

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

MICHELINE MONTREUIL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN FORCES

Respondent

RULING

2006 CHRT 57

2006/12/01

MEMBER: Pierre Deschamps

[TRANSLATION]

I. POSITION OF THE PARTIES 1

A. The complainant 1

B. The Canadian Human Rights Commission 2

C. The respondent 2

II. ANALYSIS 3

A. Documents found on an Internet site 4

B. Medical literature 5

III. CONCLUSION 6

IV. ORDER 6

[1] On October 11, 2006, the Human Rights Commission, hereinafter called the Commission, and the complainant received a series of six volumes of documents for a total of more than 1,500 pages from the Canadian Armed Forces, hereinafter, the respondent.

[2] On October 13, 2006, the complainant and the Commission presented the Tribunal with a motion to adjourn the hearing that was to begin October 23, 2006, claiming the late disclosure of the documents described above.

[3] My colleague, Karen Jensen, was first presented with the motion. In a decision rendered October 16, 2006, she referred the motion back to the member assigned to hear the complaint on merits.

[4] On October 23, 2006, the date set for the hearing on the merits, the Tribunal heard the motion to adjourn as well as many other motions and requests by the parties.

[5] The first nine days of the hearing on the merits were devoted to hearing the various motions and requests made by the parties.

[6] The hearing was finally adjourned on November 2, 2006, to December 4, 2006, when the complainant was to present its evidence. This decision summarizes the reasons on which the Tribunal based its decision to adjourn the hearing to December 4, 2006.

I. POSITION OF THE PARTIES

A. The complainant

[7] The complainant claims that many of the documents that were transmitted to her on October 11, 2006, are new, in that they were never brought to her attention during the disclosure of evidence process.

[8] The complainant also claims that this is the first time she is seeing at least 95% of the volume on the Canadian Forces recruiting standards and the volume on the Canadian Armed Forces medical standards. The same goes for the scientific literature on transsexualism and the interpretation of MMPI-2 psychometric tests.

[9] The complainant claims that by transmitting voluminous documentation that she is seeing for the first time at this stage in the proceedings, the respondent did not meet its ongoing obligation to disclose all documents relevant to the issues in question. According to the complainant, this documentation should have been transmitted before February 7, 2006. In short, the complainant claims that the disclosure of these documents is late.

B. The Canadian Human Rights Commission

[10] The Commission agrees with the complainant's position. For the Commission, this is a case of a massive, very late disclosure of documents. For the Commission, this massive, very late disclosure of documents the respondent plans on using as evidence causes a serious prejudice to the complainant and the Commission, that must read the documents in order to adequately prepare for the hearing.

[11] The Commission claims it is false to claim, as counsel for the respondent did, that by transmitting six volumes of documentation on October 11, 2006, the respondent was only conforming to the Tribunal's order of September 18 and 22, 2006, and states that such a claim does not make sense. It claims that the Tribunal would not have authorized the disclosure of new documents one week and two days before the start of the hearing.

C. The respondent

[12] The respondent claims that the disclosure respects the February 7, 2006, order by Karen Jensen on all points, and that it was only conforming to the Tribunal's order dated September 18 and 21, 2006. It also claims that the disclosure was validly authorized by the Tribunal.

[13] Counsel for the respondent feels that the documents submitted on October 11, 2006, do not constitute a late filing, and should not have taken the Commission and the complainant by surprise.

[14] As for the documents on the recruitment and medical standards of the Canadian Armed Forces, the respondent points out that these documents are available on its

Internet site. As for the medical literature, the respondent claims that the Commission's expert should have been aware of it.

[15] At the hearing, counsel for the respondent stated that the documents transmitted to the complainant and the Commission on October 11, 2006 replaced the documents previously disclosed and were, in fact, the documentary basis to be used in support of its evidence.

II. ANALYSIS

[16] At the hearing of this motion, the Tribunal was able to examine the documents transmitted by the respondent to the Commission and the complainant on October 11, 2006. The documentation, distributed in six spiral notebooks, is, in fact, more than 1,500 pages. Many of the documents transmitted had not previously been disclosed.

[17] In a given case, the *disclosure* to the opposing party of documents that are relevant to the issue in question that a party has in its possession and the *production* by a party of documentation it plans on submitting in support of its evidence are two very different things.

[18] Disclosure refers to any document a party has in its possession that it feels is relevant to prove its case. The documents produced at the hearing by a party to prove its case are, in most cases, a selection of relevant documents from the documents already disclosed.

