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

RULING ON THE RESPONDENT'S CLAIM OF IMMUNITY

Ruling No. 7
2000/05/19

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

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I. THE MOTION

[1] The Canadian Human Rights Commission has filed a Notice of Motion with the Tribunal requesting an order for the production of a number of documents which the Government says are privileged. The Complainant supports the motion.

[2] The Notice of Motion deals with two claims of privilege. The first paragraph requests an order directing the Respondent to disclose a series of documents over which the Government is claiming cabinet or executive privilege. It was accepted by all sides during the course of argument that this is properly dealt with as a claim of immunity, now known as public interest immunity. The second paragraph requests an order stating that the document identified by CD reference No. 8243 is not subject to a 'collective bargaining privilege'. This item is a one page, hand-written note, which was originally attached to a collective bargaining proposal. There is no need to deal with the second issue, since counsel for the Government withdrew its claim of privilege regarding the document during the course of argument.

[3] The original Notice of Motion claims immunity over 23 documents, all of which are found in Exhibit R-11.5, the Government's 'Fresh as Amended Privileged Document List' of December 16, 1999. These documents are identified by the number of the row in which they appear, each of which contains a reference to the author and the recipient of a document, along with an abbreviated description of its contents. When the matter was argued, on April 26th and 27th, the Complainant and the Commission dropped their challenge with respect to the documents identified by row number 226 and 697. The Government dropped its claim of privilege with respect to the document identified by row number 638.

[4] We were also informed that the document identified by row number 411, a paper prepared by Mr. Critelli, was originally an appendix to the document listed at row number 421. Although the Government originally claimed a litigation privilege over the paper, counsel agreed that it would be appropriate to treat it as part of the document at row 421, over which the Government has claimed an immunity. This has the effect of deleting the reference to the document at row 411 in the Notice of Motion and substituting a reference to the document at row 421.

[5] We are left with a total of 20 documents, identified by the following row numbers: 108, 172, 253, 261, 271, 335, 398, 421, 499, 505, 508, 509, 535, 563, 569, 572, 582, 1427, 2306, and 2910. The Government is claiming that all of these documents attract a public interest immunity.

II. THE AFFIDAVITS OF GERALD LEWIS VOYTILLA

[6] The Government of the Northwest Territories filed an affidavit from Gerald Lewis Voytilla, the secretary of the Financial Management Board and Comptroller General for the Northwest Territories, in response to the Notice of Motion. His affidavit states that the executive council of the Government functions in much the same way as a provincial cabinet. It meets in two forums, the Financial Management Board and Cabinet. The Financial Management Board has responsibility for the financial management of the government. This includes the approval of collective bargaining proposals, which have a significant financial component, such as those relating to pay equity.

[7] Mr. Voytilla has been with the Government for a considerable length of time and held senior positions throughout the course of the equal pay dispute. His affidavit draws our attention to the principles of responsible government, which give the Cabinet the central role in government. It is common knowledge that our constitutional conventions place a high priority on the secrecy of cabinet deliberations. This allows the members of the cabinet to speak frankly with their colleagues, in the knowledge that their discussions will remain private.

[8] Paragraph 14 of the Mr. Voytilla's affidavit states as follows:

14. All information contained in Executive Council papers being considered by the council or its committees prior to a decision being
taken, and related documents, are considered privileged information.

The affidavit also contains a summary of the normal contents of the papers placed before the Cabinet. These includes a discussion of the political, legal, financial and inter-departmental factors considered by the cabinet in the course of making particular decisions.

[9] The affidavit goes on to express Mr. Voytilla's opinion that the production of the documents in question 'would be injurious to the public interest'. The argument is apparently that these documents were prepared to assist in the formulation of the strategy adopted by the Government on the kinds of legal and political issues that arise in the context of the present case. These issues are still before the Government and the release of many of the documents 'could be prejudicial to the formulation of policy and the economic interests of the Northwest Territories.'

[10] The Government has also filed a second affidavit from Mr. Voytilla, which addresses the document identified by row number 421. This affidavit describes the document at 421 as an 'Options Paper' dated May 2, 1989, which is labeled 'confidential'. It addresses a variety of issues, including job evaluation and the job classification system, as well as the question of equal pay for work of equal value. It concludes with a series of recommendations.

