Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

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

SECOND RULING ON PRIVILEGED DOCUMENTS

Ruling No. 8

2000/12/29

PANEL:

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

[1] We have four different matters presently before us. It seems convenient to deal with these matters on a chronological basis.

I. The November documents

[2] The first matter is related to a review of those documents which we inspected in November 1999, in issuing our first ruling on privilege. In that ruling, we upheld the Complainant's claim of privilege regarding a number of documents in its list of privileged documents. We agreed to re-inspect these documents in order to ensure that the same standards and principles are applied to all of the documents which have been challenged by the parties.

[3] It will become apparent that we see no reason to change our original ruling. There has been some debate as to the nature and extent of the privileges which we recognized in delivering our reasons on November 23, 1999, but the essential point is that these documents deserve to be protected under the four Wigmore criteria. The Complainant has no obligation to disclose them to the other parties.

II. Documents over which the GNWT has claimed public interest immunity

[4] The second matter relates to the order of Justice MacKay, which was issued on October 2nd, 2000, and deals with the Respondent's "level 5"documents, over which it claimed a public interest immunity. To put the matter briefly, Justice MacKay has gone through the level 5 documents challenged by the Complainant and the Commission and excised those passages which are subject to an immunity. He has now directed the Tribunal to consider any other claims of privilege which the Respondent has put forward, before releasing the documents to the Complainant and Commission.

[5] We received the documents on October 17th. After reviewing them, we advised the parties that we wished to reserve our decision with respect to the Respondent's claims of privilege until such time as we had an opportunity to review the bulk of the documents

which have been challenged by all of the parties. We have now reviewed these documents a second time, in light of our inspection of the other documents before us.

[6] There are two subsequent orders from Justice MacKay, which clarify a number of points with regard to the initial order and release a number of additional passages. We have accordingly extended our review of the documents to the passages released by Mr. Justice MacKay on November 11th, and the full text of document 411, a report prepared by Mr. Critelli, which was released on December 13th.

[7] We do not propose to discuss the original set of level 5 documents separately and our comments in regard to the other documents in the possession of the Government can be applied to all of the documents before us. Having reviewed the documents referred to us by Mr. Justice MacKay, and considered the factors which come into play in the immediate case, we are of the view that the Respondent is under no obligation to disclose these documents to the other parties. We have now received a second set of level 5 documents, which the Respondent has excised, in accordance with the previous ruling of Mr. Justice MacKay. We will review these documents in the new year.

III. The Notice of Motion from the Government

[8] The third matter relates to the Amended Notice of Motion from the Government of the Northwest Territories, which was filed as Exhibit R-93.1 on December 13th. The Government is seeking an Order that a number of the documents identified in the Complainant's lists of privileged documents should be disclosed to the other parties. These documents are listed in Schedule "A" of the Notice of Motion, and a second list, an addendum, which was filed as Exhibit R-93.2. The second list was amended during the course of oral argument and some of the documents are no longer in dispute.

[9] The Notice of Motion from the Government asks for four subsidiary orders, which have already been dealt with, one way or the other, during the hearing. This leaves the Respondent's primary application, which is for an order that the Complainant disclose a number of documents on its lists of privileged documents. On December 7th, before the last sitting, the Complainant provided the Tribunal with copies of the contested documents for the purposes of inspection. As far as we are aware, we are now in possession of all of the documents which the Government is contesting and our ruling on the present motion will bring one aspect of the disclosure process to a close.

[10] We do not propose to go into detail with respect to the merits of the claims of privilege advanced by the Complainant. We have relied on the same principles in examining all of the documents before us, and our subsequent remarks can be applied equally to the documents in the possession of the Complainant and the Respondent. Perhaps the most difficult issue lies in those documents, from both sides, which refer directly or indirectly to the Hay Plan, the successor to the Joint Equal Pay Study.

