

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Citation:** 2019 CHRT 19

**Date:** May 1, 2019

**File No.:** T2220/4217

**Between:**

**T.P.**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian Armed Forces**

**Respondent**

**Ruling**

**Member:** Colleen Harrington

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## I. Introduction

[1] The Complainant T.P. has twice tried to enroll in the Canadian Armed Forces (CAF). As part of its screening process, the CAF requires applicants to complete a timed written test called the Canadian Forces Aptitude Test (CFAT). Applicants must achieve a minimum score on the CFAT in order to move on to subsequent stages of the application process. T.P. was diagnosed with a learning disability as a child, which he says affects his ability to write timed written tests like the CFAT. It is agreed that, at all times relevant to this complaint, the CAF did not permit any form of accommodation to applicants writing the CFAT.

[2] At issue in this complaint is whether the CAF's insistence that all candidates pass the CFAT without any form of accommodation is a *prima facie* discriminatory policy, contrary to section 10 of the *Canadian Human Rights Act* (the *Act*), and whether the CAF contravened the Complainant's right to be free from discrimination in employment, contrary to section 7 of the *Act*. If *prima facie* discrimination is proven, the CAF has said it will argue that the CFAT is a *bona fide* occupational requirement (BFOR).

[3] This Ruling deals with the CAF's Motion for an Order compelling the Complainant to produce certain medical documents relating to his learning disability, and to his history of receiving treatment for psychiatric conditions, as well as his psychological wellbeing. The Motion is opposed by the Complainant and the Commission, with the exception of those documents that relate to the learning disability.

[4] I am of the view that the CAF's request for the production of medical documents is overly broad and I decline to order production of the requested documents relating to the Complainant's psychiatric and psychological treatment. I agree to order production of documents relating to the Complainant's learning disability and any cognitive intellectual disability that may affect his ability to write the CFAT, on the conditions outlined in the Order below.

[5] In order to provide context for my decision with respect to this Motion I will start by summarizing the positions of the parties.

## **II. Positions of the Parties with respect to the CAF's Motion for the Production of Documents**

### **A. CAF**

[6] The CAF's Notice of Motion requests that the Tribunal issue an Order compelling the Complainant to produce the following documents:

- i) Any and all documents, including but not limited to electronic documents, held by Dr. David Warner which were relied upon when Dr. Warner completed his letter dated June 1, 2009. These documents include, but are not limited to, his previous/initial report on the complainant's past psychiatric condition;
- ii) Any and all documents, including clinical records, test results and reports, including but not limited to electronic documents, held by Dr. David Warner which relate to the Complainant's learning disability and psychological wellbeing;
- iii) Any and all documents, including but not limited to electronic documents, held by Dr. Owen James which relate to the Complainant from the start of his treatment to the present;
- iv) Any and all documents, including but not limited to electronic documents, held by Dr. Nur Shaw, Child and Adolescent Psychiatrist, and the Fraser Health Authority, which relate to the Complainant's psychological and psychiatric diagnosis, treatment and follow-up;
- v) A report from Medical Services of British Columbia providing a description of the Complainant's medical treatments from 2009 to the present;
- vi) A report from the College of Pharmacists, PharmaNet providing a description of medication dispensed to the Complainant from 2009 to the present.

[7] The CAF argues that, because some of the documents already disclosed by the Complainant refer to treatment for past psychiatric conditions, these conditions must be related to the Complainant's learning disability, and therefore to his need for accommodation when writing the CFAT. Specifically, the CAF notes that the Complainant has disclosed, "documents indicating that he has a permanent cognitive intellectual disability and a history of psychiatric illness including anxiety disorders."<sup>1</sup> It says, "the

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<sup>1</sup> 2018-11-08 – Respondent's Submissions (CAF's Motion for Production of Documents) at para. 21.

documents suggest that his medical and psychological condition are related to his learning disability as indicated in the 2001 psycho-education report.”<sup>2</sup>

[8] The documents that, in the CAF’s view, show a link between the Complainant’s learning disability and his past psychiatric conditions range from 2001 to 2015 and include:

