

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

**Citation: 2023 CHRT 52
Date: November 20, 2023
File No.: T2582/13920**

Between:

Ray Davidson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Global Affairs Canada

Respondent

Ruling

Member: Kathryn A. Raymond, K.C.

I. Overview

[1] This is a case management ruling explaining to the parties why they have an obligation to follow Tribunal directions, in this case about preparing documents for a hearing.

[2] The parties filed a Joint List of Documents & Documents in preparation for the hearing of this complaint. These materials were not prepared as per instructions provided by the Tribunal. The parties are being required to correct errors that could negatively impact the efficient use and management of documents at the hearing and to refile the List of Documents & Documents with the Registry.

[3] The parties were sent a separate letter on November 14, 2023 from the Tribunal identifying what does and does not need to be corrected in the circumstances of this case. They were provided a date to refile their documents and were advised that this ruling with the Tribunal's reasons would follow.

[4] A document described in the List of Documents as a "redacted version" has been redacted and highlighted without explanation. If a party unilaterally caused these markings to be added to the document as a result of this proceeding, that is not permitted. The other parties were entitled to notice of the proposed redactions, assuming they did not receive notice. A request to the Tribunal for permission to redact the document and, potentially, an application for a confidentiality order should have been made in advance by the party wishing to make redactions.

[5] The Tribunal will provide further directions after the involved party(s) provide clarification of the redactions and highlighting.

II. Background

[6] Parties are required by section 36 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021* (the "Rules") to prepare and file a List of Documents & Documents (the "List of Documents") before the hearing of a complaint. Section 36(1) states:

List of Documents

36 (1) Each party must file, by no later than the 30th day before the first scheduled day of the hearing, a list of the documents, other than any expert reports referred to under rule 22, that it intends to introduce into evidence at the hearing and a copy of each of those documents.

[7] The List of Documents is the reference point for documents the Parties intend to introduce into evidence at the hearing. It serves as a table of contents for the documents and assists the Tribunal and Registry in the management and description of those documents that are admitted into evidence and become exhibits.

[8] The hearing of this complaint is being conducted by videoconference. The parties will participate from different locations. It is likely that many of the documents filed with the List of Documents will be screen-shared during the videoconference among the participants in the hearing.

[9] The Tribunal wrote the parties a letter to provide written guidance about how documents should be prepared for a hearing by videoconference (the “guide”). The instructions in the guide addressed common procedural questions asked by parties regarding the preparation of these materials for hearings and reflected the experience of the Tribunal in proceedings before it. The guide was also prepared for the parties with the circumstances of this case, where the Complainant is representing himself, in mind.

[10] In part, the purpose of the guide was to ensure that documents were organized and described with a reasonable degree of consistency as between the parties and could be accessed and reviewed easily and efficiently during the virtual hearing. The instructions specifically addressed how to prepare a List of Documents in electronic format. The guide included, as examples, instructions about how to file a large number of electronic documents with the Registry and instructions that make it easier for the Tribunal and parties to access the electronic documents during the hearing and to navigate between the List of Documents and the documents themselves.

[11] In addition to the guide, the parties received an electronic template of a “List of Documents & Documents”, with examples showing how to complete the template and the information to be included in the description of the document, as applicable. The parties

were asked to prepare their List of Documents in accordance with the guide, following the template, for the upcoming hearing.

[12] The parties subsequently advised that they intended to file a Joint List of Documents on behalf of all the parties. The parties agreed upon which documents would be included, subject to the understanding that the documents would not be automatically entered into evidence as exhibits and that each party reserved the right to object to a document being made an exhibit. This agreement minimized the number of Lists of Documents from which documents will be screen-shared at the hearing and was appreciated by the Tribunal.

[13] Upon filing, Respondent counsel confirmed that the Joint List of Documents had been prepared by the Respondent's litigation team in accordance with the guide and template with the input and consent of the other parties. In some respects, the List of Documents was prepared as requested, but in other respects, it was not. The filed materials also contained administrative errors such as repeated inconsistent page orientation within a large document.

III. Procedural Ruling

[14] The parties were advised that they were required to correct errors in the preparation of the List of Documents and to refile the List of Documents with the Tribunal. Errors that are most likely to impact the hearing were selected for correction. Errors that would be time consuming to correct this close to the hearing and/or which could be accommodated at the hearing without significant inconvenience were not required to be addressed.

IV. The Reasons

[15] The Tribunal has discretion, pursuant to section 48.9 of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (the "Act"), concerning matters of procedure. Section 48.9(1) provides that "proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." The Tribunal is further required by section 5 of the Rules to interpret and apply the Rules in a

manner to secure “the informal, expeditious and fair determination of every inquiry on its merits.”

