

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2020 CHRT 34

Date: October 22, 2020

File Nos.: T2231/5317 and T2232/5417

Between:

Roger Khouri and Francois Khouri

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Virgin Mobile Canada

Respondent

Ruling

Member: Colleen Harrington

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I. Introduction

[1] On October 5, 2020, I issued an Order requiring Virgin Mobile Canada (Virgin Mobile or the Respondent) to immediately produce certain documents to the other parties. I indicated that reasons for my Order would follow in the form of a Ruling. Below are my reasons for issuing that Order.

II. Background to this Motion

[2] Roger and Francois Khouri (the Complainants) are brothers. They are legally blind. In 2016 they filed human rights complaints alleging that Virgin Mobile¹ was discriminating against them in relation to their vision impairments, contrary to section 5 of the *Canadian Human Rights Act*² (CHRA or the Act). One aspect of their complaints relates to their ability to utilize Virgin Mobile's My Account App.

[3] Since 2018 I have been case managing these complaints toward a hearing. In 2019, the Canadian Human Rights Commission (Commission) filed a Motion for an Order compelling Virgin Mobile to produce certain documents relating to facts, issues, defences and remedies identified by the parties. I issued my Ruling and Order in respect of that Motion on June 12, 2019.³

[4] As part of the 2019 Order, the Respondent was required to provide "All documents for which no privilege is claimed, including investigation notes, relating to Virgin Mobile's update of its My Account App and My Benefits App in 2015 and 2016, wherein it remediated issues raised by the Complainants, including documents showing which issues were remediated and any evidence of further updates to these Apps relating to accessibility for blind or vision impaired customers from that time to the present."

[5] In complying with the 2019 Order, Virgin Mobile disclosed a March 8, 2019 affidavit of David Deskin, Senior Manager, Design and Delivery for Bell Canada. Mr. Deskin's

¹ Virgin Mobile Canada is a brand operated by Bell Mobility Inc.

² RSC 1985, c H-6.

³ *Khouri and Khouri v. Virgin Mobile Canada*, 2019 CHRT 26 ["2019 Order"]

affidavit states: “Virgin Mobile is currently working on making the Virgin Mobile App WCAG 2.0 AA compliant. We hope to have this project completed within the next year.”

[6] Virgin Mobile says that, by October of 2019, it had complied with the 2019 Order. Since that time, the parties and Tribunal have held several Case Management Conference Calls (CMCCs). The Respondent’s compliance with the 2019 Order and whether it had, and was meeting, continuing disclosure obligations was discussed at each of these CMCCs. The parties have made efforts to resolve any outstanding disclosure issues amongst themselves prior to the hearing of these complaints, which is scheduled to take place from November 2-6, 2020 and from January 18-22, 2021.

[7] Prior to a CMCC on August 20, 2020, the Complainants wrote to the Respondent indicating that they were seeking a list of the dates that updates were made to the Virgin Mobile App, including “what was actually completed on that released update”. In response to this request, the Respondent stated: “We fail to see the relevance of the updates to the case. We respectfully decline this request.” As such, Francois Khouri advised that the Complainants would be bringing a Motion asking the Tribunal to compel the production of this information.

[8] At the CMCC on August 20, 2020, Mr. Khouri clarified that he was seeking information relating specifically to updates to the App that were completed to address inaccessibility issues for blind and vision impaired clients. Rather than proceeding by way of a Motion at that time, the parties agreed that the Respondent’s counsel, Ms. Dinning, would endeavour to obtain this information from her client.

[9] On August 28, 2020 Ms. Dinning wrote to advise that she had spoken with some internal experts about Virgin Mobile’s My Account App updates, “specifically where an App Store indicates that there have been ‘bugs’ resolved.” She understood that these were generally minor technical updates, sometimes only resulting in a change to a word, and which often involved coding and other technical matters. She stated, “It does not appear that these take place with the intention of fixing issues related to user experience, such as accessibility.” Ms. Dinning further stated that other processes had been put into place in relation to “app releases”, which she believed involved more substantial changes to the

App. She committed to obtaining further information about how accessibility is considered in these more substantial updates.

