

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 23

Date: July 28, 2022

File No.: T2610/16720

Between:

Lisa Cross Guy

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Mohawk Council of Kahnwà:ke

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] This is a ruling of the Canadian Human Rights Tribunal (the “Tribunal”) deciding the motion filed by the Mohawk Council of Kahnwà:ke (the “Respondent” or the “Council”) for the disclosure of documents for which Lisa Cross Guy (the “Complainant” or “Ms. Cross Guy”) is claiming litigation privilege.

[2] More specifically, the Council is seeking the disclosure of four documents that are on the list of the Complainant’s privileged documents, namely, COMP.PR001, COMP.PR002, COMP.PR003 and COMP.PR004.

[3] The Complainant is disputing the request. Although the Canadian Human Rights Commission (the “Commission”) is participating fully in the inquiry, it has informed the Tribunal that it is not taking a position on this motion and has therefore made no representations regarding this.

[4] On December 17, 2021, the Tribunal held a case management teleconference in order to move the proceedings forward. The motion that has led to this ruling was discussed. The parties agreed to have the privileged documents in dispute sent to the Tribunal confidentially so that it could consult them and effectively consider the issue. The Tribunal received the documents from the Complainant except for the affidavit of Mr. Patton (COMP.PR001).

[5] On July 11, 2022, the Tribunal held a case management conference to address some difficulties with the motion, specifically, regarding document COMP.PR002.

[6] According to the parties’ representations and the list of the Complainant’s privileged documents, COMP.PR002 should consist of two recordings of telephone conversations between Ms. Cross Guy and Ms. Melanie Gilbert. The Tribunal asked the Complainant to review the recordings that had been sent to it and to prepare to discuss them at the case management teleconference, without disclosing the content of the recordings, of course.

[7] During that teleconference, the parties reached an agreement to resolve the problems related to the recordings, thus confirming that the Tribunal no longer needed to consider the issue. For those reasons, the Tribunal will not deal with the request relating to

COMP.PR002 since the parties have resolved the issue without any additional intervention on its part.

[8] The Tribunal is now in a position to make its ruling regarding documents COMP.PR001, COMP.PR003 and COMP.PR004.

II. Ruling

[9] For the reasons that follow, the Tribunal dismisses the Respondent's motion with respect to documents COMP.PR001, COMP.PR003 and COMP.PR004.

[10] For document COMP.PR002, the Tribunal no longer needs to consider the issue since it was settled between the parties.

III. Issue

[11] The issue is simple:

Are the documents that the Respondent is requesting to be disclosed protected by litigation privilege as the Complainant claims?

[12] This issue clearly has sub-issues, including whether the conditions for applying litigation privilege were met for each document and, if so, whether the Respondent was able to rebut the presumption of immunity from disclosure.

IV. General Principles of Litigation Privilege

[13] First, the *Canadian Human Rights Tribunal Rules of Procedure* (SOR/2021-137) (the "Rules") provide that the parties must include in their statements of particulars a list of all the documents in their possession that relate to a fact or issue that is raised in the complaint or to an order sought by any of the parties. The documents must be disclosed to the other parties under subrule 23(1) of the Rules.

[14] Documents in respect of which privilege is claimed must also be indicated in a list of documents for which privilege is claimed (subrules 18(1)(f), 19(1) and 20(1)(e) of the Rules).

Subrule 23(1) of the Rules also provides that a party claiming privilege must indicate its nature and the basis for the privilege.

[15] The law surrounding litigation privilege is well settled in Canadian law, is a fundamental principle of the administration of justice and is central to our justice system (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII) [*Lizotte*] at para 4). The Supreme Court decision in *Lizotte* is the leading case in these matters.

[16] There are two types of privilege in Canadian law (*Lizotte*, at para 32):

- 1) class privilege; and
- 2) case-by-case privilege.

[17] The first type, class privilege, entails a presumption of non-disclosure once the conditions for its application are met. As such, there is no flexibility to tailor it to fit the circumstances of the case. There is no doubt that litigation privilege is a class privilege (*Lizotte*, at para 33) just like settlement privilege and informer privilege (*Lizotte*, at para 34).

