Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Micheline Montreuil

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Forces

Respondent

Ruling

Member: Pierre Deschamps
Date: May 8, 2007
Citation: 2007 CHRT 17

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I. Introduction

[1] Through its motion, the Commission is requesting that the respondent, the Canadian Forces, disclose or produce notes, documents and drafts relating to an expert's report prepared by Dr. Pierre Assalian for these proceedings. Specifically, the Commission is seeking the disclosure or production of a preliminary report allegedly prepared by Dr. Assalian and submitted to the respondent's counsel before April 24, 2006.

[2] For its part, the respondent is objecting to the disclosure of these documents on the grounds that they are subject to solicitor-client privilege and litigation privilege.

[3] During his testimony on his qualifications as an expert, Dr. Assalian testified about the preparation of the reports he had been called to write for these proceedings.

[4] Dr. Assalian explained that, during a meeting in the autumn of 2005, the respondent's counsel, Mr. Morissette, mandated him to review the documents to determine whether the Canadian Forces were justified in imposing an employment limitation on Ms. Montreuil because of gender dysphoria.

[5] Dr. Assalian then explained that in early 2006, he received the documents that he had to assess and that he subsequently prepared a report or preliminary report in accordance with the mandate given to him.

[6] According to Dr. Assalian, the draft had been prepared in March or April 2006 and sent by e-mail to the respondent's counsel, Mr. Lamb. Dr. Assalian stated that, after sending his draft report or preliminary report to the respondent's counsel, he had asked to meet with him in order to discuss the document.

[7] Dr. Assalian stated that when he met with the respondent's counsel, he had indicated that he wanted to perform a clinical assessment of the complainant, which the respondent's counsel agreed to.

[8] Called to explain the reasons for his request, Dr. Assalian stated that he could have been satisfied with an assessment based on the documents, but that he considered it was important to perform a clinical assessment in order to confirm his assessment, as he was of the opinion that this matter was a "*high profile*" case, to use his words, and foresaw a challenge if there were a documentary analysis without a clinical examination.

[9] Dr. Assalian, accompanied by two colleagues, therefore proceeded on May 18, 2006, with a clinical assessment of the complainant. On June 21, 2006, Dr. Assalian gave the respondent's counsel a report signed by him. This report appears to have been written based on the documentation provided by Ms. Montreuil, the interview of May 18, 2006, as well as the MMPI-2 test that Ms. Montreuil has had to take.

[10] It appears therefore from Dr. Assalian's testimony that he wrote a first report that he sent to the respondent's counsel before April 24, 2006, and that on June 21, 2006, he produced a second report following the clinical assessment of Ms. Montreuil.

[11] During his testimony, Dr. Assalian stated that he no longer had his written notes regarding the complainant's assessment, as they were destroyed after the expert report was written. He also stated that he had not kept his working documents and that he did not have a medical file on Ms. Montreuil.

[12] Based on Dr. Assalian's testimony, it therefore appears that the only document in issue is the draft report or the preliminary report prepared by Dr. Assalian, submitted to the respondent's counsel prior to April 24, 2006.

II. The Parties' Positions

A. The Commission

[13] The Commission argues, firstly, that the draft report or preliminary report written by Dr. Assalian prior to April 24, 2006, should be communicated or disclosed to it. According to the

Commission, that document is *potentially relevant* to the issues and, on that basis, it is a document which ought to be disclosed to it. On that point, it relies on the Tribunal's *Rules of Procedure*, specifically paragraph 6(1)(*d*).

[14] Secondly relying on a decision by the Supreme Court of British Columbia in *Vancouver Community College v. Phillips, Barratt, [1987] B.C.J. No. 3149*, the Commission argues that, so long as experts limit themselves to their role as a party's adviser, all of the documents that they have in their possession remain privileged and the opposing party cannot require their disclosure. However, as soon as experts are called as a witness, their role changes and their opinions and their sources cannot be considered privileged. The Commission also relies on a certain number of other decisions to the same effect.

[15] Moreover, the Commission argues that solicitor-client privilege does not apply in this case, that the applicable rules are those which apply to litigation privilege and that according to these rules, the draft reports or the preliminary reports produced by an expert are not confidential when the expert is called as a witness.

