Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 29
Date: August 24, 2021
File No.: T2163/3716

Between:

Amir Attaran

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada

Respondent

Ruling

Member: David L. Thomas

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I. Introduction

[1] This is a ruling on two written motions recently submitted to the Canadian Human Rights Tribunal (the "Tribunal" or "CHRT") by the Complainant, Dr. Amir Attaran. The hearing in this matter is well underway. Ten hearing days were completed in February 2021 and the hearing resumed for another four days in April 2021. The Complainant and the Commission have finished their evidence. The Respondent has presented three of its witnesses so far. When the hearing was suspended on April 30, 2021, the Complainant was still cross-examining the Respondent's expert witness, Professor Michael Haan. There is one more witness for the Respondent scheduled to appear when the hearing resumes in September.

[2] The first motion is dated June 4, 2021, and requests disclosure of documentation from the Respondent, Immigration, Refugees and Citizenship Canada (IRCC). This motion requests the disclosure of two sets of documents: those relating to an expert's working files and those relating to recent IRCC announcements regarding permanent residency.

[3] The second motion from the Complainant is dated July 30, 2021, and was submitted while the first motion was still under reserve. The second motion requests documentation from IRCC relating to an even more recent announcement regarding an increase in the number of parent and grand-parent (PGP) sponsorship applications to be accepted in 2021.

[4] Reflecting the different nature of the documents, the arguments for and against disclosure are different. As such, this ruling will address the documents relating to the expert witness separately from the requests for documents related to the policy changes.

[5] The Canadian Human Rights Commission (the "Commission") did not provide separate submissions on the first motion, but has advised the Tribunal that it agrees with the legal framework on litigation privilege and arguable relevance as explained by the Complainant in his first motion. With regard to the second motion, the Commission agreed with the arguable relevance of the documents but suggested limiting the introduction of new disclosure.

[6] The Interested Party in this inquiry, the Chinese and Southeast Asian Legal Clinic, is not entitled to make submissions on interim motions as per the Tribunal's earlier ruling (see 2018 CHRT 6).

II. Documentation Relating to Professor Haan's Expert Evidence

[7] The Complainant requests disclosure of three things, which he argues collectively are the foundational documents of Professor Haan's expert report:

A) disclosure of all communications that were relied on in researching or preparing Professor Haan's expert report between him and his graduate student;

B) disclosure of all documents possessed by Professor Haan that were relied on in researching or preparing his expert report, including any such documents that were provided by the Respondent's counsel; and,

C) the retainer agreement or contract that Professor Haan signed with the Respondent.

[8] The Respondent states the requested documents are not necessary, the request is too late and that, in addition, all of them are covered by litigation privilege.

[9] The law is clear that foundational documents – that may otherwise be protected by litigation privilege – must be disclosed once an expert witness is called to testify. At issue here are differing interpretations of what constitute the "foundational documents" relevant to the formulation of Professor Hann's expert opinion.

(i) Graduate Student Communications

[10] During his cross-examination, Professor Haan testified that a graduate student had assisted him in the preparation of his expert report by writing the initial drafts of paragraphs 54, 55 and 56 which he later edited. The Complainant argues that these communications are foundational documents that are not subject to litigation privilege. He contends that the "zone of privacy" in litigation privilege is limited. Communications with the graduate student fall outside of that zone, not being a third-party to the litigation, but perhaps a fourth or fifth party to it.

[11] Dr. Attaran relies on the Supreme Court of Canada's decision in *Blank v. Canada (Minister of Justice)* 2006 SCC 39 ("*Blank*") for the premise that there are limitations to the "zone of privacy" (at para. 34) and that litigation privilege contemplates not only communications between a solicitor (or litigant) and their client, but also between a solicitor (or litigant) and third parties. Dr. Attaran argues that this is where the "zone of privacy" must end, and that communications between that third party and others should not be subject to litigation privilege.

