Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Decision on the Motions of Complainant Chris Hughes and of the Canadian Human Rights Commission for production of documents

Member: Robert Malo
Date: October 25, 2012
Citation: 2012 CHRT 26

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I. Context

[1] The complainant, Chris Hughes, filed against the respondent, Transport Canada, a complaint of discrimination under section 7 of the *Canadian Human Rights Act* alleging that the respondent refused to hire him owing to a disability he disclosed to the respondent. The complaint relates to various job applications submitted by him to the respondent, namely an application for the Marine Security Analyst Position (PM-04) in fall 2005, as well as three job applications he submitted for the positions of Regional Security and Emergency Preparedness Inspector, which he applied for in September 2005, of Regional Transportation and Emergency Preparedness Inspector, which he subsequently applied for in July 2006, and finally, of Transportation Security Inspector, which he applied for in March 2007.

[2] In all of those cases, the applications were rejected without any real or reasonable excuse from the respondent in his view.

[3] For the purpose of having a better understanding of this case, the Tribunal refers to the provisions of section 7(*a*) of the *Canadian Human Rights Act (R.S., 1985), c. H-6,* which reads as follows:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[4] Also, in his arguments, the complainant maintains that the respondent allegedly discriminated against him pursuant to the provisions of section 14.1 of the *Canadian Human Rights Act,* which reads as follows:

[5] 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[6] In that respect, the complainant's ambition was to pursue a career within the federal government through the various job offers referred to in paragraph 1 above.

[7] With respect to the proceedings brought by the complainant, a conference call in preparation for the hearing of the complainant's complaint was held on May 28, 2012, between the Tribunal and the parties.

[8] At that point in time, after some discussion between the parties, it was agreed that the parties would plead in writing by way of two motions filed in the matter of Complainant Chris Hughes, that is, a motion by the complainant dated May 11, 2012, in order to obtain from the respondent, Transport Canada, certain documents that would make it possible for him to establish that the complainant was discriminated against by respondent Transport Canada and also, a second motion dated May 15, 2012, filed by the Canadian Human Rights Commission, which would also make it possible to obtain, from the respondent, Transport Canada, a series of documents that would allow the Canadian Human Rights Commission to also establish whether the respondent acted in a discriminatory manner, contrary to sections 7 and 14.1 of the *Canadian Human Rights Act*.

II. The Motions

A. Motion of Complainant Chris Hughes

[9] In his motion, dated May 11, 2012, the complainant asks that the Tribunal order the respondent to produce the following documents:

> (a) The selection board's completed Rating Guides for each candidate placed on the Eligibility List for the PM-04 Marine Security Analyst position (selection process 05-MOT-OC-VAN-005187; reference no. 90932RF73), including but not limited to the interview notes and reference checks in support of the selection board's assessment of each candidate in the "Personal Suitability" category;
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> (b) The application packages of each candidate placed on the Eligibility List in the PM-04 Marine Security Analyst competition (selection process 05-MOT-OC-VAN-005187; reference no. 90932RF73);
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> (c) The curriculum vitae of the successful applicants to the TI-06 Regional Security and Emergency Inspector position (selection process 05-MOT-OC-VAN-005467; reference no. MOT91286RF73);
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> (d) The curriculum vitae of the successful applicants to the TI-06 Regional Transportation and Emergency Preparedness Inspector position (selection process 06-MOT-OC-VAN-008455; reference no. MOT06J-007605-000099); and
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> (e) The curriculum vitae of the successful applicants to the TI-06 Transportation Security Inspector position (selection process 07-MOT-EA-VAN-60712; reference no. MOT07J-007605-000202) including all material supporting each candidate's ratings, including but not limited to interview notes and reference checks.

[10] In his motion, the complainant indicates that the required documents would be pertinent to establishing that the respondent refused to employ him contrary to the provisions of section 7 of the *Canadian Human Rights Act* owing to a disability the complainant allegedly disclosed to the respondent in the process of his applications. The claimant alleges having previously suffered from depression and anxiety, following the harassment and discrimination from his former employer, that is, the Canadian Border Services Agency (CBSA) in January 2005 and the Canada Revenue Agency (CRA) in February 2005, against him. Accordingly, the respondent allegedly refused to employ him following the disclosure of his disabilities, contrary to the provisions of the *Canadian Human Rights Act*.

