

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2019 CHRT 24

Date: June 4, 2019

File No.: T2214/3617

Between:

Allan Shaw

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Bell Canada

Respondent

Ruling

Member: Edward P. Lustig

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I. Context

[1] This is a motion by the Canadian Human Rights Commission (the “Commission”) for an Order, pursuant to Rule 3 of the Canadian Human Rights Tribunal’s *Rules of Procedure*, that the Respondent, Bell Canada (“Bell”), disclose all arguably relevant documents in its possession and/or control, with respect to the matters at issue in the present complaint. Specifically, the Commission seeks the disclosure of all documents pertaining to the accessibility of Bell’s online billing services, and the undue hardship defence that has been alleged by Bell.

[2] In particular, the Commission seeks an Order for the disclosure of the following documents:

- a. All documents outlining the work Bell has undertaken to improve the accessibility of MyBell and One Bill, from 2014 to present (as described at paragraphs 36 and 37(a) of Bell’s SOP), including project plans, memorandums and any other documents outlining the concrete actions Bell states have been taken in this regard.
- b. All documents providing details about the update that was completed on the MyBell portal and the One Bill page in or around July 2015, including related project plans and memorandums.
- c. All documents related to the alleged undue hardship Bell states that it would incur by rendering its site WCAG 2.0 Level AA compliant, including:
 - i. All documents upon which Bell relies for its estimate as to the amount of time it would take to render MyBell and One Bill WCAG 2.0 Level AA compliant (as described at paragraph 37(a) of Bell’s SOP);
 - ii. All documents upon which Bell relies for its estimate of the cost associated with rendering MyBell and One Bill WCAG 2.0 Level AA compliant (as described at paragraph 37(b) of Bell’s SOP);
 - iii. Any and all assessments Bell has conducted as to the impact that the above-mentioned costs would have on the viability of its business, particularly in light of its current large revenues and profitability.

- d. All documents outlining any potential challenges of integrating web-based accessibility features due to restrictions of the “.Net” development platform that is used by Bell.
- e. All documents related to Bell’s claim that “in the spring of 2017 Bell made significant investment to its wireless websites such that they met at least WCAG 2.0 Level A compliance” and that Bell has made its “wireless sites WCAG 2.0 Level A compliant and even higher in some instances” (paragraphs 14 and 38(c) of Bell’s SOP). This includes documents in Bell’s possession relating to the sites that have been rendered Level A compliant; the sites that have been rendered higher than Level A compliant (i.e. Level AA or AAA); the steps that were taken to achieve this compliance; and the costs Bell has incurred to achieve this compliance.
- f. All complaints received from individuals with visual disabilities, with respect to the accessibility of MyBell, One Bill, and Bell’s electronic billing documents, from the time of July 2015 rollout of the updated website to the present. This would include the internal complaint Mr. Shaw brought before Bell in or around August 4, 2015, as well as transcripts, recordings, and/or written documentation of any other such complaints received either by phone or in writing.
- g. Documents, if they exist, regarding the nature of Bell’s legacy systems/legacy platform, and which identify any restrictions these legacy systems may pose for achieving WCAG AA compliance. This would include any documents that explain: i) the type of legacy systems/legacy platform that Bell uses; ii) the nature and type of data storage method used; and iii) the access and retrieval methodology being used.
- h. Training materials for any and all training that has been provided to Bell’s web developers on the issue of accessibility and WCAG standards (from 2014 to the present).

[3] In addition, the Commission seeks an Order for Bell to provide a more detailed “Schedule B” list of privileged documents containing the date, title, author(s), and recipient(s) of each document over which privilege is claimed.

II. Background

[4] The Complainant (“Mr. Shaw”) is a legally blind individual. He is a customer of Bell. He alleges that during the material times of his complaint, Bell Canada (“Bell”) changed the format of its electronic billing and that the new online format is inaccessible to blind individuals who require the use of screen reader software to operate a personal computer and access online documentation. He alleges that this action by Bell is discriminatory, contrary to s. 5 of the *Canadian Human Rights Act* (“CHRA”) on the ground of disability. He filed a complaint on September 25, 2015 with the Commission in this matter. In his complaint, he asserts that on July 31, 2015, he logged on to his “MyBell” account to view his “One Bill” electronic billing statement. Upon logging on, he discovered that Bell had introduced a new online format. He asserts that the new format has many accessibility issues. Among other things, he was no longer able to read the correct balance owed and he experienced other accessibility issues with the billing documents available for download.