[10] On September 23, 2020, Ms. Dinning emailed to say she had followed up with her client regarding whether App Release Notes would include any discussion of accessibility and, therefore, could be produced. She stated: “Based on my discussions, I understand that there are no details about accessibility that have ever been included in our Release Notes for our apps. Accordingly, we do not have any relevant documents to produce with regards to the app updates.”

[11] On September 25, 2020 the Complainants filed their Disclosure Motion with the Tribunal and, on October 1, 2020, the Tribunal convened a telephone hearing so the parties could provide their submissions with respect to the Motion.

[12] By filing this Motion the Complainants are seeking an Order compelling Virgin Mobile to produce documents that fall within three categories:

- 1) Information relating specifically to the accessibility work done by the Respondent on the Virgin Mobile My Account App since March 8, 2019;
- 2) Accessible versions of the Complainants’ monthly account statements;
- 3) Copies of all promotional text messages that the Complainants have received from Virgin Mobile since they became customers.

[13] It is the first category of documents relating to efforts by Virgin Mobile to make its My Account App more accessible that is in dispute and which I address in this Ruling.

[14] The last two categories (monthly statements and promotional text messages) were specifically ordered to be produced in the 2019 Order, and the Complainants have indicated that they are seeking enforcement of that Order with respect to these items. The Respondent takes no issue with providing these documents and has committed to providing them to the Complainants immediately. As such, I will not discuss these items further in this Ruling, although I did order them to be produced in the October 5, 2020 Order.

III. Positions of the Parties

A. Complainants

[15] In their Motion, the Complainants are requesting information relating specifically to the accessibility work done by the Respondent on the Virgin Mobile My Account App from March 8, 2019 to the present. They state that they have been unsuccessful in obtaining any notes on the work done by the Respondent since the date of Mr. Deskin's affidavit.

[16] The Complainants believe that such documents should be available, despite what Ms. Dinning stated in her September 23, 2020 email. They rely on an email from the Commission's proposed Expert Witness, Fred Stam, to the Commission's counsel, in which he opined that the definition of the term "Release Notes" in Ms. Dinning's September 23rd email "may be very narrow and it may only refer to notes made public on the App Store site. However, it is fair to say that if there had been changes made to conform to any level of WCAG 2.0 they most likely would have been included (or trumpeted) in their public release notes."

[17] Mr. Stam went on to say that, generally, whenever the code in a software program (application) is to be amended or edited, this would be preceded with documentation outlining required changes and known bug fixes. Then, once the changes have been made, they too would be documented and kept in the revision logs for the application. He said that "these logs tend to be very technical in nature but would definitely mention any code changes pertaining to WCAG guidelines." Mr. Stam noted that he had tested version 4.3 of Virgin Mobile's App for his February 2019 report, and now the Respondent is using version 7.0.1.

B. Respondent

[18] At the hearing of the Motion, the Respondent took the position that it should not be compelled to disclose information relating to the My Account App beyond the date of the 2019 Order because, under the terms of that Order, it was only obliged to disclose documents relating to its Apps from 2015 to "the present". The Respondent argues that

reference to “the present” in the Order meant June 12, 2019, the date of the Order. The Respondent says any argument by the Complainants that the Tribunal should be enforcing the 2019 Order by compelling continued disclosure is inappropriate because the 2019 Order is “spent” and cannot be relied on to compel further disclosure relating to the My Account App.

[19] In addition, the Respondent argues that when the Complainants filed their human rights complaints with the Commission in 2016, they were dealing with a My Account App which is no longer deployed by Virgin Mobile. It says that, as the Tribunal was making the 2019 Order, Virgin Mobile was working on a brand new App designed from the ground up. While Virgin Mobile was providing its disclosure to the other parties in the fall of 2019, this new App was being deployed. Therefore, even if it had a continuous obligation to disclose documents relating to the My Account App, it says there would be nothing to report since there could be no updates made to the original App that was in existence at time of the complaints. The Respondent says there would have been no point in Virgin Mobile making revisions to an App that was withdrawn and replaced by a completely different product.

[20] Virgin Mobile says that any discussions it had with the other parties regarding ongoing disclosure after the fall of 2019 was on a purely voluntary basis, unless it was specifically covered by the 2019 Order. This includes Ms. Dinning’s emails submitted by the Complainants as part of this Motion. The Respondent’s position is that, although what is being requested by the Complainants is beyond the scope of the 2019 Order, it was willing to entertain such discussions and, while some good faith efforts were made, it could find no App Release Notes that mention accessibility.