[11] Also in his motion, the claimant refers as well to the fact that the respondent allegedly refused to employ the complainant by determining that the complainant failed to meet one of the qualification criteria, namely, to be detail-oriented. The complainant, therefore, reproaches the respondent for not having employed him not only owing to the failure noted above, with respect to the fact that he was not detail-oriented, but also owing to his disability, which he disclosed to the respondent following the complaints the complainant filed against the CBSA and the CRA, which were disclosed to the respondent. In that regard, the Tribunal refers to paragraphs 35 and 36 of the motion for disclosure of evidence filed by the complainant and dated May 11, 2012.

[12] To conclude, the complainant indicates that the documents he referred to in his motion are directly related to the complaints filed by the claimant.

[13] In its written response dated June 15, 2012, the respondent, Transport Canada, argues the following against the complainant's motion:

(a) The documents required by the complainant would not be required under section 7 of the Canadian Human Rights Act, and more particularly section 7(a) of the Act, as according to the respondent, such a section would not make it possible to conduct a comparative analysis in terms of the reasons for refusing to employ an individual during a competition in this regard.

(b) Subsequently, the respondent refers to the fact that the information sought by the complainant would be protected by the Privacy Act, 1985, c. P-21, and accordingly the Canadian Human Rights Tribunal would be subject to said Act.

[14] According to the respondent, the provisions of section 7(*a*) of the *Canadian Human Rights Act* would not make it possible to conduct a comparative analysis as required by the respondent in its complaint and that was not Parliament's intention in this regard.

[15] Moreover, the respondent indicates in its written response that the information sought by the complainant is all protected under section 3 of the *Privacy Act*, R.S.C., 1985, c. P-21, and it supports that claim by referring to *Warman v. Lemire*, 2008 CHRT 16.

[16] In response to the respondent's written response on the complainant's motion, the complainant reiterates to the Tribunal his request for documents. The complainant notes that section 7(*a*) of the *Canadian Human Rights Act* does not prohibit a comparative analysis of various candidates who were part of a job competition and in that regard, he refers to *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (*Mowat*).

[17] Furthermore, the complainant continues to maintain that the documents sought are relevant to the review of the complaints filed by the complainant against the respondent.

[18] Subsequently, the complainant indicates that the *Privacy Act* does not prohibit the production of documents required in his motion and refers more particularly to section 8(*b*) of the Act, which states that the Privacy Act does not prohibit the production of documents where required under an Act of Parliament, in this case, the *Canadian Human Rights Act* (*Privacy Act*, R.S.C., 1985, c. P-21, section 8(3).

[19] Finally, in his response to the respondent, the complainant also refers to the fact that the documents sought are in reference to allegations he filed in a complaint under section 14.1 of the *Canadian Human Rights Act*.

[20] More specifically, the documents sought would allow him to establish circumstantial evidence of the respondent's discriminatory treatment through the use of reprisals against the complainant in accordance with the provisions of section 14.1 of the *Canadian Human Rights Act*.

Analysis of the law and facts on the Motion filed by the Complainant Chris Hughes for the production of documents

[21] After having carefully read the various memorandums provided by the parties and having reviewed the relevant provisions of the *Canadian Human Rights Act* as well as the Rules of Procedure established by the Tribunal, more particularly the provisions of Rule 6(1)(b) and (e) of said rules of procedure, the Tribunal considers that the motion filed by the complainant to obtain the documents sought should be granted considering that said documents sought by the complainant are relevant to instituting an inquiry into the complaints filed by the complainant against the respondent.

[22] Nevertheless, the Tribunal considers that all information should be redacted (name, address, date of birth, sex, etc.) so as to ensure the security of confidential and personal information that may be transmitted by the respondent to the complainant.

[23] With respect for the opinion expressed by the respondent in its written response of June 15, 2012, the Tribunal does not consider that the provisions of section 7(*a*) of the CHRA prohibiting a comparative analysis of candidates in a competitive process as in the case at bar.

