Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 8
Date: February 21, 2019
File No.: T1509/5510

Between:

Pamela Egan

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Revenue Agency

Respondent

- and -

Dr. B

Interested Party

Ruling

Member: Edward P. Lustig

[1] This is a ruling on a motion by the proposed Interested Party, Dr. B, for the following relief:

1. An Order granting Interested Party status to Dr. B in this inquiry pursuant to Rule 8 of the *Canadian Human Rights Tribunal Rules of Procedure,* for the limited purpose of this motion;

2. A confidentiality Order pertaining to the disposition of the motion pursuant to s. 52(1) (c) of the *Canadian Human Rights Act* (the "*CHRA"*);

3. An Order setting aside the "Summons to a Witness to Appear Before the Canadian Human Rights Tribunal", dated May 11, 2018 issued to Dr. B (the "Subpoena"), in its entirety.

I. BACKGROUND

[2] Dr. B is a licensed psychiatrist in the Province of Ontario. Since 1992, until present, Dr. B has been Ms. Egan's treating psychiatrist. Ms. Egan and Dr. B maintain an ongoing physician-patient relationship.

[3] On May 21, 2003 Ms. Egan filed a human rights complaint against her employer, the Canada Revenue Agency ("CRA"). She alleged that CRA discriminated against her by failing to accommodate her visual impairment and chronic pain contrary to sections 7 and 14 of the *CHRA*. A brief summary of the facts in this complaint can be found in *Egan v. Canada (Revenue Agency),* 2017 CHRT 33 at paragraphs 5 to 13 (the *"2017 Ruling").*

[4] In the *2017 Ruling*, I ordered that medical documents that were in Workplace Safety and Insurance Board (WSIB) and Workplace Safety and Insurance Appeals Tribunal (WSIAT) files as a result of appeals filed by Ms. Egan concerning a 2009 workplace injury were arguably relevant to this proceeding and I ordered them to be produced. I based my decision on the criteria for determining disclosure requests set out therein at paragraph 40. At paragraphs 40, 41, 42, 44, 45, 47, and 48 I wrote as follows:

> [40] As noted above, the jurisprudence for determining disclosure requests generally relies on the following criteria:
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> - Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case.

- To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession and care of the opposing party prior to the hearing of the matter.

- Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case they are up against and, therefore, adequately prepare for the hearing.

- For that reason, if there is a rational connection or nexus between a document and the facts, issues or forms of relief identified by the parties in the matter, the document should be disclosed pursuant to sections 6(1)(*d*) and 6(1)(*e*) of the *Rules*.

- The party seeking the disclosure must demonstrate that the nexus exists and the documents are probative and be arguably relevant to an issue in the hearing, which is not a particularly high standard.

- The request for disclosure must not be speculative or amount to a "fishing expedition". The documents should be identified with reasonable particularity.

- The disclosure of arguably relevant documents does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process.

[41] The Complainant has put the 2009 workplace injury at issue in this inquiry in alleging that it is a direct result of the Respondent's failure to accommodate and that the workplace injury is relevant to both liability and remedy in this inquiry. The Complainant has been attempting, through the WSIB/WSIAT process, to have it recognized that she developed chronic pain, depression, anxiety and post–traumatic stress disorder as a result of the Respondent's failure to accommodate. But for the WSIB/WSIAT process which resulted in the Respondent receiving the files from these agencies, it would not have become aware of certain elements of the Complainant's situation that may be relevant to this inquiry. In particular, whether medical issues unknown to the Respondent contributed to the delay in providing accommodation.

[42] It is the Tribunal’s view that the Respondent adequately particularized the disputed documents at paragraphs 12, 13 and 14 of its Reply submissions for the purposes of establishing the necessary nexus to satisfy the onus of proving that they are arguably relevant to the issues in this proceeding with respect to both liability and remedies. As such, procedural fairness requires use of the disputed documents to provide the Respondent with a fair opportunity to make its case.

