in this matter. There was considerable evidence both on direct examination and cross-examination with respect to these issues.

### **c. Mark Northcote**



Mr. Northcote's evidence identified at 6(d) of the Notice of Motion will be subject to reply evidence as the Tribunal had previously made the decision on same.

**d. Robert Farrell**

Mr. Farrell's evidence identified at 6(e)(i)(ii) has not met the threshold for reply evidence and this matter was actually covered in direct cross-examination. Therefore reply evidence is not allowed.

**e. Catherine Black**

Ms. Black's evidence 6(f)(i) of the Notice of Motion has not met the threshold for reply evidence and accordingly will not be allowed.

**f. Holly Stoner**

Ms. Stoner's evidence 6(c)(i) of the Notice of Motion has not met the threshold for reply evidence with respect to this issue and therefore reply evidence will not be allowed.

[26] The hearing dates resuming the week of April 24, 2017 are confirmed and any further motions will be heard at the commencement of the hearing.

*Signed by*

George E. Ulyatt  
Tribunal Member

Ottawa, Ontario  
April 13, 2017

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal Files:** T1726/8111 & T1769/12411

**Style of Cause:** Chris Hughes v. Canada Border Services Agency

**Ruling of the Tribunal Dated:** April 13, 2017

**Date and Place of Motion Hearing:** March 7, 2017

Victoria, British Columbia

### **Appearances:**

David Yazbeck, for the Complainant

No one appearing for the Canadian Human Rights Commission

Graham Stark, for the Respondent