

In the matter of  
THE CANADIAN HUMAN RIGHTS ACT,  
R.S.C. 1985, c. H-6, as amended

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

MINISTER OF PERSONNEL FOR THE  
GOVERNMENT OF THE NORTHWEST TERRITORIES  
AS EMPLOYER

Respondent

**RULING OF THE HUMAN RIGHTS TRIBUNAL  
ON THE IDENTIFICATION OF PRIVILEGED DOCUMENTS**

Before: Paul Groarke, Chairperson  
Jacinthe Théberge, Member  
Athanasios Hadjis, Member

Appearances: Judith Allen  
For the Complainant

Rosemary Morgan/Ian Fine  
For the Commission

Guy Dufort/Thomas Brady  
For the Respondent

Date & Location of Sitting: February 8, 11, 2000  
Ottawa

## TABLE OF CONTENTS

### INTRODUCTION

#### DEFICIENCIES

1. Documents Prepared for the General Purpose of Litigation
2. Document Type
3. Document Author and Document Recipient
4. Document Description
5. Rationale
6. Other issues

### RULING

#### INTRODUCTION

The Canadian Human Rights Commission has filed a Notice of Motion requesting a number of orders with respect to the documents described in the Respondent's list of privileged documents. This list has been filed as Exhibit R-11.5, under the title: "Fresh as Amended Privilege Documents List Dated December 16, 1999".

The present ruling deals only with the Commission's request for an order "directing the Respondent to provide adequate descriptions of all documents listed in Schedule 'A', attached hereto". Although we have not counted the entries, Schedule 'A' consists of a table containing references to something in the order of 275 documents. The Complainant has joined in the Commission's request for the order. We received a second list of descriptions on Friday, February 11th, which has been attached as "Appendix 'A'" to the Notice of Motion. This document refers to hundreds of additional documents.

We have also heard from the Respondent on a separate Notice of Motion, complaining of deficiencies in the list of privileged documents provided by the Commission. That Notice of Motion has now been withdrawn, on the understanding that the Commission will provide a more detailed list. It will be apparent to all the parties that the disclosure process in the present inquiry has proved far more difficult than anyone had anticipated, and we still have a number of challenges before us regarding the claim of privilege. We are nonetheless moving towards the end of this part of the process and wish to make it clear that we are not prepared to revisit these general issues after the process is completed.

There is no reason to discuss the law of privilege at any length. The Supreme Court of Canada has made it clear on a variety of occasions that the Wigmore criteria now apply,

in determining whether the documents are privileged. It is the first requirement that seems most significant, in determining whether the description of individual documents in a list of privileged documents is sufficient. That is the simple requirement that the communication originated in the confidence that they will not be disclosed. It follows that an adequate description of a privileged document should identify the facts which give rise to the author's expectation that it will not be disclosed.

There are a variety of interests which should be considered in this context. On the one hand, the complaint before us raises complicated issues, on a plethora of documentary evidence, which cannot be managed properly without some procedural rules. There is also the fact that the Tribunal's new rules set a high standard and require full disclosure between the parties. On the other hand, it is important to remember that the human rights process is governed by the principles of fairness and informality. These principles need to be respected without losing sight of the basic principle of order which informs any adjudicative process.

At this point, we are only dealing with the adequacy of the description of individual documents in Exhibit R-11.5. The Commission took the position, at page 4931 of the transcript, that the description of privileged documents must be sufficient to permit other parties to challenge the claim of privilege. The Respondent took a different position, at page 4933, arguing that it was not obliged to provide details regarding the circumstances of the document. In spite of this difference of opinion, there does not appear to be a significant disagreement between counsel as to the relevant principles of law.

We are prepared to work on the principle to which Mr. Dufort referred, in quoting from the headnote to *Walsh-Canadian Construction Co. Ltd. v. Churchill Falls (Labrador) Corporation Ltd. (No.1)* (1979) 9 C.P.C. 229, at page 4932 of the transcript. That excerpt is as follows:

A party resisting production of documents is not required to give particulars which would destroy the benefit of any privilege which might properly attach to the documents, but the description of the documents must be sufficient for a proper determination to be made.