[18] The second type, case-by-case privilege, is applied in accordance with the circumstances of each case. Its scope as well as its very existence will depend on a case-by-case analysis. That is why the Wigmore criteria must be applied (Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision, at para 2285). That said, it is not necessary to explore the subject further because the only privilege claimed by the Complainant is litigation privilege. The Tribunal will therefore focus its analysis on this type of privilege.

[19] Litigation privilege ensures the efficacy of our justice system's adversarial process. It also maintains a protected area to facilitate the investigation and preparation of a case for trial by the adversarial advocate (*Lizotte*, at para 24).

[20] The fundamental rule is therefore as follows: litigation privilege is a class privilege that protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation, unless a clearly defined exception applies. (*Lizotte*, at paras 1, 4, 19 and 31).

[21] Litigation privilege is different from solicitor–client privilege, even though they may sometimes co-exist. That said, they are not coterminous in scope, time or meaning (*Lizotte*, at para 22). For example, litigation privilege also applies to unrepresented parties, can cover non-confidential documents and is not directed uniquely at communications between solicitors and clients (*Lizotte*, preceding reference). Litigation privilege can be asserted against anyone, not just against the other party to the litigation (*Lizotte*, at para 47).

[22] As stated above, this privilege is a class privilege: once a document is created for the dominant purpose of litigation and the litigation in question or related litigation is pending or may reasonably be apprehended, there is a *prima facie* presumption of inadmissibility (*Lizotte*, at para 33). In other words, litigation privilege is considered to entail a presumption of immunity from disclosure once the conditions for its application have been met (*Lizotte*, at paras 34 and 37).

[23] The onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the public interests that are at issue (*Lizotte*, at para 37). It is for the party urging admission to show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule) (*Lizotte*, at para 33).

[24] It is also clear that litigation privilege, unlike solicitor–client privilege, is neither absolute in scope nor permanent in duration (*Lizotte*, at para 23). Not only is it recognized that litigation privilege can be waived in some circumstances (for example, see *Lizotte*, at para 49), but there are also exceptions to its application.

[25] In this regard, the Supreme Court notes that the exceptions that apply to solicitor–client privilege are all applicable to litigation privilege, including exceptions relating to public safety, to the innocence of the accused and to criminal communications (*Lizotte*, at para 41). Another exception is the one for evidence of the claimant party’s abuse of process or similar blameworthy conduct (*Lizotte*, preceding reference).

[26] That said, the door is always open for other exceptions to litigation privilege to be recognized by the courts and tribunals in the future, taking into account the narrow and

exceptional nature of these exceptions and that they apply in specific circumstances (*Lizotte*, at para 42).

[27] The Tribunal will analyze this motion, keeping these principles in mind.

V. Analysis

A. Document COMP.PR001

[28] The first document for which the Respondent is disputing litigation privilege is COMP.PR001. This document is described as follows In the Complainant's list:

DOCID	DATE (DD/MM/YYYY)	AUTHOR(S)	RECIPIENT(S)	TYPE	TITLE	PRIVILEGE
COMP.PR001	15/04/2021	Bobby Patton	Lisa Cross Guy; Ms. Catherine Soucy, counsel for Lisa Cross Guy	Document	Affidavit Bobby Patton	Litigation privilege

[29] The document is an affidavit of Mr. Patton, who is the former chief of the Mohawk Council of Kahnwà:ke according to the Respondent. The Tribunal reiterates that it has not received a copy of this document from the Complainant.

[30] The Respondent argues that Mr. Patton appears as a witness in the list of witnesses provided by the Complainant in her Statement of Particulars. In the summary of his testimony, it is stated that Mr. Patton will testify regarding the allegations in subparagraph 6.2 (of the Complainant's Statement of Particulars) if the affidavit is not sufficient.

[31] The Respondent argues that, since the affidavit in question was brought forward by the Complainant as part of the summary of Mr. Patton's anticipated testimony, the Complainant has thus waived her privilege and the affidavit must therefore be disclosed.

[32] For her part, the Complainant submits that litigation privilege applies to COMP.PR001. She states that the document was created when litigation could reasonably be apprehended since the parties had engaged in mediation provided by the Tribunal, for

which the Respondent had filed a mediation brief. In its brief, the Respondent challenged all of the remedies sought by the Complainant. She therefore argues that, starting with the brief, it was reasonable to expect that this would result in litigation.