[5] In his complaint, Mr. Shaw asserts that as a result of this experience with his online account, he filed a formal complaint through Bell’s online customer service escalation procedure. He asserts that he received a follow-up call from a Bell customer service supervisor with whom he engaged in a lengthy discussion about the accessibility issues he encountered with Bell’s e-Billing. He alleges that no resolution was proposed by Bell to the issues he raised. He asserts that the supervisor recommended that he file a human rights complaint.

[6] On June 29, 2017, the Commission referred the present complaint to the Tribunal for adjudication.

[7] The Web Content Accessibility Guidelines (“WCAG”) constitute the widely recognized technical standards that must be met in order to ensure web accessibility for people with disabilities. WCAG standards are developed by the Accessibility Guidelines Working Group, which is part of the World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI). Mr. Shaw alleges that Bell’s electronic billing is not compliant with WCAG standards.

[8] On May 1, 2018, the Commission filed its Statement of Particulars with the Tribunal. In its Statement of Particulars, the Commission requested the disclosure of all arguably relevant documents including “all materials related to the accessibility of Bell’s e-billing and website from the time of the facts in the complaint to the present; all accessibility audit reports done by Bell Canada of its website since the time of the facts in the complaint to the present; and documents related to the costs that would be associated with rendering Bell’s website and e-billing fully compliant with WCAG 2.0.”

[9] In its Statement of Particulars filed on June 4, 2018, Bell denies that it has engaged in discrimination. It does not deny that its One Bill page is not yet entirely WCAG 2.0 Level AA compliant, although it says it will be shortly. Rather, Bell’s position is that the current design and format of the One Bill page is not discriminatory, as Mr. Shaw can still access relevant billing information on the page, or alternatively, obtain billing information in an alternative format (such as audio CD, e-test and Braille). Bell is already subject to (and complying with) regulatory requirements to provide accessible billing information. Moreover, it says requiring Bell to make the entire MyBell portal achieve Level AA compliance within a year would amount to undue hardship.

[10] In its Statement of Particulars, Bell claims among other things that it is in compliance with the Canada Radio-Television and Telecommunications Commission (“CRTC”) accessibility standards, and claims that to render its site fully accessible would constitute undue hardship in terms of cost. In response to the Commission’s request for disclosure, Bell provided a “Schedule A” list of documents containing 11 documents (10 of which are publicly available).

[11] On June 11, 2018, the Commission replied to the Respondent’s Statement of Particulars. In its Reply, the Commission again requested the disclosure of all arguably relevant documents. The Commission’s Reply states the following:

Bell was obligated to disclose all arguably relevant documents at the time of filing its Particulars, and wishes to draw Bell’s attention to this obligation. So far Bell has disclosed only 11 documents, and 10 of those are publicly available via the internet. The Commission expects that further documentary disclosure from Bell will be forthcoming shortly, particularly with respect to

paragraphs 32 to 38 of its Particulars regarding its *bona fide justification* defense.

[12] Subsequently, there was further correspondence exchanged between the Commission and Bell respecting the Commission's requests for disclosure. Bell provided additional documents in response to the requests. However, Bell has taken the position that the requests are too expansive and would lead to delay and also that some of the requests are for documents subject to litigation and/or solicitor/client privilege. Also, Bell says that many of the documents requested are not arguably relevant. Finally, Bell says that it is unable to identify the existence of some of the documents requested.

[13] In addition to the above-referenced request for disclosure, the Commission has requested all documents related to any accessibility audits conducted on MyBell portal, One Bill web page and the bell.ca website, from 2014 to the present. In its response, Bell has identified two such audits over which it claims solicitor-client and/or litigation privilege. To that end, the Commission requests that Bell provide a more detailed "Schedule B" list of documents, which lists the date, author, recipients, and title of these audits, as well as any other documents over which privilege is being claimed.

III. Issue

[14] The issue engaged by this motion is whether the requested documents are arguably relevant to facts, issues or forms of relief sought in the present complaint.

IV. Parties' Positions

[15] The parties' positions, as set out in their submissions, including the Commission's Reply, are summarized below in this part of the Ruling. It should be noted, however, that the Commission, in its Reply, has indicated that it is no longer pursuing its requests for the documents referred to in paragraph 2 d) and 2 g) above, as Bell has indicated that it is unable to identify any documents responsive to these requests. As such, I will not deal further with these requests in this Ruling.