[12] The Respondent also cites *Moore v. Getahun*, 2015 ONCA 55 ("*Moore*") in more detail, in particular where the Ontario Court of Appeal cites *Blank*:

> 69. In *Blank*, the court noted, at para. 34, that litigation privilege creates "a 'zone of privacy' in relation to pending or apprehended litigation". **The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.**
>
> 70. Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed**. Under the protection of litigation privilege, the same holds for the draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.** [Emphasis added]

[13] The Respondent also refers to *Wright v. Detour Gold Corporation* 2016 ONSC 6807 ("*Wright*") where litigation privilege was upheld in a situation where the expert witness had retained a consultant to draft his opinion for him. In that case, the plaintiffs requested the production of draft reports, the expert's invoice for his report and correspondence and communications with his consultant which, in this case, was a different law firm. The Court dismissed the application and concluded that the refusal to provide these documents was proper.

[14] I concur with the observation by Justice Perell in *Wright,* at para. 21:

> It is hardly surprising that an expert has assistance in preparing and drafting his or her opinion, and it is simply not correct to say that the assistant then becomes the author of the opinion because he or she was involved in the draftsmanship.

[15] Dr. Attaran's description of part of the report as "ghostwritten" is inaccurate. Professor Haan's evidence was that his graduate student did not write any sections of the report. She drafted paragraphs 54, 55 and 56 of the report which, Professor Hann testified, he then heavily edited. When Ms. Carrasco of the Commission asked what he meant when he said "heavily edited," Professor Haan went on to say:

> "Because I like to hold the pen on documents that I put my name on. So I don't want to just lightly edit what she does. I effectively re-write it so that it is my own."
>
> (*Attaran v. IRCC*, audio recording, April 28, 2021 @ 2:01:28)

[16] There is nothing shocking about an academic expert seeking input from a student or a colleague when preparing a report. The important fact is the expert's adoption of all of the content and conclusion of the report and their willingness to give evidence under oath to support the opinions as their own. That is what transpired in this case.

[17] As stated above, Dr. Attaran argues that *Blank* stands for limits to the "zone of privacy" created by litigation privilege. Instead of being a third-party-protected communication, emails between Professor Haan and his student would be communications between a third and fourth party, and therefore fall outside of the zone of privacy.

[18] However, *Blank* does not say that. The Supreme Court's use of the term "zone of privacy" does not refer to degrees of communication related to litigation, but rather the period of time during which litigation privilege may be claimed:

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat. (*Blank* at para.34.)

[19] I agree that once an expert becomes a witness in litigation, there is a waiver of litigation privilege insofar as the expert should be required to disclose the foundational documents upon which their expert opinion is based. The Tribunal's earlier decision in *Montreuil c. Forces canadiennes*, 2007 CHRT 17 ("*Montreuil*)" is relied upon at para. 49 for

the argument that the witness can be required to produce “any document used to prepare his or her report and to be examined on these documents.”

[20] The argument is less clear when we look at the definition of foundational documents. In *Montreuil*, the “documentary sources” requested by the Commission were not reports or studies, but in fact, a preliminary report to counsel and an earlier draft of the report. Those types of documents are not at issue here. However, the question is whether the notes between Professor Haan and his graduate student are foundational documents for the expert report.

[21] For assistance on this question, Dr. Attaran cites *Ladco Company Limited et al v. City of Winnipeg*, 2019 MBQB 139 (“*Ladco*”), which at paragraph 12 sets out the applicable common law principles. Dr. Attaran specifically cites sub-paragraph 12(g), in which *Ladco* cites *Moore* as follows:

> (g) what is referred to as “the foundational information” for the opinion includes the details and information provided to the expert, the facts provided to the expert upon which the opinion is based, the instructions upon which the expert proceeded and the assumptions the expert was asked to rely upon or accept in order to formulate the opinion.

[22] However, in sub-paragraph 13(d) of *Ladco*, the Court concludes that a draft outline for the expert report was subject to litigation privilege because it “does not contain facts or instructions upon which the expert relied to prepare the expert report.” Similarly, to order production of the communications between Professor Haan and his student, I would have to conclude that Professor Haan was relying on those communications as facts or instructions upon which he based his report.