[11] Although the affidavits review the specific documents mentioned in the original Notice of Motion, the language in the relevant paragraphs reflects the same concerns as the previous discussion. In paragraph 25 of the first affidavit, Mr. Voytilla states that all of the documents are communications 'passing at a very high level' in the hierarchy of the government, or lower level communications which were made for the purpose of making 'strategic policy decisions' at a higher level. The concern, in each case, is with the confidentiality of cabinet deliberations.

III. THE LAW RELATING TO IMMUNITY

[12] The usual way of proceeding in the instance of a claim of public interest immunity is to provide the trier of fact with an affidavit from the appropriate Minister, setting out the reasons for the claim. This procedure was set out by the House of Lords in Robinson v. State of South Australia [No. 2], [1931] A.C. 704, and has become an essential element of practice in the area. Most of the discussion in the jurisprudence has arisen in those cases where the affidavit is insufficient to establish the claim.

[13] The leading case in Canada is Carey v. Ontario, [1986] 2 S.C.R. 637, where the Supreme Court of Canada considered the concept of public interest immunity in the context of a commercial suit against the Government of Ontario. One of the more important features of the case is that the Government of Ontario claimed that ordinary cabinet documents were covered by a class privilege. In the words of La Forest J., for the unanimous court:

The claim of privilege is not based on the contents of these documents, which are not revealed, but on the class to which they belong, i.e., documents prepared for Cabinet, or that emanated from Cabinet, or that record its proceedings or those of its committees.

A similar claim has been made in our own case, on the traditional argument that the confidentiality of cabinet deliberations should be protected from disclosure.

[14] It is evident that this can no longer be accepted as an accurate statement of the law. The court in Carey makes it abundantly clear that any claim for immunity must be determined on a document by document basis. In the view of Mr. Justice La Forest J., at p. 639, the public has an interest in providing a person who asserts a legal claim with access 'to all information relevant to prove that claim'. The public also has an interest, however, in protecting the 'confidential communications of the executive branch of government' from disclosure. A court is required to weigh these competing interests, in the circumstances of the case, in deciding whether the immunity applies.

[15] Although we accept that the confidentiality of cabinet discussions needs to be protected, the court in Carey states that it is all too easy to exaggerate the significance of such an argument. At the very least, Mr. Justice La Forest remarks, 'the notion has received heavy battering in the courts.' It will be evident to anyone who reads Carey that the position of the majority in Burmah Oil Co. Ltd. v. Bank of England (Attorney General intervening), [1979] 3 All E.R.

700 (H.L.), has won out. The dissenting decision of Lord Wilberforce, which stresses the need to protect the candour of those involved in making government policy, places too much emphasis on the importance of secrecy in government.

[16] Although there is no real need to canvass the case-law, the remarks of Justice Miller in Leeds et al. v. The Queen in right of Alberta, (1990) 69 D.L.R. (4th) 681 (Alta. Q.B.), at 688, take these developments one step further.

This general trend towards full disclosure has been even more evident in Canadian court decisions when the Crown is a part to the litigation and has a direct interest in seeking immunity to perhaps bolster its position in the litigation.

It follows that any argument from the Government that it should not be subject to full discovery by the opposing party should, in the words of Justice Miller, Abe carefully scrutinized.' It makes sense that extra caution must be taken, in relying on an affidavit from a Cabinet official, when the Government stands to benefit from the decision not to provide the documents to the other parties.

IV. ARE THE EXISTING AFFIDAVITS SUFFICIENT?

[17] The first substantive question that faces us is whether the affidavits from Mr. Voytilla are sufficient. Before examining the affidavits, however, we should note that the Government has attempted to introduce new heads of privilege, in objecting to the production of the documents. Although we are not prepared to entertain new claims of privilege, in the absence of exceptional circumstances, it seems inevitable that the different heads of privilege tend to merge in the context of cabinet documents.

[18] A few examples will suffice. The document found at row 253 of the privileged document list is described at paragraphs 42 to 45 of the initial affidavit. It contains recommendations regarding legislation and policy relating to human rights. This includes legal advice provided by the Department of Justice. The document at row 1427 is described, in paragraph 87 of the initial affidavit, as a record of a cabinet decision 'with respect to equal pay bargaining strategy and addresses, among other things, legal considerations.' It may well be that these kinds of documents would normally attract the protection afforded to solicitor-client communications or documents prepared in anticipation of litigation.

[19] There are other examples. In our ruling on privilege, we accepted the submissions of the parties that documents relating to internal strategy in the collective bargaining process would give rise to a litigation privilege. It is difficult, in many instances, to separate this kind of claim from the claim that cabinet documents which record discussions relating to the collective bargaining process are subject to some form of protection under the public interest.