[33] The Complainant adds that the document in question, Mr. Patton's affidavit, is being prepared by her counsel and that it is evolving as ongoing discussions with her witness continue. The discussions with her witness began on April 6, 2021, when litigation could reasonably be apprehended, and its dominant purpose was to obtain information and evidence to use for the litigation and its preparation. It was not disclosed to either the Respondent or the Tribunal since it is a work in progress.

[34] Finally, the Complainant argues that putting forward the possibility of providing an affidavit in the summary of Mr. Patton's testimony is not a waiver of privilege. On the contrary, it helps the Tribunal assess her claim.

[35] The Tribunal has no specific rules defining what an affidavit is. It is worth noting that an affidavit is different from a simple written statement: an affidavit is also a voluntary written statement prepared by an affiant, but it is made under oath or solemn affirmation to a person legally authorized to receive it (see for example *Dirieh v. Canada (Citizenship and Immigration)*, 2018 FC 939 (CanLII) at para 28).

[36] In this case, in accordance with the Complainant's representations, the Tribunal is prepared to accept that, although COMP.PR001 was described as an affidavit in the list of the Complainant's privileged documents, it is still in the process of being prepared. However, the Tribunal notes there is nothing indicating that the statement was officially sworn and filed with the Tribunal so as to become a true formal affidavit.

[37] At this stage in the proceedings, the Tribunal understands that this document, which is still in the process of being prepared and which originates from discussions between the Complainant, her counsel and Mr. Patton about his potential testimony at the hearing, is not yet a true affidavit. Indeed, it is merely an unfinished written statement in the process of being produced.

[38] The Complainant submits that she is currently discussing the litigation with Mr. Patton, a witness she intends to call at the hearing. She is therefore exploring the content of his potential testimony and the facts he will be testifying about and is putting together information to prepare for the litigation.

[39] Accordingly, the Tribunal can conclude that the dominant purpose of the communications and of creating this written statement, which is still being drafted and is neither complete nor final, is to prepare for litigation, which meets the first *Lizotte* criterion.

[40] In addition, the Complainant states that her communications with Mr. Patton began on April 6, 2021, when litigation could reasonably be apprehended. In this respect, the Tribunal notes that Ms. Cross Guy's complaint was referred for inquiry by the Commission on November 17, 2020. The Tribunal communicated with the parties by sending them an initial letter on December 30, 2020. In that letter, it offered the parties the option of taking part in a mediation session.

[41] It appears that the parties were actively involved in this process offered by the Tribunal between December 30, 2020, and the Tribunal's letter dated August 3, 2021, stating that a party had finally withdrawn from mediation. I stress that I do not have access to the documents concerning the mediation: all of that is confidential, without prejudice, and concerns only the parties and the mediator assigned to the file.

[42] Nonetheless, it is sufficient to say that the parties engaged in the process and that documents were filed with the Tribunal to that end, including mediation briefs. Mediation briefs are summaries of the parties' positions with respect to the litigation for the purpose of settling. Thus, the parties learn through the mediation process what the other parties' positions on the litigation are.

[43] Suffice it to say that, based on the Tribunal's file, it seems that the last mediation briefs received were those of the Commission and the Respondent, and that they were received on April 6, 2021. According to the Complainant, this coincides with the start of her discussions with Mr. Patton. In addition, she argues that, having the Respondent's position in its mediation brief and considering that it was challenging all of her requested remedies, she could therefore reasonably apprehend litigation.

[44] The Tribunal is persuaded by the Complainant's argument. It considers that, as of April 6, 2021, litigation could certainly be reasonably apprehended.

[45] That said, it should also be added that the Tribunal gained jurisdiction to inquire into the complaint when the Commission referred it by official letter dated November 17, 2020 (see subsections 44(3), 49(1) and 50(1) of the CHRA, *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2 at para 13; *Letnes v. Royal Canadian Mounted Police*, 2019 CHRT 41 at para 7). In other words, we can consider that the litigation between the parties before the Tribunal existed at least as early as November 17, 2020, when the Tribunal gained jurisdiction to deal with the litigation.