[23] In footnote 18 of his motion, the Complainant acknowledges that *Moore* states that absent an impropriety, the implied waiver of privilege does not extend to draft reports exchanged between the expert and counsel. He then states that disclosure of drafts are not sought here.

[24] At paragraph 71 of *Moore*, Sharpe J.A. writes:

> Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful

> preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.

[25] I am of the view that communications with a graduate student on the draft report fall within the realm of preparatory discussions as contemplated in *Moore* and therefore should not be disclosed.

[26] In addition, there is no evidence before the Tribunal that there was any improper conduct (See *Moore* at para. 77.) Moreover, there is no evidence that the graduate student provided facts or instructions to Professor Haan on which he based his opinion. Rather, his evidence was that he heavily edited drafts prepared by the student to make it his own.

[27] At paragraph 20 of his motion, Dr. Attaran refers to the interactions between Dr. Haan and his student as being related to "research academic literature not created for the dominant purpose of litigation." There was no evidence of such communications, but even if there were, the request would likely fail on the grounds of relevance. Insofar as professor Haan may have communicated with his graduate student for her assistance with the three paragraphs of his expert report, clearly this was done for the dominant purpose of litigation, which is sufficient grounds for their exclusion. (See *Blank* at para. 60.)

[28] Perhaps most importantly, in *Blank*, the Supreme Court of Canada states clearly that, "parties to litigation, whether represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." (at para 27.)

[29] In conclusion, I cannot conclude that the communications between Professor Haan and his graduate student, who gave him limited assistance in the preparation of this report, could be seen as foundational documents. Any communications that exist with respect to her assistance were for the dominant purpose of litigation. As such, I find the

communications between Professor Haan and his graduate student are subject to litigation privilege and not admissible before the Tribunal.

(ii) Documents Relied on by Prof. Haan and Documents provided to him by Respondent Counsel

[30] During the cross-examination of Professor Haan on his qualifications as an expert, Dr. Attaran asked him what materials the Respondent counsel provided to him for the preparation of his expert report. Before he could answer the question, Mr. Stynes objected to the question on the ground of litigation privilege. I initially upheld the objection, and after further discussion (during which the witness was excluded) the Complainant agreed to defer the question until his cross-examination of Professor Haan on the substance of his report, which is currently underway.

[31] Dr. Attaran cites *Montreuil* for the premise that a party cross-examining an expert witness "is entitled to obtain a copy of all of the documents which were used to prepare the report – the documentary sources of his or her report." (para. 41.)

[32] Citing the Ontario Court of Appeal decision in *Moore*, Dr. Attaran argues there is an "implied waiver" of litigation privilege over the facts underlying an expert's opinion that results from calling the expert as a witness. That implied waiver covers "material relating to the formulation of the expressed opinion."

[33] Dr. Attaran seeks documents that were relied on in researching and preparing his report and "documents" that Prof. Haan said were provided to him by the Respondent's counsel, Mr. Stynes. Mr. Stynes objected to further questioning during the cross-examination on the grounds that the answer would be subject to litigation privilege. Dr. Attaran argues that the objection was improper. He requests that such foundational documents be produced or Mr. Stynes produce a document index identifying the documents that the Respondent provided to Prof. Haan for the purposes of preparing the expert report.

[34] The Respondent argues that the request is too broad and that some documents in this request would fall under litigation privilege. Professor Haan's report is thoroughly referenced and cited and his opinions are set out. The Respondent points out that the

Complainant has had access to all of the studies, reports and data presented in the report. Moreover, the Complainant had Professor Haan's written report for more than one year before it was presented to the hearing, during which time the Complainant could have made a request if he was having difficulty accessing those documents.

[35] Insofar as the request includes communications between the Respondent counsel and their expert, the Respondent argues they would be privileged.

[36] With respect to the question of documents provided to Professor Haan by Mr. Stynes for the preparation of the report, the disagreement may be one of terminology. The question during cross-examination, to which Mr. Stynes objected, was:

"What material did Mr. Stynes provide you for the preparation of this report?"