> [44] Second, the Tribunal finds that the extent to which the Complainant's visual impairment required accommodation is directly in issue and essential for the effective resolution of this matter. The Tribunal notes the Complainant's assertion that her medical records extend for decades. This may be true, but the Respondent made precisions that it would require her medical documents from late 2000. The Tribunal finds that this request for disclosure is arguably relevant for the Respondent's defence that the Complainant refused to provide it with sufficient information about her limitations, which prevented it from providing the Complainant with accommodation in a timely manner. It therefore cannot be said that the request amounts to a "fishing expedition" or is not sufficiently particularized.
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> [45] Finally, the Tribunal is of the view that the Complainant's right to privacy over the medical documents is not a bar to disclosure in this case.
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> […]
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> [47] It is well established at law that the party opposing disclosure has the burden of demonstrating that the documents should be privileged (*R. v. National Post*, 2010 SCC 16 at para. 60, [2010] 1 S.C.R. 477; see also *R. v. Gruenke,* [1991] 3 SCR 263 at 293). After a careful review of the Complainant's submissions, the Tribunal finds that the Complainant's submissions are silent on this issue. As such, the Complainant failed to meet her burden of proof. In any event, the Tribunal finds that by putting accommodation of her visual impairment at the center of the complaint, the Complainant has waived any right to privacy she may have had in the medical documents as they pertain to the diagnosis, prognosis and accommodation of her disability that would be necessary on a return to work (*Guay* at para. 45; *Rai* at para. 30; *Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2013 CHRT 19 at paras. 44-45).
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> [48] Furthermore, the Tribunal rejects the Complainant's submissions that such a disclosure order oversteps the provisions in *PHIPA*. Even if the Tribunal were to assume, without deciding, that *PHIPA* applies to federal bodies such as itself, subsection 9(2) of *PHIPA* provides that it does not interfere with the power of a tribunal to compel the production of documents. Thus, it is apparent that the Tribunal's disclosure order does not go beyond *PHIPA's* provisions.

[5] On April 7, 2018 and April 25, 2018, I issued directions respecting the issuance of subpoenas requested by CRA for medical records of various medical practitioners who had examined and treated Ms. Egan during the relevant period of this complaint.

[6] In the April 7, 2018 direction, I determined that CRA satisfactorily established and particularized its need for some of the documents requested in order to fairly respond to allegations made by the Ms. Egan. In particular, I was satisfied that the following documents in the possession of Ms. Egan's medical professionals, which included Dr. B, are arguably relevant for the inquiry and should be produced:

> Documents containing information about medical conditions that the Complainant has raised in the course of the present inquiry. Namely:
>
> > (i) Medical conditions the Complainant alleges were required to be accommodated by the Respondent, and/or,
> >
> > (ii) Medical conditions that were caused or negatively impacted by the Respondent's alleged failure to adequately provide the required accommodation (collectively, the "Medical Records").

[7] In the same direction, I also put in place certain safeguards in response to Ms. Egan's concerns about her health and privacy. For example, with respect to Dr. B's subpoena, I allowed CRA's request for Medical Records, but restricted the timeline to December 31, 2000 rather than date of first treatment (1992) as had been requested by CRA as follows:

> A subpoena requiring that Dr. B, psychiatrist, produce any and all clinical notes, documents and reports pertaining to her treatment of Pamela Egan for post-traumatic stress disorder, depression, and chronic pain syndrome from December 31, 2000. (Member Lustig has determined that December 31st, 2000, is more appropriate than the date of first treatment as it is consistent with his ruling in *Egan v Canada (Revenue Agency)*, 2017 CHRT 33 at para. 3).

[8] To further address Ms. Egan's concerns, I established a process for production which first directed the medical professionals, including Dr. B, to produce an unredacted copy of the Medical Records to Ms. Egan and to me simultaneously and to no one else.

[9] In light of the need to protect Ms. Egan's physical and mental well-being, the process then provided for an assessment of whether any information in the Medical Records produced should be redacted before they were disclosed to CRA. It gave Ms. Egan an opportunity, through her counsel, to raise objections she may have to the

production of the Medical Records and propose redactions if need be; CRA an opportunity to object to the proposed redactions; and Ms. Egan an opportunity to reply, with a final determination to be made by me.

[10] On April 25, 2018, to further protect the Ms. Egan's privacy concerning personal marital matters, I directed one of the other medical professionals, Dr. Walters, to redact such portions from her file that dealt with what was said by Ms. Egan, her spouse or Dr. Walters during marriage counselling, "except portions of clinical notes, documents and reports that indicate what caused the need for marriage counselling".

[11] By letter dated May 17, 2018, Dr. B was served with the Subpoena dated May 11, 2018 ordering her to produce the documents listed at "Schedule A", as follows:

> To produce, as soon as possible, and no later than 30 days after receipt of this subpoena, unredacted copies of the following medical records to The Complainant (Ms. Egan c/o her lawyer David Yazbeck (Raven, Cameron, Ballantyne & Yazbeck LLP, 1600-220 Laurier Ave. W., Ottawa ON K1P 5Z9) and to the Canadian Human Rights Tribunal (c/o Member Edward P. Lustig (CHRT, 160 Elgin Street, 11th Floor, Ottawa ON K1A 1J4), simultaneously, and to no one else:
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> > 1. Any and all clinical notes, documents and reports pertaining to the treatment of Pamela Egan for post-traumatic stress disorder, depression, and chronic pain syndrome from December 31, 2000.