IV. The Notice of Motion from the Complainant

[11] The fourth and final matter is the Amended Notice of Motion from the Complainant, which was filed as Exhibit C-23 on December 13th. The Complainant has asked for two orders. One concerns the "level 4" documents in the Respondent's disclosure lists, which contain confidential information from the personnel records of the Government. Counsel for the Respondent advised the Tribunal that he was unable to produce these documents, under the provisions of the *Access to Information and Protection of Privacy Act*, SNWT 1994, c. 20, without an order from the Tribunal. Since he had no objection to such an order, and actually invited the Tribunal to grant it, we have already ruled that the documents must be disclosed.

[12] The Complainant is also asking for an order that the documents in Schedule "A" of its Notion of Motion are not subject to privilege and should be disclosed. The schedule contains a list of those documents which the Complainant is challenging in the Respondent's list of privileged documents. During the last sitting, the Respondent provided us with copies of the large majority of the challenged documents for the purpose of inspection. There are still a number of documents outstanding, over which the Respondent has claimed a public interest immunity.

[13] We have now inspected the documents. We would like to deal with the remaining documents as soon as possible, since that will bring the disclosure process to an end. We have already advised counsel that we are only prepared to deal with exceptional instances, on a case by case basis, once the disclosure process has been completed. Any party which wishes to introduce a document that it has not disclosed will be obliged to explain why it failed to disclose the document. The ordinary principles of equity and due process will presumably apply in such instances.

[14] Counsel will undoubtedly agree that the circumstances in the case before us appear to be unique. As a result of the lengthy delay in bringing the complaint before the Tribunal, we agreed to permit the parties to adduce evidence before they had completed the process of disclosure. In order to ensure that this does not compromise the fairness of the process, we have advised the parties that we will give the Complainant and Commission a minimum of six weeks, to review the documents before they close their cases.

[15] We have commented on other occasions on the inordinate amount of information which the parties possess in relation to the immediate case. The present case is clearly exceptional in the context of human rights proceedings or ordinary civil claims. Most of the information in question is in the hands of the Government of the Northwest Territories, which has provided us with eleven ordinary disclosure lists and seven lists of documents over which it was claiming privilege or immunity. This is in addition to the six document lists filed by the other parties in the case.

[16] It follows that there is an overabundance of documentary evidence in the case. We recognize that a certain amount of human error will inevitably creep into such an extensive process of discovery. We have accordingly tried to be flexible in evaluating the documents. Our primary intention was to protect the transparency of the hearing, without opening up the process to the divisive and extraneous issues which confront the parties in other arenas. We have tried to take a broad and equitable view of collective bargaining and exercised some latitude in assessing the various claims of privilege before us.

[17] We recognize that the contemporary jurisprudence leans decidedly in favour of disclosure. On the other hand, we accept as a matter of public policy that the working relationship between the Government of the Northwest Territories and its public service deserves some measure of protection. The interest of the public in preserving this relationship extends, in our view, to the internal relationships within the union and the Government. It accordingly extends some measure of protection to the communications between the Union of Northern Workers and the Public Service Alliance, as well as communications between officials within the Government. We see no reason to force the parties to disclose documents which would only inflame the tensions between the union and the employer or give one party an unanticipated advantage in future negotiations.

[18] The purpose of disclosure is to ensure a fair trial of the issues between the parties and it is commonly accepted that the process of disclosure should not be used for extraneous purposes. This is the source of the "deemed undertaking" rule in the civil law, which states that documents obtained through the process of discovery are received on the implicit understanding that they will not be used for other purposes. Morden, A.C.J.O. explains the rationale of such a rule in *Goodman v. Rossi* (1995) 25 O.R. (3d) 359 (Ont. C.A.), at p. 367, where he states that:

. . . the principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place.

We have already accepted that the same reasoning applies in proceedings before a Human Rights Tribunal.

[19] The general law regarding the inspection of disputed documents has been set out by Lowry J. in *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (1992) 10 C.P.C. (3d) 165 (B.C.S.C.), at 172:

The request for the court's examination must never be made lightly and certainly not as a matter of course. Solicitors bear a serious responsibility to resort to this kind of court intervention only when the circumstances in which the privilege is claimed compel them to do so. But when they do, justice requires that the court's independent assessment be made.