- a) A 2001 Psycho-Educational Report from the Complainant’s school district;
- b) An undated summary signed by Dr. Shaw, a Child and Adolescent Psychiatrist at Surrey Memorial Hospital, that contains both a Psychology Summary and a Psychiatry Summary;
- c) An August 5, 2005 letter from Dr. Shaw to the Canadian Firearms Centre, supporting the Complainant’s application for a possession and acquisition licence for weapons used in hunting game;
- d) Information provided to the CAF on April 12, 2010 by Dr. James, PhD, a Registered Psychologist who had seen the Complainant from May 2004 to February 2005;
- e) A letter by Dr. James dated May 16, 2012 to the Chief Firearms Officer, in support of the Complainant’s application for a possession and acquisition license for firearms;
- f) A June 1, 2009 letter from the Complainant’s family physician, Dr. Warner. The letter says it is an addendum to his report on the Complainant’s past psychiatric condition;
- g) An October 29, 2015 letter from Dr. Warner regarding the Complainant’s limitations at work and workplace accommodation needs;
- h) A November 12, 2015 letter from Dr. Baker, a locum for Dr. Warner, writing in support of the Complainant’s application to the CAF.

[9] I will describe the contents of these documents in more detail in the Analysis section of this Ruling.

[10] In support of its Motion, the CAF relies on subsection 50(1) of the *Act*, which provides that all parties must be given a full and ample opportunity to appear at the inquiry, present evidence, and make representations. It also relies on Rules 6(1)(d) and 6(5) of the

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<sup>2</sup> *Ibid*, at para. 19.

Tribunal's *Rules of Procedure (Rules)*, requiring all parties to list and produce, on an initial and ongoing basis, all documents in their possession, for which no privilege is claimed, and that are "arguably relevant" to a fact, issue, or form of relief sought in the case. The CAF notes that Rule 1(2) says the Tribunal's *Rules* are to be liberally applied so as to advance their purpose of ensuring: (a) all parties have a full and ample opportunity to be heard; (b) arguments and evidence are disclosed in a timely and efficient manner; and, (c) the proceedings are conducted as informally and expeditiously as possible.<sup>3</sup>

[11] In order to be "arguably relevant" pursuant to Rule 6, there must be a nexus or rational connection between the document sought and a fact, issue, or remedy identified by a party to the proceeding.<sup>4</sup>

[12] The CAF also submits that, while document requests should not be speculative or amount to a fishing expedition, the threshold for the production of arguably relevant documents is low, and the trend is towards broader disclosure at this stage. The CAF points out that, simply because a document is ordered to be produced does not mean it will necessarily be admissible into evidence, or that the Tribunal will give it significant weight.<sup>5</sup>

[13] The CAF says that the Complainant's, "Statement of Particulars, the issues raised therein and the disclosure already provided meet the low threshold of arguable relevance."<sup>6</sup> In addition to the Complainant's CFAT scores from 2009 and 2014, the CAF says the following allegations in the Complainant's Statement of Particulars are relevant to its argument:

- the Complainant has a "mild academic learning disability" that negatively impacts his ability to pass timed written tests;
- he provided doctors' notes saying he has a disability that requires accommodation;

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<sup>3</sup> The purpose of the *Rules* is set out in Rule 1(1).

<sup>4</sup> *Turner v. CBSA*, 2018 CHRT 1 at para.30; *Clegg v. Air Canada*, 2017 CHRT 27 at para.21.

<sup>5</sup> *Turner, ibid* at paras.30-33; *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at para.31.

<sup>6</sup> *Supra* note 1 at para. 22.

- he says he would have become a member of the CAF but for the discriminatory policies or practices of the CAF; and
- he says he has experienced pain and suffering and hurt feelings, as well as wage loss for which he claims compensation.

[14] The CAF also points out that a psychologist has been retained to conduct testing with the Complainant in February of 2019, in order to prepare an expert report for the Tribunal's inquiry into this complaint. It says the Complainant's previous psycho-educational report, and his medical, psychiatric and psychological history will be relevant to any expert assessments of his learning disability and accommodation needs, and that the CAF is entitled to respond to this expert report, which may necessitate an expert retained by the CAF.

[15] Based on all of this, the CAF says it has met the low threshold for production of arguably relevant documents that are essential for it to be afforded the opportunity to make full answer and response to the Complainant's allegations.

