

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2017 CHRT 31

**Date:** October 4, 2017

**File No.:** T2126/4215

**Between:**

**Nicole Grace Valenti**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian Pacific Railway**

**Respondent**

**Ruling**

**Member: Anie Perrault**

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## I. Facts

[1] On July 18, 2017 I rendered a ruling (2017 CHRT 25) ordering the Respondent to disclose to the other parties one of the 16 documents requested by the Complainant, being “CP’s *Benefit Team Agreement with Manulife and policy and procedure for non-unionized benefits*” (the “*Manulife Agreement*”).

[2] Following my ruling, the Respondent, on July 24, 2017 requested the Complainant’s consent to a draft confidentiality order applicable to the *Manulife Agreement*.

[3] An exchange of emails followed between the Complainant and the Respondent and between the Respondent and the Complainant’s lawyer representing her in another legal proceeding. Both the Complainant and the Respondent are involved before a civil court in a matter closely related to the matter before this Tribunal.

[4] No agreement as to a draft confidentiality order was reached, and on August 18, 2017, the date I had set for the Respondent to disclose the *Manulife Agreement*, the Respondent filed a motion for a confidentiality order.

[5] On September 6, 2017, we held a Case Management Conference Call (CMCC) to hear oral arguments from each party on that motion.

[6] The Commission, although not participating at the hearing, did participate in the CMCC, but did not oppose the motion for a confidentiality order.

[7] During the CMCC, Ms. Anita Shearer, Director, Total Rewards for the Respondent, and as such responsible for the application of the *Manulife Agreement*, was questioned by the Respondent’s counsel on that document and its content. Both the Complainant and the Commission had an opportunity to ask Ms. Shearer questions.

[8] Ms. Shearer confirmed that the *Manulife Agreement*, the subject of the motion for the confidentiality order, is a commercial agreement between Manulife and the Respondent, describing among other things the benefits of eligible employees. It contains confidential and sensitive financial and commercial information which, if disclosed to the

public, would, according to Ms. Shearer, cause undue hardship to both the Respondent and Manulife.

[9] Ms. Shearer also confirmed that the *Manulife Agreement* contains a confidentiality provision requiring the parties to keep some information confidential, and that public disclosure of such information would constitute a breach of the agreement.

[10] The Complainant had a few questions for Ms. Shearer. Following one question from the Complainant, the Respondent's lawyer agreed to provide her with a copy of the Collective Agreement which sets out Compensation and Benefits. The Commission had no questions for Ms. Shearer.

[11] Following Ms. Shearer's testimony, I heard oral submissions from Respondent's counsel.

[12] I also heard the Complainant's submissions, but as the Complainant was unable to continue with the CMCC due to a scheduling conflict, I suggested and all parties agreed that the Complainant be able to file written submissions by September 13, 2017. As the Commission was not opposing the motion, it chose not to file any written arguments. The Respondent filed its reply to the Complainant's submissions on September 15, 2017.

## **II. Analysis**

[13] Pursuant to s. 52 of the *Canadian Human Rights Act (CHRA)*, the Tribunal has the ability, in certain prescribed circumstances, to make any order it considers necessary to ensure the confidentiality of the inquiry.

### **A. Timing of the motion for a confidentiality order**

[14] The Complainant is raising the question of the timing of the motion submitted by the Respondent. She argues that the question of the confidentiality of the *Manulife Agreement* should only be raised during the hearing, in the event the document is actually used by the Complainant and presented to the Tribunal as evidence. I disagree with that argument.

[15] The Respondent tried to obtain the Complainant's consent to its proposed confidentiality order when it sent her a draft of the order. It is only after not receiving any response from the Complainant, and because the deadline of August 18, 2017 — the deadline I had set for disclosing the *Manulife Agreement* — was fast approaching, that the Respondent chose to submit the motion to the Tribunal.

[16] More importantly, I agree with this Tribunal's ruling in *Eadie v. MTS Inc.*, 2013 CHRT 5 (*Eadie*) where it states at paragraph 12:

[12] While I understand the Commission's position that the Tribunal can more appropriately address these confidentiality concerns as they arise in the course of the hearing, I am of the view that delineating the manner in which documents may be designated as confidential in an order will help the smooth progression of the proceedings.

[17] I agree with the Respondent that it would be counter-intuitive to declare a document confidential during a hearing after it has been disclosed without any form of protection during the disclosure process.

[18] I would even add that I would prefer declaring a document confidential during the disclosure process and changing its designation at the hearing — if an objection is raised and a convincing argument is made before me during the hearing — than the other way around. Ordering confidentiality is a reversible decision. Authorizing disclosure is less so.

[19] For those reasons, I believe the motion for a confidentiality order is not premature and has been submitted in duly time by the Respondent.

## **B. The designation of a document as being confidential**

[20] The Respondent's arguments for disclosure of the *Manulife Agreement* to be subject to a confidentiality order are based on the following grounds:

1. To prevent the breach of a contract between the Respondent and Manulife;
  2. To prevent harm to both the Respondent and Manulife, as the document contains financial information which, if disclosed, would prejudice their competitive position;
- and

3. To minimize the risk of collateral use.

[21] The Respondent has demonstrated, through the testimony of Ms. Shearer, that the *Manulife Agreement* contains financial information which, if disclosed, could prejudice the competitive position of Manulife. Her testimony has also established that the *Manulife Agreement* does contain a confidentiality provision requiring the parties to keep some information confidential, and that public disclosure of such information would constitute a breach of the agreement.

