No. 138545
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, and the *Human Rights Code,* R.S.B.C. 1996, c. 210, and in the matter of a decision made by Murray Geiger-Adams, in his capacity as a member of the British Columbia Human Rights Tribunal, pursuant to Rules 24 and 29 of the Tribunal's Rules of Practice and Procedure, dated September 18, 2013

BETWEEN:

THE TDL GROUP CORP. AND TIM HORTONS INC.

PETITIONERS

AND:

EDXON GONZÁLEZ CHEIN, ERIC DESSENS DESSENS, RODOLFO DURÁN LARA and RUBÉN OMAR VARELA RAMÍREZ

RESPONDENTS

ARGUMENT OF THE RESPONDENTS

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I. OVERVIEW

1. Fundamentally, there is only one issue in this judicial review: should this Court interfere with a decision of the BC Human Rights Tribunal [the "**Tribunal**"] about the scope of disclosure required in the course of a preliminary application?

2. The Petitioners TDL Group Corp. ["**TDL**"] and its parent company, Tim Hortons Inc. ["**THI**", and collectively with TDL, **"Tim Hortons**"] have asked the Tribunal to dismiss a human rights complaint made against them by Petition Respondents Edxon Chein, Eric Dessens, Rodolfo Lara and Rubén Ramírez (collectively, the "**Workers**") on a preliminary basis. In its application to dismiss the complaint, Tim Hortons relied on the terms set out in its Operating Manual to argue that it had no role in the Workers' employment at two Tim Hortons franchise restaurants.

3. In the decision under review, the Tribunal ordered Tim Hortons to disclose the Operating Manual to the Workers on the basis that Tim Hortons had made that manual relevant when it sought to rely on its terms to have the Workers' complaint dismissed.

4. The Tribunal offered the parties a procedure to address the mechanics of how the Operating Manual would be disclosed, and whether any conditions should apply to protect confidential information. However, rather than allowing the Tribunal to complete its process, Tim Hortons filed this petition for judicial review. The Tribunal proceedings have been stayed pending the outcome of this judicial review.

5. This petition has now caused six months of delay. It has taken the Workers from the Tribunal's accessible forum to this complex superior court, where they face the risk of court costs. The petition asks this Court to deprive the Tribunal of deference on basic matters of procedure and evidence, displacing the Tribunal as master of its own house. The Workers ask that this Court decline to exercise its discretion to entertain judicial review in these circumstances.

6. In the event the Court does entertain the judicial review, the Workers submit that the Tribunal's decision is entitled to deference. As a discretionary decision on a procedural issue, this is precisely the type of decision the Legislature intended the Tribunal to make without judicial intervention, except where the discretion is shown to have been exercised arbitrarily, in bad faith, for an improper purpose or based predominantly on irrelevant factors. In short, where the decision was patently unreasonable.

7. This decision was not patently unreasonable and was indeed correct. The Tribunal ordered disclosure of the Operating Manual to safeguard the fairness of its proceedings. To do otherwise would have deprived the Workers of the opportunity to fairly and fully defend their human rights complaint from preliminary dismissal. On the basis of the argument and evidence before it, the Tribunal could not have properly reached any other conclusion.

8. The Workers ask this Court to dismiss the petition.

II. BACKGROUND

A. The Complaint

9. The Workers are all Mexican men who were brought into Canada in 2012 to work for two Tim Hortons franchises in Dawson Creek, British Columbia [the **"Tim Hortons Restaurants"**].

10. The Tim Hortons Restaurants were owned by Tony Van Den Bosch through his company 525571 BC Ltd. dba Tim Hortons [collectively, the "**Franchisee**"]. The Franchisee operated the Tim Hortons Restaurants pursuant to a Franchise Agreement with the Petitioner TDL.

11. The Workers were brought to Canada to work for the Tim Hortons Restaurants through Canada's Temporary Foreign Worker Program ["**TFWP**"]. Tim Hortons permits its franchises to hire employees through the TFWP, provided certain

requirements are met. Tim Hortons provides assistance to franchisees seeking to hire through the TFWP, through TDL's labour strategies department.

> Affidavit #1 of Earl Phillips, made November 18, 2013 [**"Phillips Affidavit"**], Exhibit D (Affidavit #1 of Chris Thomas, made June 17, 2013 [**"Thomas Affidavit"**] at paras. 16-22)

12. On November 9, 2012, the Workers filed a complaint with the Tribunal alleging they had been discriminated against in their employment and tenancy on the bases of their race, colour, ancestry and place of origin. The complaint was amended on May 22, 2013 [the "**Complaint**"]. It named both the Franchisee and Tim Hortons as respondents.

> Phillips Affidavit, Exhibit B (Complaint)

13. In the Complaint, the Workers allege that they were discriminated against in their employment in a number of ways, including:

    a. being subjected, and witness, to derogatory and racist comments about Mexico and Mexicans in the workplace (Complaint, paras. 52-64);

    b. being required to perform less desirable work on less desirable terms than local employees because of their status as temporary foreign workers from Mexico (Complaint, paras. 38-42; 45-46);

    c. being prohibited from speaking Spanish or talking to each other in the workplace, though other groups were permitted to speak to each other, including in their native tongues (Complaint, paras. 43-44);

    d. being coerced by Mr. Van Den Bosch into working when it was medically inappropriate to do so, in circumstances where non-Mexican workers were not required to do so (Complaint, paras. 47-50);

    e. being required to sign blank sheets of paper and having their passports held by Mr. Van Den Bosch– practices not imposed on non-Mexican workers (Complaint, paras. 66-67); and

    f. in the cases of Mr. Lara and Mr. Chein, being fired after raising issues of discrimination with Mr. Van Den Bosch, and being sent home to Mexico within two days of raising the issues.

14. The workplace discrimination followed the Workers home while living in Dawson Creek. Under the TFWP, employers are required to either provide affordable housing to the worker, or demonstrate that affordable housing is available in the community. As such, there is a provision regarding accommodation in the sample employment contract that TDL provides to franchisees for temporary foreign workers.

    Phillips Affidavit, Exhibit D (Thomas Affidavit at paras. 20-22 and Exhibit C, p. 174)

15. Upon their arrival in Canada, Mr. Van Den Bosch brought each of the Workers to a house that he owned [the **"Workers' House"**]. For the duration of their stay in Canada, the Workers lived in the Workers' House and paid Mr. Van Den Bosch $400 per month in rent. The five-bedroom, two-bathroom home housed up to ten foreign workers at any given time.

    Phillips Affidavit, Exhibit B (Complaint at paras. 14-20)

16. In their Complaint, the Workers allege discrimination in tenancy arising from the overcrowding, repeated invasions of privacy, and inadequate facilities provided to themselves and other Mexican employees of the Tim Hortons Restaurants.

    Phillips Affidavit, Exhibit B (Complaint at paras. 14-34)

17. The Workers allege that Tim Hortons is liable for the discrimination in employment and tenancy, pursuant to principles described briefly below.

B. <u>The Complaint against Tim Hortons</u>

18. Section 13 of the *Human Rights Code,* [1996] R.S.B.C. 1996, c. 210 [the ***"Code"***] prohibits a "person" from discriminating against another person "regarding employment or any term or condition of employment". A respondent will be liable under this section if its own acts or omissions discriminate regarding employment, or if it is liable for the discrimination committed by another person. Section 13 is interpreted expansively.

> *Maycock v. Canadian Tire Corp*, 2004 BCHRT 33 at para. 38; *Crane v. British Columbia (Ministry of Health Services)*, 2007 BCSC 460 ["***Crane***"] at para. 152; *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at para. 18, leave to appeal to SCC refused, [2006] S.C.C.A. No. 365

19. In this case, the Workers allege that Tim Hortons is liable for the discrimination of the Franchisee, based on the control exercised by Tim Hortons in the franchisor-franchisee relationship. It is a fundamental principle of human rights law that parties will be liable for discrimination where they are in a position to satisfy the remedial aims of human rights legislation by identifying and eliminating the discrimination.