[12] In June and July of 2018, Ms. Egan's counsel wrote to the Tribunal requesting the directions and subpoenas to the medical practitioners be amended to provide for the redaction of personal information of persons other than Ms. Egan and also requesting whether the subpoena issued to Dr. B (and possibly the subpoenas issued to other medical practitioners) ought to be amended or set aside based on correspondence that Mr. Yazbeck had received from Ms. Burt, counsel for Dr. B, concerning the state of Ms. Egan's health and her capacity to continue to participate.

[13] With respect to the latter request referred to in paragraph 12 above, the parties were informed by correspondence from the Tribunal dated July 5, 2018 that I was of the view that this request should only be dealt with by the Tribunal if Dr. B (and any other medical practitioner subpoenaed) brought a proper application to the Tribunal as the

Tribunal had not heard from Dr. B on this request or from any other medical practitioner. The correspondence from the Tribunal also added that if there were other medical practitioners subpoenaed who also wished to make such an application it would be most expedient and practical if the applications were joined.

[14] In a ruling dated October 17, 2018, *Egan v Canada (Revenue Agency)* 2018 CHRT 29 (the "*2018 Ruling*"), I directed the medical practitioners, including Dr. B, to redact the names and addresses of third parties from the notes, documents and reports that were subpoenaed and forward the notes, documents and reports subpoenaed to counsel for Ms. Egan and the Tribunal forthwith and before November 16, 2018. At paragraphs 26, 27 and 28 I wrote as follows:

> [26] I am satisfied that procedural fairness requires that the Respondent be able to properly respond to the Complainant's allegations that it caused or aggravated the Complainant's psychotraumatic conditions, including post-traumatic stress disorder, depression and chronic pain syndrome and as a result is liable for damages. To the extent that there is third party information in any of the clinical notes, documents and reports concerning the Complainant that are being subpoenaed in accordance with the Tribunal's existing directions, I find that the third party information is more likely than not connected to the Complainant's health conditions, since there would not seem to be any other reason for including them in notes, documents and reports about the Complainant. Such information, which is not known to the Respondent, may attribute the causes of the psychotraumatic conditions alleged by the Complainant to parties other than the Respondent, which clearly would be arguably relevant to these proceedings.
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> [27] Whether the third party information is actually relevant to these proceedings is another question that the Tribunal will decide according to the procedure adopted by the Tribunal in its directions, which follows the procedure adopted in the *Guay* decision cited by both parties. In my opinion, the procedure provides the parties with proper, reasonable and fair protection for privacy concerns on the one hand and the need to be able to fairly respond to allegations on the other hand. That procedure will allow only counsel for the Complainant and the Tribunal to initially examine the unredacted documents to determine whether to propose redactions of information that is not relevant. Only then will the Respondent be given an opportunity to challenge the proposed redactions, based upon a general description of the redactions provided by the Tribunal but without actually examining the information. Ultimately, if the issue is unresolved between the parties, the Tribunal will make a ruling on whether the proposed redactions are appropriate or not based upon the relevance of the information to the

> proceedings. That being said, the Tribunal is agreeable to redacting the names and addresses of third parties by those medical practitioners subpoenaed who have not yet produced the notes, documents and reports subpoenaed to the Complainant's counsel and the Tribunal.
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> [28] Additionally, to further protect privacy interests in appropriate circumstances it is also open to the parties to seek confidentiality orders from the Tribunal of information produced and disclosed in this case.

[15] In the *2018 Ruling*, I also adjourned the hearing for six months on the basis of Ms. Egan's health issues as attested to in letters from Dr. B and Dr. Leggett, Ms. Egan's family physician, but did not suspend all proceedings as had been requested by Ms. Egan.

[16] On October 29, 2018, Dr. B gave the Tribunal notice of the motion giving rise to the instant ruling. The Tribunal has not heard from any other medical practitioner who received a subpoena requesting that any subpoena issued to them be set aside.

[17] It is Dr. B's opinion that Ms. Egan suffers from, among other issues, Post-Traumatic Stress Disorder ("PTSD") and major depression.

[18] In Dr. B's opinion, psychotherapy is the only effective treatment modality that Dr. B can use with Ms. Egan. Dr. B has had, and continues to have, serious medical concerns with respect to the stressors to Ms. Egan associated with this matter before the Tribunal.

[19] As Ms. Egan's treating psychiatrist, it is Dr. B's opinion that the production, disclosure, provision, and/or publication of Ms. Egan's Medical Records will result in serious risk to Ms. Egan's mental and/or emotional health, in particular to her treatment and recovery. She objects to the production and disclosure of Ms. Egan's Medical Records in any manner because she is of the opinion that this will likely harm Ms. Egan.

