

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Ross Eadie

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

MTS Inc.

Respondent

Ruling

Member: Edward P. Lustig

Date: February 12, 2013

Citation: 2013 CHRT 5

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I. Context

[1] The Complainant is a video subscriber with the Respondent who relies on audio because of his vision disability. The Complainant filed a human rights complaint with the Canadian Human Rights Commission (the Commission) on May 2, 2012, alleging that the Respondent discriminated against him in the provision of a service on the basis of disability contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *Act*). The Complainant alleged that the Respondent did not accommodate his disability by not providing a descriptive video service (DVS), by not providing a means to easily turn DVS on and off, and finally, by failing to provide equipment and software that provides audible descriptions of on-screen menus. The first two of these issues have since been resolved before the Canadian Radio-television and Telecommunications Commission (the CRTC). The Complainant's outstanding complaint, referred to the Tribunal by the Commission on May 8, 2012, is with respect to the Respondent's alleged failure to provide equipment and software that provides audible descriptions of on-screen menus. The Complainant asserts that the technology is available for the provision of such a service. The Respondent submits that this technology is not currently available and its development is dependent on third party manufacturers.

[2] On December 17, 2012, the Respondent filed a Notice of Motion for a Confidentiality Order by the Tribunal, seeking to protect the confidential nature of documents containing private, commercial and proprietary technical information not available to the public. On December 20, 2012, the Tribunal held a Case Management Conference Call (CMCC) with the parties during which parties discussed the Respondent's motion. The Tribunal directed that the parties attempt to work together to draft a Confidentiality Agreement which could then be endorsed by the Tribunal.

[3] On January 16, 2013, the Tribunal held another CMCC during which the parties presented their positions regarding a Draft Confidentiality Agreement. While the Complainant and Respondent were both willing to sign the revised agreement, the Commission objected. For reasons detailed below, in light of the parties' failure to arrive at an agreement, the Tribunal is now compelled to rule on the Respondent's motion.

II. Parties' Positions

[4] In its motion dated December 17, 2012, the Respondent contends that the information exchanged between MTS and the suppliers of Internet Protocol Television (IPTV) software and equipment vendors which led to the provision of the Ultimate TV service to which the Complainant subscribes is confidential and subject to a confidentiality clause. In addition, the Respondent submits that many of the other responses it received from other suppliers and vendors as part of this process contained private financial and proprietary technical information which were provided to MTS under the auspices of a confidentiality agreement. The Respondent's motion aims to protect the confidential nature of this information.

[5] The Complainant did not initially agree with the terms of the order proposed by the Respondent in its motion. However, following an attempt by both parties to modify the terms of the order in a manner acceptable to all, the Complainant and the Respondent consented to an agreement in the following terms:

1. The Complainant, the Commission and any Interested Parties, and their lawyers, are deemed to undertake not to use the evidence or information disclosed in these proceedings for any purposes other than those of these proceedings.
2. Subject to the provisions in this Order, the Respondent shall produce to counsel for the Complainant and the Commission, the documents identified in the Respondent's Revised List of Documents as Numbers 3.1, all documents under heading 3.2, 3.4, 3.5, 3.6 and 4.1 (hereinafter the "Confidential Documents"). The Tribunal may require similar disclosure to any Interested Party, to be determined at the time of adding any such Interested Party.
3. The Complainant, the Commission and any Interested Parties, and their lawyers will instruct any witnesses or any individual to whom the Confidential Documents are disclosed for the purposes of these proceedings, of the terms of this Order and the deemed undertaking herein shall apply to that witness or other person.

4. If any of the parties, their counsel, and/or their witnesses wish to refer to any of the names of the third parties or any proprietary or financial information referred to in the Confidential Documents at any hearing in these proceedings, they shall advise the Tribunal prior to doing so and that portion of any hearing at which any such information is referred to or discussed shall be conducted *in camera*.
5. This Order does not apply to:
 - a. Information which was lawfully or without legal restriction in the possession of the Complainant or the Commission prior to the date of this Order;
 - b. Information derived independently of disclosure hereunder;
 - c. Information lawfully obtained from a person having a right to disclose such information; nor
 - d. Information that becomes publicly available through means other than a breach of this Order.
6. Any Confidential Documents provided by way of disclosure in these proceedings, or any copies thereof made or used by the parties, their counsel or their witnesses in the course of these proceedings, shall be destroyed or returned to Respondent's counsel at the conclusion of these proceedings.
7. The termination of these proceedings shall not relieve any person to whom Confidential Documents were disclosed pursuant to this Order from the obligations imposed on them in accordance with the provisions of this Order.
8. In the event that any issues or differences arise out of this Order, the parties may contact the Tribunal to make further submissions.