[46] Regardless, the Tribunal can conclude that the litigation was at least already in progress or could reasonably be apprehended when discussions with Mr. Patton began, thus meeting the *Lizotte* criterion.

[47] Since the two *Lizotte* criteria with respect to litigation privilege have been met, document COMP.PR001 is covered by the presumption of immunity from disclosure unless there is an exception; it is therefore for the party requesting disclosure to reverse that onus (*Lizotte*, at para 37). The Tribunal was not persuaded by the Respondent's arguments and finds that it was not able to reverse the onus.

[48] The exceptions to litigation privilege are public safety, innocence of the accused and criminal communications. Another exception is the one for evidence of the claimant party's abuse of process or similar blameworthy conduct. The Respondent did not argue that any of these exceptions apply.

[49] In addition, it argues that the Complainant waived her privilege when she mentioned Mr. Patton's affidavit in the summary of his testimony. The Respondent did not provide much in the way of representations or case law on the subject.

[50] The option of waiving privilege is well settled in Canadian law. In the case of an explicit waiver, the issue becomes more obvious. Canadian courts and tribunals have also acknowledged the existence of a potential implicit waiver of privilege. In that case, the issue is necessarily less obvious.

[51] Regarding the latter, the Supreme Court wrote in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC), at paragraph 6:

[6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.

[52] In the same vein, the Federal Court wrote the following regarding the implied waiver of privilege at paragraph 10 of *Canada (Citizenship and Immigration) v. Mahjoub*, 2011 FC 887 (CanLII) [*Mahjoub*]:

[10] The jurisprudence supports the following propositions relating to implied waiver of the privilege:

(a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd* (1983), 1983 CanLII 407 (BC SC), 35 CPC 146, 45 BCLR 218 (SC) (S & K);

(b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (S & K);

(c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (S & K);

(d) the privilege will [be] deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu Ag v Gaming Lottery Corp.*, [1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;

(e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (S & K at paragraph 10).

[53] At this stage in the proceedings, COMP.PR001 is not yet an affidavit in practice. It is at most a written statement in production, which was prepared for the dominant purpose of litigation when litigation could reasonably be apprehended and at least in progress.

[54] It should also be said that the affidavit seems to have been mentioned in passing in the summary of Mr. Patton's testimony provided by the Complainant. It is written that Mr. Patton will "[t]estify (if the affidavit isn't sufficient) regarding the allegations stated at subparagraph 6.2." And in the Complainant's Statement of Particulars, several allegations are made in subparagraph 6.2, some of which concern Mr. Patton specifically. Once again, COMP.PR001 appears in the Complainant's Statement of Particulars.

[55] From all of this, the Tribunal gathers that the Complainant is planning to file an affidavit by Mr. Patton as testimony on these facts. But we keep coming back to this: the document is neither final nor complete and is not yet an affidavit at this stage.

[56] Thus, the Tribunal is not satisfied that the Complainant's mention of this document in the summary of Mr. Patton's testimony or in her Statement of Particulars is an explicit or implied waiver of litigation privilege for this document that is in production

[57] The mere mention of a document or of its existence without disclosing its content does not automatically equal a waiver of the privilege (see for example *Association des procureurs aux poursuites criminelles et pénales (Létourneau) et Directeur des poursuites criminelles et pénales*, 2021 QCCFP 32 (CanLII) at para 32).

[58] In addition, it is recognized that the waiver must be voluntary and clear (*Union canadienne (L'), compagnie d'assurances c. St-Pierre*, 2012 QCCA 433 (CanLII) at para 51, relying in particular on *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31 at para 18).

[59] The document in question is clearly identified in the Complainant's list of privileged documents, and the Tribunal has received a sufficiently detailed description of the document and the privilege claimed to find that this document is in fact privileged and is therefore immune from disclosure.

[60] It should be added that the Complainant's explanations regarding this ruling clarify for the Tribunal the context of the document's creation, preparation and dominant purpose, which is to prepare for this litigation.

