

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2019 CHRT 4  
**Date:** February 11, 2019  
**File No.:** T2157/3116

**Between:**

**Jane Clegg**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Air Canada**

**Respondent**

**Ruling**

**Member:** Kirsten Mercer

## Table of Contents

I.	Summary.....	1
II.	Background.....	1
	A. The Complaint.....	1
	B. The Tribunal’s Inquiry.....	2
	(i) The Nance Report.....	2
	(ii) The Nance Report Disclosure Ruling.....	4
	(iii) The Scope Ruling.....	4
	(iv) The Nance Report Admissibility Motion.....	5
III.	The Positions of the Parties.....	6
	(i) The Commission’s Position.....	6
	(ii) The Complainant’s Position.....	7
	(iii) The Respondent’s Position.....	8
	(iv) Pilot XY’s Position.....	9
	(v) Further Submissions of the Respondent.....	10
IV.	Issues.....	10
V.	Analysis.....	11
	A. ISSUE 1: The Nance Report is Not an Expert Report.....	11
	B. ISSUE 2: The Nance Report is Not Admissible in the Tribunal’s Inquiry into the Complaint.....	12
	(i) Law of Admissibility of Evidence before the CHRT.....	12
	(ii) Privacy Interests of a Non-Party.....	14
	(iii) The Nance Report is Not Admissible as Evidence in this Inquiry.....	15
VI.	Orders.....	21

## **I. Summary**

[1] The admissibility of the Nance Report, as defined herein, into evidence before the Tribunal in this proceeding raises significant concerns regarding procedural fairness and the privacy of Pilot XY, on whose behalf the Report was commissioned. In light of the fact that Captain Nance is not being called to testify as an expert in these proceedings, the Nance Report cannot be admitted as an Expert Report within the meaning of the Tribunal's Rules. As a result, Captain Nance's hearsay opinions as expressed in the Nance Report would be of marginal assistance to the Tribunal, and could be given very little weight if the Report were to be admitted into evidence.

[2] On balance, I find that any marginal benefit that the Tribunal might gain from admitting the Nance Report into evidence is outweighed by the prejudice that would accrue to the Respondent (in respect of its rights to procedural fairness) and to Pilot XY (in respect of her privacy and the confidentiality of the issues addressed in the Report).

[3] For these reasons, as articulated more fully below, I am refusing to admit the Nance Report into evidence in this inquiry.

## **II. Background**

### **A. The Complaint**

[4] In May 2012, Jane Clegg ("Ms. Clegg" or the "Complainant") filed a complaint with the Canadian Human Rights Commission (the "Commission") against Air Canada (the "Respondent"), her former employer, alleging adverse differential treatment on the basis of sex in the course of her employment as a pilot ("the Complaint").

[5] Ms. Clegg alleges that she experienced adverse differential treatment on the basis of sex in regards to a series of specific incidents occurring between July 2009 and April 2013, as well as Air Canada's response to these incidents.

[6] The Complaint also raises broader, systemic issues regarding gender harassment of female pilots at Air Canada. Specifically, Ms. Clegg alleges widespread experiences of

gender harassment among female pilots at Air Canada and asserts the existence of “systemic ambivalence that Air Canada displays towards harassment”. Ms. Clegg seeks (among other things) a broad, systemic remedy, namely, a “modification of the Respondent’s policies and procedures regarding gender harassment in consultation with the Commission”.

[7] The Canadian Human Rights Commission (the “Commission”) conducted an investigation into the Complaint and issued a report recommending that the matter proceed to an inquiry before the Canadian Human Rights Tribunal (the “CHRT” or the “Tribunal”).

## **B. The Tribunal’s Inquiry**

[8] On June 15, 2016, the Complaint was referred to the Tribunal for inquiry.

[9] In April 2017, the parties advised the Tribunal that the disclosure process was complete and the matter was set down for a hearing in October 2017.

[10] On April 25, 2017, counsel for Air Canada advised the Tribunal that a document had been inadvertently produced during the Commission investigation which should not have been disclosed. That document was the Nance Report.

### **(i) The Nance Report**

[11] The Air Canada Nance Report (the “Nance Report” or the “Report”) was prepared by Captain John Nance in June 2014. Captain Nance was retained by the Air Canada Pilots Association (“ACPA”) to produce the Nance Report in respect of a grievance made by ACPA on behalf of Pilot XY (the “ACPA Grievance”), neither of whom are currently parties to the Complaint, against Air Canada.