[20] The adversarial nature of the relations between the parties in the present case has occasionally surfaced in the hearing. It may be understandable, as a result, that the opposing counsel want a neutral party like the Tribunal to review some of the decisions on either side.

[21] Although it is always open to a party to waive a privilege, the only obligation of the Complainant and the Government at this point in time is to inform the other parties of the case they have to meet. This obligation extends beyond the initial stage of the hearing, and extends to issues like compensation, which may arise in the later parts of the process. A party which asserts a privilege over documents will not be entitled to rely on those documents in presenting its case, since that would permit it to take the other side by surprise and defeat the essential purpose of the disclosure process.

[22] The role of the Tribunal is to supervise and regulate the disclosure process, in order to ensure the fairness and efficacy of the hearing. We recognize that counsel are required to exercise some discretion in disclosing documents and as long as that discretion is exercised within its proper limits, we are willing to respect it. Although we had some difficulty with the description of a number of documents, any decision whether a given document is privileged is a matter of judgement and we see no reason to question the good faith of the parties. It seems important to say this, if only to allay the suspicions of counsel on both sides.

[23] The Government of the Northwest Territories has claimed a collective bargaining privilege and a litigation privilege with respect to most of the documents before us. This is in keeping with the claims put forward by the union. All of the parties have accepted that we should erect some kind of firewall between the present litigation and the wider labour relations between the parties. Although there are documents which traverse the border between the two areas of activity, we have not found it all that difficult to identify the specific purpose of individual documents.

[24] The fundamental argument is that the parties should not have to disclose internal documents relating to the strategy adopted by the parties in dealing with the different facets of the pay equity dispute. This takes us back to our original ruling, which held that internal documents which were created for the purpose of preparing the parties' strategy in collective bargaining, the complaints process, and the settlement discussions concerning the Joint Equal Pay Study should be regarded as privileged. The ruling was based, to some extent, on the consensus of the three parties, who agreed that the unnecessary disclosure of internal documents might injure the continuing relationship between the Complainant and the Respondent.

[25] It is notable that we are dealing with institutional bodies who were well represented throughout the process. Mr. Fine affirmed the position of the Commission in his written argument, where he states, at paragraph 37:

The Commission accepts that there is a recognized qualified privilege covering documents prepared by parties to a collective agreement which deal with the strategy to be employed in the then current round of negotiations.

There appear to be some differences between the parties as to the exact parameters of such a privilege. The Commission, in particular, has expressed some concern about extending such a privilege to the complaints process and the settlement discussions. There is little to distinguish these documents on the fundamental issue, however, and it is the character of the documents which matters. The Tribunal, like the parties, accepts that there are sound public policy reasons to protect communications regarding the strategy adopted by an employer or a union in a labour dispute.

[26] In our view, all of the parties accepted that internal strategy, particularly in the context of collective bargaining, should be protected from disclosure. There were good reasons for accepting such a consensus and we see no reason to change our original ruling at this point in the hearing. We appreciate that Mr. Fine has expressed the Commission's concern with regard to the implications of our earlier ruling on other cases. With all respect to counsel, however, we do not feel that there is any compelling reason to re-open the issue. Although there may be circumstances where it is be possible to re-open a legal issue between the parties, we do not believe that it would be appropriate to consider such a course of action unless it is imperative to do so.

[27] The position we have taken is in keeping with the civil caselaw. The leading case in the area appears to be *Fidelitas Shipping Co. v. V/O Exportchleb*, [1965] 2 All E.R., where Lord Diplock stated, at p. 10:

Where the issue determined is not decisive of the suit, the judgement on that issue is an interlocutory judgement and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence to show that the issue was wrongly determined. Their only remedy is by way of appeal . . .