## **B. Complainant**

[16] The Complainant opposes "the vast majority of" the CAF's Motion, saying it is, "incredibly invasive and overbroad, both in scope and time period."<sup>7</sup>

[17] The Complainant says the following information, most of which is not in dispute, is relevant to the CAF's Motion:

- he was diagnosed with a learning disability when he was five years old;
- he had a past psychiatric condition for which treatment was discontinued and that has not recurred;
- despite his low score on the CFAT in 2009, the CAF allowed his application to proceed;
- while it closed his file after not receiving certain requested medical information, in 2010 the CAF declared the Complainant medically fit for service;

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<sup>7</sup> 2018-11-30—Response of Complainant to CAF Motion for Document Production at para. 2.

- in 2014, he made a new application to the CAF, as required;
- the Commission has retained Dr. Joan Pinkus to conduct a current psychoeducational assessment of the Complainant in February 2019, and to produce a report regarding his disability and any related restrictions.

[18] The Complainant says that his medical documents are confidential and private and, while “he has put medical information relating to his *learning disability* in the period around his 2014 application to the CAF in issue, he has not put any psychiatric or psychological condition or his psychological wellbeing in issue, nor is it in issue.”<sup>8</sup>

[19] The Complainant notes that the CAF’s statements that his past psychiatric condition has directly affected, and is related to, his learning disability, are not supported by any evidence, nor does the CAF explain how the documents it refers to establish such a link. The Complainant disagrees that the documents he has already disclosed show any link between his learning disability and any psychiatric or psychological condition he may have had.

[20] With regard to the documents the CAF refers to in support of its argument, the Complainant says the following:

- a) The Psycho-Educational Report from his school district was prepared in response to a request by his guardians for an assessment of his current level of abilities in school. The report refers to his cognitive ability, educational achievement, intensive resource support, and modification of academic subjects. It does not link any kind of psychiatric or psychological condition to his learning disability;
- b) The undated Dr. Shaw summary does not refer to a learning disability;
- c) The August 2005 Dr. Shaw letter does not refer to a learning disability;
- d) The April 2010 Requests for Release of Medical Information completed by psychologist Dr. James do not refer to a learning disability;
- e) The May 2012 letter from Dr. James does not refer to a learning disability;
- f) The June 2009 Dr. Warner letter does not refer to a learning disability;

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<sup>8</sup> *Ibid*, at para. 8.



- g) The October 2015 Dr. Warner letter does not refer to a psychological or psychiatric condition; and
- h) The November 2015 letter from Dr. Baker does not refer to any psychiatric or psychological condition.

[21] In addition to the legal principles relied upon by the CAF in support of its Motion, with which the Complainant agrees, he notes that his confidentiality and privacy interests in his medical information must be balanced against his obligation to disclose the documents.<sup>9</sup> Also, the scope of medical information that must be disclosed is limited to what is in issue in the complaint.<sup>10</sup> While past medical records may be producible in order to allow the Tribunal to assess whether a complainant's pain and suffering is related to the discrimination complained of, rather than as a result of a pre-existing medical condition or prior traumatic experience, the time period for the records must not be too far-reaching. The Complainant submits that two years is an appropriate time period, based on the Tribunal's case law.<sup>11</sup> Further, where the Tribunal orders the production of medical records, the Complainant argues that conditions should be imposed.

[22] With respect to the CAF's request for production of documents relating to *his learning disability*, the Complainant says he will produce all of Dr. Warner's documents relevant to this, including all documentation on which Dr. Warner relied to confirm the diagnosis of a learning disability, on the condition that:

- i) The Complainant will redact information in the documents that is not arguably relevant to his learning disability;<sup>12</sup>
- ii) The documents will only be disclosed to counsel for the CAF and the Commission;<sup>13</sup>
- iii) The documents will only be used for the purpose of the Tribunal proceeding;<sup>14</sup> and
- iv) The documents (along with all medical documents already produced) will be returned to the Complainant at the conclusion of the Tribunal proceeding.<sup>15</sup>

<sup>9</sup> *MacEachern v. Correctional Service Canada* ("MacEachern"), 2014 CHRT 31 at para.25.