> *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at paras. 15-17

20. Specifically, the Workers allege that:

> ... by its participation in the [Temporary Foreign Worker Program] and its control over the operations of the franchisee, [Tim Hortons] created conditions under which the discrimination was possible, and even likely.
>
> Phillips Affidavit, Exhibit F (*Chein and others v. Tim Hortons and others*, 2013 BCHRT 229 [the **"Disclosure Decision"**] at para. 2)

21. Two key aspects to determining Tim Hortons' liability in this case are: (1) its involvement with the recruitment and employment of the Workers through Canada's TFWP; and (2) its ability to remedy the discrimination faced by the Workers, and to prevent similar discrimination against future workers brought in through the TFWP to work for Tim Hortons franchises.

C. <u>The Application to Dismiss</u>

22. Tim Hortons applied to the Tribunal to have the Complaint against it dismissed, pursuant to ss. 27(1)(b), (c) and (d)(ii) of the *Code* [the "**Application to Dismiss**"].

> Phillips Affidavit, Exhibit D (Application to Dismiss)

23. Section 27 of the *Code* creates a mechanism by which the Tribunal can dismiss all or part of a complaint on a preliminary basis, on one of seven listed grounds. The role of this provision was described by the BC Court of Appeal as follows:

> [Section 27] creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing ... If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review.
>
> *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [***"Hill"***] at para. 27 (emphasis added)

24. Because of the potential consequences of an application to dismiss, a human rights complainant must mount a vigorous defence of her complaint.

25. In the Application to Dismiss, Tim Hortons argued that the Complaint against it should be dismissed because:

    a. the Workers did not allege that Tim Hortons employed them, or was "involved in their employment relationship" (referring to s. 27(1)(b) of the *Code,* see Application to Dismiss, para. 62);

    b. there is no reasonable prospect that the Complaint will succeed because Tim Hortons had no control over the employment relationship, no role in the day-to-day operations of the Tim Hortons Restaurants, and "no power or ability to affect the terms or conditions" of the Workers' employment (referring to s. 26(1)(c) of the *Code;* Application to Dismiss, paras. 68, 73 and 74); and

    c. it would not further the purposes of the *Code* to proceed with the Complaint against Tim Hortons because, although it was a stranger to the employment relationship, Tim Hortons had already acted reasonably to address the rights of employees, through:

        i. the requirement that franchisees comply with applicable employment laws;
        ii. the ongoing monitoring of franchisees' employment practices, including participation in the TFWP;
        iii. the requirement that franchisees implement anti-harassment and discrimination policies; and

iv. the provision of a "toll free line for employees at [all] Tim Hortons restaurants to report harassment" (referring to s. 27(1)(d)(ii) of the *Code*, Application to Dismiss paras. 78-85).

26. In Tim Hortons' arguments and evidence submitted in support of the Application to Dismiss, it made reference to, and relied on, a number of documents that had not been disclosed to the Workers in the Tribunal proceedings [the "**Undisclosed Documents**"]. For the purpose of this judicial review, the most important of these documents are the Tim Hortons' Operating Manual and materials relating to the AF TIMS Training Program [collectively, the "**Operating Manual**"].

27. Tim Hortons submitted that its relationship with the Franchisee was governed by the terms of the Franchise Agreements between TDL and the Franchisee. Copies of those Franchise Agreements were included as evidence in the Application to Dismiss.

Phillips Affidavit, Exhibit D (Application to Dismiss at para. 73)

28. Tim Hortons argued that the terms of the Franchise Agreements demonstrated that it had no "power or ability to affect the terms or conditions of the Complainants' employment".

Phillips Affidavit, Exhibit D (Application to Dismiss at para. 74)

29. A term of the Franchise Agreements requires that the Franchisee run the Tim Hortons Restaurants in accordance with the Operating Manual. The terms of the Operating Manual "constitute provisions" of the Franchise Agreements.

Phillips Affidavit, Exhibit D (Application to Dismiss, Affidavit of Bruce Knudsen, made May 30, 2013, Exhibits C and D at pp. 109 and 135 (Article VII, s. 7.03(c))

30. In support of its Application to Dismiss, Tim Hortons submitted that it required all franchisees to "operate the franchised restaurants in accordance with all applicable laws and ... maintain consistent standards as set out in TDL's confidential and proprietary operating manual". It submitted that the Operating Manual had provisions

governing the enforcement and implementation of an anti-harassment policy and complaint mechanisms to report harassment.

> Phillips Affidavit, Exhibit D (Application to Dismiss at paras. 16 and 17(g))

31. Tim Hortons' evidence also revealed that every employee is required to complete the AF TIMS Training Program.

> Phillips Affidavit at p. 169

32. Notwithstanding the fact that the Operating Manual constitutes a part of the Franchise Agreement that governs the relationship between Tim Hortons and its franchisees, it was not produced in evidence in the Application to Dismiss. Likewise, material relating to the AF TIMS Training Program, through which Tim Hortons presumably trains all employees, was not produced.

D. The Application for Disclosure

33. On July 4, 2013, the Workers filed an application seeking disclosure of the Undisclosed Documents, pursuant to Rule 29 of the Tribunal's Rules of Practice and Procedure [the "**Application for Disclosure**"]. The Application was accompanied by detailed written submissions setting out the legal and factual bases for the request.

> Phillips Affidavit, Exhibit E (Application for Disclosure)

34. In the Application for Disclosure, the Workers stated that their request for documents was limited to those that had been raised by Tim Hortons in its Application to Dismiss. The Workers cited the Tribunal's case law governing disclosure, articulating the issue as whether the documents they sought were arguably relevant, meaning there is "some nexus between the documents and a fact in issue."

> Phillips Affidavit, Exhibit E (Application for Disclosure at para. 16, citing *Brady v. Health Authority,* 2005 BCHRT 200 [***"Brady"***] at para. 53)

35. With respect to the Operating Manual, the Workers submitted:

> This manual is mentioned repeatedly throughout [Tim Hortons'] Application to Dismiss, yet has not been produced. [Tim Hortons] relies on selected excerpts from the document to support its argument that it exercises little to no control over franchisees' day-to-day operations, but have not produced the document. It is impossible for the Complainants to address the nature of [Tim Hortons'] control over franchises (and the franchises' employees) without reviewing this document.
>
> Phillips Affidavit, Exhibit E (Application for Disclosure at para. 25 (a))

36. And with respect to the training materials, the Workers submitted:

> The degree of detail in the employee training program (as referenced in the job description) will provide information as to TDL's involvement in the training of franchise employees.
>
> Phillips Affidavit, Exhibit E (Application for Disclosure at para. 25(k))

37. The parties appeared before the Tribunal in an oral telephone conference and each made submissions about the documents sought by the Workers.

38. Tim Hortons' submissions were summarised by the Tribunal as follows:

> [Tim Hortons] says that there is no general entitlement to disclosure, even of arguably relevant documents, at this stage of the process. It says that the disclosure application is an impermissible "fishing expedition". It relies on *Nsiku v. Suncreek Village and another*, 2013 BCHRT 165, as illustrating the importance of the Tribunal's gatekeeping function on an application to dismiss, and says that disclosure of the kind sought here will harm that function, and require that the Tribunal's resources be devoted to ill-founded complaints. It says that it is open to the complainants to argue that, by failing to produce sufficient information, [Tim Hortons] has failed to show, under s. 27(1)(c), that the complaint has no reasonable prospect of success, or, under s. 27(1)(d)(ii), that it would not further the purposes of the Code to allow it to proceed. [Tim

> Hortons] also says that many of the documents sought are not relevant to the application to dismiss.
>
> Phillips Affidavit, Exhibit F (Disclosure Decision at para. 12)

39. Tim Hortons objected to disclosing its Operating Manual on the basis that it was highly confidential. It also alleged that parts of the Operating Manual were not arguably relevant to the Application to Dismiss. Beyond general references to recipes and "trade secrets", Tim Hortons did not at any point make specific submissions about which portions of the Operating Manual it alleged were not arguably relevant, and - as such - which portions ought not to be disclosed.

> Affidavit #1 of Erin Pritchard, sworn December 10, 2013 ("**Pritchard Affidavit**") at para. 7

40. To date, Tim Hortons has not provided any degree of detail beyond a broad assertion that the Operating Manual is confidential, and includes *some* information not arguably relevant to the Application to Dismiss.

