Canadian human rights commission | Commission canadienne des droits de la personne

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By E-mail

June 21, 2019

Registry Office
Canadian Human Rights Tribunal
240 Sparks Street, 6th floor West
Ottawa, ON
K1A 1J4

Dear Registry Office:

Re: *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*
Tribunal File No.: T1340/7008

On June 14, 2019, the Caring Society wrote to ask for an order directing Canada to produce two categories of documents (together, the "Requested Documents"):

1. unredacted copies of certain documents disclosed in response to undertakings given during the cross-examination of ADM Wilkinson (the "Claims Documents"); and
2. copies of correspondence from the provinces that were referenced in Dr. Gideon's Affidavit of April 16, 2019 (the "Province Documents"), which were requested during her cross-examination, but have not been produced.

On June 18, 2019, the Tribunal set a deadline of June 28 for Canada to provide its response to the Caring Society's request.

The Tribunal did not set any dates for submissions from the Commission or other parties with respect to the matter. However, the Commission has taken the liberty in this letter of providing brief submissions in support of the Caring Society's request for full disclosure of the Requested Documents. We hope this will be acceptable to the Tribunal, and will not disrupt the overall schedule for resolving the production dispute.

As explained below, the Commission agrees that Canada should produce the Requested Documents in full. They meet the low threshold of arguable relevance, and Canada has not laid a foundation for any privilege or immunity that would properly exempt them from full disclosure. The implied undertaking that the parties not further disclose the documents, and the possibility of requesting confidentiality orders, are adequate safeguards for any third party privacy interests that may be at stake.

Background

During the cross-examination of Dr. Gideon on May 7, 2019, the Caring Society requested copies of correspondence from the provinces or territories that were mentioned in her affidavit (the "Province Documents"). Canada raised a concern that the authoring provinces would have to consent to any such disclosure. To date, Canada has not produced any of the Province Documents.

On May 17, 2019, Canada provided documents responding to certain undertakings given durinig ADM Wilkinson's cross-examination. The responses included redacted copies of documents denying 13 claims and two appeals (the "Claims Documents"). The redactions remove names and other identifying information that would allow a reader to determine which agencies or organizations had filed the claims or appeals (the "Requesters").

In the materials that it delivered on May 17, 2019, Canada did not state a rationale for the redactions it had made in the Claims Documents. At the cross-examination, Canada had cited a need to seek consents from the Requesters, based on privacy concerns.

Legal Principles

The Commission generally agrees with the Caring Society's statement of the law, on page 2 of its letter dated June 14, 2019.

We note that on occasion, the Caring Society states that parties are required to disclose "relevant" documents.[1] For clarity, where there is a dispute about whether a document should be produced, the Tribunal's case law calls for the application of a lower threshold -- that of "arguable relevance."[2] That threshold is reflected in the final paragraph of the passage that the Caring Society reproduces from the *Valenti* case.

[1] For example, the Caring Society states that, "…Canada remains obliged to disclose relevant documents within its possession and control…", and "It is a basic tenet of the adversarial process that relevant documents are to be disclosed" (emphasis added).

[2] *T.P. v. Canadian Armed Forces,* 2019 CHRT 14 at para. 50 ("*TP v. CAF*") (copy attached to this letter).

The test for arguable relevance is low, requiring only a rational connection between the documents requested, and the facts, issues or forms of relief identified by the parties.[3] The trend in the case law is towards more rather than less disclosure.[4]

As the Tribunal has recently stated, "Documents that are arguably relevant must be produced, subject only to claims of privilege or immunity…"[5]

Application in this Case

As a starting point, the Commission agrees with the Caring Society that the Requested Documents meet the test of arguable relevance.

Canada does not appear to have disputed this to date. Instead, Canada's position during the cross-examinations appeared to be that (i) disclosing the Claims Documents would infringe privacy rights of the Requester organizations, and (ii) disclosing the Province Documents would require the consent of the applicable provinces.

With respect, without more, these claims do not suffice to establish a privilege or immunity that would exempt Canada from having to disclose the Requested Documents in full.

The Commission recognizes that government bodies have obligations under access to information and privacy legislation to guard against the improper disclosure of material received from others. However, as the Federal Court of Appeal and the Tribunal have held, the access to information/privacy regime is not to be confused with the disclosure of evidence in the normal course of litigation.[6] In the litigation context, parties must disclose arguably relevant documents, even if they contain information from or about non-parties, subject only to proper claims of privilege or immunity.

Based on the information currently available, the Commission agrees with the Caring Society that (i) Canada should produce the Requested Documents, (ii) all parties would be under an implied undertaking to use the documents only for purposes of this proceeding, and (iii) it would be open to Canada to seek further confidentiality orders with respect to the documents under s. 52(1) of the *CHRA*, if appropriate.

This approach would be consistent with that taken in past cases where the Tribunal has ordered the production of medical or other documents containing sensitive information,

[3] *T.P. v. CAF, supra* at paras. 50-51.
[4] *T.P. v. CAF, supra* at para. 51.
[5] *T.P. v. CAF, supra* at para. 59.
[6] *Ritchie v. Canada (Attorney General),* 2017 FCA 114 at para. 47; *T.P. v. CAF, supra* at para. 78.

but put safeguards in place to ensure that the documents are not made widely available, even if later filed in evidence.[7]

It would also be consistent with situations where the Tribunal has ordered respondent employers to disclose documents containing the personal information of third party employees, despite objections from employers that this would violate the privacy interests of those third parties. For example, the Tribunal has ordered employers to produce documents showing the last known contact information for third party employees, so that complainants and/or the Commission could make their own inquiries of those employees about matters before the Tribunal.[8]

As a final observation, there do not appear to be any indications to date that Canada has asked the Requesters or the Provinces whether they actually have any concerns about disclosure of the Requested Documents. If this has not been done, the Commission would strongly encourage Canada to take that step, since the answers given could provide a full answer, and allow the parties and the Tribunal to avoid the time and expense associated with continuing the current motion.

Yours truly,

Brian Smith
Senior Counsel

cc. David Taylor, Sarah Clarke and Barbara McIsaac, Q.C., Co-counsel for **First Nations Child and Family Caring Society of Canada** (by e-mail)

Stuart Wuttke and Thomas Milne, Co-counsel for the **Assembly of First Nations** (by e-mail)

Maggie Wente and Sinéad Dearman, Co-counsel for the **Chiefs of Ontario** (by e-mail)

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Justin Safayeni and Ben Kates, Co-counsel for **Amnesty International** (by e-mail)

Robert Frater, Q.C., Jonathan Tarlton, Patricia McPhee, Kelly Peck and Max Binnie, Co-counsel for the **Attorney General of Canada** (by e-mail)

[7] For but one example, see: *MacEachern v. Correctional Service Canada*, 2014 CHRT 31 at paras. 25-27.
[8] See, for example: *Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11 at paras. 32, 35 and 37; *Nur v. Canadian National Railway Company*, 2019 CHRT 5 at paras. 200, 233, 241 and 243; *Jones v. Munsee-Delaware Nation*, 2018 CHRT 13 at paras. 24-28 (production order made on consent, coupled with confidentiality orders to protect privacy interests).