It should be noted that this principle applies to the process before the courts, and appears to contemplate a determination of challenges on the basis of the description in question. The determination which concerns us at this stage of the Tribunal process is more limited and may or may not lead into a contest as to whether privilege applies.

The question of description cannot be neatly severed from the question of challenges, however, and there is no reason to examine documents which clearly attract a privilege. In many cases, for example, the mere fact that a document is prepared by legal counsel will be sufficient to establish that it attracts a solicitor-client privilege. It would be abusive of the process to enter into an inquiry into the circumstances under which it was made. The immediate issue is whether the description of the documents, on the face of it, is sufficient to permit the other side to decide whether they wish to challenge the Respondent's assertion of privilege. It would appear, at the outset, that there are two

minimal requirements which must be met. The first is that there must be a satisfactory description of the physical documents; the second is that the description of a document should explain why it attracts a particular privilege.

There is another issue which arises in this context. As officers of the Tribunal, all counsel have legal and ethical obligations to act with a certain degree of probity in their dealings with each other. The lack of trust between counsel in the present case has had a deleterious effect on the process and we feel obliged to comment that it is not the role of the Tribunal to audit the decisions of counsel regarding the classification of privileged documents or other issues relating to their management of the case. All of the parties before us have stated that they are willing to allow the Tribunal to review contested documents, and there may be circumstances where we have no alternative but to examine the document in question. The jurisdiction of the Tribunal is a supervisory jurisdiction, however, and it would be a serious mistake to put the Tribunal in a position where it enters into questions regarding the carriage of the case by one side or the other. Before dealing with the specific entries in the lists provided by the Commission, it may help to state that Exhibit R-11.5 contains a table, which includes a row of entries for each document in the list. The documents have been numbered individually, from number 1 to number 3825, and are described under the following subtitles:

Doc #  
Doc Date  
Doc Type  
Document  
Author  
Document Recipient  
Document  
Description  
Attachments  
Privilege  
Level

Each of the cells in the column headed "privilege level" contain a single number, which corresponds with a "List of Privilege Levels" that has been attached as "Schedule A" to Exhibit R-11.5. This list is as follows:

- 1-Solicitor Client Privilege
- 2-Settlement Discussions
- 3-Internal Documents Prepared for the General Purpose of Litigation
- 4-Confidential Personal Information
- 5-Executive Privilege
- 6-Internal Documents Relating to the Collective Bargaining Process

We wish to stress that we are not deciding whether the enumerated heads of privilege apply, at this time, or whether they have a sound legal basis. The list used by the Respondent may also raise questions of confidentiality, and privacy, which take us

beyond the question of privilege.

Be that as it may, the only issue before us is at this time is the question of identification. The crucial issue is whether the entries describing each document, together with the claim of privilege, is sufficient to notify the other parties why it has no obligation to disclose the document. It is evident, in this regard, that the Respondent is obliged to indicate, without defeating the privilege, how the general claim of privilege relates to the document in question. It would normally follow that it should not be put before us in the hearing. There are separate issues, on other documents, as to whether the fact that a party has disclosed documents to the other side prevents it from asserting the privilege in the body of the hearing.

We have accepted that all of the factors identified by the Respondent should be taken into account, in determining whether a document is properly described for the purposes of disclosure. None of these factors are decisive in themselves, however, and the question whether a document is sufficiently identified is ultimately a matter of judgement. On the one hand, the ordinary principles of practice make it clear that it is not enough to state that certain documents exist and assert that they are privileged. Something more is required, which advises the other parties of the purpose of the document and explains why the relevant privilege applies.

On the other hand, it would be a mistake to set out a formula as to what is required, in each and every case. The issue is a pragmatic one, which calls for latitude and common sense, and there is no need for a detailed description of documents. It may be enough, in many instances, to provide an extremely brief description, or a recitation of circumstances which give rise to an obvious inference of privilege. The mere fact that legal counsel prepared a particular document will usually be sufficient to assert a solicitor-client privilege. In other instances, the identification of hand-written notes or other private documents will be sufficient to establish the private nature of the documents and explain why the privilege has been claimed. In the instance of collective bargaining, a reference to an "employer's proposal", with a corresponding date, may be sufficient to establish the nature and identity of the document.