[24] Also, the Tribunal is of the view that the provisions of the *Privacy Act*, R.S.C., do not prohibit the production of documents of the kind sought by the complainant in his motion, provided that the confidential nature of the applications submitted is protected.

[25] In its analysis, the Tribunal refers to a recent decision on the subject matter in *Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2012 CHRT 11 (CanLII).

[26] In his decision, Member Susheel Gupta undertook an exhaustive analysis of the case law applicable to the production of documents, and, therefore, I refer to the same principles in this case, and I quote:

[9] The right to a fair hearing requires that "…the affected person be informed of the case against him or her, and be permitted to respond to that case (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), 2007 SCC 9, at para. 53). In this regards, parties should be given an opportunity to address evidence prejudicial to their case and bring evidence to prove their position (*see Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), 2002 SCC 75, at para. 40). In order to provide the parties with this opportunity, they require the full and ample disclosure of relevant information in the possession or care of the other party.

[10] To make a determination as to whether documents should be disclosed, the Tribunal has identified the following three step process: (1) determine whether the information is "likely to be relevant", that is, the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute; (2) without examining the documents, determine whether there is a compelling reason to maintain the privacy of the documents, and, (3) if the Tribunal is unable to resolve the matter without examining the material, then it should inspect the documents and decide whether the documents should be produced (see *Day v. Canada (Dept. of National Defence)*, (December 6, 2002), T637/1501 and T628/1601 Ruling No. 3, at para. 7 (CHRT); and, *Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (CanLII), 2004 CHRT 34, at para. 44 [*Guay*]).

[11] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to his or her medical records (see *Beaudry v. Canada (Attorney General)*, (July 24, 2002), T694/8201, Ruling No. 1, at para. 7 (CHRT) [*Beaudry*]; *McAvinn v. Strait Crossing Bridge Ltd.*, (January 3, 2001), T558/1600, Ruling No. 3, at para. 3 (CHRT) [*McAvinn*]). However, the right to privacy and confidentiality with respect to medical records may cease when that person puts his or her health in issue (see *McAvinn* at para. 4 (CHRT); Guay at para. 45; and, *Communications Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*, 2005 CHRT 9 (CanLII), 2005 CHRT 9, at paras. 9-11). In cases where the Tribunal has ordered the disclosure of medical records, it has used the following procedures to protect the privacy and confidentiality of the information:

- Vet the documents to determine which ones are in fact related to the medical condition in issue (see Guay; McAvinn; and, Beaudry); and/or,
- Put conditions on who may see and copy the documents (see Shiv Chopra v. Health Canada, 2007 CHRT 10 (CanLII), 2007 CHRT 10; Micheline Montreuil v. Canadian Forces, 2005 CHRT 45 (CanLII), 2005 CHRT 45; and, Beaudry).

[27] Also, in another decision of the Canadian Human Right Tribunal in *Bushey v. Sharma*, 2003 CHRT 5 [*Bushey*], decision dated February 11, 2003, former Member Athanasios D. Hadjis, referred to the test for relevance with respect to the guiding principle regarding disclosure:

> The Respondent has taken issue with the fact that a copy of the minutes of settlement with the unions has not been disclosed to him. Although the Respondent is not represented by legal counsel and is acting on his own behalf, I understand him to be contending that he is entitled to have this document communicated to him, in accordance with Rule 6 (3) of the Tribunal's Interim Rules of Procedure. This rule, when read together with Rule 6 (1) (d), obliges a party to provide to other parties, copies of all documents in its possession which are relevant to any matter in issue in the case and for which no privilege is claimed. The test for relevance for these purposes has been expressed as being whether the document in question is “arguably relevant” to the hearing.
>
> [*Bushey* at para. 4, footnotes omitted]

[28] Bushey was also referred to in Member Edward P. Lustig’s ruling on disclosure in Knowles, Carol, Godin, Rhoda, Cannon, Elizabeth v. Human Resources and Social Development Canada, 2011 CHRT 7.

[29] Generally speaking, there has to be a rational connection between the documents sought and the issues in a motion insofar as the information sought must be arguably relevant and the disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective in the case. The retrieval of documents must be related to the dispute. (*Smith & Nephew Inc. v. Glegg*, 2005 SCC 31, see paragraph 23 of the decision.)