[20] In our view it would be a mistake, in a process characterized by fairness, to place too much emphasis on the species of protection that the Government is claiming. The present claim of immunity rests on the principle that the confidentiality of cabinet documents protects and facilitates the inner workings of government. It is apparent, however, that the kind of considerations that apply in the instance of other claims of privilege may provide additional reasons for extending an immunity to such documents. All of this, in our view, can be dealt with under the public interest.

[21] This takes us to the material in question. The description of the documents is less certain than it might be, since there are some discrepancies between the description of the individual documents in the affidavits of Mr. Voytilla and their description in the privileged documents list. It is nonetheless apparent that the documents can be divided into three sets of documents. The first set of documents relates to collective bargaining or the collective agreement with the Union of Northern Workers. These documents apparently include some discussion of equal pay issues, which is incidental to the larger discussion of collective relations. The documents in this category are those documents identified by row number 108, 172, 335, 398 and 1427. The description of the documents 108 and 1427 in the privileged documents list suggests that they deal specifically with the issue of pay equity.

[22] The second set of material contains two documents, identified by row number 253 and 261. Mr. Voytilla states that these documents deal with the formulation of general policy and legislative initiatives with regard to human rights. This apparently includes some reference to equal pay issues. The privileged documents list suggests that they deal specifically with pay equity.

[23] The third set of documents includes a variety of documents. The descriptions of these documents in the

privileged documents list suggests that all of them relate, in some way, to the cabinet's ongoing discussion of job evaluation and the replacement of the job classification system in the Northwest Territories. This category of documents contains those documents identified by row numbers 271, 421, 499,505, 508, 509, 535, 563, 569, 572, 582, 2306, and 2910. The affidavits state that these documents deal with equal pay, the job evaluation, job classification system, the complaint to the Human Rights Commission and the Joint Equal Pay Study.

[24] The matter is more difficult in the instance of some of the documents than in the instance of others. Mr. Voytilla does not inform us as to the purpose of the documents at row 172 and row 335, and we are merely advised that these documents would, in the normal course of events, have been used by a Minister or senior government officials. This is not enough to satisfy the requirements for protection.

[25] The document at row 582 is a briefing note by the Deputy Minister of Personnel, which would be intended, 'in the normal course', for the Minister and Executive Council. This is an equivocal description at best and is not sufficient to determine whether the document attracts an immunity. There is also a question whether the paper by Mr. Critelli, which now forms part of the document identified by row number 421, was written specifically for the cabinet. It is extremely difficult to determine where the balance of the public interest lies without looking at these kinds of documents.

[26] The problem is wide reaching, however, and extends to all the documents. Although the information in the affidavits and the list of privileged documents is sufficient to identify the nature of the documents, it is not sufficient to establish where the public interest lies. The affidavit ultimately provides nothing more than a relatively vague description of the documents and a ministerial opinion. This opinion is expressed in the most general manner and emphasizes the importance of maintaining the confidences of the cabinet. In spite of the discussion of individual documents in the affidavits, the Government has essentially asserted a class privilege over cabinet confidences.

[27] The ultimate consideration in a human rights hearing is fairness and it is evident that there are a variety of competing factors which must be addressed in any evaluation of the public interest. We appreciate the need to protect the candour and confidentiality of cabinet discussions. The courts have also recognized the significance of the human rights process, however, and we are obliged to give some weight to the interests of such a process in any assessment of the public interest.

[28] Since ordinary Cabinet documents no longer attract a class privilege, all of the documents need to be assessed on a document by document basis. Perhaps the primary concern is that it is impossible, without further information, to judge the extent to which a decision upholding the claim of immunity would prejudice the case presented by the Complainant and the Commission. The cases have recognized that the possible effect of documents upon a litigation 'is of itself', in the words of the Robinson court, supra, at 716, 'a compelling reason for their production'.

[29] The Respondent has acknowledged in its factum that the probative value of the evidence in the case is one of the factors that must be considered by a court in deciding whether to uphold an immunity. At paragraph 17 of the factum, counsel makes the argument that:

. . relevance and materiality are thresholds which must be met by any piece of evidence submitted to the courts. If it fails to pass those thresholds, then it does not matter how interesting the evidence may be, it is not allowed. If a decision to uphold the claim of privilege and to prevent the disclosure of the information could not effect the outcome of the trial or hearing, then the privilege claim should generally be upheld.

The problem is that the relevance and materiality of the documents cannot be assessed on the basis of the very general descriptions in the affidavits supplied by the Respondent.