[16] It should also be noted that the Commission, in its Reply, has indicated that Bell's submission that it agrees to provide a revised Schedule B that lists the accessibility audits it has conducted since the filing of the complaint, and over which it claims privilege, satisfies the Commission's request referred to in paragraph 3 above for a more detailed Schedule B. As such, I will simply incorporate Bell's agreement in the Order in this Ruling.

[17] The Commission in its submission provided an overview of the relevant provisions of the *CHRA* and the *CHRT Rules of Procedure*. In this regard it has referred to and quoted from Subsection 50(1) of the *CHRA* and Rule 6 of the *CHRT Rules of Procedure*.

[18] As well, the Commission cites *Warman v. Bahr*, 2006 CHRT 18 at paras. 6-7 ("*Warman*") in support of the basic principle that parties are required to disclose all documents in their possession and/or control which may be arguably relevant to the issues, facts or form of relief sought, as identified by the parties. The Commission also cites *Brickner v. RCMP*, 2018 CHRT 28, which it says gives an overview of the key principles regarding the applicable test for disclosure in Tribunal inquiries. An excerpt from this case is reproduced later in this Ruling.

[19] The Commission also cites in its Reply *Syndicat des communications de Radio-Canada v. Canadian Broadcasting Corporation*, 2017 CHRT 5 at para. 25 in support of its statement that the Tribunal has found that, for the purpose of analyzing arguable relevance, the complaint, the theory of the case contained in each parties' Statements of Particulars (SOPs), and the entire SOPs of each party all serve as guides.

[20] Essentially, the Commission's main argument is that the documents it is requesting are arguably relevant to the inquiry before the Tribunal. The Commission asserts that each of its requests relate to a fact, issue, defence and/or remedy raised by a party to the proceeding, as detailed below.

[21] In its responding submissions, Bell argues that certain of the documents requested by the Commission are not arguably relevant to the inquiry (as detailed below), while others either do not exist or cannot be located by Bell. It further submits that the Commission's request is overbroad and captures, *inter alia*, commercially sensitive information that Bell should not be required to disclose.

[22] Bell says that the burden lies with the Commission, as the party requesting disclosure, to establish that there is a nexus between the information or documents sought and the issues in dispute (*Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34 (*Guay*) at para. 42). The Commission must establish that the disclosure of the documents will be useful and will likely contribute to advancing the debate (*Ledoux v. Gambler First Nation*, 2017 CHRT 13 at para. 5). The Commission must identify the requested documents with reasonable particularity, and the Commission's requests must not be speculative or amount to a fishing expedition (*Guay* at para. 43).

[23] At several instances of its response, Bell says that the Commission's requests would capture potentially thousands of documents that are not kept in a central repository. Bell says that it would require a tremendous amount of time to search for the documents and then review them, and that the documents may contain confidential and proprietary information that is not relevant to the complaint. Bell argues that the probative value of this evidence does not outweigh the prejudicial effect on the proceedings.

[24] In Reply, the Commission notes that it is not seeking thousands of documents, and that it has attempted to provide additional details to allow Bell to conduct a targeted search and avoid the production of unnecessary documents.

[25] Also at several instances, the Commission has requested information related to both MyBell and One Bill. Bell opposes this scope. It says the Complainant's issues are limited to One Bill, which is Bell's online billing system. MyBell, on the other hand, is Bell's entire online portal, which encompasses functionalities beyond One Bill. Bell argues documents relating to MyBell, other than those relating to One Bill, are not relevant.

[26] In Reply, the Commission characterizes Bell's approach as "myopic". It says that MyBell and One Bill are interconnected, and notes that individuals must first access MyBell in order to subsequently access One Bill. It says that both are therefore arguably relevant and will assist in having a "holistic understanding" of accessibility challenges in accessing Bell's online billing service.

[27] Bell objects to producing certain documents on the basis that they are confidential, commercially sensitive, contain proprietary information, or contain personal information.

The Commission says that Bell has not cited any case law or legislation in support of its objections. The Commission says that concerns related to privacy and confidentiality do not override the public interest in ensuring that all relevant evidence is disclosed in a proceeding (citing *Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11, and *Palm v. International Longshore and Warehouse Union, Local 500 et al.*, 2012 CHRT 11).