> Pritchard Affidavit at paras. 8 and 19; Argument of the Petitioners at para. 103

41. Counsel for Tim Hortons submitted that Tim Hortons exerted a great deal of control over all operating aspects of its franchises, but that it had very little to do with employees.

> Pritchard Affidavit at para. 7

42. Similarly, with respect to the AF TIMS Training Program, Tim Hortons simply asserted that those documents were mainly about food preparation and the like, and would not be relevant. At no point has it been more specific with respect to the relevance of the information in these materials.

> Pritchard Affidavit at paras. 9 and 19

43. Contrary to the submission of Tim Hortons, the Workers have never agreed that the Operating Manual contains a "great deal of material ... that is not arguably relevant". The Workers could not possibly agree with this statement in the existing factual vacuum. Nor is there evidence that the Workers have acknowledged that the Operating Manual contains "documents that are highly confidential and proprietary". It certainly may, but the Workers have not seen any evidence beyond Tim Hortons' assertion that this is the case.

Argument of the Petitioners at para. 106

44. During the Tribunal telephone hearing, the parties consented to put over issues relating to the timeline of disclosure and any conditions to be imposed on the use of the materials to protect confidentiality.

Pritchard Affidavit at paras. 10-11

45. On the basis of the evidence before him, the Tribunal Member ordered Tim Hortons to disclose the Operating Manual.

E. The Disclosure Decision

46. On September 18, 2013, the Tribunal released its Disclosure Decision, holding:

> I am persuaded that most of the requested documents may be relevant to issues raised by the application to dismiss. In that application, [Tim Hortons] says that the complaint should be dismissed without a hearing, on various grounds, and relies on or refers to the documents or the information contained in them as relevant to, and supportive of, that position. While that may (or may not) be the ultimate result, it would be unfair to permit [Tim Hortons] to select from the documents the information on which it wishes to rely, without giving the complainants an opportunity to examine those documents, and make its own selection of information on which it may wish to rely to resist the application to dismiss.

> While there may be many cases in which broad disclosure should not be ordered in advance of a response to an application to dismiss, in this case it is the respondent which has asserted the relevance of the material to its own application, and triggered the complainants' application to be given access to that same material.
>
> Phillips Affidavit, Exhibit F (Disclosure Decision at paras. 13 and 14) (emphases added)

47. The Tribunal ordered that Tim Hortons disclose ten of the twelve categories of documents sought by the Workers, including the Operating Manual [the **"Disclosure Order"**]. The Member advised that he would convene a further pre-hearing conference to "address any issues the parties wish to raise as to the manner and timing of disclosure, and the protection of personal or proprietary information."

> Phillips Affidavit, Exhibit F (Disclosure Decision at para. 17)

F. Procedure post-Disclosure Decision

48. The Tribunal's next pre-hearing conference was held on October 4, 2013. The Tribunal directed the parties to attempt to resolve issues relating to the timing and manner of disclosure, and any conditions necessary to protect proprietary information. The parties were unsuccessful in reaching an agreement.

49. On October 29, 2013, counsel for Tim Hortons wrote to the Tribunal to ask for "clarification of the Order directing disclosure of the [Operating Manual]". Counsel for the Workers responded the same day, submitting that the Disclosure Order was clear in its terms, but that the parties had been unable to come to an agreement with respect to restrictions on the use of the Operating Manual. Counsel for the Workers submitted that:

> If the Tim Hortons Respondents would like further conditions applied to the use of documents disclosed pursuant to the Tribunal's order, and the parties cannot reach agreement on

> those terms, then that should be the subject of an application to the Tribunal for conditions.
>
> Affidavit #1 of Rylie Mennie, made November 18, 2013 ["**Mennie Affidavit**"] Exhibits A (at p. 2) and B (after p. 3)

50. By letter dated November 1, 2013, the Tribunal directed the parties to attend a pre-hearing conference on November 8, 2013 for the following purpose:

> ... to hear and resolve, on the basis of any relevant information the parties wish to put before the Tribunal, and their submissions (including any reference to relevant authorities), any remaining issues as to the timing and manner of disclosure of the categories of documents ordered disclosed in the Tribunal's September 18, 2013 Order, <u>including any conditions as to confidentiality</u>, which should attach to that disclosure.
>
> Mennie Affidavit, Exhibit C at p. 4 (emphasis added)

51. Rather than allowing the Tribunal to complete its process for determining the manner and timing of disclosure, as well as any conditions relevant to confidentiality, Tim Hortons filed this petition challenging the Disclosure Decision.

52. This judicial review has necessitated a further adjournment of the Workers' deadline for responding to the Application to Dismiss, and the proceedings have been stayed generally pending the outcome of the judicial review.

> Pritchard Affidavit, Exhibit A

III. ISSUES

53. Fundamentally, there is only one issue in this judicial review: should this Court interfere with a decision of the Tribunal about the scope of disclosure required in the course of an Application to Dismiss?

54. The Workers argue:

a. This Court should decline to entertain the judicial review because it is premature; and

b. In the event that the Court considers the judicial review:

i. The issue under review is one of discretion, reviewable on a standard of patent unreasonableness;

ii. The Decision was not patently unreasonable; and

iii. The Tribunal acted fairly in all of the circumstances.

55. The Workers ask that the petition be dismissed with costs.

IV. ARGUMENTS

A. The petition is premature

56. This petition is brought in the middle of the Tribunal's proceedings relating to disclosure of the Operating Manual. Those proceedings themselves are in the middle of the Tribunal's resolution of Tim Hortons' Application to Dismiss. Intervention by the court at this stage is premature, and is not a practice this Court should endorse.

57. The first principle of judicial review is that it is discretionary.

> *Kelowna (City) v. British Columbia (Human Rights Commission),* [1999] B.C.J. No. 1848 (BCSC) [***"Kelowna (City)"***] at para. 11

58. To avoid frustration, expense, delay and fragmentation of administrative proceedings, this Court has recognized that it should not exercise its discretion to entertain judicial review applications of interlocutory rulings unless early intervention is warranted by the demands of justice and efficiency.

> *Hill* at para. 37; *ICBC v. Yuan,* 2009 BCCA 279 at para. 24

59. This policy of restraint is a form of deference to the Legislature's choice to assign some matters to administrative bodies. It is consistent with the principle of deference in judicial review described by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [***"Dunsmuir"***], as:

> respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> *Dunsmuir* at para. 49

60. Restraint recognizes that:

> ... a tribunal should be permitted to complete its process and to render its final decision before judicial review is entertained. This rule is founded in the time honoured principle that a tribunal ... is established to fulfill the statutory functions it is assigned. The Board should be seen as the master of its own process, and that process should not be interfered with by the courts until a final decision is rendered, lest there be one court application after another, which would clearly frustrate the Board's mandate and its legislative purpose.
>
> ... Although a Board in the course of its hearing may make errors, it should be accorded the benefit of the doubt until its final decision has been rendered ...
>
> *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 20 B.C.L.R. (3d) 79 [***"Vancouver (City)"***] at paras. 26-27

61. In *Kelowna (City),* Justice Lamperson provided a helpful list of reasons why courts are properly reluctant to intervene before a tribunal has completed its function:

> a. Judicial intervention may fragment the tribunal's proceedings.
>
> b. The tribunal may resolve the dispute to the parties' satisfaction.
>
> c. The court's decision may be rendered moot because of the tribunal's ruling on some other aspect of the proceeding.

d. It is helpful for the court to have an evidentiary record and the tribunal's analysis of the dispute, especially in areas where the tribunal has special expertise.

e. Courts should avoid deciding constitutional and Charter issues on hypothetical facts or in a factual vacuum.

Kelowna (City) at para. 11

62. The court has occasionally exercised its discretion to intervene at an early or interim stage of a tribunal's proceedings where the alleged error related to jurisdiction, a denial of natural justice or a clear question of law.