[30] In its analysis, the Tribunal notes that the complainant seeks the production of various documents that would have been useful to a selection committee in verifying whether elements of discrimination existed in contravention of sections 7(*a*) and 14.1 of the *Canadian Human Rights Act*.

[31] The Tribunal also notes, without going into a detailed analysis of the probative value of said documents sought, that the documents would enable the complainant to build his discrimination case against the respondent.

[32] The Tribunal considers that the elements sought possess relevance, and could be useful in the litigation between the complainant and the respondent under the *Canadian Human Rights Act*.

[33] In a decision that the Tribunal consulted as well, that is, that of *Ray Davidson v. Health Canada*, 2012, CHRT 1 (CanLII), a question similar to that under review was then reviewed by another Tribunal Member.

[34] Indeed, in that decision, reference was also made to a request for the production of documents concerning the assessment of candidates in a selection process that had been the subject of two appeals to the Public Service Commission Appeal Board (PSCAB).

[35] In that case, the Canadian Human Rights Tribunal denied permission to produce such documents, considering that the PSCAB was a Tribunal with concurrent jurisdiction and, accordingly, there was no need to review the decisions of another Tribunal and to, therefore, litigate a second time what had already been decided by a different adjudicative forum.

[36] The Tribunal finds that in the case of Complainant Hughes, a mere selection committee is not a valid adjudicative forum within the meaning of *Ray Davidson v. Health Canada*, 2012 CHRT 1 (CanLII) and *Workers' Compensation Board v. Figliola*, 2011 SCC 52 (see paragraph 9 in *Ray Davidson*).

[37] Consequently, the Tribunal orders the production of the documents appearing in the motion of Complainant Hughes with the obliteration of all personal information of the various candidates who applied for the same positions as the complainant, including the name, address, date of birth and sex, as well as all other information making it possible to establish the identity of the other candidates.

B. Motion of the Canadian Human Rights Commission

[38] In a second motion filed by the Canadian Human Rights Commission on May 15, 2012, the Commission sought the production of two types of documents: the first type being documents of a non-confidential nature, whereas the second type of documents required by the Commission from the respondent were classified as privileged by the respondent.

[39] The Tribunal will, therefore, examine in order each of the two series of documents required by the Commission.

Non-privileged Documents

[40] Thus, the Commission first requires the production of the following documents from the respondent:

> This motion is for:
>
> 1. An Order for production by the Respondent, Transport Canada, of all arguably relevant documents in its possession and/or control, notably:
>
> a) All documents or material of any kind whatsoever whether in digital form or otherwise concerning the phone call between Mr. Lavers and Mr. Hughes in February 2006, including, but not limited to documents pertaining to the discussions between Mr. Lavers and other selection board members and/or Human Resources personnel regarding Mr. Hughes' references, his other complaints against other departments or agencies, or his disability; notes taken during reference checks by the selection board members, Human Resources personnel and/or any other individuals.
>
> b) All documents or material of any kind whatsoever whether in digital form or otherwise pertaining to Mr. Hughes' emails of June 19, 2006 and November 29, 2006.
>
> c) All documents or material of any kind whatsoever whether in digital form or otherwise pertaining to the conference call of March 2, 2006 between the selection board members regarding Mr. Hughes' employment application and reference checks.

> d) All documents or material of any kind whatsoever whether in digital form or otherwise pertaining to Mr. Hughes' human rights complaints against other departments or agencies.
>
> e) All documents or material of any kind whatsoever whether in digital form or otherwise regarding the conference call of February 20, 2006 between Mr. Lavers and Sonya Wood, including, but not limited to an unredacted copy of her memo to file regarding her conversation with Mr. Lavers in February 2006.

[41] The Tribunal notes that the Commission no longer requires subparagraph (f) of paragraph 1 of its motion with respect to the 2007 Public Service Commission's investigation into the complaint filed by the complainant. Accordingly, the Tribunal will not rule on subparagraph (f) of paragraph 1 of the Commission's motion.

[42] In its response dated June15, 2012, the respondent indicates that all documents in its power, possession or control and described as being those appearing in paragraphs 1 (a) to (e) of the Commission's motion, cannot be produced as they do not exist. The respondent recognizes its obligation to produce all relevant documents for which no privilege of confidentiality is required and the respondent also indicates that it undertakes to produce all documents should it ever learn of their existence. However, the respondent confirms that it does not have any other element that could have been brought to the attention of the respondent's advisor.