[12] The Tribunal understands that Captain Nance has produced a second report in respect of another airline, which was referred to in the submissions on this motion, and a copy of which appears in the document book prepared by the parties for the hearing of this

Complaint. For clarity, the subject of this motion is the Nance Report, in respect of Air Canada, as defined herein.

[13] For the purpose of this analysis, and consistent with my earlier ruling on the disclosure of the Nance Report (See *Clegg v. Air Canada*, 2017 CHRT 27 (“*Clegg*”)) I find that the following subjects are considered in the Nance Report:

- A general overview regarding developments in air safety since the late 1970’s, with particular emphasis on the impact of human error on flight safety
- The impact of distraction of the flight crew on flight safety including the impact of pornography as a distraction to the flight crew, and more specifically, the unique impacts of pornography on female pilots in a male-dominated industry
- The need for specific attention and support for pilots who may experience distraction from the perspective of flight safety
- The effect of perceived ethnic slurs on flight safety
- The duty of the flight crew regarding sexually explicit material (including pornography)
- An assessment of Air Canada’s response to:
  1. Sexually explicit materials systematically found in Air Canada cockpits;
  2. Explicit sexual and/or racist commentary in Air Canada cockpits;
  3. The existence of a hostile or poisoned work environment resulting from any repetitious or cultural incidences of (1) or (2) above.

[14] The Nance Report includes Captain Nance’s opinions about the culture at Air Canada with regard to sexual harassment and discrimination (including the impact of pornography in cockpits), contemporaneous with the time period of the Complaint, as well as Captain Nance’s opinion with regards to how pilots who have complained of discrimination in the workplace ought to be treated.

[15] Air Canada claimed that the Nance Report was not relevant to the Complaint, and furthermore, contained confidential information pertaining to a non-party.

[16] The Commission and the Complainant both argued that the document was indeed relevant to the Complaint, was properly produced, and indicated that they intended to rely on the Report at the hearing.

[17] The parties were able to agree that Air Canada would withdraw the document and that the Commission would bring a motion seeking its production, which it did.

### **(ii) The Nance Report Disclosure Ruling**

[18] On August 11, 2017, the Tribunal ruled that the Nance Report was arguably relevant to the inquiry into the Complaint. The Tribunal also recognized the privacy issues raised by the disclosure of the Nance Report - particularly the privacy interests of an individual who is not party to this complaint.

[19] In my reasons for decision, I ordered Air Canada to produce the Nance Report, as well as any additional documents in its power, possession or control that reflect Air Canada's or its employees' input into the drafting of the Nance Report or the implementation of the Nance Report.

[20] At the request of Pilot XY, who is the subject of the Nance Report, I also made a series of orders to ensure that Pilot XY's identity is protected in the disclosure process, and in any subsequent reliance on the Nance Report, for the duration of the Tribunal's inquiry into the Complaint.

[21] At that time, in order to ensure that the Tribunal was afforded the benefit of Pilot XY's perspective on the privacy concerns raised by the production and possible admission of the Report into evidence, I ordered that any further motion regarding the Nance Report would be made on notice to Pilot XY, who would have standing to make submissions to the Tribunal thereupon.

### **(iii) The Scope Ruling**

[22] On April 24, 2018, the Tribunal began the hearing into Ms. Clegg's Complaint.

[23] At the opening of the hearing into the Complaint, the Commission advised the Tribunal that it had reached a settlement with the Air Canada with regard to the systemic remedy it was seeking before the Tribunal. The Commission also advised that it would nonetheless be participating in the hearing.

[24] On a motion at the outset of the hearing with regard to the proper scope of the Complaint, the Tribunal issued a ruling and provided oral reasons with regard to the scope of the inquiry.

[25] In that ruling, the Tribunal held that the scope of its inquiry in this Complaint is as follows:

- a) the Complainant's individual complaints, in regards to the events of July 2009;
- b) the Respondent's response to the Complainant's individual complaints; and
- c) the Respondent's response to gender harassment complaints more broadly in respect of its policies, practices and procedures, including the bid-around function, but not necessarily limited to the bid-around function.

**(iv) The Nance Report Admissibility Motion**

[26] In April 2018, the hearing on the Complaint began in Ottawa. Following opening statements, Ms. Clegg began her evidence-in-chief, but for reasons of scheduling, Ms. Clegg's evidence was interrupted to permit Dr. Heeney to testify.