[37] The word "material" is rather broad, and could possibly include some communications that would be properly guarded by litigation privilege. When I upheld the objection and asked Dr. Attaran if he could re-phrase his question, he referenced professor Haan's engagement letter wherein Respondent counsel provided a list of items to be included in an expert's report. Included on the list was "the facts and assumptions" on which opinions in the report are based. Dr. Attaran argued that this brought into question any documents Respondent counsel may have given to Professor Haan.

[38] After submissions from both Dr. Attaran and the Commission, the Complainant agreed to defer the question until the cross-examination of the expert report itself. At the time of the objection by Respondent counsel, Professor Haan was still undergoing cross-examination on his qualifications.

[39] The request of the Complainant in this motion, arising from this line of questioning, is for "disclosure of all documents possessed by Professor Haan that were relied on in researching or preparing his expert report, including any such documents that were provided by the Respondent's counsel."

[40] When I read the submissions of both parties, I do not see significant disagreement in their positions. Respondent counsel does not object to the disclosure of studies, reports and data presented in the report and cross-examination based thereupon. To the extent that

these types of documentation make up any part of the facts and assumptions which are relied upon in the report, they are foundational documents.

[41] On the other hand, communications between the Respondent counsel and the expert, which are beyond foundational documents, should be respected as litigation privileged.

[42] The Complainant argues that the documents that Dr. Haan possessed that were foundational are important to gauging his credibility. In Sopinka, Lederman, & Bryant, *The Law of Evidence in Canada*, 5th edition, at para. §14.244, the authors write: "As to the expert's credibility, caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. Certainly, confidential communications which are not the foundation of the expert opinion are not waived." I concur and I am of the opinion that implied waiver needs to be narrowly interpreted to protect communications between a solicitor and third party.

[43] Accordingly, I hereby order Respondent counsel to deliver, within seven days of this ruling, an index of any documents provided to Professor Haan that are foundational documents to the report or that would constitute facts or assumptions upon which it asked Professor Haan to rely. For any of those documents which are not publicly available to the other parties, the Respondent shall also provide copies. For greater clarity, the index should not include any preliminary reports or working drafts, or any notes or communications made in the course of preparation for litigation.

(iii) Retainer Agreement between Professor Haan and Respondent

[44] Dr. Attaran further requests disclosure of Prof. Haan's retainer agreement which discloses the amount of money he was paid to prepare his report. He argues that litigation privilege cannot be used to "surgically sausage slice away the terms (such as pay) under which a party retained an expert witness…"

[45] The Respondent argues that Professor Hann's contract has no relevance to the issues in this case and in particular the payment terms and security requirements. The Respondent notes the distinction between the retainer agreement and the engagement

letter, which contains the instructions upon which the expert proceeded. The Respondent notes that its engagement letter with Professor Haan, dated December 20, 2019, was disclosed and contained the obligations of an expert witness, referencing the Tribunal's *Rules of Procedure under the CHRA* (03-05-04) (the *"Old Rules"*), the Federal Court's *Code of Conduct for Expert Witnesses* and the deadline for service and filing the report.

[46] I will not order the disclosure of the retainer agreement or contract that Professor Haan signed with the respondent. The arguably relevant document, which was disclosed along with the expert report, was the engagement letter dated December 20, 2019. The Complainant has provided no caselaw or meaningful argument to suggest that the amount Professor Haan "was paid to prepare his report" is relevant to his challenge of Professor Haan's credibility or the reliability of his evidence.

III. Documentation Relating to IRCC Policy Changes announced in March and April 2021 (1st Motion) and in July 2021 (2nd Motion)

[47] The second part of Dr. Attaran's first motion is for the disclosure of documents related to policy changes announced by the Respondent in March and April of 2021. The Complainant requested disclosure in correspondence to the Respondent counsel dated April 16, 2021 and April 29, 2021. A second disclosure motion was filed and relates to IRCC policy changes to the PGP category announced in July 2021.

[48] Both these disclosure motions may be dealt with together and disposed of on the same grounds.