Hill at paras. 33 and 35; *Brady* at para. 29; *Vancouver (City)* at para. 31; *Fire-Trol Canada Company v. Bradley* et al [***"Fire-Trol"***], 2005 BCSC 1646 at para. 5; *Brown v. PML Professional Mechanical Limited,* 2008 BCSC 1429 [***"Brown"***] at paras. 20-23

63. In the context of a tribunal's interim order for disclosure of documents, "a privacy interest [in the documents] will rarely be exigent and will rarely found an exceptional basis to challenge an interlocutory ruling for disclosure of such information". In fact, in *Gichuru v. The Law Society of British Columbia,* Cullen J. reassured the reader that the ramifications of reviewing disclosure decisions on a standard of correctness would be mitigated by "the need to establish exceptional circumstances to defeat an argument of prematurity".

Gichuru v. The Law Society of British Columbia, 2007 BCSC 1767 [***"Gichuru"***] at paras. 89 and 113; *Brown* at para. 40; *Brady* at para. 24

64. In this case, early judicial interference with the Tribunal's process is neither just nor efficient. It subverts the accessibility of the Human Rights Tribunal and its quasi-constitutional mandate by fragmenting the Tribunal's proceedings, causing needless delay, and requiring the Workers to engage in complex and risky litigation before a superior court. Further, any decision made by the Court in this judicial review risks being rendered moot by subsequent rulings of the Tribunal that could address Tim

Hortons' concerns about confidentiality. Finally, despite Tim Hortons' attempts to brand it as such, the issue in this case is not jurisdictional so as to justify early intervention. Each of these factors weighing against intervention will be explained in turn.

i. Early intervention subverts the accessibility and efficiency of the Human Rights Tribunal

65. In *Rasanen v. Rosemount Instruments Ltd.*, Justice Abella, as she then was, described the purpose of administrative tribunals as follows:

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.
>
> *Rasanen v. Rosemount Instruments Ltd*, (1994), 17 O.R. (3d) 267 (C.A.) (emphases added)

66. In this case, the Tribunal's mandate is to administer the quasi-constitutional rights conferred by the *Code.* As an administrative body, its processes are designed to be accessible to self-represented litigants. Significantly, participants in the Tribunal's processes face no risk of costs unless they engage in improper conduct.

> *Code,* s. 37(4)

67. The accessibility of the human rights system is eroded when participants are required to appear in superior court in the middle of the Tribunal's proceedings to defend an interlocutory decision on a procedural matter. The court's process is more complex and formal than an administrative body, and entails the risk of costs for a participant who unsuccessfully attempts to defend the Tribunal's order. If parties are permitted to pursue judicial intervention as a matter of course following an unsuccessful

preliminary application, the accessibility of the human rights system in BC will be seriously eroded, with a disproportionately negative effect on the most vulnerable participants.

68. In this case, the petition has been scheduled for two days in Chambers, with lengthy and complex arguments on both sides. This practice is not just, efficient, nor in accordance with the intention of the Legislature. It should not be endorsed by this Court.

69. Judicial review will add to the significant delay already occasioned by Tim Hortons' petition. The Tribunal's Disclosure Order was made on September 18, 2013. To the date of the chambers hearing, the petition will have caused six months of delay to the parties' ability to have the Application to Dismiss decided on its merits. There will be further delay as the parties wait for reasons for judgement, and even more so if the Court directs the Tribunal to reconsider any aspect of the Disclosure Decision.

ii. Allowing the Tribunal to complete its process could resolve the matter to the parties' satisfaction

70. Most of Tim Hortons' objection to the Tribunal's Disclosure Decision stems from its assertions about the sensitivity of the information contained in the Operating Manual. While such privacy concerns are unhelpful to the issue of whether this Court should intervene by way of judicial review, they shed light on how premature the petition is in this case.

> *Gichuru* at para. 89; *Brown* at para. 40; *Brady* at para. 24

71. The Tribunal has jurisdiction to order restrictions on the use that can be made of materials disclosed in the course of a human rights complaint. It routinely makes such orders, for example to safeguard a party's privacy interest in clinical records.

> *Code*, s. 27.3; see for example, *Desai v. The Owners, Strata Plan VR 123*, 2005 BCHRT 149 at para. 14; *Dove v. GVRD and others (No. 5)*, 2006 BCHRT 582 at para. 78

72. In this case, the Tribunal attempted to engage a two-step process for determining disclosure. First, it heard submissions and made a decision with respect to which documents sought by the Workers were arguably relevant to the Application to Dismiss. Second, by consent of the parties, it ordered the parties to attend a second pre-hearing conference to address, among other things, "the protection of personal or proprietary information".

Phillips Affidavit, Exhibit F (Disclosure Decision at para. 18)

73. This petition was brought before the Tribunal could hear submissions and evidence respecting the protection of private information, and make any order in that regard. It is possible that the Tribunal could, if given the chance, respond to concerns raised by the parties and resolve any issues to the parties' satisfaction. As Justice Masuhara contemplated in *Fire-Trol,* this could render the exercise of judicial review unnecessary, and weighs against judicial intervention.

Fire-Trol at para. 5; see also *Brown* at para. 22 and *Brady* at para. 18

74. The Tribunal, as a master of its own house, should be permitted to complete its process respecting disclosure.

iii. The nature of the Decision does not warrant intervention

75. The Decision is an interlocutory decision made in the course of the Tribunal's proceedings related to the Workers' Application for Disclosure. That Application itself is a procedural and evidentiary issue that arose in the middle of the Tribunal's processing of the Application to Dismiss. It is precisely the type of issue where the courts have cautioned against interference. The Court of Appeal has frowned on the "review of an interlocutory decision on an evidentiary or procedural issue that arose in the middle of a hearing".

Hill at para. 43

76. In *Gichuru,* Cullen J. confirmed that exceptional circumstances are still required to defeat an argument of prematurity where a litigant challenges a disclosure order made by the Tribunal. The nature of the issue does not, in and of itself, support an argument for intervention. In *Brown* and *Brady,* the court expressly declined to exercise judicial review over disclosure orders made by the Tribunal.

> *Gichuru* at para. 113; see also *Brady* and *Brown*

77. In *Gichuru,* the Law Society's quest for Mr. Gichuru's medical records in a context where they were unnecessary was the very foundation of his human rights complaint. As such, Mr. Gichuru's privacy interest was "at the core of his claim for discrimination". In explaining why the case was so exceptional as to warrant judicial intervention, Justice Cullen gave two reasons:

> In the first place, the order under review determines the petitioner's privacy interest on an interlocutory application despite the fact that the right of the respondent to fish for the information it protects is at the core of the dispute yet to be adjudicated. In the second place, the petitioner's assertion of a privacy interest protecting the information now being sought was, ultimately, not an issue between the parties in the dispute underlying the complaint. In other words, unlike in *Brady*, in the present case, the respondent conceded that the information it obtained through its investigation was sufficient to assess the petitioner's competence and fitness. The information now being sought was not needed in that process. Logically, the question must arise as to how it is needed in the present process.
>
> *Gichuru* at para. 93 (emphases added); see also para. 90

78. Justice Cullen found it significant that the Law Society had already implicitly conceded that the information it sought through the Tribunal's disclosure order was "extraneous, unnecessary and intrusive". There is no such concession in this case, where the Workers are at risk of having their complaint dismissed on a preliminary basis on the strength of evidence they have not seen.

Gichuru at para. 78

79. Tim Hortons attempts to frame the issue in this petition as jurisdictional. With respect, it is not. Truly "jurisdictional" questions, to the extent they still exist in administrative law, are narrow and rare.

> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61[***"Alberta (Information and Privacy Commissioner)"***] at paras. 33-39 (and see in general the majority's doubts about the modern utility of 'jurisdiction' in administrative law)

80. A question is jurisdictional if it asks "whether or not the tribunal had the authority to make the inquiry". In 2011, the Supreme Court of Canada reported that, since *Dunsmuir* was decided in 2008, it had not "identified a single true question of jurisdiction." The majority of the Court explained:

> ... unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir,* the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review.
>
> *Dunsmuir* at para. 59 (emphasis added); *Alberta (Information and Privacy Commissioner)* at paras. 33-34

81. There can be no question that the Tribunal in this case had the statutory authority to make an order about the disclosure of evidence. This authority is found in s. 27.3(2)(b) of the *Code*. The issue here is not a true jurisdictional question, and Justice Dickson's well-worn caution bears repeating here: courts "should not be alert to brand as jurisdictional ... that which may be doubtfully so".

> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at p. 233; *Dunsmuir* at para. 59

82. Rather, the issue is whether the Tribunal erred in making the decision that it did. As will be demonstrated below, this was a discretionary matter and not such an exceptional circumstance as to warrant early intervention of this Court.

83. Tim Hortons' arguments against judicial restraint rest on unfounded and overstated speculation about the consequences of deference. Assertions that judicial non-intervention would "give the Tribunal an unfettered authority to compel respondents to human rights complaints to disclose all of their most sensitive confidential business information, regardless of relevance to issues in the proceedings", allow human rights complainants to abuse the Tribunal's processes to "easily" "discover confidential and/or proprietary information", and put respondents to the impossible test of "defending their position, or protecting their business" misstate the circumstances of this case, and ignore the large body of case law governing the proper role of tribunals and the courts in our administrative law system.

Argument of the Petitioners at paras. 59 and 63

84. A more apt description of the risks of entertaining judicial review in this petition is found in the statement of Chief Justice Jacked of the Federal Court of Appeal (as he then was):

> a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal.
>
> *In re Anti-dumping Act and in re Danmor Shoe Co. Ltd.*, [1974] 1 FC 22 at p. 34

85. The Workers submit that there are no exceptional circumstances in this case to warrant intervening with the work of the Tribunal, and ask that the Court decline to exercise its discretion to entertain judicial review in this matter.

B. The standard of review is patent unreasonableness

86. In the event that this Court does entertain judicial review in this case, its role was succinctly described by Justice Wedge in *Kinexus Bioinformatics Corporation v. Asad*:

> In an application for judicial review, the court determines whether relief under the *Judicial Review Procedure Act* ... is warranted. The court assesses, on the applicable standard of review, whether a tribunal has made a reviewable error justifying the court's intervention. The court is not permitted to set aside a decision of a statutory tribunal merely because it would have reached a different conclusion...
>
> The court on judicial review does not sit as an appellate court. It does not re-try the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction...
>
> *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 [***"Kinexus"***] at paras. 12-13 (citations omitted)

87. The first step, therefore, in any judicial review is to identify the appropriate standard of review. The standard of review is determined by the nature of the issue before the court, and, for decisions of the Human Rights Tribunal, is set out in s. 59 of the *Administrative Tribunals Act.*

> *Code,* s. 32

88. Section 59 of the *Administrative Tribunals Act* provides:

> Standard of review if tribunal's enabling Act has no privative clause
>
> 59. (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the

> application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

89. There are two issues in this case: (1) the substantive question of whether the Tribunal erred in ordering Tim Hortons to disclose its Operating Manual to the Workers pursuant to s. 27.3 of the *Code*; and (2) the procedural question of whether the Tribunal acted fairly. With respect to the latter, the parties agree that s. 59(5) applies.

90. With respect to the substantive issue, however, the parties disagree about the appropriate standard of review. Tim Hortons submits that the issue is a question of law, reviewable on a standard of correctness. The Workers agree with the submissions of counsel for the Tribunal that the Tribunal's Order was made as an exercise of

discretion, and as such falls to be reviewed on a standard of patent unreasonableness, as defined in s. 59(4).

i. The analysis in Gichuru v. Law Society of British Columbia has been overtaken by subsequent jurisprudence

91. Tim Hortons relies on *Gichuru* to argue that the standard of review for the Tribunal's order is correctness. With respect, the Workers agree with counsel for the Tribunal that this decision has been overtaken by subsequent developments in the law of judicial review and, as such, this Court should decline to follow it.

> *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (BCSC) at p. 592; *McReady v. Nanaimo (City)*, 2005 BCSC 762 at para. 48

92. In *Gichuru,* the Court identified the source of the Tribunal's' authority to order disclosure as Rule 29. The Court held that the decision under review was a legal one, derived from the test set out in that Rule, namely whether the documents were arguably relevant to the complaint. The Court held that "although there are discretionary aspects to the exercise of the tribunal's authority under Rule 29, those aspects do not convert what is essentially a question of law into an exercise of discretion". The finding of arguable relevance was thus reviewed on a standard of correctness.

> *Gichuru* at para. 111

93. *Gichuru* was decided in 2007. In 2008, the entire landscape of administrative law shifted with the Supreme Court of Canada's decision in *Dunsmuir.* Cases decided in BC since *Dunsmuir* have reflected the Court's clear direction that judicial review be approached in the spirit of deference to the choice of Parliament and legislatures to delegate certain matters to administrative bodies. At common law, there is now a *presumption* that an administrative decision maker's interpretation of its home statute is subject to deference on judicial review.

> *Dunsmuir* at para. 27; *Alberta (Information and Privacy Commissioner)* at para. 34; *McLean v. British Columbia (Securities Commission),* 2013 SCC 67 at paras. 21-22; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 [***"Mowat"***] at para. 24

94. In the wake of *Dunsmuir,* the BC Court of Appeal has articulated a new approach for reviewing discretionary decisions made by the Tribunal, where the decision is based on embedded questions of law or fact. In a series of cases since 2011, the Court has directed that the deference owed to discretionary decisions of the Tribunal must not be gutted by subjecting inextricable findings of law to a separate review for correctness.

> *Morgan-Hung v. British Columbia (Human Rights Tribunal),* 2011 BCCA 122 [***"Morgan-Hung"***]; *J.J. v. Coquitlam School District No. 43,* 2013 BCCA 67 [***"J.J."***]; *Gichuru v. British Columbia (Workers' Compensation Appeal Tribunal),* 2010 BCCA 191, leave to appeal refused [2010] S.C.C.A. No. 217 [***"Gichuru v. WCAT"***]

95. The modern approach was succinctly articulated by Justice Fisher as follows:

> One standard of review should apply to discretionary decisions, subject only to questions of fact or law that are readily extricable from the discretionary decision.
>
> *Goddard v. Dixon,* 2012 BCSC 161 [***"Goddard"***] at para. 77

96. It entails a two-stage analysis:

a. First, the Court must look at the issue that was before the Tribunal member to assess whether the Tribunal was granted discretion to decide the issue.

b. Second, the Court must determine whether the finding under review is "readily extricable" from the discretionary decision. Embedded issues of fact or law that are "inextricably intertwined with the exercise of discretion" will be reviewed on the deferential standard of patent

> unreasonableness. A readily extricable finding of fact or law may be reviewed on the separate standard applicable to issues of fact or law.
>
> *Morgan-Hung* at paras. 28-29; *J.J.* at para. 35; *Gichuru v. WCAT* at para. 35; *Goddard* at para. 77

97. The Court in *J.J.* summarised the modern approach in its explanation of the chambers judge's error below:

> The judge ought to have recognized that the question before the tribunal was that of assessing compensation under s. 37(2)(d)(ii) of the *Human Rights Code*. That section is discretionary in nature. Unless there was an extricable issue of fact or law underlying the exercise of discretion, the standard of review would have been 'patent unreasonableness' as that concept is defined in ss. 59(3) and 59(4) of the *Administrative Tribunals Act*.
>
> *J.J.* at para. 35

98. In light of this new legal landscape, there are two problems with the standard of review analysis in *Gichuru:*

a. It fails to recognize that the Tribunal's jurisdiction to order disclosure is established by the Legislature in s. 27.3 of the *Code.* The language of s. 27.3 clearly confers discretion on the Tribunal to make rules or orders respecting disclosure, without limitation.

b. Under the modern approach to reviewing a discretionary decision of the Tribunal, the Court must not subject an inextricable issue of law or mixed fact or law for review on a less deferential standard. The question of whether a document is arguably relevant to an issue between the parties is inextricably bound with the Tribunal's discretion, conferred by s. 27.3. As such, it is entitled to deference.

ii. The Tribunal's authority to order disclosure is discretionary

99. The parameters of the Tribunal's jurisdiction to make Rules or orders about disclosure are established in s. 27.3 of the *Code*:

> Powers to make rules and orders respecting practice and procedure
>
> 27.3 (1) The tribunal may make rules respecting practice and procedure to facilitate just and timely resolution of complaints.
>
> (2) Without limiting subsection (1), the tribunal may make rules as follows:
>
> ...
>
> (b) respecting disclosure of evidence, including but not limited to prehearing disclosure and prehearing examination of a party on oath or solemn affirmation or by affidavit;
>
> ...
>
> (3) In order to facilitate the just and timely resolution of a complaint, a member or panel, on their own initiative or on application of a party or an intervenor, may make any order for which a rule could be made under subsection (1) or (2).
>
> [Emphases added]

100. Tim Hortons seeks to go beyond this provision to impose additional jurisdictional limits derived from what it asserts are principles of natural justice and fairness, and the Tribunal's own Rules of Practice and Procedure. With respect, this misunderstands the modern meaning of "jurisdiction" for the purpose of administrative law and judicial review.