[20] More specifically, Dr. B is of the opinion that production and/or disclosure of Ms. Egan's Medical Records will result in the following significant harm to Ms. Egan:

a. It will aggravate Ms. Egan's conditions of PTSD and major depression;

b. It will destroy the psychotherapeutic relationship that Ms. Egan and Dr. B have that is necessary for Ms. Egan's ongoing treatment and recovery, and in particular to the psychotherapy necessary for treatment of PTSD and major depression; and

c. It will destroy the trust that Ms. Egan has placed in Dr. B as her treating physician.

[21] It is Dr. B's opinion that the mere prospect of production of the Medical Records has already served to aggravate Ms. Egan's conditions of PTSD and major depression, and has adversely affected her treatment. In particular, Ms. Egan has stopped discussing issues relevant to her condition and treatment, and has become wary of Dr. B taking notes. Further, Ms. Egan has experienced difficulty in attending medical appointments out of fear the records will be produced. Dr. B is of the opinion that this is counter-productive to Ms. Egan's therapy, and is dangerous with respect to her treatment and recovery. She is of the view that actual production of the Medical Records would only aggravate matters further, in a fashion detrimental to her treatment and recovery.

[22] Dr. B is of the opinion that in the event the Medical Records are ordered to be produced, she would be, and remains, seriously concerned about Ms. Egan's personal safety, including with respect to the risk of suicide.

II. ISSUES

[23] The issues in this motion are as follows:

a. Should Dr. B be granted status as an Interested Party for the limited purpose of this motion?

b. Should a Confidentiality Order be issued pertaining to the disposition of this motion?

c. Should the Subpoena be set aside?

III. PARTIES' POSITIONS ON GRANTING INTERESTED PARTY STATUS TO DR. B

[24] Ms. Egan and CRA in their responses to the submissions of Dr. B in this motion do not object to her request for Interested Party status. Under the circumstances, I see no reason to refuse the request for Dr. B to be granted status as an Interested Party for the limited purpose of this motion and will issue the requested Order.

IV. PARTIES' POSITIONS ON THE CONFIDENTIALITY ORDER

[25] Ms. Egan, in her response to the submissions of Dr. B in this motion, does not object to the request for a Confidentiality Order. CRA also does not object, in principle, to the request for a Confidentiality Order, but submits that the request for the Order has not been sufficiently particularized and reserves the right to make further submissions on the nature of the Confidentiality Order requested. That said, CRA is agreeable to anonymizing names in the decision to protect and safeguard the information of third parties. Under the circumstances, since Dr. B has not in her Reply submissions responded to the request for further particulars, while I generally agree with the request for a Confidentiality Order, I also agree that it needs to be further particularized.

V. PARTIES' POSITIONS ON WHETHER THE SUBPOENA SHOULD BE SET ASIDE

[26] The rest of this ruling up to paragraph 72 will therefore deal with whether the Subpoena should be set aside.

(i) Dr. B's Initial Submissions:

[27] Dr. B's arguments on this issue are related to the common law of privilege, as well as Ontario's *Personal Health Information Protection Act (*"*PHIPA*"*)* and *Mental Health Act.*

[28] Dr. B relies on *McInerney v. McDonald,* 1992 CanLII 57 (SCC) ("*McInerney"*) for her position that she owns the Medical Records, and that non-disclosure of a patient's medical records by a physician may be warranted where disclosure of the contents of the records may be harmful to the patient or a third party. She further cites *Wong v. Grant Mitchell Law Corp.,* 2015 MBQB 88 as recognizing the existence of a "therapeutic privilege" (at para. 175), based on the Supreme Court's decision in *McInerney.*

[29] Dr. B's evidence, as noted above, is that the production of the Medical Records will likely cause serious harm to Ms. Egan, and that the mere potential for production of the

Medical Records has already aggravated Ms. Egan's health. Dr. B notes that this evidence has not been contested.

[30] Dr. B also points to s. 52(10)(e)(i) of *PHIPA* which provides an exception to an individual's right of access to their personal information under the custody or control of a health information custodian in cases where granting access could reasonably be expected to "result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person."

[31] Dr. B acknowledges that s. 41(1)(d) of *PHIPA* allows her to disclose personal health information for the purposes of complying with "a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information." However, she argues that this section is merely permissive in nature and must give way to the specific concern about risk of harm.

[32] Dr. B also argues that Ontario's *Mental Health Act,* which applies to persons under the jurisdiction of psychiatric facilities, recognizes the significance of risk of harm to patients by the production of personal health information. Under the *Mental Health Act,* a physician can express in writing that the disclosure of personal health information is likely to result in harm to the treatment or recovery of the patient, upon which a confidential hearing is held to determine the issue. The disclosure, transmittal or examination of the information will then not be undertaken unless it is determined that it is "essential in the interests of justice to do so" (s. 35(7)).

