

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE

COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA,
FEMMES-ACTION

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

BELL CANADA

Respondent

2nd RULING ON PRIVILEGE

PANEL: J. Grant Sinclair, Chair 2004 CHRT 18
Pierre Deschamps, Member 2004/06/01

I. INTRODUCTION

[1] CEP asserts the existence of a litigation privilege with respect to two documents.

[2] **Document 1** is a seven page document containing pages 1 to 6 and page 8. This document bears the heading *Discussion Elizabeth Millar, May 25 and 28th*. Pages 5 and 6 have been produced and entered as Exhibit R-269. Exhibit R-270 is probably page 7 of Document 1. This is not certain. CEP has not produced pages 1, 2, 3, 4 and 8 of Document 1 claiming litigation privilege.

[3] **Document 2** (Document 382 of CEP disclosure) is an agenda for an August 27th meeting. On the front side of page 1, there are handwritten notes presumed to be written by Fred Pomeroy. The handwritten notes are "cont'd over" on to the flip side of page 1. Document 2 has been produced to Bell except for the flip side of page 1. CEP claims litigation privilege on the "cont'd over" notes.

II. LAW

[4] For CEP to succeed in its claim for litigation privilege, CEP must satisfy the following tests:

- (1) the communication must have been produced with litigation in mind;
- (2) the communication must have been produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation;
- (3) prospect of litigation must be reasonable.

III. RULING

A. Document 1

[5] Pages 5, 6 and 7 have been produced and tendered in evidence. Ms. Blackstaffe has been cross-examined on those exhibits. The transcript shows that she links these pages to Mr. Ranger's assessment of the Manitoba Pay Equity Study. The evidence now shows that pages 5, 6 and 7, are in fact related to a discussion that Ms. Elizabeth Millar and Ms. Blackstaffe had on May 25 and May 28 and have nothing to do with Mr. Ranger's assessment of the Manitoba study.

[6] The question is whether CEP by disclosing part of the document has waived any privilege claim to the remainder. In our opinion and supported by law, whether intended

or not, waiver may also occur if fairness requires it. CEP has disclosed part of Document 1. Bell has conducted its cross-examination on the understanding that this was the whole of the document. This is not the case and the context is incomplete. Having received part of the document, fairness requires that Bell receive the whole of the document.

[7] Further, Document 1 reflects Ms. Millar's views as to pay equity, job evaluation, points, the use of the Manitoba study, the filing of complaints. It does not appear that the document was created for the dominant purpose of receiving legal advice or as an aide to the conduct of litigation. Nor does the evidence or arguments of CEP convince us that the document was produced with litigation in mind.

B. Document 2

[8] As for Document 2, the Tribunal also finds that CEP's assertion of privilege is ill-founded. It does not satisfy the tests for litigation privilege.

[9] The handwritten notes are personal notes or observations written down by, it is assumed, Fred Pomeroy. We are not satisfied that these notes are a communication by Mr. Pomeroy or are the result of any communication received by Mr. Pomeroy for the purpose of receiving legal advice or as an aid to litigation.

[10] Accordingly, CEP must produce to Bell the disputed pages relating to Document 1 and Document 2.

Signed
by _____
J. Grant Sinclair, Chair

Signed
by _____
Pierre Deschamps, Member

OTTAWA, Ontario

June 1, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T503/2098
STYLE OF CAUSE:	Communications, Energy and Paperworks Union of Canada, Femmes-Action v. Bell Canada
DATE AND PLACE OF HEARING:	Ottawa, Ontario May 31, 2004
RULING OF THE TRIBUNAL DATED:	June 1, 2004

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