> Arguments of the Petitioner at para. 91

101. The concept of "jurisdiction" today has one, simple meaning:

> 'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter .... Reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> *Dunsmuir* at para. 59 (emphasis added)

102. As set out above, the Supreme Court of Canada has directed that true questions of jurisdiction are "exceptional", and in 2011, reported that it has not seen such an exceptional case since *Dunsmuir.*

> *Alberta (Information and Privacy Commissioner)* at para. 34

103. The question of the Tribunal's jurisdiction to order disclosure, therefore, is resolved by reading s. 27.3 of the *Code*. In that section, the Tribunal is granted the discretionary authority to make rules and orders respecting disclosure of evidence. The Legislature has not imposed any limitations on this broad discretion. In that regard, the straightforward analysis of this Court in *McIntosh* v. *Metro Aluminum Products Ltd* applies equally here:

> The section providing the authority for the Tribunal to award a remedy, s. 37(2)(d), is quite clearly discretionary; the Tribunal "may order" compensation for "all, or a part" of any lost wages.
>
> *McIntosh v. Metro Aluminum Products Ltd*, 2012 BCSC 345 [***"McIntosh"***] at para. 37

104. As the BC Court of Appeal explained in *Workers Compensation Appeal Tribunal v. BC Human Rights Tribunal,* "[t]he use of the word 'may' clearly denotes that the power granted is 'permissive and empowering'".

> *Workers' Compensation Board v. British Columbia (Human Rights Tribunal),* 2010 BCCA 77 at para. 38, overturned on other grounds in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [***"Figliola"***], citing *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29

105. The notion of "arguable relevance", which Tim Hortons seeks to enforce as a limit on the Tribunal's jurisdiction, has been introduced by the Tribunal itself through its Rules of Practice and Procedure and case law. This cannot be correctly understood as a jurisdictional issue. The Tribunal cannot set jurisdictional limits on its own authority. Only the Legislature can determine jurisdiction.

106. Other provisions of the *Code* that the courts have found to confer a discretion include:

a. Section 27, which provides that the Tribunal "may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of [the statutory criteria] apply" (see e.g. *Gichuru v. WCAT; Figliola* at para. 40; *Berezoutskaia v. BC (Human Rights Tribunal),* 2007 BCCA 95);

b. Section 22, which provides that the Tribunal "may accept all or part of [a late-filed] complaint if the member or panel determines that" two statutory criteria are met (*Goddard* at paras. 92 and 95; *Lewis v. BC (Ministry of Public Safety),* 2013 BCSC 1980 at para. 27);

c. Section 37(2)(d), which provides that the Tribunal "may order the person that contravened this *Code* to ... compensate the person discriminated against... " (*J.J.; Morgan-Hung; McIntosh*); and

d. Section 37(4), which provides that the Tribunal "may" award costs against a party where the statutory criteria are met (*Goddard*).

107. In each of these provisions, a Tribunal member exercising her discretion is bound to apply certain statutory criteria and legal tests to the facts to make her decision. However, where those legal issues are inextricably wound in with the discretion, the whole decision remains to be reviewed on a standard of patent unreasonableness. For example:

a. The legal determination of whether the statutory criteria in s. 27 have been met, so as to justify dismissal of a complaint, is inextricably wound with the discretion to dismiss the complaint, and reviewable on a standard of patent unreasonableness. Review of those questions of law on a separate standard of review is an "impermissible parsing of the decision-making process" (*Gichuru v. WCAT* at para. 32; see also *Goddard* at para. 71).

b. The question of whether a complainant has established an allegation of a "continuing contravention", within the legal meaning of that term, is inextricably wound with the Tribunal's discretion to accept complaints filed out of time, and reviewable on a standard of patent unreasonableness (*Goddard* at paras. 92 and 95; *Lewis v. BC (Ministry of Public Safety),* 2013 BCSC1980 at para. 27).

c. The Tribunal's findings with respect to whether a complainant mitigated her damages was inextricably wound in the Tribunal's jurisdiction to assess compensation under s. 37(2)(ii) of the *Code* (*J.J.* at paras. 35 and 44).

d. The question of whether a party had engaged in "improper conduct" so as to attract an award of costs is inextricably wound up in the Tribunal's discretion to award costs under s. 37(4) of the *Code* (*Goddard* at paras. 98 and 206).

108. In *Goddard,* Fisher J. found that case law had affected the validity of an earlier decision of this Court in *Cariboo Chevrolet Pontiac Buick GMC Ltd. v. Becker,* 2006 BCSC 43 [***"Cariboo"***], with respect to the standard of review of decisions made under s. 27(1)(b) of the *Code.* Justice Fisher explained:

> In my opinion, these subsequent authorities have affected the validity of *Cariboo.* In *Berezoutskaia, Gichuru* and *Figliola* the nature of the Tribunal's decisions under s. 27 was generally considered to be discretionary but there was recognition that some paragraphs confer more discretion than others. *Morgan-Hung,* while not dealing with a decision under s. 27, provides

> concrete guidance about how to apply the standard of review in s. 59 of the ATA to discretionary decisions generally.
>
> In my view, it is no longer correct to say, as did this Court in *Cariboo*, that a decision under s. 27(1)(b) involves only a question of pure law and does not require an exercise of discretion. The case at bar demonstrates that a decision under s. 27(1)(b) involves not only a question of law but also a preliminary assessment of the facts alleged in the complaint with a view to determining whether those facts are sufficiently connected to a prohibited ground of discrimination to constitute a contravention of the *Code*. ...
>
> *Goddard* at paras. 78-79

109. Fisher J. held that it was "difficult to conceive that any finding of fact or question of law could be readily extricable" from a discretionary decision about whether to dismiss a complaint on the basis that the acts or omissions alleged in the complaint do not contravene the *Code*.

> *Code*, s. 27(1)(b); *Goddard* at para. 81

110. Likewise here, the question of whether the Operating Manual was arguably relevant to the Application to Dismiss was inextricably wound in the Tribunal's discretion to order disclosure of materials. It is not, as Tim Hortons, asserts "a question of central importance to the legal system as a whole". In that regard, the Supreme Court of Canada's assessment of a similar argument in *Mowat* are apposite:

> ... The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the [Human Rights] Tribunal's mandate and expertise to make factual findings relating to discrimination ... a decision as to whether a particular tribunal will grant a particular type of compensation – in this case, legal costs – can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an

> element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.
>
> *Mowat* at para. 25 (emphasis added)

111. Applying the standard of review analysis set out in *Morgan-Hung* and subsequent cases, the standard of review that applies to the Disclosure Decision is patent unreasonableness. As such, this Court must not interfere unless the Decision is shown to meet one of the four criteria set out in s. 59(4).

C. The Knudsen Affidavit is inadmissible

112. Before proceeding to the review, the Court must correctly identify the proper scope of the record before it. In that regard, Affidavit #1 of Bruce Knudsen, made November 18, 2013, is inadmissible in this judicial review.

113. The scope of the record that is properly before a court on judicial review falls into four categories:

a. Evidence that was before the Tribunal (this includes portions of the Mennie Affidavit, the Phillips Affidavit and the Pritchard Affidavit);

b. Evidence necessary to show a lack of jurisdiction;

c. Evidence relating to allegations of a denial of natural justice (this also captures evidence tendered by the deponents in the Mennie Affidavit, the Phillips Affidavit and the Pritchard Affidavit); and

d. The Tribunal's record of proceedings, as defined in the *Judicial Review Procedure Act.*

SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611, 2011 BCCA 353 at para. 80; *Kinexus* at paras. 16-18; *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, s. 1

114. Mr. Knudsen's affidavit does not fit into any of these categories. It is purely new evidence that was not before the Tribunal in this case. It is inadmissible in judicial review.