[6] The Commission disagrees with the confidentiality order proposed by the Respondent and the Complainant for a number of reasons. The Commission submits that there already exists an implied confidentiality undertaking that parties are not to disclose documentary evidence in a

Tribunal proceeding, making a confidentiality order of this kind unnecessary. The Commission takes issue with section 4 of the order in particular, which provides for instances where portions of the hearing would be held *in camera*. The Commission argues that section 52 of the *Act* lists exceptions to the general rule that Tribunal inquiries be conducted in public and that these exceptions are more appropriately raised during the hearing as opposed to in advance in a confidentiality order. The Commission also submits that the destruction of documentary evidence at the conclusion of the proceedings provided for at section 6 of the order is cause for concern as this is not normally done. Overall, the Commission expressed that it failed to see why the present matter, in comparison with the other cases before the Tribunal, would require a confidentiality order of this kind and is concerned with setting such a precedent for future hearings.

III. Analysis and Decision

[7] During the CMCC of January 16, 2013, the parties requested that the Tribunal issue a consent order on the basis of the draft confidentiality order agreed upon by the Respondent and the Complainant. Paragraph 18 of the Federal Court decision *Uppal v. Canada (Minister of Employment & Immigration)*, [1987] 3 F.C. 565 summarizes clearly the scope and purpose of a consent order:

A consent judgment has no precedential value. Generally speaking, a Court granting a consent judgment is concerned with only two things: the capacity of the parties to agree and its jurisdiction to make the order they have agreed to ask it to make. A consent judgment reflects neither findings of fact nor a considered application of the law to the facts by the Court. It is an exercise in a different fashion of the Court's basic function to resolve disputes: by giving effect to a settlement agreed to by legally competent persons rather than by reaching a concluded opinion itself.

[8] In the present case, although the Complainant and Respondent have agreed on the proposed draft, the Commission has not. Section 51 of the *Act* delineates the Commission's role in cases before the Tribunal.

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint

[9] While the section does not explicitly state that the Commission is a "party to the proceedings", this is undoubtedly the case. This finding was made expressly by the Federal Court in *Canadian Museum of Civilization Corp. v. Public Service Alliance of Canada, Local 70396*, 2006 FC 703 at paragraphs 29, 51 and 55. In light of the Commission's opposition to the agreement brought forward by the parties, the agreement cannot be said to have been made on consent of all the parties. It is therefore not possible for the Tribunal to issue a consent order in these circumstances.

[10] Pursuant to section 52 of the *Act*, the Tribunal has the ability to make any order it considers necessary to ensure the confidentiality of the inquiry. Section 52 reads as follows:

52. (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

(a) there is a real and substantial risk that matters involving public security will be disclosed;

(b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

(c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to

prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or

(d) there is a serious possibility that the life, liberty or security of a person will be endangered.

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

[11] The Respondent argues that many of the documents subject to disclosure in this case, a case which in its essence, deals with the availability of proprietary technology not accessible to the public, contain confidential, private and sensitive commercial information. In addition, the Respondent alleges that it is itself subject to a number of confidentiality undertakings *vis à vis* third parties regarding this information. Should this information be publicly disclosed in the course of these proceedings, the Respondent would be in breach of these undertakings and open itself to potential liability towards third parties. Framed under section 52(1)(c) of the *Act*, I understand the Respondent's argument to be that the disclosure of this information would cause undue hardship which outweighs the societal interest that the inquiry be conducted in public.

[12] While I understand the Commission's position that the Tribunal can more appropriately address these confidentiality concerns as they arise in the course of the hearing, I am of the view that delineating the manner in which documents may be designated as confidential in an order will help the smooth progression of the proceedings. As the Tribunal seldom encounters cases involving proprietary confidential information, the CRTC Rules of Practice and Procedure (SOR/2010/277), the Broadcasting and Telecom Information Bulletin CRTC 2010-959, *Guidelines on the CRTC Rules of Practice and Procedure* and the Broadcasting and Telecom Information Bulletin CRTC 2010-961, *Procedures for filing confidential information and requesting its disclosure in Commission proceedings* have been of notable use in this regard. The Tribunal's jurisprudence dealing with the adoption of confidentiality measures to ensure the protection of medical records is also worth noting (see, for example, the confidentiality measures

adopted in *Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2013 CHRT 1). Having examined the parties' submissions, the draft order, CHRT caselaw and the CRTC Rules of Procedure mentioned above, the Tribunal adopts the following Confidentiality Guidelines.