This has been followed by the Canadian courts, particularly in *Toronto-Dominion Bank v. Leigh Investments* (1997) 35 O.R. (3d) (Ont. Gen. Div.), at p. 276, and *Diamond v. Western Realty Co.*, [1924] S.C.R. 308, [1924] 2 D.L.R. 922.

[28] Ms. Allen has argued that we should recognize a qualified privilege over internal strategy documents. This may be a matter of semantics, since we are still obliged to set out the general principles which determine when such a privilege would apply. We nevertheless accept the essential position of the Complainant, which is that the documents should be protected if they meet the four Wigmore criteria. These criteria state that the communication in question must originate in the confidence that it not be disclosed. This element of confidentiality must be essential to maintaining the relationship between the communicating parties. It must be clear, in addition, that the

relationship is one which "ought to be sedulously fostered". And finally, the harm to the relationship must outweigh the benefits of disclosure.

[29] The approach that we have taken is in keeping with the contemporary law, which suggests that decisions on disclosure should be tailored to the needs of individual cases. Mr. Karayannides has argued that the present case is governed by its facts, which establish that the relationship between the union and the employer during most of the relevant period was inherently adversarial. It follows that they dealt with one another in the manner of litigants, looking for a tactical advantage which would assist them in the ensuing contest. This is true, whether we are speaking about collective bargaining, the complaints process, or the Joint Equal Pay Study.

[30] This raises the traditional concerns which arise in the context of documents prepared in contemplation of litigation. These concerns arise out of the view that every litigant is entitled to a certain sphere of privacy, in which to consult its lawyers and develop strategy. This promotes the efficacy of litigation and preserves the overall efficiency of the legal system. The Respondent has submitted, with good reason, that this privacy maintains the fairness of the legal process. One of the fundamental tenets of our law is that every litigant is entitled to seek counsel and consult advisors in deciding how to conduct itself in legal proceedings.

[31] In our earlier decision, we recognized that it is possible to discern the strands of a variety of separate litigations within the broader dispute over pay equity and there are at least three different processes that could be described as "litigation". The first relates to the collective bargaining process, which all of the parties asked us to protect. The second relates to the complaints process under the *Canadian Human Rights Act*. The third relates to the settlement discussions which took place in the context of the Joint Equal Pay Study. There is the further problem that these processes seem to merge, and then divide, in the course of the dispute.

[32] In spite of these difficulties, we are of the view that the documents generally speak for themselves. We have not found it all that difficult to determine when a document was prepared in the necessary adversarial context, with the dominant purpose of preparing for litigation. It is a matter of judgement where the exact boundaries of a privilege lie in a particular case and it is a mistake to draw strict limits as to when documents come within the kind of privilege that we have recognized. There are advantages and disadvantages which accrue to both sides, whatever position we adopt. Nonetheless, the decisive issue is when the parties become conscious legal adversaries. The situation is complicated by the fact that the relationship between the union and the government has a distinctly adversarial character.

[33] In reviewing the documents, we have accordingly applied the traditional test for documents prepared in contemplation of litigation. We have then considered the privileges specific to the case, which come within the Wigmore criteria. In the latter instance, we have restricted our ruling to documents 1) which are entirely internal; and 2) which are predominantly strategic. The documents in question are essentially private:

they are the kind of documents which a party would only prepare on the understanding that they will not be seen by an opposing party.

[34] The current law holds that the salient question regarding documents prepared in contemplation of litigation is whether the dominant purpose of the documents was to prepare for litigation. Thus, in *Edgar v. Auld* [2000] N.B.J. No. 69 (N.B.C.A.), at ¶ 11, Justice Ryan accepts the position of the Ontario Court of Appeal in *General Accident* [*Assurance v. Chrusz et al.* [1999] O.J. No. 3291, 45 O.R. (3d) 321]:

As pointed out in the majority judgement at para. 30 in *General Accident*, the dominant purpose test has been adopted by appellate courts in Nova Scotia, British Columbia, Alberta and New Brunswick; see *McCaig and McCaig v. Trentowsky*, (1983) 47 N.B.R. (2d) 71 (C.A.).