[49] The March policy change was in the form of a general announcement to all applicants in the PGP category to advise them that their immigration applications will take longer than usual and that IRCC is unable to provide accurate processing times on individual applications at this time. Dr. Attaran's motion included a sample copy of the letter from IRCC to applicants advising them of the delay.

[50] The April policy change was an announcement by the Respondent Minister of an unprecedented, new "innovative pathway to permanent residence for over 90,000 essential workers and international graduates in Canada." Dr. Attaran's motion included a copy of a

news release from IRCC dated May 5, 2021 which provided further details of the new "pathway" to permanent residence in Canada.

[51] The July policy change was an announcement by the Respondent Minister that the Government was going to triple the number of PGP applications in 2021 to admit 30,000 people. Dr. Attaran's motion included a copy of a news release from IRCC dated July 20, 2021, and an article from the Toronto Star of the same date which provided further details of the new number of applications to be available in the PGP category and the new digital platform for that process.

[52] Dr. Attaran requested production of any documents which indicate how the Respondent exercised discretion in making these changes. With respect to the revised processing times for PGP applicants, the new pathway for 90,000 new visas and the 30,000 additional applications available for the PGP category in 2021, Dr. Attaran says the disclosure is arguably relevant as they represent dramatic changes to the 2021 Levels Plan. How much discretion is possessed by IRCC and the Minister to deviate from the Levels Plan is relevant to several issues for Dr. Attaran: whether immigration is a "service," whether the Levels Plan is strictly binding, and the specific terms of a systemic remedy for discrimination going forward.

[53] The Respondent rejects the request for disclosure of these documents. Firstly, for the March-April 2021 announcements, they argue that these policy changes are part of the government's response to the Covid-19 pandemic. For a complaint that arose in 2009, they argue anything related to the pandemic response could not be part of the complaint or the matters that were referred to the Tribunal for inquiry.

[54] In addition, the Respondent argues that these requests come at a very late stage in the inquiry and that they would suffer prejudice if disclosure was ordered. The Complainant and the Commission have completed presentation of their evidence at the hearing already. The Respondent is mid-way though presenting its evidence.

[55] Moreover, the Respondent questions the relevance of the documents. In its view, the Tribunal has been asked to inquire whether the Complainant suffered discrimination due to the length of time it took to process his application to sponsor his parents over a decade

ago. This hearing, they argue, is not a commission of inquiry into how the government is governing.

[56] Finally, they argue that there are no facts before the Tribunal that engage the documents sought.

[57] In his first Reply submissions, Dr. Attaran highlighted correspondence to him from Respondent counsel dated April 12, 2021 which included some of the documentation requested in this disclosure motion. Dr. Attaran argues that by doing so, the Respondent conceded the arguable relevance, timeliness and lack of prejudice in his current requests. As such, he says the Respondent is now estopped from resiling.

[58] In its submissions for the second motion, the Commission argues that the requested documents are arguably relevant. However, the Commission suggests that full disclosure of all the requested documents is not necessary, and they suggest the admission of just the press release, the Toronto Star article and a detailed breakdown of the 2021 Levels Plans showing how many PGP applicants the government had committed to accepting in 2021.

[59] I permitted the Respondent to reply to the Commission's submissions, and they pointed out that they tried to admit the breakdown of the 2021 Levels Plan into evidence during the 9th day of this hearing on February 12, 2021. At that time, Dr. Attaran objected to the admission of new evidence after the hearing had commenced. He argued for finality in the documentary record and not for the admission of new documentation that shifted the goalposts for him in making his case. I upheld his objection.

IV. Tribunal Ruling for Documents Relating to IRCC Policy Changes announced in March and April 2021 (1st Motion) and in July 2021 (2nd Motion)

[60] Under the Tribunal's *Rules*, there is an ongoing obligation for disclosure of arguably relevant documents (see *Old Rule* 6(5) or *Canadian Human Rights Tribunal Rules of Procedure,* 2021, SOR/2021-137, *Rule* 24(1)(2)). This ongoing commitment does not cease when the hearing commences. In cases such as this one, where the hearing commenced more than 6 months ago, it would not be surprising for something to arise during the course

of the inquiry. The first question for the Tribunal, therefore, is whether or not the documents requested are arguably relevant.