[27] On April 27, 2018, as a result of a personal matter and with the consent of all parties, the Tribunal adjourned the hearing following the conclusion of the testimony of the Complaint's psychologist, Dr. Heeney, before resuming with Ms. Clegg's evidence-in-chief.

[28] At that time, a number of issues had been raised with respect to requests for further production, the list of anticipated witnesses and the admissibility of the Nance Report. The parties anticipated that some of these issues would require a formal motion.

[29] On June 20, 2018, the Commission filed a motion seeking to have the Nance Report admitted into evidence. As ordered, the Commission made its motion on notice to Pilot XY, and coordinated with Pilot XY to facilitate her submissions on the motion. The Tribunal appreciates the Commission's efforts in this regard.

[30] On July 2, 2018, the Complainant filed submissions in support of the Nance Report's admissibility.

[31] On June 29, 2018, the Respondent filed its responding submissions, seeking to have the Tribunal rule the Nance Report inadmissible.

[32] On July 5, 2018, the Tribunal received the submissions of Pilot XY. Pilot XY opposed the admission of the Nance Report into the Tribunal's record, on the basis that any probative value of the Report (which Pilot XY submits would be very limited, and perhaps non-existent) could not justify the prejudice that she would experience were the Report to be admitted.

[33] The submissions of Pilot XY also focussed on Pilot XY's concerns re privacy and confidentiality of the sensitive personal information contained in the Nance Report, in the event that the Tribunal elected to admit the Nance Report into evidence.

[34] On July 6, 2018, the Respondent filed a Reply to the submissions of the Complainant with respect to the Complainant's submission that the Tribunal ought to apply the *Mohan* test in considering this motion as the Complainant's submissions had not been received when the Respondent filed its submissions in response to the Commission's motion.

[35] The Tribunal has considered all of the parties' submissions (as well as the submissions of Pilot XY) in rendering its decision on this motion.

### **III. The Positions of the Parties**

#### **(i) The Commission's Position**

[36] The Commission submits that the Nance Report is clearly relevant to the issues raised in the Complaint as it addresses systemic issues facing women working in an overwhelmingly male-oriented environment.

[37] More particularly, it identifies the following excerpts of the Nance Report that it submits are relevant to this inquiry:

- A) "A distracted pilot in any phase of the airline operation is less able to perform at the highest levels of awareness and skill than a non distracted pilot" (at page 6).
- B) "Reporting pilots must be supported and protected" (at page 15); and



C) “The downward spiral of an impacted female pilot, who is subtly transferred from the position of reporting a problem to the status of being the problem, has a predictable and tragic end in far too many cases in which the pilot is left permanently traumatized, sequestered, and ultimately deprived of her profession” (at page 16).

[38] Further, the Commission submits that in order to resist the admission of the document into evidence, the Respondent would have to demonstrate that the Nance Report is not relevant to the matter before the Tribunal.

[39] With regard to the procedural fairness of admitting the document, the Commission submits that Air Canada has had the opportunity to cross-examine the Report’s author in the context of the ACPA Grievance for which the Report was prepared, and that the Respondent has had knowledge of the Nance Report since 2014 and therefore ample opportunity to respond to it.

[40] The Commission submits that any procedural fairness issues raised by the Respondent in opposition to the admissibility of the Report go largely to weight, and that those concerns can be addressed by the Tribunal in the course of the hearing, and through closing arguments.

[41] Finally, the Commission acknowledges that the admission of the Nance Report would likely raise privacy issues for Pilot XY, but it submits that those issues can be addressed by the Tribunal through a confidentiality order, or through redaction of identifying information as has already been ordered.

## **(ii) The Complainant’s Position**

[42] The Complainant echoes the Commission’s submissions and requests that the Nance Report be admitted into evidence before the Tribunal.