B. The respondent

[16] For its part, the respondent is objecting to the disclosure or production of the preliminary report prepared by Dr. Assalian before April 24, 2006, on the grounds that it is protected by solicitor-client privilege, which is disputed by the Commission.

[17] The respondent relies, *inter alia*, on the fourth paragraph of section 50 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6, which reads as follows:

> The [Tribunal] may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

It also relies on section 40 of the *Canada Evidence Act*, R.S. 1985, c. C-5, which reads as follows:

> In all proceedings over which Parliament has legislative authority, *the laws of evidence in force in the province in which those proceedings are taken*, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this *Act* and other *Acts* of Parliament, *apply to those proceedings*.
>
> [Emphasis added.]

[18] On this point, the respondent argues that in this case, Quebec evidence law must be applied even though the dispute is one that falls within the purview of a federal statute, namely the *Canadian Human Rights Act*, *supra*, and even though there may be resulting discrepancies at the provincial level regarding the applicable rules of evidence.

[19] Moreover, the respondent argues that in Quebec law, an expert's drafts, notes, and preliminary reports are protected by solicitor-client privilege. The respondent is relying primarily on the decision by the Court of Appeal of Québec in *Poulin v. Prat, [1994] A.Q. No. 142.* In this decision, the Court of Appeal of Québec clearly established that a party cannot require the production of an expert's pre-trial reports, notes, or preliminary drafts and that these documents are covered by solicitor-client privilege.

C. The complainant

[20] The complainant in essence espouses the Commission's position.

III. Analysis

[21] From the outset, it should be pointed out that this is not an issue about the disclosure of documents in the possession of a party, documents that the party would be required to disclose under paragraph 6(1)(*d*) of the Tribunal's *Rules of Procedure*. Accordingly, my colleague Jensen's decision on a motion for disclosure of documents filed by the Commission is not

applicable given that the issue in this case is not one of disclosure but rather one of production of documents.

[22] Experts' reports and accompanying documents should not be considered *documents in a party's possession* within the meaning of paragraph 6(1)(*d*) of the Tribunal's *Rules of Procedure*, documents a party would be required to disclose.

[23] In any case, a distinction should be made between documents that are in a party's possession when litigation arises and *documents created* for a proceeding for the purposes of the litigation. The experts' reports and, where applicable, all of the related pre-trial versions, must, in this respect, be considered as documents created specifically for litigation purposes and not as related documents in the possession of a party when litigation arises.

[24] Considering the experts' reports as documents in the possession of a party would mean that in cases where a party obtained an expert's report for guidance without intending to file it or having the expert testify, the party would be required to disclose it to the opposing party. This can not be the scope of paragraph 6(1)(*d*) of the Tribunal's *Rules of Procedure*.

[25] The rules under section 6 of the *Rules of Procedure* apply to documents in the possession of a party when the litigation arises which could be potentially relevant to the issues.

[26] In this case, it is rather a matter of determining whether a party can require the production of a document prepared by an expert, be it a draft report or even a preliminary report, in the course of preparing an expert's report.

[27] More specifically, the issue in this case is whether the document prepared by Dr. Assalian prior to April 24, 2006, in accordance with the mandate conferred to him by the respondent, is protected by solicitor-client privilege or litigation privilege.

[28] If the document falls under solicitor-client privilege, it is protected and the Commission cannot have access to it. If the document falls under litigation privilege, the Commission could have access to it. It is therefore important to examine the meaning and the scope of these two concepts of solicitor-client privilege and litigation privilege.

A. The privileges

[29] The Commission argues that a distinction should be made between solicitor-client privilege and litigation privilege. It is correct. In Canadian law, the courts nowadays distinguish solicitor-client privilege and litigation privilege, in Quebec civil law as well as in common law; these privileges are subject to different rules of application.

(i) Solicitor-client privilege or the litigation privilege

[30] In Quebec, in *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456, the Supreme Court of Canada held that, in Quebec's statutory framework, the term professional secrecy includes solicitor-client privilege as well as litigation privilege.

[31] According to the Court, professional secrecy contemplates both the duty of confidentiality imposed on counsel with regard to their client and immunity from disclosure that protects the content of information against compelled disclosure in regard to third parties (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, paragraph 29).