[30] There are a number of complicating factors which need to be considered, in this context, some of which concern the relationship between the government and its public service, and some of which concern the current sensitivities of government. There is also the question of bad faith, which was raised as a defence by the Respondent. One of the more significant issues which arises in this context is whether the union entered into collective negotiations with the Government without properly disclosing the complaint.

[31] The question of bad faith brings in equitable considerations, and the doctrine of clean hands, which cannot be

dealt with without reviewing the conduct of both sides in the case. Although we have only heard a few witnesses, it is apparent that the state of knowledge of the Respondent with respect to the complaint has become a material issue in the inquiry. This is not a minor consideration, since both sides appear to have participated in some hard bargaining at the negotiating table. It is impossible to say, without inspecting the documents, whether they shed any light on such issues or whether any decision to protect them would be prejudicial to the Complainant and Commission.

[32] The Court of Appeal in Carey had refused to inspect the documents on the basis that they should not be inspected unless there is a concrete reason, 'something beyond speculation', for believing that the documents were likely to provide evidence which would substantially assist the party seeking their production. The problem with such an approach, as the Supreme Court recognized, is that it places the burden of demonstrating the significance of the documents on the party who has never seen them. This is in spite of the fact that the government has included the documents in one of its lists of relevant documents. It is evident that most of the documents we are dealing with refer to the same issues of job classification and job evaluation that have come before us in the body of the hearing.

V. WHAT IS THE APPROPRIATE COURSE OF ACTION IF THE AFFIDAVITS ARE INSUFFICIENT?

[33] This takes us through the first stage of the process. Although we find the affidavits insufficient, this does not give us the liberty to order that the documents be disclosed to the other parties. It is more than possible, as Lord Blanesburgh held in Robinson, supra, at p. 722,

. . . that there may be amongst the scheduled documents some, at least, to which the privilege genuinely attaches, and to throw open these documents to the inspection of the plaintiff, without more, would destroy the protection of the privilege.

The House of Lords held that a judge should inspect the documents before proceeding further, in order to ensure that matters that deserve some measure of secrecy are not disclosed, merely because the Government has provided an inadequate affidavit.

[34] The Supreme Court of Canada followed the same line of reasoning in Carey, at p. 674, in directing that contested documents be inspected.

This will permit the court to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.

The purpose of inspection is therefore to accommodate a Government party and protect the confidentiality of the challenged documents. It benefits the Government.

[35] The court in Carey treats this as a rule of practice, at p. 683, and adopts the rule set out by the New Zealand courts in Fletcher Timber Ltd. v. Attorney General, [1984] 1 N.Z.L.R. 290. There, the New Zealand Court of Appeal held, at p. 308:

. . . once the documents are admitted to relate to the case, as they are here, they should be available for inspection unless there is some reason shown why in the interests of public policy that course should not be followed. And the onus of establishing that they should not be produced for inspection must lie on the party which seeks a departure from the general rule.

This is in keeping with the general principle that the Government should be treated in the same manner as other litigants, unless there is a public interest which demands otherwise.

[36] We do not find anything in the affidavits provided by the Government of the Northwest Territories that shows why the ordinary route of inspection should not be followed. There is another alternative, however.

VI. SHOULD WE DIRECT THE RESPONDENT TO PROVIDE A FURTHER AFFIDAVIT?

[37] The Respondent has suggested that we ask for another affidavit, if the affidavits before us are insufficient. This kind of issue has arisen in the case law. Counsel for the Respondent has urged us to follow the decision of the Northwest Territories Supreme Court in Fullowka v. Royal Oak Mines Inc., [1998] N.W.T.J. No. 87 (Q.L.), at p. 5, where Vertes J. ordered the Government of the Northwest Territories to produce a second affidavit 'providing with reasonable specificity a description of each document for which privilege is claimed and the nature of the public interest concern applicable to each document.'

[38] The situation in the Fullowka case was quite different than the situation which confronts us, however, since the Government had not provided any description of the documents in question and had merely included a list of 98 numbers in its 'Statement as to Documents'. In the present case, we have a description of the documents in the 'Fresh as Amended' list, and the problem lies elsewhere, in the identification of the different public interest concerns which must be weighed in the instance of each document.

[39] In our view, the situation in other cases is closer to our own. Although the House of Lords in Robinson was concerned about the possibility of divulging documents to which an immunity applies, the court was unwilling to give the State a second opportunity to justify its claim, since that 'would necessarily involve further serious delay, without, it may be, advancing any further the final solution of the question at issue.' (722) We find ourselves in much the same position.