[28] The Commission notes that according to the *CHRA* and the Tribunal's *Rules of Procedure*, the only exceptions to disclosure are information that is not arguably relevant, and information that is privileged. It notes that all documents disclosed would be subject to the implied rule of non-disclosure to non-parties. Further, Bell may request the Tribunal to issue a confidentiality order pursuant to s. 52 of the *CHRA*. The Commission notes that confidentiality orders can be used to strike a balance between disclosing arguably relevant documents and protecting sensitive information, and that it would be open to considering such an order depending on how it is worded.

[29] Mr. Shaw agreed with the Commission's initial submissions, and later provided a Reply to Bell's response. In his Reply, Mr. Shaw reiterated the arguable relevance of the Commission's requests and provided examples of types of documents that would be responsive. For example, Mr. Shaw pointed to documents such as business requirements, project plans, project guidance and direction provided to developers and contractors as to the WCAG accessibility requirements, action plans, quality control procedures, testing plans and methodologies, testing criteria and scripts, testing tools, and testing results (including tests conducted by users of assistive technologies).

[30] In addition to these points, the parties have made the following arguments specific to each of the Commission's requests, as outlined in paragraph 2 above.

[31] a) All documents outlining the work Bell has undertaken to improve the accessibility of MyBell and One Bell, from 2014 to present (as described at paragraphs 36 and 37(a) of Bell's SOP), including project plans, memorandums and any other documents outlining the concrete actions Bell states have been taken in this regard.

[32] The Commission says that Bell has disclosed documents related to accessibility testing it has conducted, but has not disclosed documents related to actions Bell may have taken following those tests.

[33] Bell submits that it has already partly responded to this request. However, it disagrees with the time period of this request as Mr. Shaw did not experience accessibility issues until July 2015. Bell argues that the Commission has not provided a reason for extending the time period of its request to 2014 and that this time period not arguably relevant. In Reply, the Commission says that the time-period should not be strictly limited to July 2015. The Commission says that extending its request to one year prior will give the Tribunal the appropriate context and chronology leading to the time when Mr. Shaw began experiencing accessibility issues.

[34] Further, Bell says that Mr. Shaw's complaint relates to his visual impairment; however, the Commission has requested documents relating to all accessibility improvements. Bell says that accessibility improvements, other than those relating to visual impairment, are not relevant. Finally, as noted above, this is an instance in which Bell says that the Commission's request captures potentially thousands of documents.

[35] In Reply, the Commission notes that this request stems from Bell's SOPs in which it states it has made accessibility improvements. The Commission says that it is not seeking disclosure of every single document, but rather only those that outline concrete steps that Bell has taken to improve the accessibility of MyBell and One Bill, as well as issues identified by screen reader testing. In attempt to assist Bell in narrowing its searches, the Commission suggested that documents containing the type of information it is seeking may be called accessibility strategies, final/approved accessibility project plans, or summaries of the outcomes of such projects, but that Bell would be in the best position to know what these types of documents are called. The Commission also noted that it is primarily seeking documents related to accessibility improvements that have an impact for individual with visual disabilities.

[36] Further, the Commission notes that the affidavit submitted as part of Bell's motion record indicates that Bell is working on making One Bill WCAG 2.0 AA compliant and

expected to complete this by March 2019. The Commission says documents related to this work, such as a final/approved project plan, are arguably relevant.

[37] b) All documents providing details about the update that was completed on the MyBell portal and the One Bill page in or around July 2015, including related project plans and memorandums.

[38] The Commission says that this information is relevant because Mr. Shaw alleges he began experiencing accessibility issues as a result of this update.

[39] Bell, on the other hand, says this request is not reasonably related to the complaint. It says that most of the upgrades to the One Bill page and MyBell portal were unrelated to accessibility and that any documents that are relevant to the complaint would be captured by the above request (request (a)).

[40] Further, as above, Bell says that documents related to MyBell are not relevant to the complaint, other than those related to One Bill. It also says that this request is too broad and insufficiently particularized. As a result, it would require significant resources to gather potentially thousands of documents.

[41] In Reply, the Commission says that there may be a project plan or strategy document that exists that explains the update that was completed, and it would be satisfied to receive only that one document, if it exists.