<sup>10</sup> *Egan*, *supra* note 5 at para.34.

<sup>11</sup> *Yaffa v. Air Canada* ("Yaffa"), 2014 CHRT 22 at paras.13-14.

<sup>12</sup> *MacEachern* *supra* note 9 at para.27.

<sup>13</sup> *Ibid*; *Yaffa* *supra* note 11 at para.15.

<sup>14</sup> *Ibid*; *Rai v. Royal Canadian Mounted Police* ("Rai"), 2013 CHRT 6 at para.37.

<sup>15</sup> *Rai*, *ibid* at para.37.

[23] The Complainant says none of the other documents sought by the CAF are properly producible. He says, “the CAF cannot use the documents already produced which refer to a psychiatric condition (but do not link it to the learning disability) as a launching pad for irrelevant medical information.”<sup>16</sup> He says while the threshold to reach arguable relevance may not be high, it still must be met, and there is no evidence that any psychiatric or psychological condition, or the Complainant’s psychological wellbeing, are related to his learning disability any more than a broken leg would be. The Complainant says that, while his psychiatric and psychological status and history may be arguably relevant for occupational interest purposes, this complaint is about his learning disability. He notes also that his disability will be fully explored in Dr. Pinkus’ report.

[24] In addition, the Complainant argues that, even if his psychiatric or psychological history or status were relevant to the complaint, the records sought from thirteen or more years ago are not: “It bears repeating that any past psychiatric condition was resolved by 2005 and the CAF declared T.P. medically fit for service in 2010.”<sup>17</sup>

[25] With regard to the requests for the reports from Medical Services of British Columbia and the College of Pharmacists, PharmaNet, from 2009 to the present, the Complainant says these requests are, “extraordinarily overreaching in scope and time”. He says such reports would likely include a great deal of confidential and private medical information entirely unrelated to his complaint. He also says the CAF has provided no explanation for its arbitrary choice of 2009 as a starting date for these reports.

[26] The Complainant says the documents he objects to producing are not arguably relevant, and certainly not essential for the CAF to make full answer and response to his complaint.

### **C. Commission**

[27] The Commission’s position is essentially the same as the Complainant’s. The Commission agrees that documents relating to the Complainant’s learning disability in the

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<sup>16</sup> *Supra* note 7 at para. 12.

<sup>17</sup> *Ibid*, at para. 14.

period around his 2014 application to the CAF are arguably relevant and should be produced. However, it says that the other requested documents relating to historical assessments and psychiatric conditions are overbroad and do not meet the test for arguable relevance.

[28] The Commission agrees with the legal principles relied upon by the CAF and the Complainant, and adds that there are additional factors the Tribunal should consider when a respondent seeks production of a complainant's medical records. For example, a complainant's right to privacy or confidentiality with respect to medical records may cease if they put their health at issue in a proceeding. However, even if a complainant puts some aspects of their health at issue, this does not automatically mean that full disclosure of all medical records is required. Rather, a complainant's obligation to disclose must be balanced with legitimate privacy concerns. Further, a complainant is only obliged to disclose medical records that are arguably relevant to conditions that are actually at issue in the case. Where a medical record contains some information that is arguably relevant and some that is not, the information that is not arguably relevant should be redacted from the record prior to production. Where a complainant believes that a medical document is personal, and not arguably relevant, the Tribunal may give the complainant the option of sharing a copy of the document with the Tribunal in advance, to allow the Tribunal to determine whether it should or should not be disclosed.<sup>18</sup>

[29] Aside from the documents that the Complainant agrees to produce relating to his learning disability, the Commission says none of the other medical documents requested by the CAF have been shown to be arguably relevant. It says that the documents disclosed thus far do not on their faces, "appear to draw the linkages asserted by the CAF, and the CAF has not provided pinpoint citations to the passages that it says would support the claims."<sup>19</sup>

[30] The Commission says it is important to remember that all indications are that any past psychiatric condition was resolved by 2005, nine years before the 2014 application

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<sup>18</sup> *Egan*, *supra* note 5 at paras.29-34 and 50; *MacEachern*, *supra* note 9 at paras.13-14 and 25-27; *Yaffa*, *supra* note 11 at paras.12 and 15; *Rai*, *supra* note 14 at paras.30-31 and 35.