[61] The Respondent has not persuaded the Tribunal that the Complainant implicitly waived her privilege (*Mahjoub*, above). As the Federal Court notes at paragraph 10 of

Mahjoub, “in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent”. The Tribunal concludes that this is not the case here.

[62] That said, it is worth noting that privilege is not absolute and is limited in time (*Lizotte*, at para 23). Thus, should document COMP.PR001 become an official, complete and final affidavit and should the Complainant ask to file it with the Tribunal to partially or fully replace Mr. Patton’s testimony, we could consider that, at that point, the affidavit will have to be disclosed and officially filed.

[63] How could it be otherwise? The Tribunal will necessarily have to read Mr. Patton’s affidavit, and the Respondent and the Commission will need to know its content to be able to respond to it, which includes the opportunity to cross-examine the affiant about his affidavit.

[64] As mentioned above, there may be implied (or implicit) waiver where procedural fairness and consistency dictate it (*Merck & Co. Inc. v. Apotex Inc.*, 2009 FCA 27 (CanLII), at para 12; *Jim Shot Both Sides v. Canada*, 2021 FC 280 (CanLII) at para 19; *Brass v. Canada*, 2012 FC 927 (CanLII) at para 190). In this case, we could reason that, because of procedural fairness, if the Complainant officially filed such an affidavit as testimony (in part or in full), privilege would necessarily be implicitly waived because procedural fairness would then require it to be disclosed.

[65] The Complainant will eventually have to make a choice: renounce reliance on the affidavit and have Mr. Patton testify fully about the facts he knows about, or file his affidavit as testimony, disclose it to the parties and file it officially with the Tribunal.

B. Documents COMP.PR003 and CROMP.PR004

[66] The last two documents for which the Respondent is challenging the claim of litigation privilege are COMP.PR003 and COMP.PR004. They are identified as follows in the Complainant’s list of documents:

DOCID	DATE (DD/MM/YYYY)	AUTHOR(S)	RECIPIENT(S)	TYPE	TITLE	PRIVILEGE
COMP.PR003	03/09/2021	Lisa Cross Guy; Blue Sky	Lisa Cross Guy; Blue Sky	Facebook messages	Facebook messages between Complainant and Cousin	Litigation privilege
COMP.PR004	13/07/2021	Lisa Cross Guy; Brent D'Ailleboust	Lisa Cross Guy; Brent D'Ailleboust	Facebook messages	Facebook messages between Complainant and Cousin	Litigation privilege

[67] The Respondent alleges that the documents are Facebook messages dated March 9 and July 13, 2021, between the Complainant and her cousins. It adds that the Complainant's counsel was not involved in these messages and that it would therefore be difficult to conclude that their dominant purpose was to prepare for litigation.

[68] The Complainant submits that these messages were obtained on the instructions and legal advice of her counsel dating back to late June and early July 2021. Following their discussions, it was decided that the Complainant should contact her cousins to get more information and to forward it to her counsel to help her prepare for the litigation. Since the communications took place in July and September 2021, they were not only made on counsel's instructions but also obtained when litigation could reasonably be apprehended. Finally, the Complainant reiterates that it is not necessary for a lawyer to be a party to information obtained by a party for the purposes of litigation and of its preparation.

[69] Firstly, the Tribunal notes that the concepts of solicitor–client privilege and litigation privilege should not be confused. Although these concepts can overlap, they are different and their scope is not necessarily the same (*Lizotte*, at para 22).

[70] The Respondent has not filed any case law allowing the Tribunal to conclude that, once a party is represented by counsel, litigation privilege only applies when the latter is involved in the communication.

[71] To the contrary, the Tribunal finds it hard to conceive that it would be the case as litigation privilege applies equally to both represented and self-represented litigants (*Lizotte*, at para 22). It is clear that the application of this privilege has nothing to do with the fact of

being represented or not by counsel. In *Lizotte*, the Supreme Court does not refer to such requirement. However, the involvement of a counsel might raise the concept of solicitor-client privilege, which is a different issue that does not need to be addressed in our circumstances.

[72] Therefore, the Tribunal concludes that Ms. Cross Guy's counsel was not required to take part in these conversations for the litigation privilege to apply. This privilege exists as soon as the conditions required for its existence are met independently of whether she is represented by counsel or whether her counsel takes part in these conversations.