[42] c) All documents related to the alleged undue hardship Bell states that it would incur by rendering its site WCAG 2.0 Level AA compliant, including:

- i. All documents upon which Bell relies for its estimate as to the amount of time it would take to render MyBell and One Bill WCAG 2.0 Level AA compliant (as described at paragraph 37(a) of Bell's SOP);
- ii. All documents upon which Bell relies for its estimate of the cost associated with rendering MyBell and One Bill WCAG 2.0 Level AA compliant (as described at paragraph 37(b) of Bell's SOP);
- iii. Any and all assessments Bell has conducted as to the impact that the above-mentioned costs would have on the viability of its business, particularly in light of its current large revenues and profitability.

[43] With respect to the time and cost for rendering MyBell and One Bill WCAG 2.0 Level AA compliant, the Commission points to the paragraphs of Bell SOPs in which this is raised.

[44] Bell, however, says that it does not have any documents detailing the cost it would have to incur, but rather it “has made an estimate”. Bell also says it “has already committed to providing further particulars... relating to undue hardship... when they are available”.

[45] In Reply, the Commission states that it simply requests all documents related to Bell’s undue hardship defence, as outlined in its SOPs. Mr. Shaw and the Commission are entitled to test such a defence with an expert, if need be. Further, Bell has not explained what is meant by “when they are available”, or provided any documents it may have relied upon to arrive at its estimates of costs.

[46] e) All documents related to Bell’s claim that “in the spring of 2017 Bell made significant investment to its wireless websites such that they met at least WCAG 2.0 Level A compliance” and that Bell has made its “wireless sites WCAG 2.0 Level A compliant and even higher in some instances” (paragraphs 14 and 38(c) of Bell’s SOP). This includes documents in Bell’s possession relating to the sites that have been rendered Level A compliant; the sites that have been rendered higher than Level A compliant (i.e. Level AA or AAA); the steps that were taken to achieve this compliance; and the costs Bell has incurred to achieve this compliance.

[47] Bell says One Bill and MyBell were not updated as part of that process, and, in any event, it has not been able to identify any responsive documents.

[48] The Commission says this request is directly related to Bell’s assertion in its SOPs that some of its sites have been rendered WCAG 2.0 AA compliant. The Commission says that information about rendering other sites compliant may help in understanding the costs associated with rendering MyBell and One Bill WCAG 2.0 AA compliant. This is arguably relevant to Bell’s undue hardship defence. The Commission is willing to narrow this request to final/approved project plans to explain what was done to render those sites WCAG 2.0 AA compliant, as well as associated budgets.

[49] f) All complaints received from individuals with visual disabilities, with respect to the accessibility of MyBell, One Bill, and Bell's electronic billing documents, from the time of July 2015 rollout of the updated website to the present. This would include the internal complaint Mr. Shaw brought before Bell in or around August 4, 2015, as well as transcripts, recordings, and/or written documentation of any other such complaints received either by phone or in writing.

[50] Bell says it has already provided the Commission with transcripts, recordings, and/or written documentation regarding Mr. Shaw's complaint of August 4, 2015. It says it has also provided the Commission with information relating to complaints from individuals with visual disabilities. However, Bell submits that the Commission's request is overly broad as it extends beyond One Mill and MyBell and therefore captures documents that are not relevant to the complaint. Bell also says that Mr. Shaw's complaint relates to his specific screen reader, and that including complaints that relate to the use of different screen readers would alter the scope of the complaint.

[51] Bell further characterizes the Commission's request as a fishing expedition and says that it is not necessary to involve the experience of individuals other than Mr. Shaw in order to substantiate his complaint or to prove that the issue is systemic. Moreover, disclosing such information would mean disclosing personal information of Bell's clients, which it says is not only unnecessary, but a violation of Bell's legal obligations to keep client information confidential.

[52] In Reply, the Commission says that this complaint has a systemic component. It cites specific passages from both Mr. Shaw's complaint and its own SOPs that it says demonstrate that there is both an individual and systemic element to the complaint. As such, this information is arguably relevant to the Tribunal's understanding of the systemic nature of the complaint and for the purposes of potentially fashioning systemic remedies. The Commission says this information may also provide evidence to support Mr. Shaw's allegations.

[53] h) Training materials for any and all training that has been provided to Bell's web developers on the issue of accessibility and WCAG standards (from 2014 to the present.

[54] The Commission says their request is arguably relevant to the remedy that Mr. Shaw is seeking in his SOPs.

[55] Bell opposes this request as it says that its training materials were provided to Bell by a third party OCAD University, and that OCAD University has said that the information contained in those materials is proprietary and has asked Bell not to disclose them. Bell has been unable to identify any other responsive documents.