<sup>19</sup> 2018-12-02 – Written Submissions of the Canadian Human Rights Commission (in response to the CAF's Motion for Production) at para. 12.

that is at issue in the complaint, and that the CAF declared the Complainant to be medically fit for service in 2010, four years before the 2014 application. The Commission says that, with this in mind, the CAF has not shown that medical documents from the named health professionals who treated or assessed him in the early to mid-2000s would have any possible relevance in examining the impact the CFAT has had on the Complainant, or other persons with learning disabilities, in 2014.

[31] The Commission notes that it has retained Dr. Joan Pinkus, a Registered Psychologist, to conduct a current psychoeducational assessment of the Complainant. In addition to preparing a report, the Commission says it is intended that Dr. Pinkus will give evidence at the hearing about any learning disability the Complainant may have, and any associated restrictions. With regard to the CAF's argument that it will be entitled to respond to Dr. Pinkus' report, the Commission accepts that such a response would typically require the CAF to receive copies of any documents that Dr. Pinkus may have consulted during the conduct of her assessment, and the preparation of her report. However, the Commission says that, to its knowledge, Dr. Pinkus is not in receipt of any of the documents contested in this Motion. If this changes in the future and the parties do not agree at that time as to whether such documents should be produced, the Commission says the parties may return to the Tribunal for further direction.

#### **D. Reply of CAF**

[32] In reply to the Complainant's and Commission's submissions with respect to its Motion, the CAF says it, "is requesting documents precisely because T.P. has already produced documents referring to past psychiatric conditions and treatment indicating that he suffers from general and social anxiety disorder, mood disorder, psychotic and adjustment disorder and depression for which he received treatment in the past. Each of these conditions can affect a learning disability and any requirements for accommodation."<sup>20</sup>

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<sup>20</sup> 2018-12-10, Respondent's Reply at para.3.

[33] The CAF concludes by saying that, based on the limited information presented, and the Complainant's partial disclosure of a previous psychiatric history and condition relating to anxiety disorders and a cognitive intellectual disability, "there is a clear and obvious nexus and a rational connection between the documents sought and a fact or issue in the complaint."<sup>21</sup>

### III. Issue

[34] Should the Tribunal grant the CAF's request for an Order compelling the Complainant to produce the medical documents set out in its Notice of Motion?

### IV. Analysis

#### (i) Legal Principles

[35] The Tribunal has considered several motions for the disclosure of documents, out of which have arisen certain principles it has come to rely on in determining the pre-hearing disclosure obligations of parties. The parties have referred to the principles relevant to this Motion in their submissions. The CAF is correct that, in exercising its right to a fair hearing, it must be informed of the case against it, and be permitted to respond to the case.<sup>22</sup> As part of this procedural fairness requirement, each party is entitled to be provided with all arguably relevant documents in the possession or care of the opposing party.<sup>23</sup> In order to be arguably relevant, there must be a rational connection between the document sought and a fact, issue, or remedy sought by any party, and the arguable relevance of the requested documents must be determined on a case-by-case basis, having regard to the issues raised in each case.<sup>24</sup>

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<sup>21</sup> *Ibid*, at para. 7.

<sup>22</sup> See *Charakaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para.53; *Leslie Palm v. International Longshore and Warehouse Union et al.*, 2012 CHRT 11 at para.9; *Egan*, *supra* note 5 at para.29.

<sup>23</sup> Rule 6(1)(d) & (e) of the Tribunal's *Rules of Procedure*; *Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 at para.40; *Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11 at para.26.

<sup>24</sup> *Warman v. Bahr*, 2006 CHRT 18 at para.9.

[36] The burden of proving the rational connection rests with the moving party and, while the threshold for the test of arguable relevance is low, the party must still establish the necessary rational connection. The documents requested must be identified with reasonable particularity and the request must not be too broad or general.<sup>25</sup>

[37] While a complainant's right to privacy or confidentiality with respect to medical records may cease if they put their health at issue in a proceeding, the obligation to disclose must be balanced with these legitimate privacy concerns. As the Commission notes, even if a complainant puts some aspects of their health in issue, this does not automatically mean that full disclosure of all medical records is required.

