

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2020 CHRT 30

Date: October 2, 2020

File No: T2207/2917

[ENGLISH TRANSLATION]

Between:

Cecilia Constantinescu

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] This ruling by the Canadian Human Rights Tribunal (Tribunal) concerns the redaction of handwritten notes taken by two investigators, Josée Brunelle and Sandro Bartucci, in connection with a disciplinary investigation of Reno Ouellet.

[2] More specifically, this ruling concerns a missing portion of Ms. Brunelle's notes. In this regard, and for clarity, it suffices to note that the Tribunal has already issued an initial ruling concerning the redaction of these two investigators' notes. That ruling was issued on April 16, 2020 (see *Constantinescu v. Correctional Service Canada*, 2020 CHRT 8 [ruling 2020 CHRT 8]).

[3] In the interests of brevity and speed, it is not necessary at this stage to repeat the background to that initial ruling dated April 16, 2020. The Tribunal invites readers to consult two rulings, *Constantinescu v. Correctional Service Canada*, 2020 CHRT 4, and ruling 2020 CHRT 8, to better understand the Tribunal's reasons surrounding the redaction of Mr. Bartucci's and Ms. Brunelle's handwritten notes.

[4] That being said, after the Tribunal distributed ruling 2020 CHRT 8 on April 16, 2020, the respondent informed the Tribunal and the other parties, on May 7, 2020, that the notes by Ms. Brunelle that had been sent to the Tribunal so that it could render its ruling were incomplete.

[5] In other words, when the Tribunal rendered its ruling on April 16, 2020, some of Ms. Brunelle's notes were missing. Counsel for the respondent raised the irregularity as soon as they discovered it. After a teleconference with the parties during which the situation was discussed, it became abundantly clear that ruling 2020 CHRT 8 had not taken all of Ms. Brunelle's notes into consideration.

[6] Therefore, the Tribunal must rule on the redaction of the missing portion of Ms. Brunelle's notes since the Tribunal did not have access to that portion when it rendered ruling 2020 CHRT 8.

[7] The missing portion of Ms. Brunelle's notes were finally sent to the Tribunal in early August 2020, once counsel for the respondent had the opportunity to go in to their office,

which had been impossible up to that point because of restrictions related to the COVID19 health crisis. As ordered, the respondent sent two versions of the missing portion of Ms. Brunelle's notes: redacted, and unredacted.

[8] Now that I have the missing portion of Ms. Brunelle's notes, I can rule on the redaction issue. For the reasons that follow, I order that certain specific items be disclosed.

II. Law

[9] I will very briefly review the principles of disclosure that I have already set out in ruling 2020 CHRT 8, at para 8.

[10] The principles of disclosure are summarized in *Malenfant v. Vidéotron S.E.N.C.*, 2017 CHRT 11, at paras 25 to 29 and 36:

[25] Each party has a right to a full hearing. In this regard, the *CHRA* provides as follows at subsection 50(1):

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. [Emphasis added.]

[26] This right includes the right to the disclosure of relevant evidence in the possession or care of the opposing party (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34, para. 40). The Rules of Procedure of the Canadian Human Right Tribunal (the Rules) provide as follows in Rule 6(1), and more specifically at paragraphs (d) and (e):

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;

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

...

[Emphasis added.][27] Regarding disclosure, the Tribunal has already ruled several times that the guiding principle is probable or possible relevance (*Bushey v. Sharma*, 2003 CHRT 5 and *Hughes v. Transport Canada*, 2012 CHRT 26. See in the alternative *Guay, supra*; *Day v. Department of National Defence and Hortie*, 2002 CanLII 61833; *Warman v. Bahr*, 2006 CHRT 18; *Seeley v. Canadian National Railway Company*, 2013 CHRT 18). The Tribunal notes that the parties have an obligation to disclose potentially relevant documents in their possession (*Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, para. 17).

[28] To show that the documents or information is relevant, the moving party must demonstrate that there is a rational connection between those documents or information and the issues in the case (*Warman, supra*, para. 6. See for example *Guay, supra*, para. 42; *Hughes, supra*, para. 28; *Seeley, supra*, para. 6). Relevance is determined on a case-by-case basis, having regard to the issues raised in each case (*Warman, supra*, para. 9. See also *Seeley, supra*, para. 6). The Tribunal notes that the threshold for arguable relevance is low and the tendency is now towards more, rather than less disclosure (*Warman, supra*, para. 6. See also *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 36, para. 18). Of course, the disclosure must not be speculative or amount to a fishing expedition (*Guay, supra*, para. 43).

[29] The Tribunal notes that the production of documents stage is different from the stage of their admissibility in evidence at the hearing. Accordingly, relevance is a distinct concept. As Member Michel Doucet stated in *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 (hereafter *TEAM*), at para. 4:

[4] ... The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get information or documents that are or could be arguably relevant to the proceedings. This does not mean that these

documents or this information will be admitted in evidence or that significant weight will be afforded to them.

...