[73] That said, according to the Complainant and her list of documents, the conversations or messages exchanged on Facebook took place in July and September 2021. That period coincides with when she communicated with her lawyer to obtain instructions and legal advice regarding the litigation.

[74] In this respect, the Respondent appears to have made an error in its representations in writing out the date of 03/09/2021 as March 9, 2021, when it should have written September 3, 2021.

[75] The Tribunal was able to read the exchanges between the Complainant and her cousins, Blue and Brent. The Tribunal cannot speak to the details of those conversations, but it can confirm that they are Facebook message conversations, one involving a person with the first name Blue and the other a person with the first name Brent.

[76] The Tribunal notes that there were no exact dates for the Facebook message exchanges between Ms. Cross Guy and her cousins. However, the time of the exchanges is indicated. That said, the Complainant confirms that the exchanges between her and her cousins took place in July and September 2021, and it should be noted that the Complainant's representations are supported with an affidavit by her counsel, Ms. Soucy. The Tribunal can rely on the facts in Ms. Cross Guy's reply and presume them to be true at this stage.

[77] As the exchanges took place in July and September 2021, they were made after April 6, 2021. As concluded above, not only could the litigation be reasonably anticipated at

that time, but the Tribunal also considers it to have existed since as early as November 17, 2020.

[78] Without revealing the content of the messages, the Tribunal also find that the dominant purpose of the exchanges between the Complainant and her two cousins was to prepare the litigation and the facts related to it. The Complainant submits that she contacted her cousins to obtain more information concerning this inquiry at her counsel's request. The Tribunal notes that this is indeed the case in both situations.

[79] Therefore, the two *Lizotte* criteria are met with respect to documents COMP.PR003 and COMP.PR004, and they are therefore covered by immunity from disclosure.

[80] Finally, the Respondent presented no arguments showing that an exception applies in the circumstances or that the Complainant waived privilege explicitly or implicitly. Accordingly, the Tribunal finds that the Respondent was not able to reverse its onus.

C. Passing Remarks

[81] In passing, the Tribunal noted that the Complainant refers to some documents in her Statement of Particulars for which privilege is claimed. For example, in paragraphs 6.2.3 and 6.5, she refers to documents COMP.PR003 and COMP.PR004, which are at issue in this ruling and which the Tribunal concluded are indeed covered by litigation privilege.

[82] According to the Tribunal Rules, exhibits in support of a fact, a question of law or a remedy do not have to be added to the Statement of Particulars immediately. This practice is more reminiscent of practices before other tribunals or courts. Exhibits will be filed later on in the proceedings.

[83] Now, the Tribunal notes that privilege provides immunity from disclosure. This means that the Complainant will not be able to rely on those documents to prove the facts they support unless she waives privilege. She would of course be able to do so using other evidence.

[84] It therefore seems unhelpful for a party to support a fact in their Statement of Particulars with a document in their possession if it cannot be disclosed due to privilege.

[85] The Complainant must therefore, once again, make a choice because it may be considered unfair to allow her to refer to privileged documents at the hearing in support of a fact, a question of law or a remedy while the other parties are unaware of its content and cannot defend themselves (*Mahjoub*, at para 10).

[86] Having made these passing remarks, the Tribunal maintains that, in cases of an implied waiver of litigation privilege, the Federal Court has noted that there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent (*Mahjoub*, at para 10).

[87] In this case, the Tribunal does not find that there was implied waiver at this stage even though the Complainant referred to the documents in her Statement of Particulars.

VI. Order

[88] For the above reasons, the Tribunal dismisses the Council's motion regarding documents COMP.PR001, COMP.PR003 and COMP.PR004.

[89] With respect to document COMP.PR002, it is no longer necessary for the Tribunal to consider that issue.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
July 27, 2022

English version of the Member's decision

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2610/16720

Style of Cause: Lisa Cross Guy v. Mohawk Council of Kahnwà:ke

Ruling of the Tribunal Dated: July 28, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Catherine Soucy, for the Complainant

Caroline Carrasco and Christine Singh, for the Canadian Human Rights Commission

Stephen Ashkenazy and Marylee Armstrong, for the Respondent