[16] Similarly, the Tribunal has flexibility in providing procedural directions for matters not specifically addressed in the Rules. As recently confirmed by Chair Khurana in *Ryan Richards v Canadian Human Rights Commission and Correctional Service Canada* 2023 CHRT 51 at para. 29:

...[A]dministrative tribunals are expected to... have the ability to provide simplified and streamlined proceedings that can promote access to justice (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] at para. 29). The parties are in turn expected to do their part to support this flexibility so that this matter moves forward as efficiently as possible. (emphasis added)

[17] In this case, the Tribunal provided the guide and template to simplify and streamline the pre-hearing submission of documents needed for the virtual hearing. In part, the instructions were intended to ensure that documents required by the Rules were prepared efficiently by the parties. The instructions anticipated frequently asked questions and fostered consistency in the materials to be filed by the parties and used at the hearing. The instructions were also of general relevance to the efficient conduct of a virtual hearing. They were intended to ensure that document management at the hearing is easy and efficient for the participants and the Tribunal.

[18] The guide and the instructions within it are not written into the Rules and ought not need be; documents like the guide and template provided in this case offer more flexibility respecting instructions and can be improved without the process of amendment which applies to the Rules.

[19] It is recognized, as well, that the instructions provided were described to the parties as a “guide” for preparing documents for a virtual hearing, not as a strict set of requirements. Likewise, the template is subject to some judgement about what should be included about any one document in the document description in the List of Documents.

[20] Nonetheless, the Tribunal directed that the guide and template be followed during case management. Procedural tools such as written instructions and templates do not only

assist the parties and self-represented litigants by clarifying procedural requirements, they also enhance the effectiveness of the litigation process itself. They ought to be followed in the interests of efficiency and expeditiousness. If every procedural question about how to prepare a document to be submitted as evidence at a virtual hearing or about how to prepare a List of Documents were addressed separately by the Tribunal or the Registry, the timely progress of all cases before the Tribunal, including this complaint, would be undermined.

[21] Efficiency can be gained from the use of procedural tools such as the guide provided in this case. However, these efficiencies can only be realized if the directions are followed.

[22] The negative implications for efficiency extend beyond the parties themselves when the Rules or instructions provided in case management are not followed, without acceptable reason. This is especially true where instructions have been developed to address significant aspects of the litigation and/or are customized for the case in question. The time that is lost may include the time spent by the Tribunal preparing or customizing the instructions for the case, reviewing information or documentation from the parties that needs to be redone, the time spent making arrangements for additional case management conferences and/or explaining the problems to the parties, the time taken to formally or informally resolve the procedural issues, to confirm new dates and directions and to ensure that the parties follow-up. All of this can take the time of the Tribunal away from other complaints, without a reason that further advances the case at hand. In this case, the problems with the Joint List of Documents also took time away from other issues impacting this complaint, at a time when the hearing is pending.

[23] The parties in this case have an obligation, along with the Tribunal, to try to achieve procedural efficiencies. This includes ensuring that this case is ready to proceed to hearing as seamlessly as possible. They ought to have taken steps to ensure that the Joint List of Documents was prepared as instructed in the guide and template. As noted, they had been directed to follow the guide and template during case management.

[24] Not many errors in the preparation of documents will lead to a formal procedural ruling by the Tribunal; the preparation of a ruling is a further expenditure of time and the need for a ruling is a relevant consideration. Minor errors without procedural impact will

rarely merit comment. Those that do are usually resolved informally at the next opportunity during case management or by letter.

[25] In this case, the Tribunal has tried to address many pre-hearing issues in case management discussions and by means of correspondence, consistent with the procedural goals of informality and expeditiousness stated in the Act and Rules, rather than by issuing formal rulings. Some of these efforts have been acted upon or implemented by the parties, but too many have not and required time-intensive follow-up. The issue of compliance with directions has been addressed by the Tribunal with the parties before.

[26] In these circumstances, the Tribunal concluded that it is necessary to provide a ruling with its reasons to the parties to ensure that the parties understand that the more informal context of case management, as opposed to formal proceedings, does not relieve them of their obligation of compliance with Tribunal directions or instructions. When the Tribunal employs more flexible procedures, whether by attempting to resolve pre-hearing disclosure issues in case management instead of requiring motions, or whether by providing written instructions and procedural guides to the parties beyond the content of the formal Rules, these steps are taken to streamline the process and achieve efficiencies. It is expected that, barring approval to proceed otherwise, the Tribunal's directions will be followed.

