Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 20
Date: June 29, 2018
File Nos.: T1111/9205, T1112/9305 & T1113/9405

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Respondent

- and -

Sue Allardyce, Chantal Basque, Aubrey Brenton, Robert Churchill-Smith, Glen Coutts, Claudette Dupont, Pat Glover, Gary Goodwin, Valerie Graham (Estate of), Carol Ladouceur, Mayer Pawlow, Cindi Resnick, Sharon Smith and Don Woodward

Interested Parties

Ruling

Member: Matthew D. Garfield

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I. Introduction

[1] Sixteen individuals - two Complainants[1] and fourteen non-Complainants granted Interested Party status, collectively referred to as "the Goodwin Group"[2] - seek an Order from the Canadian Human Rights Tribunal ("Tribunal") that they performed "Eligible Work" under the Memorandum of Agreement of July 3, 2012 between Ruth Walden et al. and the Attorney General of Canada ("MOA"), and compensation (for pain and suffering, lost wages/benefits) and other remedies (reclassification). The Employer, Employment and Social Development Canada ("ESDC"), formerly Human Resources and Skills Development Canada and Social Development Canada, determined that their work as Vocational Rehabilitation Case Managers ("VRCMs") did not qualify as Eligible Work under the MOA and accordingly, were denied any compensation.

[2] The Goodwin Group seeks an Order that certain documents, some of which are purportedly privileged, be disclosed by the Respondent to it in complete, unredacted form, and that a Summons to Appear be issued to compel the testimony of Mr. Laurence Armstrong, then-counsel to 382 of the Complainants in the *Walden* proceeding.

II. Issues

[3] The issues addressed in this Ruling are as follows:

a. Should the Respondent produce the documents in question in unredacted form;

b. Should the Tribunal issue a Summons to Appear and hear the testimony of the witness in question;

c. Has notice been given to all those entitled to receive it regarding the lifting of privilege?

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[1] Both Ms. Pick and Ms. Taylor received *Walden* compensation as Complainants for their work as MAs, and hence already had standing before the Tribunal. Accordingly, they are included in "*Walden et al.*" in the style of cause/title of proceeding. They are also part of the sixteen individuals - the Goodwin Group - claiming compensation and other remedies for their work as VRCMs.

[2] Mr. Goodwin is the Interested Party who filed the Eligible Work motion on behalf of the Group and also represents it, along with Ms. Ladouceur.

III. Decision

[4] For the reasons that follow, the Goodwin Group's requests are granted in part.

IV. Legal Principles

[5] Many of the documents in question and the proposed testimony of the witness involve questions of privilege. I consider and apply the following basic principles regarding privilege:

1. Solicitor-client privilege "…is a cornerstone of our judicial system and any impediment to open candid and confidential discussion between lawyers and their clients will be rare and reluctantly imposed: *R. v. McClure*, 2001 SCC 14, at para. 61;

2. The concept of privileged communication goes beyond the ideas of confidentiality and privacy, although those considerations intersect privilege: Hubbard et al., *The Law of Privilege in Canada* (Canada Law Book, 2 volumes loose-leaf, updated Aug. 2016), at 1.20;

3. Privileged communication (oral and written) is not an absolute, unqualified right. There are exceptions and parties may waive the privilege, expressly, impliedly or inadvertently: Hubbard, *supra*, at 11.10 and 11.220;

4. Privilege belongs to the client, not his/her counsel and may be waived only by the client: *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, at para. 39;

5. Solicitor-client privilege is a substantive legal right, a class privilege "as close to absolute as possible", has fewer exceptions than the other types of privilege, and "…should only be set aside in the most unusual circumstances": *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at para. 17; Hubbard, *supra*, at 11.10 and 11.20;

6. Settlement privilege, also a class privilege, belongs to all parties involved in the negotiation of a settlement. Its goal is to encourage settlement among parties through a protected environment that fosters frank discussion: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at paras. 11-13;

7. A presumption of inadmissibility attaches to class privileges. The burden of proof regarding a class privileged communication falls on the party wishing to lift the veil of privilege: *Yaffa v. Air Canada*, 2016 CHRT 4, at para. 16.