[43] Also, the respondent refers to paragraph 1(d) of the Notice of Motion of Canadian Human Rights Commission with respect to documents that could come from other agencies or departments and the respondent indicates that if such documents exist they are not in its possession, power or control and, therefore, they cannot be the subject of an order for production by the Tribunal. In that same regard, the respondent refers to the *Privacy Act*, which prohibits such an order.

[44] Later in its response, the respondent also alleges the following at paragraphs 11, 12 and 13 of its response:

> 11. Those materials that do not relate to matters at issue have not been produced. In addition, any materials that are otherwise protected by the *Privacy Act*, or are not relevant to a claim brought under Subsection 7(a), cannot be produced. Subsection 7(a) of the CHRA is very specific as it relates to a refusal to hire by a Respondent. More specifically, subsection 7(a) differs from 7(b) in that it does not require a comparative analysis. This means that the qualifications of other individual candidates are <u>not</u> relevant to proceedings respecting a refusal to hire.
>
> 12. Based on the <u>specificity</u> of the CHRC's motion one of two things is possible: (a) either the Complainant is already in possession of the documents being sought, or (b) they do not exist. If the Complaint has these materials in his possession then they should have been disclosed in his list of documents.
>
> 13. It is trite to say that documents that do not exist cannot be produced. No law is necessary to support this assertion.

[45] In its response to the respondent's response, the Commission contends that the respondent's arguments for refusing to produce the documents appearing in its motion are nothing more than a blanket response, and therefore, the Commission requires a precise answer for each of the items appearing in its motion.

[46] Without reiterating again the reasons for the Tribunal's decision on the general principles for the production of documents as set out by the Tribunal with regard to the complainant's motion for the production of documents, the Tribunal understands that the Commission also seeks information to support its position with respect to evidence of discrimination which the respondent allegedly committed against Complainant Hughes.

[47] The Tribunal considers that the information sought by the Commission in its motion for the production of documents in paragraphs 1 (a) to (e) of its motion may be relevant to the complaints filed by the complainant against the respondent. There is no doubt, however, that the requirement for production of all documents or material of any kind whatsoever appearing in the wording of each of the items required by the Commission should not amount to a fishing expedition as our courts have repeatedly stated in a number of decisions (see more particularly *CTEA v. Bell Canada*, [2000] C.H.R.D. No. 6, T503/2098, Ruling No. 2, paragraphs 12 to 14; subsequent paragraphs.

[48] Is that the case here?

[49] The Tribunal is faced with a situation where the respondent claims that it does not have the documents in its possession and/or that they do not exist using a phraseology that appears vague to the Tribunal.

[50] In such a context, it appears to the Tribunal that it would be prudent and appropriate to require from the respondent a clear and unequivocal acknowledgement that it cannot produce any of the documents required by the Commission in its motion with respect to paragraphs 1 (a) to (e).

[51] In order to clarify the situation, the Tribunal finds that it would therefore be good practice for the respondent to file an affidavit clearly and formally indicating, for each of the documents required by the Commission that it is not in possession of the documents required by the Commission. The Tribunal refers the reader to the reasons for such an affidavit at paragraph 63, which follows.

[52] Furthermore, in the event that the respondent fails to file such an affidavit within fifteen (15) days from the date of this judgment the Tribunal considers that such documents exist and accordingly, the respondent is therefore ordered to produce such documents without further delay.