[43] The Complainant submits that the criteria applicable on consideration of the motion are those espoused by the Supreme Court of Canada in *R. v. Mohan*, 1994 CanLII 80

(SCC) (“*Mohan*”). She asserts that those criteria apply to the facts of this motion as follows:

- A) ***The evidence is relevant to some issue in the case:*** the Nance Report provides expert opinions regarding the issues raised in the Complaint, specifically, the reason for the Complainant’s resignation, the level of support provided to the Complainant surrounding the alleged harassment, and the connection of the Complainant’s concerns to issues of flight safety;
- B) ***The evidence is necessary to assist the trier of fact:*** the Nance Report supports the connection between the distraction experienced by a pilot and her inability to continue to perform her duties, and would provide the Tribunal with assistance regarding the technical aviation issues relevant to the Complaint;
- C) ***The evidence does not violate any exclusionary rule;*** and
- D) ***The witness is a properly qualified expert:*** Captain Nance is a highly credentialed aviation safety consultant who is indisputably qualified.

### (iii) The Respondent’s Position

[44] The Respondent submits that the Nance Report is not relevant to the facts and issues in the present case, and that the Report ought not be admitted into evidence because neither the Commission nor the Complainant have complied with the relevant Rules governing the admissibility of expert evidence.

[45] Air Canada further submits that admitting the Nance Report would offend principles of procedural fairness as it would not be afforded the opportunity to rebut or test the Report’s probative value through cross-examination of the author. It relies upon the Tribunal’s jurisprudence in *Dhanjal v. Air Canada*, 1996 CanLII 2385 (CHRT), aff’d on other grounds, 1997 CanLII 5751(FC); and *Jeffers v. Citizenship and Immigration Canada et al.*, 2008 CHRT 25 in support of these submissions.

[46] The Respondent argues that the Tribunal should reject the Commission’s submissions regarding the test for admissibility, and submits that the correct criterion is

that of relevance. The Respondent submits that the burden is to be borne by the party seeking to introduce the document into evidence, and it is not (as the Commission suggests) up to the party seeking to resist its admissibility to demonstrate that the evidence is irrelevant to the matters in issue.

[47] Furthermore, the Respondent submits that neither the Commission nor the Complainant have met that burden for the following reasons:

- A) Captain Nance is not an expert in harassment or in the bid-around function available in Air Canada's scheduling systems, but rather is an air safety expert;
- B) The Nance Report is primarily about aviation safety and the impact that pilot distraction has on aviation safety;

[48] The Respondent highlights that the Nance Report was produced in an altogether different context, regarding different allegations, different facts, different parties (apart from Air Canada) and a different forum. As such, the Respondent submits that the Nance Report is not necessary for the Complainant to advance her case, nor is it of assistance to the Tribunal in deciding the issues in this Complaint.

[49] Finally, the Respondent submits that the Nance Report is inadmissible due to the fact that neither the Commission nor the Complainant has complied with the Tribunal's Rules regarding the filing of an Expert Report.

[50] In the alternative, the Respondent submits that, should the Nance Report be admitted in evidence, the Tribunal should not give the Report any weight.

#### **(iv) Pilot XY's Position**

[51] Pilot XY identifies several concerns raised by the admission of the Nance Report into evidence, and describes the impact of the current inquiry on her and her family.

[52] Pilot XY submits that the Nance Report is of limited utility to the Tribunal in this inquiry because it was produced based on another set of facts and for another purpose

altogether. As such, Pilot XY submits that the Report's use cannot justify the risk of harm that she would suffer and that it should therefore not be admitted into evidence.

[53] Alternatively, in the event that the Tribunal elects to admit the Nance Report into evidence, Pilot XY requests that the Tribunal take the following steps to protect her privacy and confidentiality:

- A) Maintain the existing confidentiality measures ordered in the Tribunal's ruling of August 11, 2017;
- B) Make a further order pursuant to s. 52(1)(c) of the *CHRA* designating all versions of the Report as confidential and subjecting the Report to a publication ban.

**(v) Further Submissions of the Respondent**

[54] Upon receipt of the Complainant's submissions, the Respondent filed brief supplementary submissions regarding the applicability of the *Mohan* test to the instant question, which it submits is not the appropriate test for the Tribunal to apply in this case. In these supplementary submissions, the Respondent argues that:

- A) The Nance Report is not necessary to the Tribunal, as much of the technical and aviation safety information has already been provided by the Complainant's own testimony, and further evidence may be provided through the testimony of additional witnesses; and
- B) Whether or not Captain Nance is an expert in the field of aviation safety, he is not a properly qualified expert pursuant to the Tribunal's Rules.

**IV. Issues**

- (a) Is the Nance Report admissible to this Inquiry as an Expert Report?**
- (b) Is the Nance Report otherwise admissible as evidence in the Tribunal's Inquiry into the Complaint?**

## V. Analysis

[55] I will begin this analysis by situating my consideration of this motion in the systemic context of the Complaint.