[32] Thus, solicitor-client privilege or, more narrowly in civil law, counsel's duty of confidentiality toward their client, covers in essence the verbal and written communications exchanged between counsel and their client. These communications are considered privileged and a party cannot require their production or their disclosure (See, to the same effect, *Poulin v. Prat*, [1994] A.Q. No. 142).

[33] That said, even if in Quebec law both privileges are included in the privilege of professional secrecy, the two parts must nonetheless be distinguished from one another, according to the Supreme Court (*Foster Wheeler Power Co., supra*).

[34] With regard to the common law, the Supreme Court determined in *Blank v. Canada (Minister of Justice*), [2006] S.C.J. No. 39, paragraph 7) that for the purposes of the legal analysis, it is important to consider solicitor-client privilege and litigation privilege as distinct concepts and not as two components of a single concept. These two privileges are subject to different legal rules.

(ii) The litigation privilege or immunity from disclosure

[35] In Quebec civil law, immunity from disclosure, equivalent to the common law's litigation privilege, is considered a component of solicitor-client privilege (see to this effect: *Foster Wheeler Power Co., supra*, paragraphs 1 and 15). As stated earlier, both concepts are nevertheless distinct and subject to different rules of application.

[36] To the contrary, in common law, the Supreme Court determined in *Blank v. Canada (Minister of Justice, supra*, paragraph 7) that litigation privilege differs from solicitor-client privilege in terms of their scope, their objective and their different sources. It should be noted here that in *Blank*, the Supreme Court did not refer at all to the decision in *Foster Wheeler Power Co.*

[37] According to *Blank*, litigation privilege applies to non-confidential communications between *counsel and third parties* and *even includes documents* that are not communications in nature (Sharpe, cited in *Blank*, at paragraph 28: see also *Vancouver Community College v. Phillips, Barratt, supra*, *Jesionowski v. Gorecki*, [1992] F.C.J., No. 816. It exists independently of solicitor-client privilege.

[38] Having established the differences between solicitor-client privilege and litigation privilege, it is now necessary to determine whether the document Dr. Assalian gave to the

respondent's counsel prior to April 24, 2006, in relation to the mandate conferred to him by the respondent, falls under the privilege of solicitor-client privilege or whether it is protected or not by the litigation privilege. It is necessary to examine this issue in light of the rules of evidence governing the production of experts' reports, in civil law as well as at common law.

B. The experts' reports

[39] With regard to experts' reports, a distinction should be made, on the one hand, between the documents used by experts for writing their reports, which are documents relevant to the expert's cross-examination and, on the other hand, the draft report or preliminary report prepared by experts in fulfilling the mandate given to them by a party.

[40] From the outset, it should be pointed out that, in this case, the Commission is not trying to obtain the documents relied on to prepare Dr. Assalian's report, regarding which he will be examined, but the preliminary report or the draft report which he sent to the respondent's counsel prior to April 24, 2006.

(i) The documents used by experts in preparing their reports

[41] Once a physician is called as an expert and his or her report has been filed in evidence, a party 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. This is necessary so that the counsel cross-examining the expert can, with respect to the report filed, fully assess the facts and issues of the expert's reasoning in regard to the report filed, as well as the expert's intellectual process.

[42] Once a party has filed an expert's report in evidence, this party may not keep any part of the report confidential. This is what stems from the Supreme Court of Canada's decision in *R. v. Stone*, [1999] 2 S.C.R. 290, paragraph 98.

[43] Moreover, experts will be bound to make available to the opposing party all of the documents in their possession relied on to prepare their report. This stems from the decision

rendered by the Supreme Court of British Columbia in *Vancouver Community College v. Phillips, Barratt, supra,* paragraph 34. It is important to note that this decision does not specifically refer to an expert's draft reports or preliminary reports, but refers in a broader sense to the documents in the expert's possession.