[40] One of the questions in Carey was whether the Government had a right to appeal an order of inspection, before the court proceeded to enforce the order. The remarks of La Forest J. on the issue, at p. 646f, are helpful in the present context.

Appeals are creatures of statute, and counsel did not draw our attention to any statute permitting an appeal to the Court of Appeal from an order of inspection. He simply relied on English and New Zealand cases, which as Thorson J.A. remarked may rest on a different statutory basis. So far as the jurisdiction of this Court is concerned, it is premature to discuss the issue until it arises. I might say, however, that I am impressed with the practical implications mentioned by Thorson J.A. militating against permitting appeals to be heard on issues of this kind until the final disposition of the action. This is especially true in view of the fact that a special procedure has been provided for dealing with the really sensitive issues such as international relations and national defence and security: see Canada Evidence Act, R.S.C. 1970, c. E-10, subs. 36.1(2), 36.2(1), as enacted by S.C. 1980-81-82-83, c. 111, s. 4, sch. III.

We find these comments convincing.

[41] It is worth repeating, as often as it is necessary, that we have an obligation to proceed expeditiously. The original complaint was filed in 1989, some eleven years ago, and we still have a great deal of ground to cover before we can contemplate a decision on the merits of the claim. The parties should be discouraged from interrupting the process, unless there are compelling reasons to do so. We are convinced that it would be a mistake to delay the hearing any further and ask for another affidavit, which may be of doubtful assistance.

VII. DOES THE TRIBUNAL HAVE THE POWER TO INSPECT THE DOCUMENTS?

[42] This would seem to take us to the next stage in the process. As Justice Sopinka writes, in The Law of Evidence in Canada (2d),

In Carey v. R., La Forest J. remarked that the Minister should be as helpful as possible without disclosing what is sought to be protected. If the affidavit is insufficient, the court may decline the claim of immunity or inspect the documents in issue. (868)

The Respondent has countered that the Tribunal is not a court and has no power to order the production of these documents, even for the limited purpose of inspection. This requires a review of the powers of the Tribunal over the process of discovery and the production of documents.

[43] There is case law dealing with the power of a quasi-judicial body to compel the production of documents outside a hearing. In Canadian Pacific Air Lines v. Canadian Air Line Pilots Association, [1993] S.C.J. No. 114 (Q.L.), for example, the Supreme Court considered a provision in the Canada Labour Code, R.S.C., 1970. The majority stressed, at

p. 8f that the exercise of such powers is normally reserved for superior courts, 'whose powers of coercion find their origins in the inherent jurisdiction of those courts.' The words of the relevant provision were construed narrowly and the court held that the Board had no power to order the production of documents outside a hearing.

[44] There are a number of significant differences between the Labour Relations Board and the Canadian Human Rights Tribunal. The Tribunal is an adjudicative body, whose sole function is to try and decide those cases that come before it. The Tribunal has no investigative function, which has been retained by the Commission, and is not privy to the investigative process. It seems plain that the powers exercised by the Tribunal are ancillary to the powers that it exercises in holding an inquiry. In our view, the discovery powers of the Tribunal are indispensable to the fulfillment of its mandate and constitute an integral part of the larger hearing process.

[45] The decision of the majority in the Canadian Pacific Air Lines case rests on the judicial character of the power to compel the production of documents. It is a mistake, the court holds, to assume that an administrative body has such powers unless the enabling legislation specifically grants it.

In light of the judicial nature of the power, an extension of the power so that it would be exercisable in an administrative context would be an exceptional enlargement of its application. The power cannot be envisaged to be so broad in the absence of clear wording to that effect.

The question in the immediate case is accordingly whether our own legislation contains clear wording that gives the Tribunal the power to compel the production of documents for the purpose of inspection.

[46] The powers of the Tribunal are set out in s. 50 of the Canadian Human Rights Act, R.S.C., 1985, C. H-6, as amended. The relevant provisions appear to be the following:

50. (1) Conduct of inquiry--After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

(2) Power to determine questions of law or fact--In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

(3) Additional powers--In relation to a hearing of the inquiry, the member of panel may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing of the complaint;

(e) decide any procedural or evidentiary question arising during the hearing.

It is notable that the section in the original act did not include either subsection 2 or subsection (3)(e), both of which extend the powers of the Tribunal.