[19] In this case, it cannot be claimed that the Tribunal authorized the disclosure of new documents less than 10 days before the start of the hearing. The reading of the transcript of the stenographer's notes regarding the hearings of September 18 and 21, 2006 does not allow for such a conclusion to be reached.

[20] This being said, in a particular case, not only should a party not be taken by surprise, but that party must also be allowed to prepare adequately. This applies particularly to expert witnesses who are to inform the Tribunal of technical aspects that are beyond its field of legal knowledge.

[21] Transmitting a significant volume of documents that had not previously been disclosed to a party a few days before the start of a hearing is a cause of prejudice to the party to whom the documents were transmitted; it could prevent the party from preparing adequately and prevent its expert witnesses from preparing adequately.

[22] Among the documents transmitted to the complainant and the Commission on October 11, 2006, two series of documents warrant particular attention: the documents that can be found on the respondent's Internet site and the scientific literature produced.

A. Documents found on an Internet site

[23] The fact that documents are available and accessible on a party's Internet site, in this case, the respondent, should not be interpreted as implicit disclosure of their content to the opposing party.

[24] It is the responsibility of the party that has documents on its Internet site to not only inform the opposing party of the documents it considers relevant to the issues in question but also to send it copies.

[25] The volume of documents available today on so many Internet sites is such that it is not possible to have a party find out which documents on the Internet site of another party may be relevant to the issues in question in a particular case. This task is the responsibility of the party that has such a site.

B. Medical literature

[26] In a given case, it is important for an expert to have prior access to the relevant scientific documentation to which a party plans on referring, in order to properly inform the Tribunal of technical or scientific issues. To assume that an expert should be aware of all this documentation does not seem reasonable.

[27] Therefore, the fact that medical literature is now available on the Internet does not exempt a party, that considers certain scientific articles relevant to the issues in question and plans on using them in support of its evidence, from disclosing these articles to the opposing party as soon as possible.

[28] In this case, there seems to have been confusion or a misconception by the respondent between the disclosure of relevant documents relate to the case and the production of documents it intends to tender in evidence. This should not be prejudicial to the complainant and the Commission.

[29] At the hearing on the motion, the complainant stated many times that she needs some time to read all the documentation transmitted by the respondent on October 11, 2006. The Tribunal set the date of November 24 for the filing of the reply by the complainant and the Commission to the respondent's statement of particulars.

[30] In this case, the Tribunal considers that the complainant and the Commission had six weeks to examine the documentation submitted by the respondent. Of course, during this period, nine days were devoted to the hearing of various motions and requests.

[31] This being said, as of November 2, 2006, the complainant and the Commission had a little more than three weeks to examine the documentation submitted by the respondent on October 11, 2006, and present a reply, which, given the circumstances in this case, would constitute a deadline that could not be considered a miscarriage of justice.

III. CONCLUSION

[32] The Tribunal finds that the request for an adjournment by the complainant and the Commission was, in this case, fully justified, considering the scope and importance of the new documents sent to them on October 11, 2006.

[33] Starting the hearing of witnesses on October 23, 2006, would, in this case, have caused serious prejudice to both the complainant and the Commission. They should have a sufficient period of time to examine the new documents that were sent to them by the respondent on October 11, 2006, and to prepare accordingly.

IV. ORDER

[34] For the above-mentioned reasons, the Tribunal allows in part the motion for adjournment presented by the complainant and the Commission, and orders the following:

The hearing of witnesses in this case is differed to **December 4, 2006**, when the complainant will begin its evidence;

The respondent shall send the complainant and the Commission any additions to its expert reports on or before **November 10, 2006**;

The Commission shall send the complainant and the respondent any additions to Dr. Beltrami's report on or before **November 21, 2006**, as well as all related documentation;

The Commission shall send the respondent and the complainant the result of the MMPI-2 test in Dr. Beltrami's possession on or by **November 21, 2006**, including the graph and responses to the questions;

The complainant and the Commission shall send the respondent their reply to the respondent's statement of particulars on or before **November 24, 2006**, as well as all related documentation.

Pierre Deschamps

OTTAWA, Ontario
December 1, 2006

PARTIES OF RECORD

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APPEARANCES:	
Micheline Montreuil	For herself
Ikram Warsame	For the Canadian Human Rights Commission
Guy Lamb / Pauline Leroux	For the Respondent