V. Analysis

A. Scope of the Eligible Work hearing

[6] After the "notice" question, the next hurdle to said document/information requests being ordered produced is whether they are arguably relevant to a material fact, issue or relief sought. For some of the documents, the Respondent did not claim lack of arguable relevance, but instead, invoked a claim of privilege. The Commission supports the Respondent's position of settlement privilege over certain of the documents and the proposed testimony of Mr. Armstrong.

[7] My November 22, 2016 Ruling in this matter, 2016 CHRT 19, along with discussions I have had with the parties regarding the scope of the hearing since then during some of the Case Management Conference Calls, make it clear what the central issue is: Did the VRCMs perform Eligible Work ("EW") under the MOA? Part of that central issue includes: What was the intent of the parties to the MOA regarding the meaning of the definition of EW and its application to the VRCMs and their work? And in that vein, I am informed by the Supreme Court of Canada's comment in *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 37:

> Interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract [citation omitted]. Surrounding circumstances, including "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting", may be considered in interpreting the terms of a contract,

> although they may not overwhelm the contract's express words [citation omitted].

B. Documents in Question

[8] The outstanding production requests involve: the May 2013 Settlement Processing Guidelines and Annexes ("Guidelines") and two redacted emails, one each from Ms. Pichette and Ms. Lamadeleine. Through an ATIP request, the Goodwin Group received redacted Guidelines with no Annexes. By agreement of the parties, the Respondent sent me the unredacted version (with Annexes) and the two emails for my review. I ordered them sealed pending my determination.

(1) Emails of Ms. Pichette (dated September 20, 2013) and Ms. Lamadeleine (dated February 27, 2014)

[9] Both emails are internal ones and deal with the application of the MOA (i.e., EW definition) to VRCM work and specifically, to two individual VRCMs referred to in the emails, neither of whom is a member of the Goodwin Group. The Goodwin Group received these emails with redactions. It submits that the two emails are arguably relevant to its EW motion and it should receive them in complete, unredacted form. The Respondent argues that due to lack of arguable relevance and privacy concerns (i.e., disclosure of personal information of the two individuals), the redacted portions should not be revealed.

[10] I agree with the Respondent with respect to one of the individuals named in both emails, on the basis of the lack-of-arguable-relevance point. However, given that the other individual, Mary-Helen Macdonald, is on the witness list of the Goodwin Group for the yet unscheduled hearing and that the Goodwin Group may wish to examine her concerning these two emails, I find that the unredacting of her name and other information pertaining to her is arguably relevant. Regarding the privacy issues, I find that there is no statutory bar for my ordering it produced under the *Canadian Human Rights Act* ("*CHRA*"), the Tribunal's *Rules of Procedure* or the *Privacy Act* (para. 8(2)(c)). The other person's name

is unnecessary and not arguably relevant. Accordingly, the Respondent is ordered forthwith to provide the Goodwin Group with the two emails on the terms indicated above.

(2) The Guidelines

[11] The Guidelines were received with some redactions and without the Annexes. Mr. Goodwin does not have the ATIP cover letter or other relevant documentation with explanations for the reasons for those actions by the ATIP section. And I do not have any evidence or information on which to make a finding in that regard. Annex A (CHRT decisions, Consent Orders and MOA) is not in dispute here.

[12] The Respondent argues lack-of-arguable-relevance for some redactions or non-production of a document in its entirety, and privilege for others. Indeed, Ms. Marchildon questions whether the Guidelines are even arguably relevant, but that it is a moot point in terms of what has been provided to the Respondent already via the ATIP response. The Commission takes the position that certain documents and parts thereof are privileged and that privilege should be "jealously guarded" by the Tribunal. The Goodwin Group argues that the Guidelines with Annexes are arguably relevant and that any claim of privilege has been waived by ESDC when the ATIP request was met.