[56] The Commission, in its Reply submits that the confidentiality proprietary concerns raised by Bell are not valid.

V. Legal Framework

[57] Subsection 50(1) of the *CHRA* gives all parties “a full and ample opportunity...to appear at the inquiry, present evidence and make representations.” Rule 6 of the *CHRT Rules of Procedure* provides:

6 STATEMENT OF PARTICULARS, DISCLOSURE, PRODUCTION

Statement of Particulars

6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,

{...}

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.

{...}

Production of documents

6(4) Where a party has identified a document under 6(1)(d), it shall provide a copy of the document to all other parties. It shall not file the document with the Registry.

[58] The purpose of documentary disclosure is to allow parties, including the Commission when it is representing the public interest under s. 51 of the *CHRA*, to identify

the issues at play and to adequately prepare. Disclosure is tied to parties' rights to be given an ample opportunity to present their case before the Tribunal.

[59] The case of *Brickner v. RCMP*, 2018 CHRT 28, cited by the Commission sets out the key principles regarding the applicable test for disclosure in Tribunal inquiries as follows:

II. Principles of Disclosure

[4] Pursuant to subsection 50(1) of the *Canadian Human Rights Tribunal Act*, R.S.C. 1985, c. H-6 (*Act*), parties before the Canadian Human Rights Tribunal (Tribunal) must be given a full and ample opportunity to present their case. To be given this opportunity, parties require, among other things, the disclosure of arguable relevant information in the possession or case of the opposing party prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case it is up against and, therefore, adequately prepare for the hearing.

[5] In deciding whether the information ought to be disclosed, the Tribunal must consider whether the information at issue is arguably relevant (see *Warman v. Bahr*, 2006 CHRT 18 at para. 6). This standard is meant to “prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming” (see *Day v. Department of National Defence and Hortie*, Ruling No. 3, 2002/12/06). This also ensures the probity of the evidence.

[6] The standard is not a particularly high threshold for the moving party to meet. If there is a rational connection between a document and the facts, issues, or forms of relief identified by the parties in the matter, the information should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure* (03-05-04) (Rules) (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34 at para. 42 (*Guay*); *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6 at para. 28, and *Seeley v. Canadian National Railway*, 2013 CHRT 18 at para. 6 (*Seeley*)).

[7] However, the request for disclosure must not be speculative or amount to a “fishing expedition” (see *Guay* at para. 43). The documents requested should be identified with reasonable particularity. It is the Tribunal's view that in the search for truth and despite the arguable relevance of evidence, the Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the Rules are respected, in order to ensure the informal and expeditious conduct of the inquiry (see *Gil v.*

Canada (Minister of Citizenship and Immigration), 1999 CanLII 8407 (FC) at para. 13; see also s. 48.9(1) of the *Act*).

[8] This Tribunal has already recognized in its past decisions that it may deny ordering the disclosure of evidence where the probative value of such evidence would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal should be cautious about ordering searches where a party or a stranger to the litigation would be subjected to an onerous and far-reaching search for documents, especially where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para. 4; *Seeley* at para. 7; see also *R. v. Seaboyer*, 1991 CanLII 76 (SCC), {1991} 2 S.C.R. 577 at 609-611).

[9] It should also be noted that the disclosure of arguably relevant information does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded it in the decision making process (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 at para. 4).

[10] Moreover, given that a party's obligation to disclose is limited to documents that are "in the party's possession" under section 6 of the Rules, the Tribunal cannot order a party to generate or create new documents for disclosure (see *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para. 17).

[60] In *Egan v. Canada (Revenue Agency)*, 2017 CHRT 33 I provided the following guidance with respect to disclosure:

[40] As noted above, the jurisprudence for determining disclosure requests generally relies on the following criteria:

Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case.

To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession and care of the opposing party prior to the hearing of the matter.

Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case they are up against and, therefore, adequately prepare for the hearing.

For that reason, if there is a rational connection or nexus between a document and the facts, issues or forms of relief identified by the parties in

the matter, the document should be disclosed pursuant to sections 6(1)(d) and 6(1)(e) of the *Rules*.

The party seeking the disclosure must demonstrate that the nexus exists and the documents are probative and be arguably relevant to an issue in the hearing, which is not a particularly high standard.

The request for disclosure must not be speculative or amount to a “fishing expedition.” The documents should be identified with reasonable particularity.

The disclosure of arguably relevant documents does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process.