[33] In addition to her argument of therapeutic privilege, Dr. B submits the Medical Records should be protected by "case-by-case privilege." In doing so, she relies on the Supreme Court of Canada's decision in *M. (A) v. Ryan,* (1997) 1 SCR 157 ("*Ryan"*), which addressed case-by-case privilege pertaining to medical records sought to be produced in a civil action.

[34] In *Ryan,* the Supreme Court noted that for case-by-case privilege, communications are not privileged unless the party opposing disclosure can show they should be privileged according to the four-part Wigmore test:

1. The communication must originate in a confidence.

2. The confidence must be essential to the relationship in which the communication arises.

3. The relationship must be one which should be "sedulously fostered" in the public good.

4. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[35] Dr. B asserts that the first three Wigmore criteria are met. The Medical Records were forged in confidence essential to the fiduciary, therapeutic, psychiatrist-patient relationship "sedulously fostered" over 25 years between Dr. B and Ms. Egan.

[36] As to the fourth Wigmore criteria, Dr. B notes paragraph 29 of *Ryan:*

> (29) The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

[37] Dr. B says that the outcome of the fourth Wigmore criteria will depend upon all the circumstances of each case. In this case, Dr. B argues that the interests in non-disclosure of the Medical Records include: injury to Ms. Egan's ongoing relationship with Dr. B; Dr. B's future treatment of Ms. Egan; Ms. Egan's health; the effect that a finding of no privilege would have, including on other persons seeking psychiatric treatment, and on psychiatrists' ability to provide treatment; the societal interest in ensuring individuals are

able to obtain treatment; and Ms. Egan's privacy interest, including the value of privacy under s. 8 of the *Canadian Charter of Rights and Freedoms.*

[38] Essentially, Dr. B reiterates her earlier arguments that Ms. Egan will suffer harm should the Medical Records be produced, and indeed has already suffered harm from the mere possibility that the Medical Records may be produced. Dr. B says that the production of the Medical Records may result in her no longer being able to treat Ms. Egan, which would put Ms. Egan's recovery at risk. Dr. B says that partial production will not mitigate this risk.

[39] Dr. B acknowledges that the Supreme Court ordered disclosure in *Ryan,* but distinguishes *Ryan* from the instant inquiry. She notes that *Ryan* involved a claim for damages for sexual assault, rather than a human rights complaint. Dr. B also says that in Ms. Egan's case, there are other health care professionals who may produce documents that can assist the Tribunal, such that the Medical Records that could be produced by Dr. B would not be necessary. Finally, Dr. B asserts there is evidence that Ms. Egan has been traumatized in the past by non-consensual production of medical records, whereas there was no evidence of similar prior trauma in *Ryan.*

[40] Dr. B concludes that in all the specific circumstances of this case, the balancing of the parties' interests weighs in favour of protecting the Medical Records in the interest of Ms. Egan's health.

(ii) Ms. Egan's Submissions:

[41] Ms. Egan provided only brief submissions in the form of a letter from her counsel, and no legal arguments.

[42] With respect to the substantive issues raised in the motion – which is to say, Dr. B's request for an order setting aside the Subpoena – Ms. Egan's position is that the Subpoena should be set aside "at this time" in light of Ms. Egan's current medical condition. However, Ms. Egan submits that this should not preclude the parties from seeking production of, and/or introducing, evidence which is the subject of the Subpoena at some future date.

(iii) CRA's Submissions:

[43] CRA notes Dr. B's position that she owns the Ms. Egan's Medical Records, relying on *McInerney*. The CRA notes that *McInerney* was cited in an Ontario Court of Appeal decision, *Ontario (Human Rights Commission) v. Dofasco Inc.,* 2001 CanLII 2554 (ON CA) ("*Dofasco"*) to stand for the proposition that the complainant had a general right of access to her medical records, which is "consistent with the general proposition in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them" (*Dofasco* at para. 50).

[44] CRA argues that Dr. B has improperly relied on both *PHIPA* and the Ontario *Mental Health Act.*

[45] CRA notes that s. 41(1)(d) of *PHIPA* permits a health information custodian to disclose personal health information to comply with "a summons, order or similar requirement." Further, s. 9(2)(d) of *PHIPA* provides that "nothing in this *Act* shall be construed to interfere with…the power of a court or a tribunal to compel a witness to testify or to compel the production of a document."

[46] With respect to the *Mental Health Act,* CRA argues that it applies to psychiatric facilities, circumstances that do not exist in the instant case.