Documents for which privilege of confidentiality is alleged

[53] In the second part of the Commission's motion, the Commission requires that the respondent produce all documents for which the respondent alleged a privilege of confidentiality. Such privilege of confidentiality appears in a list of documents appearing in the correspondence between the parties, but more particularly in the Commission's motion dated April 24, 2012, and described as follows:

1. Employee Performance Management Report with handwritten notes, September 26, 2004.
2. File Cover – Harassment Case No. 67 – FIY 2008/2009 from June 19, 2006.
3. Fax from Pat McCauley to Edie Preugschat, June 19, 2008.
4. Fax from Pat McCauley to Edie Preugschat, June 24, 2008.
5. Email from Ryan Savelieff to Pat McCauley re: Human Rights Complaint # 2007-1019, July 02, 2008.
6. Email from Pat McCauley to Ryan Savelieff re: Human Rights Complaint # 2007-1019, July 25, 2008.
7. Email from Ryan Savelieff to Pat McCauley re: CHRC Complaint Canadian Human Rights Commission Complaint Form, August 13, 2008.
8. Letter to Deborah M. Olver Templates (draft), August 14, 2008.
9. Email from Ryan Savelieff to Pat McCauley re: CHRC Complaint w/attachments, August 14, 2008.
10. Fax from Ryan Savelieff to Pat McCauley, August 15, 2008.
11. Email from Filomena Dicamillo to Information Mgmt, January 27, 2009.
12. Email from Ryan Savelieff to Pat McCauley re: any update on CHRC Complaint # 2007-1019, February 26, 2009.
13. Email string between Ryan Savelieff and Pat McCauley re: CHRC Complaint, August 07, 2009.
14. Email between Michael Fu and Parmi Gill with handwritten notes, January 20, 2010.
15. Teleconference Appointment with handwritten notes, April 26, 2010.
16. **The Commission is not requesting the production of the documents at this tab.**
17. Response to Allegations with handwritten note, undated.
18. Canadian Human Rights Complaint # 2007-1019 - Response to Allegations with handwritten notes, undated.
19. Post-it note regarding reference check, undated.
20. Post-it note regarding reference check and marks, undated.
21. Handwritten notes, undated.

[54] The Tribunal notes that the respondent submits that the Commission's motion respecting the documents sought in the second part of the Commission's motion is barred on the basis that the documents are privileged (list of privileged documents).

[55] First, the Tribunal notes that the Commission’s motion for the production of all documents appearing in the list of privileged documents, with the exception of the documents at Tab 16 for which the Commission does not require production, does not appear to clearly identify the documents so as to link them to the complainant’s file.

[56] In other words, while the requirement of production of such documents, as drafted, does not directly refer to information that would be useful or necessary for the purposes of the complainant’s file, said point does not appear to be fatal at this stage of the Commission’s motion for the production of documents. The relevance of such documents will be more highly appreciated by the tribunal member at the hearing on the merits of this case.

[57] The Tribunal then notes that the respondent refers to a privilege of confidentiality and, correlatively, does not in any way indicate, for each of the items required, how the privilege of confidentiality should be applied in this case.

[58] In other words, what is the nature of the privilege of confidentiality that should apply to each of the items appearing in the list of documents required by the Commission?

[59] In the case law applicable to such a question of confidentiality and claims of solicitor-client privilege, the Tribunal consulted a number of decisions, the most relevant of which appear below.

[60] First, in Public Service Alliance of Canada v. Canada (Minister of Personnel for the Government of the Northwest Territories), 2000, CanLII 20412 (CHRT), the Canadian Human Rights Tribunal referred to Walsh-Canadian Construction Co. Ltd. v. Churchill (Labrador) Corporation Ltd. (No.1) (1979) 9 C.P.C. 229. In that decision of the Canadian Human Rights Tribunal, the Tribunal members stated as follows:

> The question of description cannot be neatly severed from the question of challenges, however, and there is no reason to examine documents which clearly attract a privilege. In many cases, for example, the mere fact a document is prepared by legal counsel will be sufficient to establish that it attracts a solicitor-client privilege. It would be abusive of the process to enter into an inquiry into the

circumstances under which it was made. The immediate issue is whether the description of the documents, on the face of it, is sufficient to permit the other side to decide whether they wish to challenge the Respondent's assertion of privilege. It would appear, at the outset, that there are two minimal requirements which must be met. The first is that there must be a satisfactory description of the physical documents; the second is that the description of a document should explain why it attracts a particular privilege.