[13] I will discuss further below the issues of arguable relevance and privilege. At this point, I find that the sending of the partially redacted Guidelines without the Annexes by ESDC's ATIP unit did not amount to an admission of arguable relevance or a waiver of privilege. I do not know the reasoning of the ATIP unit for its decision and it is not determinative for purposes of the matter before me. For purposes of this Ruling, I am satisfied that the Guidelines (or at least parts thereof) are arguably relevant.

[14] I do not agree with the Goodwin Group's submission that any privilege was waived by virtue of ESDC having disseminated the Guidelines to "dozens, perhaps hundreds" within the department. I asked the Respondent for further information regarding who received the Guidelines, including their names and positions. Counsel responded on November 9, 2017:

> …Ms. MacNeil so far has only been able to establish that the Settlement Guidelines and attached documents were in a secure folder with limited access. She expects that only a few staff in ESDC's human resources branch and chief financial officer branch (CFOB) had access to the Guidelines. Ms. MacNeil has not yet been able to confirm this with any officer who was present at the time the guidelines were created in 2013.

Counsel indicated that she would write further with any further information. On June 8, 2018, the Respondent confirmed that it had no further information to provide.

[15] Mr. Goodwin wrote after the November 9th email from the Respondent that such limited dissemination of the Guidelines seemed unlikely. He stated that given the number of people involved in drafting them and being in different locations, and the realities of modern day email systems and workplace practices, it is highly unlikely that the Guidelines with Annexes "were in a secure folder with limited access".

[16] While Mr. Goodwin's assertions about the distribution and location of, and access to, the Guidelines are theoretically plausible, they are nevertheless speculative and insufficient to convince me that Ms. MacNeil's November 9th statement lacks credibility or reliability. Based on the evidence before me,[3] I accept at this juncture that the Guidelines "were in a secure folder with limited access" to the relevant people in the units mentioned above dealing with the implementation and financial aspects of the Settlement Agreement. I also add that the *number* of people who received the Guidelines would not in and of itself necessarily constitute a waiver of privilege as the Goodwin Group also asserts. In that regard, I follow the decision of the Supreme Court of Canada in *R. v. Campbell and Shirose*, [1999] 1 SCR 565 in which the Court at para. 67 identified the RCMP as "the client" for purposes of ownership and waiver of privilege regarding legal advice given. The Court stated that the whole police force was the client, as opposed to the individual officer who requested and received the advice. I have no evidence that privilege was waived by ESDC through its instructing official, or the Attorney General of Canada. Respondent counsel echoes this and claims privilege over some of the Annexes.

[3] Under para. 50(3)(c) of the *CHRA*, the Tribunal is entitled to "receive and accept any evidence and other information" that it "sees fit" whether or not it would be admissible in a court of law, subject to ss. (4) and (5).

i) Annex B (TBS Information Notice)

[17] The Respondent declines this production request on the basis of lack of arguable relevance. The Notice's purpose is "to provide relevant departments with information and authorisation required to convert Medical Adjudicators positions, currently classified as PM's, to the new NU-EMA sub-group." Having reviewed the document, I find that it is arguably relevant to the issue of the reclassification remedy that the Goodwin Group seeks and thus order it be provided by the Respondent to the Goodwin Group forthwith.

ii) Annex C (Redacted individual surnames on page 25)

[18] The Respondent refuses the Goodwin Group's request for disclosure on the basis of lack of arguable relevance and privacy concerns. The Goodwin Group argues their relevance. As indicated earlier, the privacy concerns involving the release of "personal information" enunciated by the Respondent do not prevent me from making a production order under the *CHRA*, the Tribunal's *Rules of Procedure* or the *Privacy Act*. However, I am not satisfied that the surnames are even arguably relevant. I say this having read the excerpt on page 25 in the context of the entire purportedly privileged June 16, 2011 letter from whence it comes. I do not order the surnames be unredacted.

iii) Annex C (Draft Letter from Ms. Marchildon to Mr. Armstrong dated June 16, 2011)