[47] CRA agrees with Dr. B that the Medical Records meet the first three elements of the Wigmore Test, as adopted by the Supreme Court of Canada in *Ryan*.

[48] However, CRA submits that Dr. B does not meet her burden on the fourth part of the test, which is to say, the interests served by protecting Ms. Egan's communications from disclosure do not outweigh the interest in getting at the truth and disposing correctly of the litigation.

[49] CRA reiterates its previous views that the information is highly relevant, considering that Ms. Egan is seeking substantial damages based on conditions that she attributes to CRA. Further, records from other medical professionals will not assist the Tribunal to the same degree as Dr. B's, because Dr. B is Ms. Egan's primary treating psychiatrist and

therefore can provide records that are uniquely comprehensive in relation to the Complainant's psychiatric conditions.

[50] While the Tribunal has recognized that parties have a right to privacy and confidentiality with respect to their medical records, CRA says this right to privacy and confidentiality is limited where a party puts his or her health at issue before the Tribunal. CRA relies on *Guay v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 34 ("*Guay*"), *Palm v. I.L.W.U., Local 500,* 2012 CHRT 11 ("*Palm*") and *MacEachern v. Correctional Service Canada,* 2014 CHRT 31. The CRA also cites the Tribunal's decision in *McAvinn v. Straight Crossing Bridge Ltd.,* 2001 CanLII 38296 (CHRT) ("*McAvinn*"), which quotes *Hay v. University of Alberta et al,* 1990 CanLII 2619 (AB QB): "the right to confidentiality is then eclipsed by the right of those who face the action to know the basis and scope of the claim being advanced" (*McAvinn* at para. 5).

[51] CRA concludes by saying that the framework and safeguards put in place by the Tribunal in its directions issued on April 7, April 25 and October 17 are sufficient to protect the privacy of Ms. Egan and any third parties, while at the same time providing the CRA with sufficient access to the arguably relevant information it needs.

(iv) Dr. B's Reply Submissions:

[52] Dr. B clarifies that her motion is not about the privacy rights of Ms. Egan, but rather about Dr. B's professional rights and obligations in circumstances in which the production of medical information could, in her opinion, seriously harm her patient. While CRA says that the Tribunal orders have struck "the right balance", Dr. B says there can be no right balance when the production of the Medical Records will lead to harm to the patient. The only relief that will alleviate Dr. B's concerns in this regard is a complete setting aside of the subpoena.

[53] Dr. B distinguishes the jurisprudence relied upon by CRA, particularly *Guay*, on the basis that there was no risk of serious harm to the patient/complainant in those cases, and the person objecting to the disclosure was the complainant themselves, not the treating physician.

[54] Dr. B refers to the three step-process found in paragraph 10 of *Palm*:

> [10] To make a determination as to whether documents should be disclosed, the Tribunal has identified the following three step process: (1) determine whether the information is "likely to be relevant", that is, the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute; (2) without examining the documents, determine whether there is a compelling reason to maintain the privacy of the documents; and (3) if the Tribunal is unable to resolve the matter without examining the material, then it should inspect the documents and decide whether the documents should be produced (see *Day v. Canada (Dept. of National Defence),* (December 6, 2002), T627/1501 and T628/1601 Ruling No. 3, at para. 7 (CHRT), and, *Guay v. Royal Canadian Mounted Police,* 2004 CHRT 34, at para. 44 (*Guay*).

[55] Dr. B says that in all the cases relied upon by CRA, the Tribunal considered only the first step. Dr. B says that the Tribunal did the same thing in the instant case in the *2018 Ruling*. Now that the Tribunal has the benefit of Dr. B's evidence that even initiating the disclosure process risks serious harm to Ms. Egan, Dr. B argues that this risk of harm is a "compelling reason" under step two of the *Palm* test to not order production.

[56] Dr. B reiterates her argument that there exists both common law "therapeutic privilege" in the Medical Records, and common law "case-by-case privilege."

[57] Dr. B notes CRA's reliance on *Dofasco*, but distinguishes it. *Dofasco* did not involve a third party objecting to disclosure (as only the parties had been ordered to disclose information), nor did it consider the exceptions outlined by the Supreme Court of Canada in *McInerney* relating to when a physician can refuse to give a patient access to his or her medical records.

[58] With respect to the Ontario *PHIPA* and the Ontario *Mental Health Act,* Dr. B says that she is not relying on these pieces of legislation as being dispositive of the motion, but rather as signalling the Ontario legislature's recognition of the medical reality of "therapeutic privilege". Indeed, Dr. B cites s. 9(2)(b) of *PHIPA,* which provides that "nothing in this Act shall be construed to interfere with…any legal privilege, including solicitor-client privilege…"

[59] On the issue of the fourth part of the Wigmore Test, Dr. B says that CRA has no evidentiary basis for its submissions that "the interests served by protecting the Complainant's communications from disclosure do not outweigh the interest in getting at the truth and disposing correctly of the litigation." CRA has not seen the Medical Records and therefore is unable to assess their utility. Further, the Tribunal must critically consider the evidence of Dr. B relating to the risk of harm to Ms. Egan posed by the production and disclosure of the Medical Records.