[56] As I have noted above, I have found that the Complaint includes a systemic allegation against Air Canada with regards to its practices and procedures applied when women make complaints of harassment on the basis of sex. This allegation includes, but is not limited to, a claim that Air Canada encourages complaining pilots to use the bid-around mechanism in scheduling their shifts, in order to schedule around or avoid their alleged harasser. Furthermore, I note (even in the absence of an expressly systemic complaint) that the Tribunal's remedial jurisdiction, in the event that a complaint is substantiated, allows for the issuance of systemic and preventative orders (See *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, paras. 15-16)

### A. ISSUE 1: The Nance Report is Not an Expert Report

[57] Under rule 6(3) of the CHRT *Rules of Procedure*, a party who wants to call an expert witness must serve an expert report on all parties and file a copy with the Tribunal, as part of the disclosure phase in advance of the Hearing. The purpose of requiring the service and filing of an expert report in this way is to provide opposing parties with advance notice of the expert's intended testimony at the hearing.

[58] While the time for the filing of expert reports is not fixed in the *Rules*, and is to be determined by the member during the pre-hearing case management phase, it is clear that the filing of the report is a preparatory step in anticipation of the proposed expert's testimony.

[59] Although Captain Nance did appear on the Complainant's initial witness list, Ms. Clegg later notified the parties and the Tribunal that she would not be calling Captain Nance to testify in this case. The Commission has not indicated any intention to call Captain Nance to testify.

[60] Given that they contemplate the presentation of expert testimony at the hearing, the *Rules* governing the filing of an expert report have no bearing on this admissibility motion, as no expert is intended to be called.

[61] This does not mean that none of the witnesses have any relevant expertise. It is not disputed that several of the witnesses indeed do have considerable expertise in various matters relating to the Complaint. Rather, it means that none of the witnesses have been engaged as expert witnesses in the formal sense, which would allow the Tribunal to consider their pure opinion evidence, triggering the obligation to file an expert report as per the *Rules*.

[62] According to the CHRT's established practice and procedure, expert reports are not filed as self-contained, free-standing pieces of documentary evidence—rather, they serve to elucidate future expert opinion testimony, and provide effective notice thereof. As such, the Nance Report is not an Expert Report for the purpose of this proceeding.

[63] Accordingly, the analysis relied upon by the parties with respect to the *Mohan* test is not applicable to this motion.

**B. ISSUE 2: The Nance Report is Not Admissible in the Tribunal's Inquiry into the Complaint**

**(i) Law of Admissibility of Evidence before the CHRT**

[64] The *Canadian Human Rights Act* affords the Tribunal a great deal of discretion to admit documents into evidence in the inquiry before it.

[65] *CHRA* s. 50(2) empowers the Tribunal to decide all questions of law or fact necessary to determining the matter.

[66] In particular, the Tribunal is largely unfettered by the traditional rules of admissibility that govern the conduct of proceedings before a court(see *Canada (Attorney General) v. Johnstone*, 2013 FC 113, para. 159, var'd on other grounds 2014 FCA 110 ; *Tahmourpour v. Canada (Attorney General)*, 2010 FCA 192, para. 29; *Dhanjal, supra*).

[67] The *Act* allows it to receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit. (See *CHRA* s. 50(3)(c))

[68] The Tribunal must exercise this discretion in a manner that is consistent with the scheme of the *Act*, and the principles of natural justice, balancing the rights of all parties to a full and fair hearing (*CHRA*, ss. 48.9(1), 50(1)).

[69] Given the foregoing, the Tribunal's approach to admissibility tends to be highly permissive in most cases. Nonetheless, it is helpful to understand what factors weigh in the consideration of whether a piece of evidence should be received and accepted by the Tribunal.

[70] The basic rule of admissibility is that all evidence must be relevant to a material issue in the case. "Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence." (David Paciocco and Lee Stuesser, *The Law of Evidence*, 7<sup>th</sup> ed. (Toronto: Irwin Law, 2015) at pp. 27, 30; *Québec (Commission de la santé et de la Sécurité du travail) v. Canada*, 2000 CanLII 16617 (FC)).