1. Filing information that is designated as confidential

[13] To file confidential information before the Tribunal, parties must follow the following steps:

- i. First, the party wishing to file the confidential information must file the information with the Tribunal and designate it as confidential;
- ii. Second, another party or the Tribunal can request that the information be disclosed and the party who designated the information as confidential can reply to this request; and
- iii. Third, based on the request to disclose and the party's reply, the Tribunal will determine whether it will disclose the information or require it to be disclosed.

[14] A party filing information can "designate" it as confidential at the time it is filed with the Tribunal if it falls into one of the following categories:

- i. Information that is a trade secret;
- ii. Financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
- iii. Information the disclosure of which could reasonably be expected
 1. To result in material financial loss or gain to any person;

2. To prejudice the competitive position of any person; or
3. To affect contractual or other negotiations of any person.

[15] At the time the party files information it designates as confidential, it must provide an abridged version of the document along with an explanation of how the information falls into a category of information listed above. The party must provide a detailed rationale to explain why the disclosure of the information is not in the public interest. The abridged version of the document and the reasons for the designation of information as confidential will be placed on the public record of the proceeding.

[16] Documents containing information designated as confidential shall be filed separately and clearly marked as confidential. Documents designated confidential shall be disclosed to the Complainant, the Respondent, their counsel, and Commission counsel only and shall not be disclosed to any other individuals without prior permission from the Tribunal. A party who wishes to discuss a document or information that has been designated as confidential during the hearing shall advise of its intent to the Tribunal at which point the Tribunal will decide whether or not to exercise its discretion pursuant to section 52 of the *Act* and conduct this discussion *in camera*.

[17] Confidential documents may not be used for any purpose outside of the present inquiry. Confidential designation of documents made by the Tribunal continues in effect until the Tribunal orders otherwise, including for the duration of any judicial review and/or appeal of the proceedings and after final judgment.

[18] Parties, with the exception of the Commission, must return confidential documents to the party who disclosed them at the final disposition of this matter, once all judicial recourses have been exhausted. The Commission, as a government institution, will preserve the confidential nature of the documents in conformance with applicable governmental policies and directives on

the conservation and safeguard of confidential proprietary information. Confidential documents in the Tribunal's possession will be sealed in accordance with Tribunal practice.

2. Requesting disclosure of information designated as confidential

[19] If one of the parties believes that the designated information should be made public pursuant to the test for disclosure, the following process must be followed:

- i. The party must file its request with the Tribunal and serve the person who designated the information as confidential. The request must explain why the party believes it would be in the public interest to disclose the information.
- ii. The party who filed the designated information can file a reply with the Tribunal within 10 days, serving any party who requested disclosure of the designated information.

3. Determination whether information designated as confidential will be disclosed

[20] The Tribunal may disclose or require the disclosure of information designated as confidential if:

- i. It does not properly fall within one of the categories of information that can be designated confidential; or
- ii. It was properly designated confidential but disclosure is in the public interest.

[21] Where the Tribunal has determined that information should be disclosed, the party may be required to file a revised abridged version. The party must file the revised document within the time limit established by the Tribunal.

[22] These guidelines do not apply to:

- i. Information which was lawfully or without legal restriction in the possession of any of the parties prior to the date of this Order;
- ii. Information derived independently of disclosure hereunder;
- iii. Information lawfully obtained from a person having a right to disclose such information; nor
- iv. Information that becomes publicly available through means other than a breach of this Order.

[23] The Tribunal reserves the right to amend these Guidelines as needed in the course of these proceedings.

IV. Direction on the Respondent's Request for Oral Hearing on Motion on Tribunal's Jurisdiction

[24] During the January 16th CMCC, the Tribunal indicated that it would be providing parties with a direction regarding the Respondent's request that its preliminary motion, challenging the Tribunal's jurisdiction, be heard in an oral hearing. However, since parties' written submissions on the motion will have all been submitted to the Tribunal by March 8, 2013, the Tribunal will wait until it has received the written submissions before deciding on the necessity to hold an oral hearing.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 12, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1821/5112

Style of Cause: Ross Eadie v. MTS Inc.

Ruling of the Tribunal Dated: February 12, 2013

Appearances:

Raymond D. Hall, for the Complainant

Samar Musallam and Giacomo Vigna, for the Canadian Human Rights Commission

Robert A. Watchman and Karen R. Poetker, for the Respondent