[60] Dr. B reiterates that her evidence is uncontested, and provides first-hand knowledge of Ms. Egan's mental state and the harm she may suffer should the Medical Records be produced. The Tribunal should act based on uncontested medical evidence, and the concerns about significant harm should take priority above all else.

[61] Dr. B submits it would not be fair to her, or procedurally proper, to have the Subpoena set aside temporarily or on a limited basis because this would create a "state of flux" that would be contrary to the proper administration of justice and the principle of finality.

VI. ANALYSIS

[62] For the reasons that follow, I will not set aside the Subpoena as I have already determined in the April 7, 2018 direction, as referred to in paragraph 6 above, that CRA has satisfactorily established and particularized its needs for the production of the subpoenaed Medical Records in order to fairly respond to allegations made by Ms. Egan against CRA, and that I was satisfied that the documents were arguably relevant in these proceedings. This is consistent with my *2017 Ruling*, as quoted in paragraph 4 above. It is also consistent with my *2018 Ruling*, as quoted in paragraph 14 above, concerning the need to be fair to CRA in providing it with an opportunity to obtain arguably relevant documents in order to know the case it has to meet in response to allegations by Ms. Egan that it failed to accommodate her disability, and that its actions actually aggravated her medical conditions and thereby caused her to suffer substantial damages.

[63] The submissions made by Dr. B do not move me to expose CRA to these allegations without CRA being able to have a fair opportunity to answer them by obtaining the arguably relevant subpoenaed Medical Records, within the process I have already established. For example, if the subpoenaed Medical Records revealed that there were other causes than those attributable to CRA's alleged discriminatory actions that contributed to the harm to Ms. Egan's health, or that there were opportunities for accommodation of Ms. Egan's health problems that were available but not made known to CRA to be able to act on in a timely manner, it could have an impact on the disposition of this case *vis-à-vis* both liability and remedy. As such, in using the case-by-case analysis advocated by Dr. B in respect of the fourth criteria of the Wigmore test, in my opinion, I am satisfied that protecting the subpoenaed Medical Records from disclosure does not outweigh the interest in getting to the truth and disposing correctly of the litigation. The subpoenaed Medical Records, in my opinion, should be produced to be fair to CRA in knowing the case it has to meet since Ms. Egan has put her health at the centre of this case (see *Guay*, *Palm* and *McAvinn*).

[64] In my view, as a general proposition, it is fundamentally unfair for a person to proceed with litigation against another person claiming damages for personal injuries allegedly caused by the other person but not provide the other person with disclosure and production of available arguably relevant medical documents that are related to the allegations because the disclosure and production of the documents would be harmful to the health of the person asserting the claim. Persons asserting such claims simply can't have it both ways. Either they proceed with their claims and disclose the arguably relevant documents to the other side, or they should not be allowed to proceed without disclosure of the arguably relevant documents. Otherwise, even in cases like this one where the disclosure and production of arguably relevant medical documents gives rise to a *bona fide* medical concern for the health and safety of the Complainant, defending such actions could be made impossible, or at least very difficult, if the case was allowed to proceed in the absence of the production of arguably relevant medical documents.

[65] While I understand that in this motion it is Dr. B rather than Ms. Egan who does not want the subpoenaed Medical Records produced because of her opinion that there is

serious danger to her patient's life if they are produced and her responsibility to avoid such danger, the unfairness to the Respondent of not producing the Medical Records, in the event that Ms. Egan's case was allowed to proceed, is the same as if it was Ms. Egan who was objecting to the production.

[66] In my opinion, the main case cited by Dr. B for therapeutic privilege is distinguishable from the present case. Unlike this case, in *McInerney* the Complainant was seeking to access her own medical records from her physician. As such, "...the interest of pursuing the truth and disposing correctly of the litigation" as per the fourth Wigmore criteria referred to in paragraph 29 of *Ryan* cited by Dr. B was not invoked in terms of balancing the rights of a Respondent to know the case made against the Respondent for damages allegedly caused to a Claimant's health.

[67] Further, for the reasons provided by the CRA as referred to in paragraph 45 above as well as in paragraph 48 of the *2017 Ruling* quoted in paragraph 4 above I do not believe that *PHIPA* serves as a bar to disclosure, in light of the Subpoena. Nor do I believe that the *Mental Health Act* is relevant to this case as it applies to psychiatric facilities not present in this case.