VI. Analysis

[61] For the reasons that follow, I will allow the motion, in part, and order the disclosure of the documents requested by the Commission as set out in paragraphs 2a), 2b), 2c), 2e), 2f) and 2h) of this Ruling, (the “documents”), subject to the refinements that the Commission has suggested in its Reply dated March 27, 2019 to the requests for the documents referred to:

- i. in paragraph 2a) as underlined in paragraph 35;
- ii. in paragraph 2b) as underlined in paragraph 41;
- iii. in paragraph 2c) as underlined in paragraph 45; and
- iv. in paragraph 2e) as underlined in paragraph 48.

[62] Having reviewed the parties’ submissions, in applying the legal principles referred to in Part V of this Ruling to the facts in this matter as noted above, I am satisfied that the Commission has discharged its onus of establishing that the documents requested are arguably relevant to this matter as there is, in my opinion, a nexus or rational connection between the documents requested and the facts, issues or forms of relief identified by the parties.

[63] As noted in Part V of this Ruling, the threshold for satisfying the test for disclosure of arguable relevancy is low and the trend today to avoid unfair surprises is to err on the side of more than less disclosure especially since ultimate admission of documents at a

hearing and relevancy and weight of the evidence at that time is a separate matter yet to be determined.

[64] In considering the issue of arguable relevance of the documents at this stage I have reviewed the SOPs of the parties which serve as guides for analysing arguable relevancy, as this case is about the complaint of Mr. Shaw alleging discrimination by Bell in changing the online format of its electronic billing system that allegedly created accessibility issues for Mr. Shaw when he logged on to his MyBell account to try to read his One Bill statement.

[65] Using this lens, I agree with the Commission's position that MyBell and One Bill are interconnected and are therefore both arguably relevant and will assist in having a “holistic understanding” of accessibility challenges in accessing Bell's online billing system.

[66] In my opinion, there is insufficient evidence before me or case law cited upon which to conclude that certain documents are confidential, commercially sensitive, contain proprietary information or contain personal information that should not be disclosed. In any case, I agree with the Commission that concerns related to privacy and confidentiality do not override the public interest in ensuring that all relevant evidence is disclosed in a case such as this where probative value of the documents requested appears to exist. Besides, if needed, confidentiality orders can be requested.

[67] In my opinion, the refinements that the Commission has suggested in its Reply to the requests, as underlined in paragraphs 35, 41, 45, and 48 of this Ruling are reasonable and appropriately address Bell's concerns about the requests being too broad and time consuming to find and respond to. I believe that the requests for the documents are necessary and don't amount to a “fishing expedition” and that the Commission has identified the documents with sufficient particularity especially with the refinements that will allow Bell to reduce the time needed to respond and allow them to focus their search. To the extent that documents cannot be found or do not exist, of course, they cannot be disclosed.

[68] In my opinion, the Commission is correct in its analysis of the complaint as having a systemic component for the reasons referred to in paragraph 52 of the Ruling.

[69] As such, the documents need to be disclosed and produced by Bell, subject to the refinements suggested, in order to permit the Commission to know the case it is up against and to adequately prepare for the hearing. This is the whole point of disclosure and in the end will provide procedural fairness to the parties and allow the case to be litigated on its merits in the most expedient and efficient manner.

VII. Orders

[70] Bell is ordered to disclose the documents requested by the Commission as set out in:

- i. paragraph 2a) of this Ruling, subject to the refinements suggested by the Commission as underlined in paragraph 35 of this Ruling;
- ii. paragraph 2b) of this Ruling, subject to the refinements suggested by the Commission as underlined in paragraph 41 of this Ruling;
- iii. paragraph 2c) of this Ruling, subject to the refinements suggested by the Commission as underlined in paragraph 45 of this Ruling;
- iv. paragraph 2e) of this Ruling, subject to the refinements suggested by the Commission as underlined in paragraph 48 of this Ruling;
- v. paragraph 2f) of this Ruling; and
- vi. paragraph 2h) of this Ruling.

[71] Bell is ordered to provide a revised Schedule B that lists the accessibility audits it has conducted since the filing of the complaint in this matter, and over which it claims privilege.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
June 4, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2214/3617

Style of Cause: Allan Shaw v. Bell Canada

Ruling of the Tribunal Dated: June 4, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Allan Shaw, for himself

Sasha Hart and Giacomo Vigna, for the Canadian Human Rights Commission

Sacha Liben and Lisa Alleyne, for the Respondent