Although the facts in these cases differ considerably from the facts before us, we accept that the same principle governs the process of disclosure before us.

[35] It will be evident that there are two narrower legal issues which arise in the immediate case. The first relates to the question of what should be considered "litigation" for the purposes of attracting such a privilege. The second issue relates to the internal workings of institutional or corporate actors, who can only conduct their affairs through a process of internal consultation and discussion. The concern is that this would extend a privilege or protection to communications outside the solicitor-client relationship, which provided the original basis for the development of a privilege over documents prepared in contemplation of litigation.

[36] The only authority that we are aware of on the first point is *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988) 61 Alta. L.R. (2d) 319, however, the Alberta Court of Appeal held that an investigation under the *Combines Investigation Act* was "litigation" for the purpose of determining whether working documents attracted the privilege customarily accorded to documents prepared for the purposes of litigation. At p. 326, Chief Justice Laycraft writes:

Once the director focused on the Caterpillar companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone contemplation.

We accept Mr. Fine's argument that there are substantial differences between the process contemplated by the *Combines Investigation Act* and the complaints process under the *Canadian Human Rights Act*.

[37] This is not decisive, however, and does not prevent us from adopting the Respondent's position that the complaint which was filed in the present case gives rise to the kind of potential consequences that ordinarily attract a privilege. As Mr. Karayannides argued, in response to the Commission:

MR. KARAYANNIDES: We have had dollar amounts bandied about. Even if you take the lowest one, it is extremely significant. If you take the largest one, it is phenomenally significant.

You have the political implications of an adverse finding, and you have the labour relations implications of an adverse finding, so you do have the harm, the significant consequences, to use the term that is found in Ed Miller Sales, of an adverse finding. (10064; 3 ll.)

The evidence before us bears out the fact that all of the parties treated the pay equity dispute as a momentous issue, whether they were considering it in the context of collective bargaining, the human rights complaint, or the JEPS process.

[38] It follows that the parties are entitled to claim something akin to a litigation privilege for those documents that were created for the purpose of preparing a response to any of these developments in the history of the case. We do not believe this will impair the legitimate investigative powers of the Human Rights Commission under the *Canadian Human Rights Act*. The kind of privilege which we have extended to the documents before us is restricted to those documents that contain opinions or information which is provided for the express purpose of assisting the party in formulating its strategy. It does not apply to ordinary business documents, which prove or disprove a discriminatory pattern of conduct.

[39] As any solicitor is aware, these kinds of documents often contain statements which might be construed as admissions by the other parties. Ms. Allen has expressed concern on previous occasions about statements or admissions which might establish the bad faith of the Respondent. We agree, however, that the privilege will not protect documents that provide serious or substantial evidence of bad faith. There is nothing of this nature in the documents and the fact that the author of a document made a casual or ill-considered remark is not enough to defeat the privilege.

[40] This leaves the second issue, which is whether the privilege extends beyond those documents which were prepared for the purpose of consulting a lawyer. The problem can be illustrated by a simple example. It is easy to imagine a meeting which has been called, by the employer or the union, to discuss the strategy to be followed in litigation. The question is whether the documents relating to that discussion are privileged. There is no question that the privilege attaches if the documents are prepared with the intention that they will be reviewed by a solicitor. But what if they are internal, or entirely prefatory, and were never prepared with the idea that a solicitor would review them? Do they still attract a privilege?

[41] Although we have not been directed to any law on this point, it is significant that the parties before us have agreed that these kinds of internal documents should be protected from production. The union has taken the position that union officials often act in a similar capacity to counsel and argued that arbitrators have recognized the existence of something like a litigation privilege in the context of the grievance process. If the

documents in question were prepared primarily for the purpose of developing a strategy in the ensuing litigation, the suggestion is accordingly that they should be privileged. This is where the "dominant purpose" test comes into play: the crucial question is whether the documents were prepared for the purpose of developing the strategy to be followed by a party in its subsequent dealings with the opposing side.