[21] When asked whether it intended to refer to this new App as part of its case, the Respondent replied that it might and, if so, it could file relevant materials, if they exist, within a matter of days.

[22] The Respondent argues that, as we are only weeks away from the hearing, it would be inappropriate to make a new Order at this time.

[23] The Respondent requests that I dismiss the Complainants’ Motion.

C. Commission

[24] The Commission says it did not join the Complainants in making this Motion as it felt it was unnecessary. The Commission's view is that, by requiring certain documents to be disclosed up to "the present" in the 2019 Order, the Tribunal was requiring the Respondent to produce documents that are arguably relevant to the issues before the Tribunal up to the date of the hearing. As the accessibility of the My Account App is one of the issues before the Tribunal, any information about efforts to make the App accessible up to the hearing date is relevant, and such documents should be disclosed to the parties.

[25] The Commission was not previously aware of the Respondent's position that the App that was the subject of the 2019 Order was replaced in the fall of 2019. In any event, the Commission takes the position that this does not change anything, as its public interest concern in these complaints relates to the accessibility of Virgin Mobile's App for vision impaired individuals. If Virgin Mobile has any documents about efforts it has made to improve accessibility for these customers, even if they are not in the form of Release Notes, these must be disclosed.

[26] The Commission points out that, if Virgin Mobile intends to argue before the Tribunal that this new App, deployed in the fall of 2019, is more accessible than the previous iteration of the App, it must disclose documents that support that contention. It is the Commission's position that, if the Respondent tries to introduce documents for the first time during the course of the hearing, it will strenuously object to those materials becoming evidence.

D. Complainants' Reply

[27] The Complainants disagree with the Respondent's position that they are asking the Tribunal to enforce the 2019 Order in relation to the App accessibility updates requested in this Motion. Rather, they say that Mr. Deskin's affidavit was produced as a result of the Commission's disclosure Motion and the 2019 Order. They say Mr. Deskin predicted an outcome in his affidavit – improved accessibility of the My Account App within a year from March of 2019 – and they want to know what the Respondent has done in this regard.

They say they have been dealing in good faith with the Respondent for many months, rather than making a disclosure Motion, but they were compelled to bring this Motion as a result of the vague information provided by the Respondent in response to their requests for further information.

[28] The Complainants also say their complaints did not end at the point the new App was created in the fall of 2019. They say, fundamentally, their complaints are about accessibility and, if the Respondent decided to reinvent the wheel and come up with a completely new App, that is beside the point. Even if the App was redesigned, the end product is still fundamentally the same to the user. They point out that it is still the way clients access their information, that the name of the App has not changed, and that it is still available from the App Store. Also, each time the App has been updated since they became customers in 2015, the version number of the App has increased and is now at 7.0.1.

IV. Decision

[29] Rule 6 of the Tribunal's *Rules of Procedure* requires all parties to list and produce, on an initial and ongoing basis, all documents in their possession, for which no privilege is claimed, and that are arguably relevant to a fact, issue, or form of relief sought in the case. In order to be arguably relevant pursuant to Rule 6, there must be a "nexus or rational connection" between the document sought and a fact, issue or remedy identified by a party to the proceeding.⁴ The arguable relevance of a document must be determined on a case-by-case basis.⁵ However, the threshold for the production of arguably relevant documents is low, and the trend is towards broader disclosure at this stage.⁶

[30] As stated in the 2019 Order, the reason that parties are required to disclose documents to one another prior to the hearing is to ensure that all parties have a sufficient opportunity to present their cases, by being able to adequately prepare for the hearing.

⁴ *Clegg v. Air Canada*, 2017 CHRT 27 at para.21; *Turner v. CBSA*, 2018 CHRT 1 at paras.30, 31.

⁵ *Seeley v. Canadian National Railway*, 2013 CHRT 18 at para.6.

⁶ *Turner*, *supra* note 4 at paras.30-33; *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at para.31.

Receiving all relevant documents in advance can also prevent surprises and delays during the hearing.