[22] Those characteristics of the *Manulife Agreement* correspond to the categories established by this Tribunal in *Eadie, supra*, as to when a document can be designated confidential by a party. I refer here to paragraph 14 of the ruling:

[14] [...] if it falls into one of the following categories:

- i. Information that is a trade secret;
- ii. Financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
- iii. Information the disclosure of which could reasonably be expected
  1. To result in material financial loss or gain to any person;
  2. To prejudice the competitive position of any person; or
  3. To affect contractual or other negotiations of any person.

[23] As such, the characteristics of the *Manulife Agreement* falls under s. 52(1)(c) of the *CHRA*, which gives the Tribunal the ability to declare a document confidential if “there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public”.

### C. Implied undertaking of confidentiality

[24] The Complainant is also arguing that a confidentiality order is not necessary and that the implied undertaking rule of confidentiality, which all parties are subjected to when documents are disclosed, is sufficient to protect the *Manulife Agreement*. She also seems to be asserting that the confidentiality order would deny her the use of counsel.

[25] I disagree with the Complainant. After hearing the Respondent's witness and reading all the parties' submissions, I am of the view that the "implied undertaking rule" would not be sufficient to protect the document from the risk of collateral use in another litigation matter or from the risk of disclosure to the public of confidential information contained therein. I note the remarks made by this Tribunal in *Public Service Alliance of Canada (Local 70396) v. Canadian Museum of Civilization Corp.*, 2004 CHRT 38 at paragraph 12:

[12] All parties agree that the "implied undertaking rule", applies to any documents or information disclosed by the Museum. The rationale for this rule is that a party to litigation should have the full right of disclosure and inspection of relevant information, including that which is confidential, as is necessary to dispose fairly of the case. However, a party cannot use this right of disclosure for any purpose collateral to the litigation. If there is a real risk of such use despite the undertaking, additional restrictions can be imposed on how the disclosed information can be used. (See *Zellers Inc. v. Venta Investments Ltd.* [1998] O.J. No. 2118, (O.C.J.); *Reichmann v. Toronto Life Publishing Co.* [1990], 44 C.P.C. (2d) 206, 207-210 (H.C.J.); *Alberta (Treasury Branches) v. Leahy* [2000] A.J. No. 993, pp. 54-55 (Q.B.).

[Emphasis added]

[26] Since there is another matter involving the Complainant and the Respondent before a civil court, it is important that both matters proceed under their respective, separate rules of disclosure. This means that if the *Manulife Agreement* is sought by the Complainant in the other file, she should make a request for it pursuant to the disclosure rules of that civil court.

[27] Finally, I am of the opinion that the confidentiality order would not deny her the use of counsel, as it would not prevent disclosure to the lawyer she has retained for the hearing of this matter.

### III. Conclusion

[28] I am satisfied that the Respondent has established a real and substantial risk of undue hardship under s. 52(1)(c) of the *CHRA* if the document is disclosed without any form of confidentiality protection, such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[29] I order that the *Manulife Agreement* be designated as confidential as per s. 52 of the *CHRA*, with the following rules:

- that the Respondent shall disclose the *Manulife Agreement* to the Complainant and Commission, and their respective counsels on or before October 11, 2017;
- that the Complainant and the Commission shall not disclose the *Manulife Agreement* to any other person, without prior consent from this Tribunal;
- that the confidential designation of the *Manulife Agreement* continues in effect until the Tribunal orders otherwise, including for the duration of all Tribunal proceedings, related judicial review and appeals, and after final judgment therein;
- that a party wishing to use the *Manulife Agreement* during the hearing should advise the Tribunal in advance and the Tribunal may then decide, at its discretion under s. 52 of the *CHRA*, to pursue the discussion *in camera*;
- that the Complainant must return the *Manulife Agreement* to the Respondent at the final disposition of this matter, once all judicial review and appeal recourses have been exhausted;
- that the Commission, as a government institution, will preserve the confidential nature of the *Manulife Agreement* in accordance with applicable governmental policies and directives on the conservation and safeguard of confidential proprietary information. Alternatively, the Commission may return the *Manulife Agreement* to the Respondent on the same terms as the Complainant;
- finally, that the *Manulife Agreement*, and any other confidential documents in the Tribunal's possession shall be sealed in accordance with Tribunal practice, and shall not be disclosed to any person.

### IV. Request for disclosure of other documents

[30] The Complainant's written objections to the confidentiality order also include a request for disclosure of other documents which have not been requested before.



[31] The first three documents are documents referred to by the Respondent's witness, Anita Shearer, during the CMCC, as separate from the *Manulife Agreement* (the Master Agreement), but still part of it. They were referred to as ASO plans by Ms. Shearer and covered 1) Non-union health and dental benefit entitlements; 2) Insured plans and 3) Long Term disability plans.

[32] According to Ms. Shearer's testimony, the other documents are two stand-alone documents, entitled "Benefits at a glance" for unionized employees, and "Flex Benefits at a glance" for non-unionized employees.

[33] Although those five documents should have been requested by the Complainant through a separate request for additional disclosure, in the interests of an expeditious inquiry, and having regard to the Respondent's alternative argument, I am granting the Complainant's request, but I order that disclosure be subject to the same conditions as stated above for the *Manulife Agreement*.

**V. Additional time for the complainant to file her reply**

[34] The Complainant is requesting additional time to file her reply Statement of Particulars. I am granting the Complainant's request and giving her until November 10, 2017 to do so.

*Signed by*

Anie Perrault  
Tribunal Member

Ottawa, Ontario  
October 4, 2017

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2126/4215

**Style of Cause:** Nicole Grace Valenti v. Canadian Pacific Railway

**Ruling of the Tribunal Dated:** October 4, 2017

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Nicole Grace Valenti, for herself

Shane Todd, for the Respondent