

Canadian Human Rights Tribunal

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Tribunal canadien des droits de la

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

PRODUCTION OF DRAFT DOCUMENTS

Ruling No. 4

2001/10/23

PANEL: Benjamin Schecter, Chairperson

Elizabeth Leighton, Member

Gerald Rayner, Member

I. BACKGROUND

[1] A request has been made by the Respondent, Canada Post, to the Alliance for any draft reports or responses or comments among the three members of the Evaluation Committee with respect to the Respondent's written questions as outlined in Exhibit R-554.6.

[2] That Exhibit is the Evaluation Committee's joint response to written questions posed by the Respondent during cross-examination of Dr. Martin Wolf, concerning the report filed as Exhibit PSAC-180.

[3] PSAC-180 was entered as the foundation for expert opinion evidence for the Alliance, in reply.

[4] It was during the cross-examination of Dr. Wolf, in reply, that certain written questions were drafted by the Respondent, and agreed to by the Alliance and the Commission.

[5] These questions were posed to the Evaluation Committee, and were expected to elicit responses which would expedite Dr. Wolf's cross-examination.

[6] Originally, the Evaluation Committee was to meet, face-to-face, to answer the posed questions.

[7] The terrorist events of September 11, 2001 changed the plans of the Evaluation Committee; instead of a personal meeting, they met "online" to discuss the questions and to generate the answers which became Exhibit R-554.6.

[8] The Respondent, therefore, wishes to access any draft reports or responses to the questions that may have been exchanged among the Evaluation Committee members,

together with any comments received by Dr. Wolf from his two colleagues with respect to drafts of the report which became R-554.6.

II. RESPONDENT'S SUBMISSIONS

[9] The Respondent argues that access to these draft reports or responses or comments is necessary to its fuller understanding of the process by which the Evaluation Committee came to its expert opinion, expressed in PSAC - 180.

[10] Arguing that, in job evaluation, the process followed is as important as the conclusions reached, the Respondent submits that this documentary evidence of the Evaluation Committee's process is, therefore, extremely relevant to its understanding of the conclusions reached.

[11] Moreover, the fact that one member of the Evaluation Committee is putting forth answers to questions resulting from a group deliberation, leads the Respondent to argue in favour of being made aware of any recorded exchanges among the members.

[12] The Respondent also notes that the trend in Canada is now generally towards greater disclosure and further notes that an expert witness should be thoroughly cross-examined on all matters and documents touching on the weight of the evidence he or she offers.

III. ALLIANCE AND COMMISSION SUBMISSIONS

[13] The Alliance and the Commission argue that a key aspect of the Respondent's request is whether or not the requested documents are even relevant, given the existence of a final response or report (R-554.6).

[14] There is, they argue, no entitlement of the Respondent to go behind that final report, as it represents the joint answers of all Evaluation Committee members, arrived at in confidence, and signified as such by their individual signatures.

[15] To give that entitlement could set an unfortunate precedent, not in the public interest, that an expert's notes, observations, and interim writings should be disclosed and placed before the Tribunal.

[16] Indeed, the Alliance and the Commission argue that such a decision could open the door to the systematic destruction of such materials by experts, once their final reports are written and distributed, just to avoid such a request as is being made by the Respondent.

[17] Their argument of no entitlement is based upon the principle of litigation privilege, which they submit, is a branch of solicitor-client privilege and, therefore, seminal to the security and confidentiality of the client, a concept which should remain uppermost in the minds of those involved in the litigation process.

IV. CONCLUSION

[18] All counsel agree that the case law concerning the release of draft reports and internal communications relating to expert reports is not definitive; indeed, there appear to be two jurisprudential currents.

[19] Some cases have found that the concept of litigation privilege is distinct from solicitor-client privilege, and that litigation privilege is automatically waived once an expert becomes a witness, while other cases have accepted that litigation privilege is an extension of the traditional solicitor-client privilege and, as such, is sacrosanct.

[20] Cases which have required production of working papers and other materials peripheral to the final report of an expert witness have noted that the search for truth with respect to an expert's evidence outweighs any interest that might be served by protecting the expert's preliminary work.

[21] More recent cases rely on the necessity to demonstrate the relevance of the materials being requested in order to find that they should be produced.

[22] The issue for the Tribunal then is:

Is the request for production of draft reports or responses or comments which led to the answers found in R-554.6 relevant to the substance of the opinion presented in PSAC-180?

[23] The Tribunal is of the view that the question of relevance is the determinative factor, and is of the opinion that there is some relevance in understanding the process by which the Evaluation Committee came to its opinion, filed as PSAC-180, through the production of the draft reports or responses or comments leading to the report in R-554.6. As with all other evidence, the Tribunal will ultimately have to give appropriate weight to those draft reports or responses or comments.

[24] Accordingly, the Tribunal orders that the reports or responses or comments, to the extent that they exist, shall be delivered to the Respondent, Canada Post, with copies to all parties, and shall be entered as an Exhibit in this hearing, once identified by Dr. Wolf.

Benjamin Schecter, Chairperson

Elizabeth Leighton, Member

Gerald Rayner, Member

OTTAWA, Ontario

October 23, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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(October 17, 2001)

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APPEARANCES:

James Cameron For the Public Service Alliance of Canada

Fiona Campbell For the Canadian Human Rights Commission

Joy Noonan, Jennifer Perry For the Canada Post Corporation