[47] Section 50 (3)(a) might appear to give the Tribunal the powers of a superior court, in ordering the production of the documents. That provision deals with the authority of the Tribunal over witnesses, however, and does not deal with the process outside the formal hearing. Although the provision might be interpreted in a manner which gives us power over such a process, the other provisions would seem sufficient to fill any gap in the legislation.

[48] Section 50(1) implies that the parties are entitled to review any relevant and admissible evidence in the possession of the other parties. Section 50(2) extends the powers of the Tribunal to 'all questions of law or fact necessary to determining the matter'. The breadth of this provision is significant, since it extends our powers beyond the hearing room and the formal hearing process. The decision which faces us on inspection appears to be a question of mixed fact and law, since it requires us to determine whether an immunity lies on the facts of the specific documents before us.

The effect of section 50(3)(e) appears to depend on whether one gives a narrow interpretation to the power to 'decide any . . . evidentiary question arising during the hearing'.

[49] In our view, the provisions of section 50 give us the power to order the production of documents outside the formal hearing when that is necessary, in the words of s. 50(2), to determine the matter before us. We are of the opinion that it would be impossible to hold a fair hearing, in the present case, without a full disclosure of the relevant documents in the possession of the parties. This is not possible without an inspection of the documents that form the subject of the Notice of Motion. In the Canadian Pacific Air Lines case, at p. 13, the Supreme Court comments on its earlier decision in Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission) [1989] 1 S.C.R. 1722. There, the court recognized that the CRTC possessed those powers 'which, if unrecognized, would result in the frustration of the work of the Commission.' The same logic applies in the instance before us.

[50] There are pragmatic reasons to adopt a position in favour of the Tribunal's power to supervise the discovery process. We have already commented, in earlier rulings, on the number of documents in the possession of the Government of the Northwest Territories. It would be naive to think that the present hearing could proceed without some formal process of discovery, and the practical realities of the situation are too overwhelming to expect the parties to prepare their cases without examining the documents in the possession of the other side. This is a matter of necessity and fairness, and brings the principles of natural justice into play under s. 50(1). We have already sat for 57 days and have heard argument on a variety of complex issues pertaining to the cases put forward by the different parties.

[51] There are other factors that relate to the integrity of the hearing. The Complainant and the Commission have made it clear that they are not in a position to proceed with their cases until such time as the matter has been resolved. This is an important consideration and one of the problems with the position advanced by the Respondent is that it permits the parties to interrupt the inquiry process, and leave it in abeyance, while the issue is decided in the Federal Court. This is in spite of the fact that we may find in favour of the Respondent, on inspecting the documents.

VIII. WHAT IS THE EFFECT OF SECTIONS 37 TO 39 OF THE CANADA EVIDENCE ACT?

[52] This might seem sufficient to decide the matter. There are additional difficulties, however. The Respondent is apparently willing to accept that the Tribunal has the power to regulate the ordinary discovery process. The narrower argument is that a claim of public interest immunity does not come within the ordinary purview of the discovery process.

[53] This argument is not to be taken lightly. Section 37 of the Canada Evidence Act, R.S.C. 1985, c. C-5, as amended, states as follows:

37. (1) Objection to disclosure of information--A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Where objection made to superior court--Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

(3) Where objection not made to superior court--Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by

(a) the Federal Court-Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament . . .

The rest of the section sets out relatively stringent time limits on the hearing of any application under these provisions and any subsequent appeal.

[54] Section 38 sets out a specific procedure for hearing an objection which has been made on the grounds that the disclosure would be injurious to international relations, national defence or national security. Such applications must be heard by the Chief Justice or a judge designated by the Chief Justice. Under section 39, information that has been certified as 'a confidence of the Queen's Privy Council for Canada' attracts an absolute privilege and cannot be examined by the courts. This privilege does not apply to discussion papers if, under subs. (4)(b), the 'decisions to which the discussion paper relates have been made public' or 'four years have passed since the decisions were made.'

[55] All of the counsel who appeared before us agreed that the Government of the Northwest Territories can be considered as an 'other interested person' under s. 58 of the Canadian Human Rights Act. We see no reason to distinguish between this term and the use of the term 'other person' in s. 37(1) of the Canada Evidence Act. We are also willing to accept, for the sake of argument, that the affidavits of Mr. Voytilla are sufficient to satisfy the requirements of certification. This is in spite of the fact that the subsection seems to call for something more than a general assertion that the secrecy of ordinary cabinet documents should be maintained.