D. The Disclosure Decision was not patently unreasonable, and indeed was correct

115. In order for this Court to overturn the Disclosure Decision on the basis that it was patently unreasonable, it must be satisfied that one of the criteria in s. 59(4) of the *Administrative Tribunals Act* have been met. Those criteria are reproduced here for ease of reference:

> ... a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
> (b) is exercised for an improper purpose,
> (c) is based entirely or predominantly on irrelevant factors, or
> (d) fails to take statutory requirements into account.

116. Tim Hortons submits that the Disclosure Decision was patently unreasonable on three bases:

a. The Tribunal's jurisdiction was exercised arbitrarily because it failed to apply the test of arguable relevance (Argument of the Petitioners at para. 121);

b. The Tribunal's discretion was exercised improperly because its purpose was to "give the Complainants an opportunity to examine those documents, and make [their] own selection" of arguably relevant documents (Argument of the Petitioners at para. 122); and

c. The Tribunal failed to take statutory requirements into account, namely the principles of procedural fairness and the test of arguable relevance

set out in the Tribunal's Rules (Argument of the Petitioners at paras. 123-124).

117. None of these arguments demonstrate that the Disclosure Decision was patently unreasonable.

i. The Tribunal did apply a test of arguable relevance

118. Contrary to Tim Hortons' submissions, the Tribunal did articulate and apply a test of arguable relevance in making the Disclosure Decision. It found that ten of the twelve categories of Undisclosed Documents, including the Operating Manual, had been made relevant by the fact that Tim Hortons relied on them in its Application to Dismiss. Clearly, Tim Hortons viewed the Operating Manual as relevant when it relied on its terms to argue that it "did not have any role in the day-to-day operations of the Restaurants at the relevant time".

Phillips Affidavit, Exhibit D (Application to Dismiss at para. 73)

119. A decision that a party seeking to rely on a document must produce that document can hardly be said to be arbitrary.

ii. Tim Hortons has mischaracterised the Tribunal's purpose in making the Decision

120. In its submissions, Tim Hortons repeatedly quotes the Tribunal's ruling that the Workers should be entitled to examine certain documents, including the Operating Manual, out of context. Tim Hortons uses its decontextualized quote to argue that the Tribunal's purpose in making the Disclosure Decision was to delegate its jurisdiction to the Workers.

Argument of the Petitioners at paras. 104, 108, 112 and 114

121. Understood in its proper context, the proposition put forth by the Tribunal is unassailable:

> I am persuaded that most of the requested documents may be relevant to issues raised by the application to dismiss. In that application, [Tim Hortons] says that the complaint should be dismissed without a hearing, on various grounds, and relies on or refers to the documents or the information contained in them as relevant to, and supportive of, that position. While that may (or may not) be the ultimate result, it would be unfair to permit [Tim Hortons] to select from **the documents** the information on which it wishes to rely, without giving the complainants an opportunity to examine **those documents**, and make its own selection of information on which it may wish to rely to resist the application to dismiss. (Emphasis added)
>
> Phillips Affidavit, Exhibit E (Disclosure Decision at para. 13)

122. The "documents" that the Tribunal is referring to are the documents that Tim Hortons relied on in its Application to Dismiss.

123. Put simply, where a party relies on a document in support of its position, she makes the document relevant. Fairness requires it be disclosed to the other party to make her own assessment of its import to the issues between the parties. In this way, the responding party is able to know fully the case against her.

124. The Tribunal's clear purpose in exercising its discretion to order Tim Hortons to produce those documents was to protect the fairness of the proceedings for the Workers, who would otherwise be faced with defending their Complaint against evidence they have not seen. This is not improper, and in fact made the Decision correct.

125. This Court recently held that the Tribunal acted unfairly when it failed to allow a complainant to make submissions based on evidence relied on by the respondents in an application to dismiss her complaint.

Kirk v. Burnaby (City), 2014 BCSC 155

126. In *Kirk,* the Court reviewed a decision of the Tribunal to dismiss a human rights complaint made by the petitioner against the City of Burnaby. The City of Burnaby had applied to dismiss the petitioner's complaint. After the petitioner made her submissions defending her complaint, the City disclosed further documents to her. The petitioner requested that the Tribunal consider additional submissions based on those documents. The Tribunal did not consider any additional submissions.

127. The Court found that the Tribunal acted unfairly in failing to provide a process for the petitioner to make additional submissions. In that regard, the findings of Justice Griffin resonate with the circumstances of this case:

> The facts mentioned in *Baker*, applied here, lead me to conclude that the petitioner was entitled to a high degree of procedural fairness. I conclude that the content of that fairness ought to provide her with the same access to evidence disclosed by the parties' documents as enjoyed by the respondents; and the same opportunity as the respondents to make submissions informed by that evidence.

And later:

> It was not procedurally fair for the Tribunal to consider a final application on the merits when there was such unequal access to the evidence through no fault of the petitioner. As an employee, she could not be expected to have access to records of the employer that might support her complaint or that might refute the respondents' submissions.
>
> *Kirk,* at paras. 57 and 79 (emphases added)

128. Likewise in this case, it would not have been fair for the Tribunal to consider Tim Hortons' Application to Dismiss in circumstances where there was such unequal access to critical evidence. The Tribunal's purpose in exercising its discretion was to safeguard the fairness of the procedure for the Workers. This cannot be described as improper.

129. Before the Tribunal, the only party that could have allowed a greater granularity of analysis of the Operating Manual was Tim Hortons. Beyond a bare assertion that the Operating Manual contained some information that would not be relevant, no argument was provided respecting the entire content of the Operating Manual and which precise portions Tim Hortons sought to have excluded. This information was not put before the Tribunal and was indeed critical for the Tribunal to make any other decision besides the one it ultimately made.

iii. The Tribunal did not fail to take statutory criteria into account

130. Tim Hortons argues that principles of procedural fairness and the Tribunal's Rules of Practice and Procedure create statutory criteria. Neither of these are statutes. There is no evidence that the Tribunal failed to take statutory criteria into account.

iv. The Disclosure Decision was correct

131. In any event, the Disclosure Decision was correct. It was the only fair and reasoned decision that the Tribunal could have made in the circumstances.

132. Again, judicial review is not an opportunity for this Court to re-try a decision made by the Tribunal. It is not a second chance for the parties to make arguments or submissions that they could have, but did not, put forward at first instance. In *Alberta (Information and Privacy Commissioner),* the Supreme Court of Canada cautioned:

> ... parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
>
> ... Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.
>
> *Alberta (Information and Privacy Commissioner)* at paras. 54-55

133. In this case, Tim Hortons has submitted that it was confused about the procedure being followed by the Tribunal, and the meaning of the Disclosure Decision. Its counsel deposes that they understood that further proceedings would address the arguable relevance of various portions of the Operating Manual.

Mennie Affidavit at para. 6

134. Tim Hortons is represented by seasoned counsel who is experienced in appearing before the Tribunal. It is unclear on what basis Tim Hortons may have been led to believe that arguable relevance was not the *very* –indeed the *sole* – issue between the parties in the Application for Disclosure. The Workers had provided detailed written submissions arguing that the Operating Manual must be disclosed because it had been made relevant by Tim Hortons' reliance on its terms. An oral hearing was held, with substantive submissions by both parties' counsel on the issue of arguable relevance. There is no evidence that the Tribunal led the parties to believe there would be another opportunity to make submissions about the scope of disclosure. Indeed, such a process would be needlessly duplicative and inefficient. In oral submissions, counsel for Tim Hortons only asked that matters relating to timelines and conditions to preserve confidentiality be deferred to a second hearing. Counsel for the Workers agreed to defer these matters alone.