[19] The Respondent argues that her "preliminary draft letter" marked "Without Prejudice" was never sent and should not be produced because of the claim of solicitor-client privilege. It constituted and stemmed from legal advice given to her client. The Goodwin Group counters that the letter is arguably relevant and that any solicitor-client privilege has been waived by ESDC "…because of its release to "dozens and dozens, perhaps hundreds" of ESDC employees…"

[20] Upon my review, the draft letter may be characterized as solicitor-client privileged or litigation privileged (lawyer work product).[4] It is not settlement privileged communication as the "preliminary draft letter" was never sent to Mr. Armstrong (or copied to Mr. Poulin). Hence, notice need not be given to Mr. Armstrong's former clients or the Commission for that matter.

[21] The solicitor-client relationship is one which is "jealously guarded" by the courts for obvious reasons. The exceptions are few and none applies to the draft letter. Regarding the question of waiver, I do not find that that has occurred. Waiver must be expressly found or inferred through an implied waiver. For the reasons expressed above, I do not find that the ESDC employees' access to the Guidelines to which this letter is annexed constitutes either an express or implied waiver.

iv) Annex C (Letters sent between Counsel dated June 22 and 28, 2011)

[22] The Goodwin Group requests the production of these two sent letters: the first dated June 22, 2011 from Ms. Marchildon to Mr. Armstrong "to clarify the details of our settlement offer"; and the second dated June 28, 2011 from Mr. Armstrong to Ms. Marchildon accepting said offer for compensation for pain and suffering and outlining the terms. Both letters were copied to Commission counsel. The Goodwin Group claims that any privilege has been waived. The Commission does not waive privilege. The Respondent only waived privilege initially to one additional paragraph in the June 22, 2011 letter.

[23] Upon reviewing both letters, I find that they are clearly covered and protected by settlement privilege. The privilege belongs to *all* parties that were involved in the settlement discussions and negotiations that resulted in these letters being authored, sent and received. In order for these letters to be produced to the Goodwin Group, all such parties need to waive privilege, or an Order needs to be issued by the Tribunal lifting the veil of privilege based on an exception to privilege or implied waiver. Furthermore, and at

[4] "The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context": *Blank v. Canada*, 2006 SCC 39, at para. 49.

the very least, *before* I make such a determination, said parties must be given notice of the Goodwin Group's request and an opportunity to present their respective positions.

[24] The question arises: aside from the 382 Armstrong-represented Complainants (constituting over 90% of the 417 *Walden* Complainants), the Commission and the Respondent, does the Goodwin Group need to give notice of its requests to the 35 non-Armstrong-represented Complainants? The Goodwin Group submits that notice need not be given to any of the other parties. The Respondent submits that the 35 Complainants need not be given notice as they were not the addressees and did not receive the two letters and indeed did not participate in the settlement negotiations. Rather, the Respondent avers that Mr. Armstrong and Ms. Marchildon arrived at the EW definition and negotiated the 2011 "pain and suffering" settlement, and that the agreement was presented to the 35 Harrison- and self-represented parties after-the-fact for their acceptance. Mr. Poulin of the Commission argues that *all* Complainants must receive notice.

[25] With regards to the "waiver" issue, I directed the Registry Officer to send out a letter asking the Respondent for confirmation as to whether it filed the three letters with the Tribunal as indicated on pages 9 and 24 of the Guidelines wherein it states that the three letters were "shared" with the Tribunal. Mr. Armstrong filed the June 28, 2011 letter with the Tribunal on June 30, 2011 with a cover letter. The Respondent replied that it had no information to contradict the Tribunal's statement that the June 28th letter had been filed by Mr. Armstrong. Ms. Marchildon also wrote that the Respondent had not "shared" the June 16 or 22, 2011 letters. I accept that uncontroverted information. Hence, of the three June 2011 privileged letters, only the June 28th one was filed with the Tribunal. Furthermore, none of the parties who received it ever notified the Tribunal that it was filed in error. Accordingly, I am satisfied that the Armstrong-represented Complainants, the Commission and the Respondent have waived privilege over the June 28th letter only.