[61] Also, the Tribunal stated the following further on in the decision:

> Be that as it may the only issue before us is at this time is the question of identification. The crucial issue is whether the entries describing each document, together with the claim of privilege, is sufficient to notify the other parties why it has no obligation to disclose the document. It is evident, in this regard, that the Respondent is obliged to indicate, without defeating the privilege, how the general claim of privilege relates to the document in question. It would normally follow that it should not be put before us in the hearing. There are separate issues, on other documents, as to whether the fact that a party has disclosed documents to the other side prevents it from asserting the privilege in the body of the hearing.
>
> We have accepted that all of the factors identified by the Respondent should be taken into account, in determining whether a document is properly described for the purposes of disclosure. None of these factors are decisive in themselves, however, and the question whether a document is sufficiently identified is ultimately a matter of judgement. One the one hand, the ordinary principles of practice make it clear that it is not enough to state that certain documents exist and assert that they are privileged. Something more is required, which advises the other parties of the purpose of the document and explains why the relevant privilege applies.
>
> On the other hand, it would be a mistake to set out a formula as to what is required, in each and every case. The issue is a pragmatic one, which calls for latitude and common sense, and there is no need for a detailed description of documents. It may be enough, in many instances, to provide an extremely brief description, or a recitation of circumstances which give rise to an obvious inference of privilege. The mere fact that legal counsel prepared a particular document will usually be sufficient to assert a solicitor-client privilege. In other instances, the identification of hand-written notes or other private documents will be sufficient to establish the private nature of the documents and explain why the privilege has been claimed. In the instance of collective bargaining a reference to an “employer’s proposal”, with a corresponding date, may be sufficient to establish the nature and identity of the document.

[62] Those same principles reappear in *Poitras v. Twinn*, 2001 FCT 456 (CanLII), where the following is stated for the same issue:

> [5] That brings me to the second part of this motion, namely, the claim for privilege in the affidavit of documents of the Crown. In this aspect, I am in agreement with the Band’s submissions, the claim for privilege is altogether too broad and vague. Twenty two documents or bundles of documents are identified by an index number only. A further file is identified by a description only, namely the solicitors’ trial file. There is no indication with respect to any of those documents or bundles of documents as to whether or how many documents they contain, there is no indication as to their dates, and there is only the most general indication as to the author and recipient of each of those documents. This is clearly inadequate. While I agree that the description of a document to which privilege is claimed should not be such as to defeat the claim for privilege itself, the mere indication of a date and either the name or title or initials of the author and the recipient will normally not defeat a claim for privilege unless there is some special circumstance attaching and there has been no suggestion that that is the case here.
>
> [6] Accordingly, I will order that the motion will be allowed in part and the Crown will be required to produce a further and better affidavit of documents with respect to its claim for privilege within the next 30 days.

[63] Also, in 1185740 Ontario Ltd. v. Canada (Minister of National Revenue), 1999 CanLII 9151 (FC), in reference to Lumonics Research Ltd. v. Gordon Gould, Refac International Limited, and Patlex Corporation, [1983] 2 F.C. 360, the following is stated:

> [6] In *Lumonics Research Ltd. v. Gordon Gould, Refac International Limited, and Patlex Corporation* [1983] 2 F.C. 360, the Federal Court of Appeal made it clear that the party opposing the production of documents by reason of privilege had the onus of establishing the facts relevant to the claim of privilege. In my view, the Respondents herein have not met that onus. Counsel for the Applicant argued that it was incumbent on the Respondents to establish the facts which gave rise to the privilege which they claimed, and that the Respondents had not adduced any evidence in that regard. I agree entirely with counsel’s submission. Counsel argued, rightly in my view, that Ms. Castle, counsel for the Respondents, could not by way of argument adduce in evidence the facts on which the Respondents relied for their claim of privilege. Obviously, that contention cannot be disputed. Counsel for the Applicant referred me to the decision of Rothstein J. (as he then was) in *Evans (K.F.) Ltd. v. Canada (Minister of Foreign Affairs)*

> [1996] 106 F.T.R. 210. In *Evans*, Rothstein J. had to decide whether solicitor-client privilege attached to certain documentary material. In support of his claim that the documents did not have to be produced by reason of solicitor-client privilege, the Respondent Minister filed the affidavit of Beverly Anne Chomyn, the solicitor who had given the legal advice at issue.
>
> [7] Mr. Justice Rothstein then went on to conclude that the Respondent had waived privilege because of partial disclosure. I need not address the issue of waiver, in view of my conclusion that the Respondents have not met their onus. It is clear from Mr. Justice Rothstein's decision in *Evans* and the decision of the Court of Appeal in *Lumonics* that an affidavit setting forth the relevant circumstances is necessary to establish a claim of privilege. In the present matter, as the Respondents have filed no affidavit setting forth the relevant facts and circumstances, I am unable to decide whether the expunged portions of the memoranda are subject to a solicitor-client privilege. As the burden of proof was on the Respondents, the Applicant succeeds on its motion and the expunged portions will be produced by the Respondents within ten days of this Order.