[27] As noted above, the Tribunal is exercising its procedural discretion to require that an amended Joint List of Documents & Documents be refiled. To be clear, not every imperfect document or form should be returned to the party filing it to be corrected and refiled. The Tribunal may have a self-represented party appearing before it who may not have prepared anything like an electronic List of Documents & Documents before and may need more explanation than a written guide provides. At the other end of the spectrum, errors or mistakes by a party that compromise the fairness of the hearing are required to be corrected in the interests of natural justice. The issue of the unexplained redactions and highlighting in a document, addressed below, is an example of the Tribunal ensuring that the procedure is fair to all parties.

[28] However, in this case, the errors are likely to make the hearing less efficient and more difficult for the participants. The Joint List of Documents is likely to be used extensively

during the hearing by all parties, given the nature of the issues in dispute. It consists of approximately 900 pages. A number of witnesses will be cross-examined on documents in the Joint List of Documents. The participants will need to be able to access and refer to documentary evidence during the hearing efficiently and quickly.

[29] The Joint List of Documents was prepared on behalf of the parties by counsel possessing expertise and access to resources. The List of Documents should have been prepared and filed in conformity with all of the instructions.

V. Unexplained Redactions and Highlighting

[30] One issue with the Joint List of Documents is singled out for inclusion in this ruling. Redactions of typed content and yellow highlighting appear throughout a document, consisting of 131 pages, labelled as Doc-2 in the Joint List of Documents. The Tribunal is not in a position to ascertain if these markings appear on the original of the document or whether the documentary evidence has been altered. If a copy of the document has been altered during this proceeding, no explanation is provided regarding by whom and for what reason. If the redactions have been unilaterally added by a party for purposes of this litigation, that is not permitted.

[31] If documents to be filed with the Registry will appear altered to the Tribunal or the other parties, it is expected that this will be brought to the attention of the Tribunal and be explained. Explanation is warranted because documentary evidence is to be preserved and is not expected to be altered by a party once that party has notice of litigation, including not in the course of review and preparation of the List of Documents.

[32] Permission to redact a document usually is requested when redactions are desired for purposes of privacy or confidentiality. The party wishing to redact documents is required to give notice to the other parties of the placement of the proposed redactions and the reasons for them. The other parties are entitled to an opportunity to respond. There is nothing provided with the Joint List of Documents to indicate that this occurred. If the markings were added without notice to the other parties, this is a matter of procedural fairness and must be corrected.

[33] Further, before redacted documents are filed with the Registry, there must first be either a direction or order of the Tribunal that specific content in documents may be redacted for privacy reasons because it is irrelevant, or, if content is arguably relevant, a confidentiality order must be issued by the Tribunal pursuant to section 52 of the Act. Proceedings before this Tribunal are required to be public except in the circumstances prescribed by section 52:

52 (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

(a) there is a real and substantial risk that matters involving public security will be disclosed;

(b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

(c) 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; or

(d) there is a serious possibility that the life, liberty or security of a person will be endangered. (emphasis added)

[34] Section 52 requires a party seeking to preserve confidentiality to make an application for an order. They are required to persuade the member of the Tribunal conducting the inquiry that a confidentiality order should be granted. Issues of privacy and confidentiality engage important issues and are to be addressed with the Tribunal, not unilaterally by one party or upon agreement by the parties without the involvement of the Tribunal.

[35] Similar concerns arise respecting highlighted areas in the same document respecting their potential significance. No explanation of this accompanied the Joint List of Documents when it was filed. It is not indicated if the Tribunal has been provided with a colour copy of the original document or if the highlighting has been added. If the latter, a party should not alter documentary evidence submitted to the Tribunal for the purpose of bringing specific content to the attention of the Tribunal absent notice to the other party and/or instruction by the Tribunal that this be done. If the highlighting occurred during the proceeding but for some other reason, that should have been explained.

VI. Orders

[36] The parties are to refile a corrected Joint List of Documents & Documents on or before November 23, 2023.

[37] The party(s) with direct knowledge of the redactions and highlighting is to provide a written explanation to the Tribunal by November 23, 2023. That party is encouraged to have canvassed the other parties for their positions respecting the appropriateness of the redactions and highlights if they have not already done so.

Signed by

Kathryn A. Raymond, K.C.

Ottawa, Ontario
November 20, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2582/13920

Style of Cause: Ray Davidson v. Global Affairs Canada

Ruling of the Tribunal Dated: November 20, 2023