[26] But what of the 35 non-Armstrong-represented Complainants? It appears that they only received the June 28th letter when it was filed with the Tribunal by Mr. Armstrong as an attachment to his letter of June 30, 2011. And I accept the information from Ms. Marchildon that she and Mr. Armstrong negotiated the "pain and suffering" settlement

agreement in 2011, and that the agreed to terms were then put before the 35 other Complainants. They could either agree to them (which they did) or seek their own remedy before the Tribunal. This is corroborated by Mr. Armstrong's June 30th letter filed with the Tribunal and copied to *all* the other parties. He wrote in part asking that the following be conveyed to me:

> I am pleased to advise that Ms. Marchildon and I have reached agreement on an appropriate pain and suffering award. I enclose a copy of my letter of June 28, 2011 setting out the terms. Now that we have reached agreement, Ms. Marchildon will present an identical offer to the balance of the Complainants. Our agreement, however, is not dependent upon acceptance by the unrepresented Complainants, and if they refuse the offer then they will have to seek such remedy as they are able from the Tribunal.

[27] However, that does not complete the story, at least with respect to the July 2012 MOA. It was signed by Ms. Wellman of the Armstrong Wellman firm representing the 382 Complainants and Ms. Nabbali representing the Respondent, and included an appended letter. That letter marked "Without Prejudice" is dated May 31, 2012 from Ms. Marchildon addressed to the "Self-Represented Complainants and Harrison Represented Complainants (as per distribution list attached)" and Mr. Armstrong, and copied to Mr. Poulin from the Commission and Mr. Engelmann from PIPSC. The letter was "for settlement purposes only" and responds to "your May 4th letter" containing a counter-offer.

[28] Based on the foregoing, I am satisfied that the 35 other Complainants did not participate in the settlement process in 2011 beyond just having the "pain and suffering" agreement (negotiated and agreed to by Mr. Armstrong and Ms. Marchildon) offered to them after June 28, 2011. However, while the principal negotiations culminating in the July 2012 MOA seem to have taken place between Mr. Armstrong and Ms. Marchildon, the 35 Complainants appear to have participated in the settlement process at least in May 2012 that resulted in the MOA. This would be so at the very least, by May 4, 2012 if "your May 4th letter" was from all the Complainants, or alternatively, by May 31, 2012, if the May 4th letter had only been sent by Mr. Armstrong to Ms. Marchildon.

[29] As well, my review of the Supreme Court of Canada's decision in *Sable*, *supra* imparts to me that individual parties to a proceeding can set up settlement privileged walls as against other parties. In *Sable* at para. 16, the Supreme Court of Canada cites with approval the B.C. Court of Appeal's judgment in *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CanLII 4039*:* "In my judgment this [settlement] privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility,…" In other words, co-complainant "X1" can claim settlement privilege over communications (oral or written) with respondent "Y" as against co-complainant "X2". Indeed, some parties may negotiate settlements while others do not. In terms of the rationale behind the protection of settlement privileged communications, what sense would it make to allow party "X2" to claim settlement privilege over correspondence that s/he never received? That would create a future disincentive to full and frank negotiation between the parties who are *actually communicating with each other for settlement purposes*.

[30] Accordingly, I find that the Armstrong-represented Complainants, the Commission and the Respondent have implicitly waived any claim of privilege by the filing of the June 28, 2011 letter with the Tribunal by Mr. Armstrong. Privilege over this letter does not extend to the 35 other Complainants; notice need not be given to them. The June 28, 2011 letter (along with the cover letter dated June 30, 2011) shall be provided to the Goodwin Group by the Tribunal Registry.