[42] It will be evident that the mere fact that these documents are internal will not be sufficient to protect them from disclosure. There must be good reasons to protect the relationship between the communicating parties. In the immediate case, these reasons can be found in the larger concerns of public policy, which militate in favour of protecting the relative harmony of the relations between the Government and its public service. They can also be found in the need to maintain the efficacy and justice of the hearing process. Neither of these considerations dispenses with the need to assess the probative value of the documents before us. It is obvious that the parties are not entitled to hide damaging communications, which might hurt their case, behind the protections and privileges which they are claiming. That would defeat the purpose of the privileges in question, which are there to assist rather than impede the legal process.

[43] All in all, our primary obligation is to ensure the fairness of the proceeding. This brings in equitable considerations, which would support the view that we should accommodate the parties when there is a reasonable consensus between them. There was a legitimate concern, on all sides, that a complete disclosure of the internal documents in the possession of the parties could damage the relationship between the union and the government. It might also divert the present inquiry from its primary purpose, which is to determine whether the wage structure in the North West Territories was discriminatory and the consequences which flow from such a finding. There are many collateral issues between the parties, which are no concern of the present Tribunal.

[44] The major issue in dealing with the Respondent's documents was whether reports, ratings and data produced by the employer in introducing the Hay Plan were subject to a collective bargaining or litigation privilege. Although it would not be appropriate to describe these documents in detail, it may be helpful to say that the employer prepared a series of confidential reports, in order to examine the effect of the job ratings and pay plan on the existing wages. This was a matter of some concern, since the effect of the resulting redistribution of jobs and wages on the existing wage structure was largely undetermined.

[45] The Government's Statement of Case appears to raise an issue with respect to the relative merits of the Hay Plan and the Willis Plan, which was used in the Joint Equal Pay Study. Be that as it may, we accept that the documents before us were prepared primarily for the purpose of collective bargaining. It is evident from the documentary record that the employer was determined not to share the methodology which it used in preparing these documents with the union. This introduces a decisive element of strategy into the origins of the documents, which places them squarely within the collective bargaining and internal strategy privileges which we have agreed to recognize.

[46] This does not prevent the parties from raising questions concerning the Hay Plan in the hearing. It is still open to either side to go into the efficacy and validity of both plans, insofar as that proves or disproves the present complaint. We essentially agree with the parties that this raises different issues than the collective bargaining process. It may be difficult to completely separate the labour relations between the parties from the complaints process and the issues which arise in the context of the present hearing. There are nonetheless compelling reasons to respect the wishes of the parties and keep matters related to the negotiation and application of the collective agreement outside the purview of the hearing.

[47] The contemporary law recognizes that there are a number of competing interests which must be weighed in determining what is fair in any case. It is important to achieve the proper balance. In individual cases, it will also be necessary to consider the practical factors which help to determine the significance of individual documents in the context of a hearing. In the immediate case, these factors include the date of the document, the date of the complaint, the proximity of collective negotiations, and the role and identity of those individuals who created the documents.

[48] Having reviewed the law, and inspected the Respondent's documents, we find that there are only two documents, documents 4618 and 4684, which must be disclosed. The Respondent will accordingly provide copies of these documents to the other parties forthwith. The present ruling will hopefully help counsel determine whether privilege attaches to other documents. We will deal with the remaining level 5 documents and any ancillary matters relating to disclosure when the hearing resumes. The Registry Officer will contact counsel and determine whether the documents in the possession of the Tribunal should be returned to the parties or destroyed.

Paul Groarke, Chairperson

Jacinthe Théberge, Member

Athanasios Hadjis, Member

OTTAWA, Ontario

December 29, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T470/1097

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RULING OF THE TRIBUNAL DATED: December 29, 2000

APPEARANCES:

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George Karayannides
Joy Noonan For the Government of the Northwest Territories