## DEFICIENCIES

We would like to state, before examining the list, that we recognize the difficulty of the task which faced Mr. Bevan and his staff, in sorting and classifying the multitude of documents in the Respondent's possession. It is inevitable that lapses and deficiencies will arise in a project of such magnitude. In order to simplify the matter, we have divided the entries which we find deficient into the categories set out below. We have tried to maintain a consistent approach and keep our book-keeping as accurate as possible, but if there are any errors, our comments should be sufficient to establish the necessary ground-rules between the parties. Some of the documents listed under one category may be listed under another, and a further description of a document may, in some instances, remedy the need to identify the author or provide other details. Most of the deficiencies are relatively easy to remedy and we do not foresee this as a time-consuming task.

## 1. "Documents Prepared for the General Purpose of Litigation"

We have a general concern with those documents which come under the head of documents prepared for the general purpose of litigation . This is a particular concern in the instance of early documents, like the document numbered 1, which is dated January 1, 1985. We are less concerned with documents which were created after the complaint was filed with the Canadian Human Rights Commission. There is still room for confusion, however, since there was arguably more than one litigation between the parties. In our view, the Respondent is obliged to indicate which litigation it is referring to, when it claims such a privilege.

This ruling accordingly applies to the following documents:

1, 31, 32, 33, 67, 68, 72, 75, 76, 77, 86, 87, 114, 216, 226, 227, 248, 259, 273, 277, 283, 298, 319, 336, 342, 343, 345, 341, 348, 350, 377, 390, 399, 404, 408, 411, 450, 453, 469, 470, 471, 485, 488, 495, 498, 516, 518, 528, 546, 548, 549, 551, 552, 553, 583, 586, 608, 609, 610, 615, 621, 622, 624, 625, 659, 668, 670, 671, 675, 690, 698, 699, 702, 707, 708, 709, 712, 715, 719, 721, 723, 724, 728, 735, 737, 740, 742, 745, 747, 748, 749, 757, 759, 762, 771, 776, 777, 812, 815, 816, 844, 875, 879, 903, 910, 913, 979, 1040, 1046, 1079, 1082, 1095, 1115, 1184, 1185, 1203, 1307, 1319, 1326, 1331, 1335, 1336, 1338, 1339, 1343, 1345, 1381, 1389, 1402-1411, 1413, 1414, 1416-1419, 1421-1424, 1429, 1430, 1432, 1434, 1451, 1452, 1457, 1488, 1489, 1493, 1513, 1479, 1520, 1690, 1702, 1706, 1707, 1710, 1711, 1724, 1727, 1767, 1781, 1840, 1881, 1908, 1909, 1921, 1968, 2009, 2057, 2061, 2137, 2142, 2143, 2146, 2147, 2152, 2185, 2466, 2516, 2526, 2530, 2531, 2601, 2610, 2867, 2939, 2958, 2976, 2977, 3038, 3069, 3098, 3101, 3115, 3145, 3146, 3251, 3253, 3392, 3393, 3395, 3396, 3398, 3416, 3439, 3450, 3451, 3473, 3489, 3497, 3517, 3521, 3542, 3669, 3716, 3717, 3722, 3734, 3735, 3740, 3714, 3802, 3805, 3806, 3810-3815, 3814, 3815, 3821, 3823

This list is less daunting than it appears. Although we gather from the circumstances of some of the documents that they refer to the complaints process before the Human Rights Commission, or matters arising out of the collective bargaining process, we feel that the Respondent is obliged to indicate the specific course of litigation to which it is referring. It would be sufficient if the Respondent provided the Commission and the Complainant with a brief indication of the different litigation between the parties, and a list of the documents which pertain to each litigation.

## 2. "Document Type"

There are a number of documents which are described as "OTHER". Although there are situations where the nature and identity of a document is evident, in spite of this typology, there are other instances where the Commission and the Complainant are entitled to a better description of the document. The Respondent is accordingly obliged to clarify the type of document to which it is referring in the instance of the documents numbered 16, 31, 205, 266, 485, 650, 659, 668, 745, 1290, 1319, 1707, 2119, 3144, 3251, 3716, 3717. Document 216 is described as "POLICY". This is also insufficient.