[44] As pointed out by the British Columbia Supreme Court in *Vancouver Community College* and the Supreme Court of Canada in *R. v. Stone*, when experts are asked to testify, parties waive any privilege connected to the report. According to the Court, *once a witness takes the stand, he/she can no longer be characterized as offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately* (paragraph 99). (*Emphasis added.)*

[45] More recently, *R. v. Stone* was applied in the decision by the Court of Appeal for Ontario in *Horodynsky Farms Inc. v. Zeneca Corp. (c.o.b. Zeneca Agro*), [2006] O.J. No. 3012. In this decision, a judge of the Court of Appeal for Ontario who was called to interpret the scope of subsection 31.06(3) of Ontario's *Rules of Civil Procedure*, held that a memorandum prepared by counsel after a conversation with an expert who had later filed a report should have been given to the opposing party and that the memorandum was not protected by the litigation privilege.

[46] According to the Court, this memorandum could be included in the observations, opinions and conclusions referred to in subsection 31.06(3) of the *Rules of Civil Procedure*. In *obiter*, Mr. Justice Gillese of the Court of Appeal was of the opinion that an expert's draft reports fell under the purview of subsection 31.06(3) of Ontario's *Rules of Civil Procedure*.

[47] That said, it appears to us that this decision is of limited scope and cannot be considered a statement of general principle to the extent that it focuses on the interpretation of the meaning of the words *findings, conclusions or opinions* which are found in subsection 31.06(3) of Ontario's *Rules of Civil Procedure* and because the document at issue was a memorandum.

[48] In Quebec, the Court of Appeal of Québec held in *Poulin v. Prat, supra*, that [Translation] *a party is entitled to know the facts on which the expert has based his or her opinion. According to the Court, a party is entitled to know the facts on which the expert based his or her opinion. From this perspective, a party certainly has the right to know the sources, documentary or otherwise, where the expert drew this information. However, . . . the party cannot compel the expert to produce notes, drafts, or preliminary reports which led to the preparation of the expert's final report* (paragraph 34).

[49] These different decisions indicate that once an expert is called as a witness, the expert can be required to produce any document used to prepare his or her report and be examined on these documents. The opposing party is, in fact, entitled to know the documentary sources for the expert's report and to require that the expert produce all of the documentation used to prepare the report. The party producing the expert then waives the litigation privilege, whether it is incorporated in the solicitor-client privilege or not, as is the case in Quebec.

[50] In this case, therefore, the complainant and the Commission will be entitled, during their cross-examination of Dr. Assalian, to ask him to produce all of the documents that he used in fulfilling the mandate conferred to him by the respondent, unless those documents are already in their possession.

(ii) The preliminary reports or draft reports

[51] It appears that in common law, certain decisions suggest that the draft reports prepared by an expert called to testify in a proceeding are not covered by the litigation privilege and that a party can require their production. This stems from an *obiter* by Gillese J.A. of the Court of Appeal for Ontario in *Horodynsky Farms Inc. v. Zeneca Corp. (c.o.b. Zeneca Agro*), *supra*, paragraph 38.

[52] Similarly, in *Chapman Management & Consulting Services Ltd v. Kernic Equipment Sales Ltd*, [2004] A.J. No. 756, Mr. Justice McIntyre of Alberta's Court of Queen's Bench held, relying *inter alia* on the decision in *Vancouver Community College*, *supra*, that the defendant

had to produce its expert's drafts as well as all documents in the expert's possession which were used to elaborate his opinion (paragraph 2).

[53] That said, there does not appear to be unanimity at common law regarding the production of draft reports, notes or preliminary reports relating to the testimony of an expert in a given proceeding. In fact, at common law, there is case law where the courts refused to follow the approach adopted in *Vancouver Community College, supra,* and considered experts' drafts and preliminary reports privileged and protected by the litigation privilege (see, for example, *Kelly v. Kelly*, [1990] O.J. No. 603), *Bell Canada v. Olympia & York Developments Ltd.* et al., 68 O.R. (2d) 103, *Highland Fisheries Ltd v. Lynk Electric Ltd*, 63 D.L.R. (4th) 493).

[54] In this context, one cannot claim that the state of law in common law in matters involving the production of draft reports, notes or preliminary reports is clear and simple, with no room for differing points of view. The decision in *Vancouver Community College, supra,* does not seem to have as much authority as the Commission seems to assign to it. Besides, the decision in *Vancouver Community College, supra,* did not bear specifically on the production of draft reports or preliminary reports but rather on documents in the possession of an expert which were relied on in preparing the expert's report.