[56] Once these criteria are satisfied, the question is whether the Government's claim of immunity must be decided in the Federal Court, under the provisions of s. 37. The difficulty is that the language of s. 37(3) of the Canada Evidence Act is explicit and unequivocal. When a public interest objection is raised before a federal body 'other than a superior court', that objection must be decided in the Federal Court. It follows that the critical question is whether the Canadian Human Rights Act carves out an exception to s. 37 or leaves the general rule intact. Counsel for the Respondent has suggested that the general language of a provision like s. 50 of the Canadian Human Rights Act cannot be used to override the restrictions in more specific provisions. The language in some of the provisions of section 50 is reasonably specific, however, and s. 50(2) gives the Tribunal the power to decide 'all questions of law or fact necessary to determining the matter'. The word 'all' is significant, since it implies that the Tribunal's power over the discovery process extends beyond the ordinary questions of privilege. This is a question of emphasis and must not be taken too literally: it does not dispense, for example, with the limits placed on the process by the provisions of subs. 38 and 39 of the Canada Evidence Act.

[57] The wording of s. 50(2) is relatively explicit and gives us the power to decide questions of law, which are normally reserved for the courts. The subsection gives the Human Rights Tribunal a legal character that distinguishes it from many quasi-judicial bodies and permits it, like the courts, to decide questions of law and mixed fact and law. This does not detract from its role as a fact-finding body, but allows it to draw legal inferences from those facts and make any legal conclusions that it finds necessary to determine whether a complaint has been substantiated.

[58] The human rights process has its own attributes and the efficacy of the process is based on a more informal principle of fairness than the principle that guides the criminal or civil courts. Nonetheless, the Tribunal has acquired an increasingly legal character. This is evident in the introduction of s. 50(2), which was only passed in 1998. It is also evident in the expertise of the members of the present panel, all of whom have considerable experience in the courts. This does not change the essential role of the Tribunal, which retains the latitude, under s. 50(3)(c), to receive evidence that might not be admissible in a court of law.

[59] Although the Tribunal is not a court, its abilities lie in adjudication. This is important in the context of legal tasks, such as the inspection of documents under a public interest immunity. This requires an assessment of the relevance, admissibility and weight of evidence, along with the ability to draw a legal conclusion on the basis of the existing case law. While we recognize that this kind of task is normally entrusted to the superior courts, and may take the Tribunal to the very edges of its powers, there are many reasons why the Tribunal appears to be the appropriate body to decide the question of immunity.

[60] The Tribunal has the primary responsibility of deciding the facts in the case and legal questions relating to the admissibility and relevance of evidence are properly seen as a necessary correlative of the fact-finding task. We accept the view of the court in Carey, which recognized that a Minister's affidavit deserves 'due consideration', only to add that the weight of such an opinion 'must be weighed against the need of producing it in the particular case.' (653) It appears to us that the Tribunal is the body in the best position to determine the latter issue.

[61] The Respondent's position would leave us with the responsibility for reviewing Mr. Voytilla's affidavit, only to transfer the matter to the Federal Court, if we felt inspection was necessary. This piece-meal approach is awkward and illogical, and would put the Federal Court in the position of finishing a task that we have already started. It is the

present panel that is familiar with the factual issues between the parties and is in the best situation to determine the prejudicial effect of any decision to protect the documents from disclosure. This is particularly true in the present case, which calls for the expertise of a dedicated Tribunal and requires the discovery of thousands of documents.

IX. WHAT IS THE EFFECT OF SECTION 58 OF THE CANADIAN HUMAN RIGHTS ACT?

[62] This interpretation of the s. 50(2) is borne out by the provisions of s. 58 of the Canadian Human Rights Act. That section reads as follows:

58. (1) Application respecting disclosure of information--If an investigator or a member or panel of the Tribunal requires the disclosure of any information and a minister of the Crown or any other interested person objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter.

(2) Certificate--Where the Commission applies to the Federal Court pursuant to subsection (1) and the minister of the Crown or other person interested objects to the disclosure in accordance with sections 37 to 39 of the Canada Evidence Act, the matter shall be determined in accordance with the terms of those sections.

(3) No certificate--Where the Commission applies to the Federal Court pursuant to subsection (1) but the minister of the Crown or other person interested does not within ninety days thereafter object to the disclosure in accordance with sections 37 to 39 of the Canada Evidence Act, the Court may take such action as it deems appropriate.

Counsel for the Respondent argued that the section restricts the powers of the Tribunal under s. 50, since it indicates that any decision to disclose information over the objection of an interested party should be taken in the Federal Court.