[31] Consistent with my findings above, the Group of 35 need not be given notice by the Goodwin Group of its request for the June 22, 2011 letter. However, the Goodwin Group will need to give notice to the Armstrong-represented Complainants with regards to the June 22, 2011 letter.

v) Annex D (Sample of MA Settlement Report)

[32] The Respondent declines the Goodwin Group's request based on lack of arguable relevance and privacy concerns regarding personal information contained therein. Ms. Marchildon wrote that the document in question "provides a point-in-time status of

issues arising in the implementation of the settlement, including personal issues arising in relation to specific individuals or groups of individuals who were potentially entitled to monies under the settlement." It does not contain any reference to VRCMs or vocational rehabilitation case management work/issues. The Goodwin Group avers that the document is arguably relevant to its EW motion.

[33] Having reviewed the unredacted document, I agree with the Respondent. Annex D is not arguably relevant to a material issue, fact or remedy in the EW motion before me. I also wish to add that the document does not deal with the arguably relevant issue of the constituent elements of the EW definition in the MOA.

C. Proposed Testimony of Mr. Armstrong

[34] The Goodwin Group has long advised that it wishes to call Mr. Armstrong to testify about his clients' intentions, and their and the Respondent's positions during settlement negotiations concerning the definition of EW in the MOA and its application to the VRCMs and their work, if any. The Goodwin Group seeks the issuance of a Summons to Appear. The Respondent counters that said testimony is not relevant and that settlement privilege attaches. The Respondent does not waive privilege. The Commission also opposes this request.

[35] The basic test for the admissibility of testimony is relevance. I am satisfied based on the amended will-say filed by the Goodwin Group and the submissions made, that Mr. Armstrong's testimony is relevant to the EW motion before me. However, as his testimony involves settlement privileged communications with Ms. Marchildon (and with the Commission due to its being copied on letters at the very least), notice must be given to his 382 former clients and to Mr. Armstrong himself.[5] In that regard, it would be prudent for the Goodwin Group to contact Mr. Armstrong in advance of serving him with its Notice of Motion to ascertain if a protocol was in place whereby one lead Armstrong-represented complainant - or a committee of them - could bind the others.

[5] Lawyers have a legal and professional duty to protect, and not to disclose, privileged information or confidential communication and other information belonging to their clients, including former clients.

[36] Furthermore, given my earlier findings concerning the negotiation of the MOA and the May 31, 2012 "revised offer" letter from Ms. Marchildon to *all* the parties, I also require that the Group of 35 non-Armstrong-represented clients be given notice of the Goodwin Group's motion to compel Mr. Armstrong to testify at the EW hearing.

[37] Given the logistical challenges posed by the notice and submissions to be given and exchanged among this large group of parties, the Tribunal suggests that the parties see if there is an admission, agreed fact and/or joint submission that would render the production of the June 22, 2011 letter and proposed testimony unnecessary. The parties came close to reaching such an agreement during one of our CMCCs. If the Goodwin Group wishes to proceed, the Tribunal will issue a Direction regarding the "next steps" to be followed and addressing the logistical considerations involving such a large group.

VI. Order

[38] Upon reading the written submissions and documents filed and hearing the oral submissions, I order the following:

a. The June 28, 2011 letter is unsealed and a copy of it (and the June 30, 2011 cover letter) shall be provided by the Tribunal Registry to the Goodwin Group;

b. The Respondent shall provide the Goodwin Group the following forthwith:

    i. the two emails unredacted to the extent stipulated in this Ruling;
    ii. Annex B in its unredacted form.

c. The Goodwin Group shall advise the Tribunal by July 13, 2018 if it intends to pursue its motion for production of the June 22, 2011 letter and the issuance of a Summons to Appear to compel the testimony of Mr. Armstrong.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
June 29, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1111/9205, T1112/9305 & T1113/9405

Style of Cause: Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Ruling of the Tribunal Dated: June 29, 2018

Motion dealt with in writing and oral submissions (via teleconference)

Representations by:

Gary Goodwin and Carol Ladouceur, for the Interested Parties

Daniel Poulin, for the Canadian Human Rights Commission

Lynn Marchildon, for the Respondent