[31] I appreciate that I should have been clearer in making the 2019 Order. While I did intend that requiring the Respondent to provide certain information “to the present” meant to a reasonable period prior to the hearing, I did not actually say this. However, I also assumed that, after the Order was made and disclosure was complete, the hearing would take place in a timely fashion, and not over a year later. The Complainants have been requesting a hearing in a timely manner since our first CMCC. They have not been responsible for any delays. Virgin Mobile, on the other hand, has requested additional time throughout the case management process for its various lawyers to familiarize themselves with the file as counsel has changed quite frequently, with eight different lawyers having worked on the file at various times since I took carriage of this matter.

[32] Despite a lack of clarity in the 2019 Order, however, the Complainants and Commission are correct that the complaint is about the Complainants’ experiences accessing services from Virgin Mobile as vision impaired customers. I do not agree with the Respondent that the parameters of litigation are about efforts that were made or not made by Virgin Mobile at the time the complaints were filed, based on the products Virgin Mobile was using at the time. Both complaints filed with the Commission indicate “ongoing” discrimination. In my June 2019 Ruling, I accepted that “Virgin Mobile’s disclosure obligations extend to all aspects of the Complainants’ interactions with Virgin Mobile in which accessibility has been an issue for them as vision impaired customers. This includes the text messages sent by Virgin Mobile, its website, and any of Virgin’s Apps that were utilized by the Complainants, in addition to the 411 service fees and credits, and the provision of accessible service contracts and monthly statements.”⁷

[33] It is unfair for the Respondent to suggest that the Complainants have raised this issue late in the process. The Complainants say the Respondent has known about their request for months and they agreed to proceed in good faith with the Respondent’s suggestion that it seek out the information first, before they filed a Motion. Given the

⁷ *Supra* note 3 at para.34.

response they received from the Respondent's counsel, they felt compelled to bring this Motion.

[34] The Complainants are requesting documents relating to the Respondent's efforts to make the Virgin Mobile App more accessible to vision impaired users. As they point out, Mr. Deskin stated in an affidavit in relation to this proceeding, that Virgin Mobile was working on making the App WCAG 2.0 AA compliant. In preparation for the hearing, the Respondent has submitted an April 23, 2019 letter from its proposed Expert Witness, Lisa Liskovoi, which states: "I have reviewed the accessibility design documentation the team is implementing for the development of the incoming My Virgin App and if implemented in accordance with WCAG 2.0 AA criteria, I can confirm that the app is designed to be accessible and to meet current accessibility regulations." I noted during the hearing of this Motion that the Complainants had previously been seeking the information that Ms. Liskovoi relied on to form this opinion and Ms. Dinning confirmed that Virgin Mobile has disclosed the accessibility design documentation that Ms. Liskovoi refers to in her letter.

[35] I mention this because, as part of its case, Virgin Mobile appears to be raising improvements it is making or has made to its App to make it more accessible. Both Mr. Deskin and Ms. Liskevoi refer to WCAG 2.0 AA compliance in relation to the App. It is difficult to understand how documents relating to Virgin Mobile's efforts in this regard are not arguably relevant to a fact, issue, defence or remedy in this case. Whether these documents are required to be disclosed by the 2019 Order or not, the Respondent is bound to disclose all arguably relevant documents in accordance with Rule 6 of the Tribunal's Rules of Procedure.

[36] I fail to see how implementing a new iteration of the App in the fall of 2019 excuses the Respondent from complying with its obligation to disclose arguably relevant documents, given the subject matter of the complaint.

V. Conclusion

[37] I agree that the Respondent must disclose all documents for which no privilege is claimed containing information about work done by or for the Respondent on the Virgin

Mobile My Account App to address accessibility for blind and vision impaired users, from March 8, 2019 to the date of the hearing of this matter. This includes the new version of the App introduced in the fall of 2019 and all updates or versions of this App up to the date of the hearing.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
October 22, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2231/5317 and T2232/5417

Style of Cause: Roger Khouri and Francois Khouri v. Virgin Mobile Canada

Ruling of the Tribunal Dated: October 22, 2020

Date and Place of Hearing: October 1, 2020

Hearing conducted by teleconference

Appearances:

Roger Khouri and Francois Khouri, for themselves

Caroline Carrasco and Jessica Walsh, for the Canadian Human Rights Commission

François Longpré and Bethan Dinning, for the Respondent