[63] There are a number of problems with this argument. The first is that s. 58(1) states that the Commission may apply to the Federal Court for a determination of the matter and says nothing of a situation where the Commission has yet to make an application. The second is that s. 58(1) refers to 'the disclosure of any information' and does not appear to restrict itself to a public interest immunity. We have examined the French and English versions of the text, and in our view, subsections (2) and (3) seem to contemplate the possibility that other objections to disclosure might be taken to the Federal Court.

[64] The problem is that this opens up the prospect of transferring a wide variety of evidentiary matters to the Federal Court, particularly if we accept the Respondent's position that it has the right to be heard in that court. This goes against the spirit of s. 50 and provisions such as s. 50(3)(e), which gives the Tribunal the power to decide 'any procedural or evidentiary question arising during the course of the hearing'. The situation is different in the instance of an investigator than in the instance of a Tribunal. From a practical perspective, it would be a fundamental mistake for this Tribunal to delegate the task of determining evidentiary issues to the Federal Court, which has made it clear that its mandate over the Tribunal is a supervisory one.

[65] There are additional difficulties for the Respondent. We do not accept that the word 'disclosure', as it appears in s. 58, includes the inspection of documents by the Tribunal. In our view, the word 'disclosure' refers to the public disclosing of the documents and does not apply to an inspection by the members of the Tribunal. This is apparent from the case law, which suggests that a judge's inspection of disputed documents does not breach the confidentiality of the documents. If this were not the case, a court's examination of documents would constitute a violation of the immunity, in itself.

[66] As it turns out, the provisions of the Canada Evidence Act are helpful in determining the meaning of the word 'disclosure' in this context. Section 37(2) states that a court dealing with an objection to the disclosure of information 'may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate'. This distinguishes between the act of inspection and the act of disclosure. Section 39(1) makes the same distinction, in stating that 'disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.'

[67] It is evident that the French version of s. 58(1) lends support to this interpretation of the section.

58. (1) Dans les cas où un ministre fédéral ou une autre personne intéressée s'opposent à la divulgation de

renseignements demandée par l'enquêteur ou le membre instructeur, la Commission peut demander à la Cour fédérale de statuer sur la question.

The word 'divulgation', in the French text, refers to a public disclosing of the documents in question and would not be taken, in normal circumstances, to include a private viewing of documents by the members of a Tribunal. The definition of 'divulguer' in the Petit Robert (1993) provides a good illustration of this. The main entry is: 'Porter à la connaissance du public (ce qui était connu de quelques-uns).'

[68] We realize that the Supreme Court of Canada did not make a firm distinction between inspection and disclosure in the Carey decision. At p. 674, supra, for example, Mr. Justice La Forest actually ordered 'disclosure of the documents for the court's inspection.' The precise meaning of the word 'disclosure' was not in issue, however, and the court did not address the point that has been raised before us. It is evident, moreover, that the court in that case uses the term disclosure in different ways. In the same paragraph, for example, Mr. Justice La Forest states that 'Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice'. It is in this restricted sense, in our opinion, that the word is used in s. 58 of the Canadian Human Rights Act.

[69] There might be room for an argument that s. 58 would come into operation, if we order the Respondent to disclose the documents to the other parties. It is too early to address any argument on this issue, however, and the matter is open to doubt. The important observation, in deciding whether we have the power to inspect the documents, is that s. 58 clearly sets out the normal route that must be followed in taking a claim of immunity before the Federal Court.
[70] The Commission has apparently been given the role of gatekeeper under the section, and has the discretion to decide whether objections are taken to the Federal Court. The obvious intention of the section is to filter out frivolous or gratuitous claims. We are willing to acknowledge that there may be difficulties with the role of the Commission in such a context, since they remain a party in the case. That is an issue which must be decided in another forum, however, and it is not for us to rule on the obligations of the Commission or the scope of its discretion under the section.

X. CONCLUSION

[71] We would like to conclude by saying that we have been provided with a number of authorities that list the factors to be considered in determining whether it is in the public interest to protect cabinet documents from disclosure. We feel that it would be premature to enter into a discussion of these factors at this time, however, without reading the documents for ourselves. The Respondent is accordingly ordered to provide the Tribunal with three copies of the documents in question, within the next five days, for the purposes of inspection.

Dated this 19th day of May, 2000.

Paul Groarke, Chairperson

Jacinthe Théberge, Member

Athanasios Hadjis, Member

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

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