[61] The Respondent suggests that the Tribunal does not have any facts before it that engage the documents that are sought. On this point, I do not agree. Firstly, the Respondent's Statement of Particulars ("SOP") presents an argument that the Levels Plan sent to Parliament each year limits flexibility. Paragraph 39 of its SOP reads in part:

> "The Respondent could not approve significantly more permanent residence applications from parents and grandparents to solve the problem. The Levels Plan did not provide the authority to do so."

[62] The testimony of the Respondent's witness, Mr. Bornais, also confirmed this contention. During cross-examination by the Complainant on February 12, 2021, the following exchange was heard:

> Q. The Levels Plan that Cabinet gave Parliament in 2012 and 2013, unlike in previous years, provides a range that lumps together the economic, family and refugee classes. Is there now flexibility within that range for these classes, as is set out in the Levels Plan that Cabinet gave?
>
> (Objection to question by Respondent counsel. Overruled by Member. Clarification of question sought.)
>
> Question re-phrased by Member: Does this range give the Department the flexibility to decide the mix?
>
> A. Is that the question? The answer is no.
>
> (*Attaran v. IRCC*, audio recording, February 21, 2021 @ 3:28:21)

[63] Although there were other snippets of testimony along the same lines, the foregoing is sufficient for me to conclude that certain documents requested in these motions, as they relate to the current Levels Plan, forwarded to Parliament as per s. 94 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), are sufficiently connected. Therefore, in conjunction with the Respondent's SOP, I find these documents to be arguably relevant.

[64] The Respondent also argues Dr. Attaran's request is based on speculation that it may be relevant. It notes that more than a decade's worth of evidence has already been admitted which already gives him the opportunity to test his theory of the case. It is worth

noting that in the first motion, it was speculated that the letter sent to PGP applicants about processing times meant things would get worse:

> "The act of delaying PGP applications, while rocketing other applications ahead, is obviously relevant to the Applicant's allegation of arbitrary, adverse, differential treatment in the processing time of PGP applications."

[65] However, the second motion relates to an announcement by IRCC suggesting the opposite. The number of PGP applications for 2021 will be tripled, presumably having the effect of expediting many of the applications for people waiting to sponsor PGP applicants. Although there is some merit to the argument that these requests amount to a fishing expedition, it does not change my conclusion that they have arguable relevance.

[66] The Respondent also raises the concern that disclosure of these documents, while the hearing is already underway, would cause them considerable prejudice. They argue these policy changes have arisen as a result of the Covid-19 pandemic response, and therefore they must be viewed in proper context, which might include the introduction of further evidence or an additional witness. They also suggest that the dates for the resumption of this hearing, less than one month away, might be in jeopardy if new disclosure is ordered at this time.

V. Conclusion

[67] Although I have found that some of the documentation requested has arguable relevance, I am not going to order further disclosure at this time.

[68] The Tribunal is obligated under subsection 50(1) of the *Canadian Human Rights Act* R.S.C. 1985, c. H-6 (*CHRA)* to afford the Complainant a full and ample opportunity to present evidence and make representations to the Tribunal. However, this obligation must also be balanced against subsection 48.9(1) of the *CHRA* which instructs the Tribunal to conduct its proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[69] In an interim ruling issued on March 26, 2021, I ordered the Respondent to disclose documents requested in the Complainant's motion for disclosure of March 5, 2021,

notwithstanding that the Respondent argued that the majority of those documents were subject to Cabinet Privilege. In the interest of fairness to the Complainant, I ordered the Respondent to make a request for certification by the Clerk of the Privy Council under s.39 of the *Canada Evidence Act*, R.S.C. 1985, c C-5, if they intended to rely on that privilege. That exercise took almost four months and the certification was eventually granted by the Clerk, precluding the disclosure of all of the privilege-claimed documents.