[64] Based on the principles cited above, the Tribunal finds that a privilege of confidentiality or solicitor-client privilege cannot be validly claimed unless a document containing information describing, on the one hand, the document in question and explaining, on the other hand, the reasons for claiming privilege of confidentiality, is produced preferably in the form of a detailed affidavit. The Tribunal mentions that while the requirement of an affidavit does not appear in the rules of evidence of the CHRT, which are different from those of the Federal Court of Canada, the use of an affidavit is certainly appropriate and better meets the need for a more formalized response as in this case.

[65] However, there is no affidavit before the Tribunal in this case from the respondent, only a mere claim of privilege of confidentiality on the part of the respondent.

[66] The mere assertion of a privilege of confidentiality is not acceptable in the absence of appropriate reasons as per the decisions of our courts which the Tribunal refers to above.

[67] Of course, it is not within the powers of the Tribunal to argue the substantive issue of the existence of privilege of confidentiality owing to a solicitor-client relationship. In that regard, the Tribunal has no jurisdiction to do so as held in the case law, more particularly in *Canada*

(Privacy Commissioner) v. Blood Tribe Department of Health and Attorney General of Canada et al. [2008] 2 S.C.R. 574, 2008 SCC 44.

[68] However, the mere assertion of a privilege of confidentiality, without a valid explanation that does not compromise said privilege, is not acceptable by the Tribunal.

[69] Consequently, if the respondent wishes to reasonably claim a privilege of confidentiality in respect of the items appearing in the list of documents referred to in the Commission's motion, it is suggested that it provide an affidavit sufficient for each of the items appearing in said list by indicating why said documents cannot be produced, owing either to their confidential nature or to a relationship of solicitor-client privilege and/or established in preparation for litigation, within fifteen (15) days from the date of this judgment.

[70] Failure by the respondent to file such an affidavit within the prescribed time frame shall result in an order requiring the respondent to produce the documents appearing in the Commission's motion, without further delay.

III. Decisions

For these reasons, the Tribunal orders as follows:

On the motion of Complainant Chris Hughes::

(a) The respondent is ordered to produce the documents appearing in the complainant's motion dated May 11, 2012, by redacting all information that would identify each of the persons referred to in each of the documents to be produced by the respondent;

On the motion of the Canadian Human Rights Commission:

(b) The respondent is ordered to produce all non-privileged documents required by the Canadian Human Rights Commission, unless the respondent files a detailed affidavit indicating why the respondent cannot validly produce said documents, the said affidavit to be produced within fifteen (15) days from the date of this decision, and failing such affidavit the respondent shall provide all non-privileged documents appearing in the motion of the Canadian Human Rights Commission;

(c) The respondent is ordered to produce all documents appearing in the Commission's motion in respect of privileged documents with the exception of the documents at Tab 16, unless the respondent files a detailed affidavit indicating for each of the items a valid reason that would allow the respondent to claim a privilege of confidentiality, the said affidavit to be produced within fifteen (15) days from the date of this decision, and if such affidavit is not filed, the respondent shall provide all documents appearing in the motion of the Canadian Human Rights Commission, at paragraph (d) of its motion, with the exception of paragraph 16.

Signed by

Robert Malo
Tribunal Member

OTTAWA, Ontario
October 25, 2012

CANADIAN HUMAN RIGHTS TRIBUNAL

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1656/01111

Style of Cause: Chris Hughes v. Transport Canada

Ruling of the Tribunal Dated: October 25, 2012

Appearances:

Andrew Raven, Michael Fisher, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Kevin Staska, Sid Restall, Malcolm Palmer, for the Respondent