[71] In considering the admissibility of evidence, the Tribunal is often required to balance the probative value of evidence to its inquiry against any prejudicial factors that may militate against its admissibility. (See *e.g. Lafrenière v. Via Rail* 2018 CHRT 19; *Pieters v. Department of National Revenue*, 2001 CanLII 38322 (CHRT) para. 16). Chair Proulx, writing for the panel in *Dhanjal*, helpfully described the Tribunal's approach to admissibility:

In short, the "golden rule" in regard to the admissibility of evidence could be articulated as follows: any evidence which is or is likely to be relevant and which, according to the rules of procedural fairness and fundamental justice developed in administrative law, does not unduly prejudice the opponent, is admissible by a human rights tribunal, as is expressly allowed by paragraph 50(2)(c) [now 50(3)(c)] of the *CHRA*, subject to the tribunal's final decision concerning the weight that is to be accorded such evidence in the circumstances.

Relevance and fairness are thus the two key considerations in the independent evidentiary regime of this Tribunal, which is the complete master of its own procedure...

(Dhanjal, *supra* at p. 5)

[72] In other words, in considering the admissibility of a piece of evidence, the Tribunal will weigh the evidence's relevance, consider issues of procedural fairness, and may factor in restrictions from the law of evidence more generally or any other prejudice that may militate against the admissibility of the evidence under the regime established by the *CHRA*.

[73] The fact that the Tribunal is afforded considerable latitude in determining what evidence it can admit, and in ultimately determining the appropriate weight to afford that evidence once admitted (*Canada (C.H.R.C.) v. Canada (A.G.)*, 2018 SCC 31 para. 55.), does not mean that the Tribunal is required to admit any and all evidence that is tendered before it in every case. ( See *e.g. Jeffers, supra*, at para. 10). At the admissibility stage, the Tribunal must carefully balance the value of the proposed evidence against the prejudice that its admission could cause to the inquiry, to a party, or—as is the case before me on this motion—to the affected non-party. This balancing inheres in the proper exercise of the Tribunal's discretion under s. 50(3)(c) of the *Act*.

## **(ii) Privacy Interests of a Non-Party**

[74] This motion engages the privacy interests of a non-party to the proceeding.

[75] While there has been no objection to the Tribunal's approach to the recognition of the interests of a non-party in this case, including a partial grant of standing to Pilot XY, it bears noting that the Tribunal has previously recognized the privacy interests of non-parties to a proceeding, and has given protection to those interests in various ways.

[76] The Tribunal observes that, to date, the parties to this Inquiry have taken care that those interests be safeguarded.

[77] While it is difficult to make a general statement about how and when these interests may arise, where serious privacy interests of a non-party are engaged or imperilled by the



questions, issues or evidence raised on an inquiry before the Tribunal, it is in the public interest to ensure that care is taken to consider those interests, and protect them where appropriate.

[78] It is incumbent on all parties, and indeed on the Tribunal, to be mindful of the possible engagement of the privacy interests of non-parties, and to proceed with caution so as to consider and protect those interests, wherever possible. This could include, but is not limited to, measures taken under the Tribunal's common law authority over its own procedures, or s. 52 of the *CHRA*.

[79] The weight given to the interests of non-parties must be contextual and case-specific. In other words, each case must be considered on its facts.

[80] In some cases, as in this one, the Tribunal elected to proactively seek the submissions of the non-party whose privacy interests were likely to be impacted by the production and possible admissibility of the Nance Report. The Tribunal made an order ensuring the anonymization of the identity of Pilot XY; sealing the Tribunal's records with regard to the Nance Report and Pilot XY's submissions; and limiting the publication of information pertaining to Pilot XY, her identity, and the Nance Report (see *Clegg, supra*).

### **(iii) The Nance Report is Not Admissible as Evidence in this Inquiry**

[81] Having found that the Nance Report is not admissible as an expert report, as it was not tendered in anticipation of expert opinion testimony, the Tribunal's analysis can now turn to whether the Nance Report is otherwise admissible as evidence before the Tribunal.

[82] As the Commission submits, the Tribunal's approach to admissibility is often a permissive one, with more stringent consideration being reserved for the question of how much weight to give to a particular piece of evidence once admitted.

[83] The Tribunal has broad discretion to determine its own procedure, and—as discussed above—considerable latitude to determine what evidence it will admit, or not.