[55] In Quebec civil law, the Court of Appeal, for its part, has held several times that notes and rough drafts, drafts and preliminary reports produced by an expert are included in solicitor-client privilege and that they cannot be produced in evidence at the request of the opposing party (*Poulin v. Prat, supra*, *Laviolette v. Bouchard*, [2001] J.Q. No. 3642).

[56] In *Poulin v. Prat*, the Court of Appeal expressed the opinion that [Translation] *when counsel, in preparing to defend the interests of a client, hires an expert, he is only acting as an agent for his client* (paragraph 22). For the Court, the written *as well as the verbal communications* between counsel and the expert, except under particular circumstances, remain confidential and are protected by solicitor-client privilege (paragraphs 22 and 26).

[57] Moreover, for the Court of Appeal, [Translation] *producing an expert as a witness must not enable the opposing party to require this witness to produce everything in the expert's possession such as notes, drafts and preliminary reports that the expert could have gathered and written while he was assessing the file and the thought process which led to the formulation of the final opinion that the expert is called to share with the court* (*Poulin v. Prat*, *supra*, paragraph 27).

[58] In *Poulin v. Prat*, the Court found that the documents sought in that case, exchanged between counsel and the expert, were confidential and protected by solicitor-client privilege (paragraph 31).

[59] It therefore appears that in Quebec, the law which applies to the production of an expert's draft reports, projects of report or preliminary reports is much more clear if we consider the decisions by the Court of Appeal in *Poulin v. Prat*, *supra*, and *Laviolette v. Bouchard*, *supra*. Under these circumstances, the case law of the Court of Appeal must be considered as decisive regarding the production of an expert's draft reports, projects of report or preliminary reports.

[60] In conclusion, it is important to point out that if seeking the truth is at the heart of every legal dispute, one must however accept that the expert whose services are retained by a party be able to fulfill the mandate conferred by that party without restraint. Experts must be able to develop their opinions and formulate their findings without fearing that third parties could at any time come and capture ideas and words that they wrote down at a time when they were still in the process of analyzing and reasoning and had not formed a final opinion on an issue.

[61] It is important that experts rest assured that their intellectual process will not be scrutinized by third parties. One can already imagine that a good number of experienced experts do not keep drafts of their report or written notes, for fear that these documents will fall into the hands of the court, thereby publicly revealing their intellectual process, likely to evolve according to the information gathered and periods of reflection spent reviewing a matter.

[62] That said, the fact remains that the expert who is called to testify in a given proceeding and who files a report should produce all of the documents relied on in preparing the report when so requested by a party. This party is entitled to examine the expert on all of the elements relied on in preparing the report. The Tribunal will then have to assess the objectivity and the soundness of the expertise produced. Moreover, a party will always be able to dispute the validity of an expert's opinions and findings during the party's cross-examination of the expert or by calling their own expert who could have points of view which differ from those expressed by the expert. Medicine is both a science and an art.

[63] Surely, there is always a risk that experts could misunderstand their role as experts and think that they are there to serve the interests of the party calling them as witnesses. There is also a risk that the experts could let themselves be influenced by the remarks of counsel who retain their services or that they agree to change their findings or assessments at the request of counsel. A skilled cross-examination will often expose the shortcomings of an expert's report that is not objective.

IV. Conclusion

[64] The Tribunal finds that the report sent by Dr. Assalian to the respondent's counsel before April 24, 2006, is protected by solicitor-client privilege and therefore must be considered confidential. It cannot therefore be admitted in evidence in accordance with subsection 50(4) of the *Canadian Human Rights Act*.

V. Decision

[65] For the reasons stated above, the Commission's motion for the production of documents or the disclosure of the draft report or the preliminary report submitted to the respondent's counsel by Dr. Assalian before April 24, 2006, is dismissed.

Signed by

Pierre Deschamps
Tribunal Member

Ottawa, Ontario
May 8, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1047/2805

Style of Cause: Micheline Montreuil v. Canadian Forces

Ruling of the Tribunal Dated: May 8, 2007

Date and Place of Hearing: May 3 and 4, 2007

Québec, Quebec

Appearances:

Micheline Montreuil, for herself

Ikram Warsame, for the Canadian Human Rights Commission

Guy Lamb and Claude Morissette, for the Respondent