[36] Finally, I would remind the parties that the duty to disclose the documents concerns documents in their possession. Accordingly, the duty does not extend to creating documents for disclosure (*Gaucher, supra*, para. 17). ...

III. Analysis

[11] The respondent disclosed Exhibit 91 to the parties, which consists of the handwritten notes of two investigators, Josée Brunelle and Sandro Bartucci. The respondent redacted certain passages from the notes. The complainant had asked that the exhibit be disclosed to her unredacted.

[12] As I noted above, the Tribunal has already dealt with the issue of redactions to the handwritten notes in two rulings (2020 CHRT 4 and 2020 CHRT 8). As Ms. Brunelle's notes were incomplete, the Tribunal must now review them and determine whether some items that were redacted must be disclosed.

[13] The test the Tribunal must apply with regard to disclosure is arguable relevance. The Tribunal must determine whether the items that the respondent redacted are arguably relevant to the case, that is, whether they are arguably relevant to a fact, issue, or form of relief sought (see Rule 6(1)(d) of the Rules).

A. Pages 1 to 33

[14] The respondent redacted pages 1 to 33 of Ms. Brunelle's handwritten notes in their entirety. As I am able to consult the unredacted version submitted by the respondent, I am thus in a position to determine whether the items in these notes are connected with Ms. Constantinescu's complaint and therefore arguably relevant to a fact, issue, or form of relief sought.

(i) Pages 1 to 8

[15] Having examined the items contained in pages 1 to 8 of those notes, I find that they do not actually have any connection with the complaint before the Tribunal and are therefore not arguably relevant to the case. Accordingly, the redaction is maintained.

(ii) Pages 9 to 14

[16] Pages 9 to 14 concern an interview with an individual who is not involved in the complaint before the Tribunal. The notes are not arguably relevant and have no connection with the complaint to be heard by the Tribunal. The redaction of these pages is therefore maintained.

(iii) Pages 15 to 17

[17] Pages 15 to 17 contain Ms. Brunelle's notes from an interview with an individual who is not involved in the complaint being considered by the Tribunal. The items in these notes are therefore not arguably relevant to the case and are not connected with the complaint before the Tribunal. The redaction is maintained.

(iv) Pages 18 to 22

[18] Pages 18 to 22 contain notes Ms. Brunelle took during an interview with another individual who is not involved in Ms. Constantinescu's complaint. The redacted items have no connection with the complaint and are not arguably relevant to a fact, issue, or form of relief sought. Consequently, the redaction is maintained.

(v) Pages 23 to 29

[19] Pages 23 to 29 concern a second interview, once again with an individual who is not involved in the complaint before the Tribunal. The redacted items are not connected with the complaint and therefore not arguably relevant to the case. Accordingly, the redaction is maintained.

(vi) Pages 30 to 33

[20] Pages 30 to 33 concern an interview with another individual who is not involved in the complaint before the Tribunal. The notes are not connected with the complainant's complaint and therefore not arguably relevant to the case. The redaction is therefore maintained.

B. Pages 34 to 41

[21] The respondent redacted parts of pages 34 to 41 of Ms. Brunelle's notes. I can now determine whether the redacted passages are arguably relevant to the case.

(i) Pages 34 and 35 – Daniel Parent

[22] Pages 34 and 35 contain notes taken by Ms. Brunelle during an interview with Daniel Parent.

[23] The respondent redacted almost everything on page 34, including the title, except for a tiny section in the middle of the page.

[24] I agree with the respondent's redaction, in that the items on page 34, apart from what was not redacted, are not arguably relevant to the case.

[25] The title, at the top of page 35, was also redacted.

[26] That said, the titles on pages 34 and 35 are themselves relevant in that they provide the reader with context and put in their proper perspective the other items in the notes that were not redacted.

[27] Accordingly, I order the respondent to disclose the following titles on pages 34 and 35, respectively:

“Daniel Parent (2) 14.11.14” (page 34)

“Parent” (page 35)

[28] On page 35, the respondent disclosed most of the notes concerning Mr. Parent. Having reviewed the other redacted items, I find that they are indeed not arguably relevant to the case.

(ii) Pages 36 to 41 – Reno Ouellet

[29] Pages 36 to 41 contain the handwritten notes taken by Ms. Brunelle during an interview with Reno Ouellet.

[30] Having examined all of Ms. Brunelle's unredacted notes, I find that none of the items the respondent redacted are arguably relevant to the case or connected with Ms. Constantinescu's complaint. The redaction is therefore maintained.

IV. Ruling

[31] For the above reasons, the Tribunal grants the complainant's request in part and orders the respondent to disclose certain items in Exhibit 91.

[32] More specifically, I order the respondent to comply with the order by removing the redaction of the portions described at paragraph 27 of this ruling.

[33] I order the respondent to send the amended documents to the other parties by October 16, 2020, at the latest.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
October 2, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2207/2917

Style of Cause: Cecilia Constantinescu v. Correctional Service Canada

Ruling of the Tribunal Dated: October 2, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

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Paul Deschênes and Nadia Hudon, for the Respondent