Phillips Affidavit at para. 10; Pritchard Affidavit at paras. 10-11

135. After each party completed its submissions, the Tribunal made a decision based on the record before it. This record did not include:

a. Evidence or submissions by Tim Hortons to support an argument that the Operating Manual should be redacted to include only those portions that relate to what Tim Hortons now calls the "Employment Control Element"; or

b. Evidence or submissions by Tim Hortons to support an approach that the Operating Manual be treated as separate documents, with each document separately adjudicated for relevance.

Phillips Affidavit, at para. 9; Argument of the Petitioners at paras. 19-20

136. Tim Hortons now emphasises that it told the Tribunal that it treated the Operating Manual as confidential. With respect, this is irrelevant to the question of whether the Manual was relevant and required to be disclosed. Any concerns about confidentiality can only be relevant to whether terms should apply to its use, an issue on which the Tribunal has yet to rule.

137. The Operating Manual is clearly relevant to the Application to Dismiss. Its terms form part of the Franchise Agreements with the Franchisee. As such, it is central to the determination of whether Tim Hortons is liable for the discrimination in this case. In that regard, the Tribunal has explained:

> There is no universal conclusion that a franchisor is not a proper respondent to a complaint under the *Code* against its franchisee. Each franchise relationship will be governed by the terms of the franchise agreement.
>
> ...
>
> The terms of the franchise agreement are very material to the determination required here ...
>
> *Chárthaigh v. Blenz*, 2012 BCHRT 264 at paras. 24 and 26 (emphasis added)

138. The question of whether Tim Hortons is in an employment relationship with the Workers is a broad one. In *Crane,* the Tribunal articulated the basic principles that apply:

i. "Employ", "employer" and "employment" are to be given a large and liberal interpretation which will best achieve the purposes of the *Human Rights Code*;

ii. The determination of the identity of the employer or employers is a highly fact-specific enquiry; no one "test" can be developed which will serve in all contexts;

iii. While no one "test" can be developed, there are a number of factors or considerations which may be relevant to the determination of employer status. The most important of these include:

a. "Utilization" - ... looks to the question of whether the alleged employer "utilized" or gained some benefit from the employee in question;

b. Control - did the alleged employer exercise control over the employee, whether in relation to the determination of his or her wages or other terms and conditions of employment, or in relation to their work more generally, such as the nature of the work to be performed or questions of discipline and discharge?;

c. Financial burden - did the alleged employer bear the burden of remuneration of the employee?; and

d. Remedial purpose - does the ability to remedy any discrimination lie with the alleged employer? ...

Crane v. British Columbia (Ministry of Health Services), 2005 BCHRT 361, rev'd on other grounds in *Crane, supra*, at para. 79; these principles were recently upheld in *Ismail v. British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079, at para. 268.

139. In *Re. White Spot Ltd.,* the BC Labour Relations Board identified additional indicia that a franchisor and franchisee are "one employer" for the purposes of the *Labour Relations Code,* including:

a. Control over menu prices and food items;

b. Requirements to use specific suppliers and delivery companies, with attendant restrictions on the price of food supplies and control over the profit of the franchisee; and

c. Control over management in the franchise restaurants.

Re. White Spot Ltd., [1995] B.C.L.R.B.D. No. 184 at paras. 49 and 51

140. The above cases indicate that the scope of inquiry here is broad. It contemplates a comprehensive consideration of the degree of control exerted by the franchisor over its franchisee, to determine the franchisor's role in the employment relationship. Even factors like the degree of control over pricing can affect employment, as it sets limits on the franchisee's profitability, which in turn determines wages. The degree of control over employee procedures relating to handling food and customer service can reveal influence over working conditions. As the court explained in *Crane,*

> There can be no doubt that human rights legislation must be interpreted liberally and in a manner consistent with its underlying purposes and its quasi-constitutional status. The *Code* definition of "employment" can and should be interpreted generously and flexibly to further *Code* purposes and protect against or remedy acts of prohibited discrimination. ... courts and tribunals have stretched the meaning of "employment" to ensure that the purposes of human rights legislation are not thwarted in the sense that the targets of discrimination are not left without any remedy. The intent behind such an expansive interpretation is to ensure that the person/entity committing the discrimination does not escape accountability for the discriminatory act by reason of some legalistic technicality based more on form than on substance.
>
> *Crane* at para. 152 (emphasis added); see also *Vancouver Rape Relief Society v. Nixon,* 2005 BCCA 601, at para. 18, leave to appeal to SCC refused, [2006] S.C.C.A. No. 365

141. In this context, and in a context where Tim Hortons relied on it, the Operating Manual is central to the determination of whether the Workers' Complaint against Tim Hortons should proceed. Failure to order the disclosure would have been grounds for

the Workers to successfully challenge the fairness of the Tribunal's proceeding, as the complainant did in *Kirk*. The Tribunal's decision that Tim Hortons was required to disclose it was correct.

E. The process engaged by the Tribunal was fair

142. Procedural fairness in administrative law is concerned with ensuring that:

> ... administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22; see also *Kinexus* at paras. 24-25

143. The question for the court in evaluating issues of procedural fairness is simply: did the tribunal act fairly in all of the circumstances?

> *Administrative Tribunals Act*, s. 59(5); *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCS 55 at para. 52

144. Tim Hortons argues that the Tribunal acted unfairly by failing to "provide *any* mechanism for the Petitioners to limit disclosure of commercially-sensitive material in the [Operating Manual] to those materials that are arguably relevant to the Employment Control Element." With respect, this argument has no merit.

> Arguments of the Petitioners, para. 154 (emphasis in original)

145. The Tribunal engaged in a full process of written and oral submissions on the precise issue of whether the Operating Manual was arguably relevant to the Application to Dismiss. It applied the correct law, and rendered a written decision. In the circumstances, it is difficult to see what additional procedures it could have offered

the parties. The words of Justice Grauer in *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)* apply equally here:

> ... I see no evidence of actual procedural unfairness. The SPCA had a full opportunity to put forward all factors it considered relevant, both in its own reasons and in its submissions before the FIRB. I cannot see that it required a further opportunity. I am satisfied that the SPCA was given a meaningful opportunity in this context to present its case fully and fairly, which is the objective of procedural fairness: *Uniboard Surfaces Inc v. Kronotex Fussboden GmbH and Co* KG, 2006 FCA 398, [2007] 4 FCR 101, at paras 7ff.
>
> *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331 at para. 59

146. To the extent Tim Hortons seeks procedures to protect information it asserts is confidential, the Tribunal proposed a process for submissions on that very issue, which has been declined in favour of this judicial review.

147. Additional assertions of confidentiality and unsubstantiated allegations of harm are unhelpful. The Ontario Superior Court of Justice's comments in another case where Tim Hortons sought a sealing order over certain information are apropos:

> ... I accept that much of the information has been treated by Tim Hortons and its franchisees as confidential – obviously in the ordinary course of their businesses, they would have absolutely no reason to disclose it to third parties or to make it public. This is true in almost every business relationship ...
>
> ... Tim Hortons' evidence of harm is speculative, general and lacking in specifics. ...
>
> *Fairview Donut Inc. et al v. The TDL Group Corp.*, 2010 ONSC 789 at paras. 64-65

148. The Tribunal's process was fair in all of the circumstances. Had the Tribunal deprived the Workers of the opportunity to view and use the Operating Manual to respond to the Application to Dismiss, which Tim Hortons says would have been a

proper result, the Workers would not have the opportunity to know the full case against them and the proceedings would be unfair.

Kirk at paras. 57 and 79

F. In the event that the Court finds the Tribunal erred, the appropriate remedy is to remit the matter back to the Tribunal

149. If the Court finds that the Tribunal erred in certain aspects of its decision, then the appropriate remedy is to send the application back to the Tribunal for reconsideration of those parts of the Disclosure Decision found to be in error.

Judicial Review Procedure Act, s. 5; *Hill* at para. 51

V. CONCLUSION

150. Tim Hortons has not demonstrated any basis for this Court to intervene with the Tribunal's exercise of discretion in ordering disclosure of the Operating Manual. The Tribunal did only what was fair in all of the circumstances.

151. The Workers ask that the petition be dismissed, with costs.

All of which is respectfully submitted.

March 17, 2014

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