[84] Based on the above-described general approach to admissibility at the Tribunal, in the face of a question about the admissibility of a piece of evidence, the Tribunal will consider whether:

- a) the evidence is relevant;
- b) the admission of the evidence is consistent with the principles of natural justice and procedural fairness;
- c) the probative value of the evidence is outweighed by its prejudicial effect; and
- d) there is any bar to the admission of the evidence, including consideration of s. 50(4) and s. 50(5) of the *Act*.

**(a) Relevance**

[85] In my ruling ordering the production of the Nance Report in this inquiry, I found several aspects of the Report to be arguably relevant to the Tribunal's inquiry into this Complaint (*Clegg, supra* at paras. 33-35).

[86] At the time of that ruling, Captain Nance was included as a proposed witness in support of Ms. Clegg's Complaint.

[87] In my reasons for decision, I noted that issues pertaining to weight and admissibility were being explicitly reserved for consideration at the hearing, and I specifically raised a concern about the relevance of the document in the absence of Captain Nance's testimony, and the weight that could be given to the document in the absence of such testimony. (*Clegg, supra* at para. 36).

[88] As Ms. Clegg has elected not to call Captain Nance to testify, and as I have determined above that Captain Nance is not qualified as an expert in these proceedings, those aspects of the Nance Report that reflected Captain Nance's opinion (and which may have been arguably relevant for the purposes of considering the disclosure motion) are now merely hearsay opinion arising from different factual circumstances from those which are before the Tribunal in this Complaint.

[89] As such, the Nance Report is of only marginal relevance to the Tribunal in determining the issues raised in this Complaint.

**(b) Procedural Fairness**

[90] The admission of a document containing statements opining on facts relating even marginally to the issues before the Tribunal in the instant case, without providing the ability to cross-examine the author, raises legitimate procedural fairness issues for the opposing party.

[91] In a quasi-judicial setting, the right to be heard can require that the author of a document adduced in evidence be made available for cross-examination,— particularly where that document touches on a subject in dispute in the proceedings, or where it touches upon issues central to the Tribunal’s inquiry.

[92] While the factual matrix underlying the Nance Report is distinct from that underlying this Complaint, I am clearly being invited to infer that the observations in the Report apply to the present case. Such inferences could affect the determination of key issues before me. I therefore agree that admitting the Report into evidence without calling Captain Nance to testify would raise serious fairness concerns.

[93] I acknowledge that the Tribunal’s approach to admissibility has allowed it to dispense with the requirement of calling a witness for the purpose of authenticating a document, (see *First Nations Child and Family Caring Society of Canada et al v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2 at para 58). The issues with admitting the Nance Report, however, go beyond matters of authentication.

[94] The Tribunal has refused to admit a document on the basis that it contained hearsay evidence of little probative value to the Tribunal where the author would not be available for cross-examination (see *Jeffers v. Citizenship and Immigration Canada and Canada Border Services Agency* at para 13).

[95] I find that admitting the Nance Report into evidence in this proceeding, without Captain Nance being produced as a witness, would be unfair to the Respondent. While perhaps not insurmountable, these fairness concerns militate strongly against the admissibility of the Nance Report.

**(c) Probative Value vs. Prejudicial Effect**

[96] Even in the event that the Nance Report were to be of sufficient relevance to the inquiry and that the procedural fairness concerns raised by the Respondent could be satisfactorily mitigated, serious concerns remain with regard to the prejudicial impact of the Report's admission on the privacy interest of Pilot XY.

[97] The Nance Report details incidents pertaining to Pilot XY, a female pilot who is still employed as a pilot at Air Canada.

[98] As described above, the Report was produced in the context of the ACPA Grievance, and contains sensitive personal information pertaining to a matter that Pilot XY and her union have previously resolved with Air Canada.

[99] The events detailed in the Nance Report pertain to the presence of pornographic images in the cockpit of Air Canada aircraft, and the possible impact of the presence of those images on female pilots (including Pilot XY), and more broadly on flight safety. These issues are not completely unrelated to the issues before me. Therefore it cannot be said that the report has no probative value whatsoever.

[100] On the other hand, the specific facts surrounding these events are substantially different from those raised by this Complaint, as are (to the best of the Tribunal's knowledge) the individuals involved, with the exception of Air Canada, which is a party to both the ACPA Grievance and this Complaint.

[101] Pilot XY highlighted her specific concerns about disclosure and possible admission of the Nance Report before the Tribunal in the submissions (made under Seal) in August 2017. Pilot XY reiterated some of these concerns in her submissions on this motion.