[68] As I understand Dr. B's position, it is that Ms. Egan would be exposed to serious danger to her life if the subpoenaed Medical Records were produced given Ms. Egan's current state of health. Dr. B's evidence in this regard is uncontested. It follows that if it was not for this danger to her life because of the state of Ms. Egan's health, Dr. B would not have brought this motion and would not be objecting to the Subpoena. Further, if Ms. Egan's state of health improved to the point that Dr. B's concerns about producing the subpoenaed Medical Records no longer existed, there would be no reason for Dr. B to continue to object to the production of the subpoenaed Medical Records.

[69] As such, I don't view this as an exercise of balancing the need to produce the documents to protect the Respondent's right to fairness in defending itself from the allegations **against** the need to not produce the documents to protect Ms. Egan's life (which, of course, is of paramount importance to me). Rather, I see this as an exercise of

balancing the protection of the Respondent's right to fairness **together with** the protection of Ms. Egan's life.

[70] Accordingly, while I will order the production of the subpoenaed Medical Records in order to provide for their preservation now for when they may be needed and used in the future in this case, I am also mindful of the concerns expressed by Dr. B with respect to Ms. Egan's health and safety and to Dr. B's professional obligations to Ms. Egan in this regard. To that end, I will again attempt to put into place a further process that is fair to CRA, Ms. Egan and Dr. B by balancing their interests in a manner that I feel is reasonable under the circumstances as explained below.

[71] Dr. B will produce copies of the subpoenaed Medical Records within 60 days of the date of this ruling but will seal them herself and then will immediately forward them to the Tribunal and no one else. The Tribunal will store the sealed Medical Records so that no one other than Dr. B will have seen them until such time as Dr. B advises the Tribunal and the parties that, in her opinion, it is safe for Ms. Egan for the Medical Records to be unsealed and produced to me and to the parties in the manner and in accordance with the process that I have previously directed and ruled. In the meantime, this case will not be permitted to proceed until the subpoenaed Medical Records are unsealed and so produced, unless both CRA and Ms. Egan consent to the case, or part of the case, proceeding without the unsealing and production of the subpoenaed Medical Records.

VII. ORDERS

[72] Dr. B is granted Interested Party status for the limited purpose of this motion;

[73] Dr. B shall provide additional particulars regarding her request for a confidentiality order under s. 52 of the CHRA. The Complainant and the Respondent will be given an opportunity to respond, and Dr. B will be given an opportunity to reply. In their submissions, the parties should address, inter alia, the nature of the confidentiality order sought, such as whether it will apply to the ruling, the record, both, or other; as well as whether the confidentiality order should apply to the documents in their entirety or in part (e.g. anonymizing documents, redacting information). In the interim, pursuant to s. 52 of

the CHRA, I order that the parties treat this ruling, and any documents filed with the Tribunal in relation thereto, as confidential until such time as I direct otherwise, subject to any judicial review proceedings that may be taken under the Federal Courts Act.

[74] Dr. B shall produce copies of the subpoenaed Medical Records to the Tribunal within 60 days of the date of this Ruling, in accordance with the following requirements:

- Dr. B shall send copies of the subpoenaed Medical Records to the Tribunal in a double envelope, with the inner envelope sealed to her satisfaction and marked with the Tribunal's case file number ("T1509/5510") as well as "Confidential: Not to be Opened Except on Direction from Edward P. Lustig, Tribunal Member".

- The sealed, subpoenaed Medical Records shall be retained by the Tribunal Registry in a locked filing cabinet, separate from other Tribunal case files.

- In order to guard against the risk of destruction of the sealed, subpoenaed Medical Records that may result from circumstances beyond the Tribunal's control, for example in the event of a fire or natural disaster, Dr. B shall retain in her possession the original Medical Records provided to the Tribunal until such time as the Tribunal directs otherwise.

[75] The proceedings shall remain adjourned until such time as Dr. B has advised me and the parties that, in her opinion, it is safe for Ms. Egan for the subpoenaed Medical Records to be unsealed and produced to me and the parties at which time the subpoenaed Medical Records will be unsealed and produced to me and the parties in accordance with the process I have previously directed and ruled, unless both the Complainant and the Respondent consent to the case, or part of the case, proceeding without the unsealing and production of the subpoenaed Medical Records.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 21, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1509/5510

Style of Cause: Pamela Egan v. Canada Revenue Agency

Ruling of the Tribunal Dated: February 21, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

David Yazbeck, for the Complainant

Gillian Patterson, Laura Tausky and Nicole Walton, for the Respondent

Glynnis P. Burt and Scott Robinson, for the Interested Party