### 3. "Document Author" and "Document Recipient"

There are also deficiencies in the identification of the author and recipient of the documents. As in other instances, many of these deficiencies are made up for by the description of the document or the other details provided by the Respondent. We nonetheless feel that further information with regard to the author and recipient of the documents is necessary with respect to the documents numbered 111, 253, 264, 273, 496, 615, 719, 745, 748, 759, 1077, 1185, 1290, 1319, 1725, 1726, 2650, 2651, 3038, 3253, 3316, 3318, 3722, 3809, 3811, and 3822. We recognize the difficulty of ascertaining the authorship of anonymous documents in the administrative and policy files of the government, and this deficiency could be remedied by a better description of these documents.

There are a number of instances where it is unclear why the Respondent has claimed a solicitor-client privilege. In these cases, it may be sufficient if the author or recipient is identified as a lawyer. This would apply to the documents numbered 199, 834, 1042, 1478, 1521, 1522, 1523, 1689, 1775, 2159, 2512, 3099, 3100, 3144, and 3501. It may be simpler to advise the other parties which of the individuals identified in the list of documents were acting in a legal capacity.

### 4. "Document Description"

There is also a concern with the description of some of the documents listed in the Commission's lists. It is true that other entries relating to a document, and the type of privilege which the Respondent is claiming, are often sufficient to provide the other parties with an adequate description of the nature and purpose of the document.

There are documents, however, which are insufficiently described and we are of the view that the Respondent is obliged to provide the other parties with a fuller description of the following documents:

3, 16, 111, 201, 217, 218, 235, 253, 264, 266, 314, 319, 399, 412, 427, 432, 453, 496, 587, 612, 653, 670, 719, 721, 723, 724, 728, 735, 745, 748, 759, 820, 903, 1169, 1185, 1209, 1210, 1237, 1290, 1389, 1479, 1555-1559, 1775, 1791, 1968, 2119, 2161, 2225, 2650, 2651, 2867, 3038, 3253, 3398, 3405-3407, 3450, 3483, 3649, 3650, 3713, 3733, 3820, 3822 and 3821.

Many of these descriptions are too broad to advise the other parties of the nature and identity of the document in question.

The problem with most of these descriptions is relatively straightforward, however, and the missing details should be relatively easy to provide. The parties are all aware of the history of relations between themselves, in far greater detail than the Tribunal, and it should not be difficult to locate the place of a particular document in that narrative. In some instances, it will be sufficient to specify which discussions or positions to which a

document refers. To which transfer, which transaction, which Ministry, is the Respondent referring to?

#### 5. Rationale

The other concern is with those descriptions which do not elaborate why the document attracts the particular privilege in question. It is not enough, as we have stated, to inform the other side that certain documents exist, and then assert a privilege. It is not evident, for example, why the documents numbered 520 and 616 attract a privilege under heading 4, which refers to "Confidential Personal Information". Similar questions arise with respect to the documents numbered 338, 361, 593-596, 1315, 2164, 2204, 2207, 2209, 2210, 2294, 2623, 2624, 2650, 2651, 3037, 3355, 3543, and 3733.

#### 6. Other issues

We wish to add that there are some puzzling documents which, on the face of the description, do not appear to attract any privilege. The document numbered 495, for example, is a document that originated with the Canadian Human Rights Commission. There is nothing to indicate that there are any handwritten annotations or other features which would bring it within the class under the rubric of documents prepared in contemplation of litigation.

Although we are not deciding the issue of privilege, at this time, the same is true of other documents. There is nothing, on the face of the descriptions regarding the documents numbered 1307, 1671, 1769, 2061, 2185, 3395, 3565 and 3689 which would attract a privilege in law.

#### RULING

We are accordingly ordering the Respondent to provide the other parties with a further description of the documents which we have identified, in accordance with our previous comments. Since the disclosure process has already taken far too long, we are ordering the Respondent to comply immediately with this order.

Dated this 14th day of February, 2000.

Paul Groarke, Chairperson

Jacinthe Théberge, Member

Athanasios Hadjis, Member