[70] The Tribunal's ruling in *Brickner v. RCMP* 2017 CHRT 28 ("*Brickner*") considered whether certain requests for documents, even though they may be arguably relevant, should nevertheless not be granted considering the impact on the parties and the Tribunal's process. The CHRT is an administrative tribunal. It is not a court of law. Administrative tribunals like the CHRT were created by Parliament to handle disputes more quickly and informally than the courts (see s. 48.9(1) of the *CHRA*). Unfortunately, some inquiries, like this one, go on before the Tribunal for years. In keeping with the spirit of subsection 50(1) of the *CHRA*, parties are usually offered wide latitude to present their cases as they wish.

[71] In the Complainant's earlier disclosure motion, the hearing process was interrupted and the Respondent was given the opportunity to request certification of Cabinet Privilege by the Clerk of the Privy Council. As mentioned above, that certification was eventually granted four months later, resulting in the loss of time and resources for no gain to the Tribunal's process. I wish to avoid further delay that will result in little or no benefit to the Tribunal's inquiry.

[72] I made a similar cost-benefit analysis in *Brickner* at para. 36:

> [36] In a broad sense, any documentation requested must be arguably relevant, and as such it must bear some connection with the allegations made by a party to the dispute. It is apparent that this request relates to the allegations Cpl. Brickner made in paras. 62-73 of her SOP where she alleges that between June 2012 and December 2014, there were 11 vacant positions of which she was not advised or selected. This request seeks to further identify what other positions might have been available during this period for which again, Cpl. Brickner was not advised or considered. **I am not convinced that this additional documentation will add to Cpl. Brickner's case in any measurable way. It is the Tribunal's view that allowing this request may unduly delay the efficiency of the inquiry without adding any substantial probative value as the Complainant seems to already be in possession**

> **of evidence that may support her claim that she was not considered for several jobs in M Division.** The Tribunal wishes to take this time to remind the parties that the Complainant need only establish that she was passed over for one position on a prohibited ground in order for the Tribunal to make a finding of discrimination. (Emphasis added.)

[73] In this case, there may be potential relevance in the evidence sought to be gained by this motion. However, at the same time, that must be weighed against the context of this inquiry, which is already exceptionally long in duration. Over 140 documentary exhibits have been entered so far, including evidence which is similar to the documents now sought, as they relate to the Levels Plans. In fact, the Tribunal has already received into evidence information disclosing the Levels Plans from the years 2008-2019 and several Ministerial Instructions relating to the changes in number of PGP admissions mid-year. As Dr. Attaran's reply submissions specify, the 2021 Levels Plan for PGP (Exhibit 103) and the memorandum to the Minister on the 2021 PGP intake (Exhibit 88) are also on record.

[74] These two disclosure motions seek to adduce evidence when there is a substantial body of documents on record to speak to the core issues, including whether the Respondent is providing a "service" within the meaning of section 5 of the CHRA. While the new documentation sought from 2021 has arguable relevance, I am not convinced it will add to the existing evidence in any measurable way. Dr. Attaran's complaint concerns events that occurred between 2009 and 2012. I am of the opinion that we do not need to seek out and admit this documentation in order to deal with the issues raised by this complaint. The prejudice to the Tribunal's process outweighs the potential relevance and usefulness of the documents sought.

[75] Lastly, I would concur with arguments made on February 12, 2021, when the Complainant objected to the introduction of new evidence regarding the Levels Plans. There needs to be some finality to the record. The ground cannot be forever shifting as new policy announcements are made a decade or more later than the impugned conduct.

[76] For all of these reasons, I have concluded that the disclosure motions should be dismissed.

[77] As per paragraph 43 above, Respondent counsel will deliver, within seven days of this ruling, an index of any documents provided to Professor Haan that are foundational documents to the report or that would constitute facts or assumptions upon which the Respondent asked Professor Haan to rely.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
August 24, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2163/3716

Style of Cause: Amir Attaran v. Immigration, Refugees and Citizenship Canada

Ruling of the Tribunal Dated: August 24, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Amir Attaran, for himself

Caroline Carrasco, for the Canadian Human Rights Commission

Sean Stynes, for the Respondent