[102] Out of concern for the inadvertent disclosure of identifying information, I will not recite those submissions in detail here. It will suffice to state that the Tribunal found those concerns to be real and compelling, as well as undisputed by any party to this Complaint.

[103] The parties have notified the Tribunal that Pilot XY and her spouse may have already been contacted by the media in response to inquiries arising from Ms. Clegg's Complaint. Pilot XY has communicated that she does not wish to speak publicly about her experience, or the facts underlying the Nance Report.

[104] While Pilot XY appears on the Complainant's witness list, the Tribunal understands that Ms. Clegg no longer intends to call her as a witness.

[105] While the terms of the resolution of the ACPA Grievance are unknown to the Tribunal, Air Canada submits that the parties to that dispute have resolved the ACPA Grievance to their mutual satisfaction. The Tribunal does not wish to interfere with that resolution by entering on the Official Record that which the parties have settled privately as between themselves.

[106] The Tribunal acknowledges the difficulty that this proceeding has unintentionally created for Pilot XY, by the mere reference to the Nance Report in the documents and pleadings in this Complaint. I do not wish to compound that difficulty by admitting a document of limited probative value into the Tribunal's evidentiary record, further shining light on a matter that the ACPA Grievance parties have resolved. Any increased risk to the confidentiality of Pilot XY's identity or personal information cannot be justified on the facts before me in this motion.

[107] In the face of this considerable prejudice to Pilot XY and the unfairness accruing to the Respondent, addressed above, the Tribunal must consider the probative value of the Nance Report.

[108] The aspects of the report that are highlighted in the Submissions of the Commission and the Complainant pertain to Captain Nance's opinion regarding the impact of distraction on flight safety, the importance of supporting pilots who come forward with

complaints, or the consequences of failing to do so. These elements are of limited probative value to the Tribunal.

[109] This is not to say that none of these issues are relevant to this Complaint. Indeed, the Tribunal has already heard evidence on many of these issues.

[110] However, the probative value of Captain Nance's opinion on these subjects – particularly as reflected in a report prepared in regard to another case – is marginal at best. That is to say, his opinion evidence does not make the proposition for which it is advanced significantly more likely than it would appear in the absence of that evidence.

[111] As such, any probative value of the Nance Report to this proceeding is vastly outweighed by the prejudicial effect of admitting the Nance Report, both on the privacy rights of Pilot XY, and on the right of the Respondent to be heard.

**(d) Any Absolute Bar to Admissibility**

[112] No party to this motion has asserted any other basis on which to refuse admissibility of the Nance Report, and in particular, no objection on the ground of privilege has been articulated within the meaning of ss. 50(4) and (5) of the *Act*.

**(e) Conclusion**

[113] Admitting the Nance Report into evidence before the Tribunal raises serious fairness concerns and is of marginal relevance to the issues before me on this Complaint. What is more, any probative value attaching to this document is outweighed by the likely prejudice to the privacy interests of Pilot XY that would result from its admission.

[114] While there are absolute bars to admissibility that have been raised before me, my consideration of the other three admissibility factors militates against admitting the Nance Report into evidence.

[115] While some of these concerns could possibly be mitigated, taken together, I find that the admissibility of the Nance Report cannot be justified in circumstances where its

relevance is marginal and its probative value is very low. For these reasons, I have determined that the Nance Report is not admissible as evidence in this proceeding.

**VI. Orders**

[116] Exercising my discretion under s. 50(3)(c) of the *CHRA*, I hereby order that:

1. The Nance Report shall not be received as evidence before the Tribunal in this inquiry.

[117] Exercising my discretion under s. 52(1)(c) of the *CHRA*, I make the following order:

1. The Nance Report shall be subject to an order of confidentiality preventing its disclosure, and the disclosure of any identifying information in respect of Pilot XY.
2. The submissions of Pilot XY with regard to the Nance Report shall be sealed.

*Signed by*

Kirsten Mercer  
Tribunal Member

Ottawa, Ontario  
February 11, 2019

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T257/3116

**Style of Cause:** Jane Clegg v. Air Canada

**Ruling of the Tribunal Dated:** February 11, 2019

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Jane Clegg, for the Complainant  
Daniel Poulin, for the Canadian Human Rights Commission  
Karen M. Sargeant and Rachel Younan, for the Respondent