[38] In this case, the Complainant has alleged discrimination in relation to his disability. As such, the parties are entitled to, "relevant health information that may be pertinent to the claim".<sup>26</sup> As the Complainant asserts that his learning disability affects his ability to complete timed written tests like the CFAT, any outstanding medical records relating to his learning disability should be provided to the CAF as soon as possible, in accordance with the conditions set out in the Order below.

[39] However, the CAF is also requesting medical records relating to the Complainant's psychiatric and psychological history and treatment, based upon its assertion that the conditions for which the Complainant received treatment in the past, "can affect a learning disability and any requirements for accommodation." The conditions referred to by the CAF are: "general and social anxiety disorder, mood disorder, psychotic and adjustment disorder and depression."

## **(ii) Review of Documents Already Disclosed**

[40] In support of its Motion, the CAF provided the Tribunal with copies of the already-disclosed medical records it is relying on to argue that there is a link between the Complainant's learning disability and his psychiatric and psychological conditions. It says these documents, "suggest that his medical and psychological condition are related to his

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<sup>25</sup> *Guay*, *supra* note 23 at para.43; *Turner*, *supra* note 4 at para.25.

<sup>26</sup> See *Guay*, *ibid* at para.45; see also *Egan*, *supra* note 5 at para.34.

learning disability as indicated in the 2001 psycho-education (*sic*) report.”<sup>27</sup> I have reviewed all of these documents to determine whether there is support for the CAF’s argument:

**(a) Psycho-Educational Report**

[41] The Psycho-Educational Report was prepared by a School Psychologist with the Complainant’s School District, who administered a cognitive ability test, as well as an educational achievement test. The assessment was triggered by the Complainant’s guardians, who disagreed with the modifications being made to his academic subjects. The report provides a brief summary of his educational history and the types of assessments he underwent as a child. It says that, “At 5-11 years of age, [T.P.] was seen for a pediatric and developmental assessment. At that time, he was diagnosed with ... a learning disability with marked delays in gross and fine-motor skills ....”

[42] The Report concludes that, based upon the testing conducted by the School Psychologist, his scores did not, “place him within Ministry Guidelines for Severe Learning Disabilities at this time”, but suggest “a cognitive ability at the low end of the Average range with specific weaknesses in numeric reasoning and short-term memory for non-meaningful stimuli.” The Report provides recommendations for his future learning and says that he would benefit from an assessment at a children’s hospital to explore reasons for his social and academic difficulties. It also says that he will continue to require resource support in all aspects of his learning.

[43] While the Report discusses the Complainant’s cognitive ability and confirms that he has a learning disability for which he required resource support while at school, there is no mention of the psychological or psychiatric conditions the CAF suggests are linked in some way to his learning disability.

**(b) Dr. Shaw summary (undated)**

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<sup>27</sup> *Supra* note 1 at para. 19.

[44] The Psychology Summary includes the results of the Wechsler Abbreviated Scale of Intelligence (Verbal 69, Performance 75, Full Scale 69). The Psychiatry Summary says the Complainant's discharge diagnosis includes: "Generalized Anxiety Disorder, Social Anxiety Disorder, Dysthymic Disorder, Mild MR, affect dysregulation". He was prescribed medication on discharge to treat agitation and anxiety.

[45] While I agree that there is no mention of a learning disability in this summary, I will discuss below those aspects of the summary I consider to be relevant to this Motion.

**(c) August 5, 2005 letter from Dr. Shaw supporting the Complainant's application for a hunting weapon licence**

[46] Dr. Shaw indicates that he had recently assessed the Complainant, and he did not meet the criteria for a diagnosis of depression, that his mood and affect were stable, and he was not thought disordered, although he had some challenges related to social anxiety.

[47] I agree that there is no mention of the Complainant's learning disability in this letter.

**(d) April 12, 2010 Dr. James information requested by the CAF**

[48] Dr. James is a Registered Psychologist who had seen the Complainant from May 2004 to February 2005 for an adjustment disorder with mild depression and intermittent anxiety. Dr. James was providing this information to the CAF in response to two Requests for Release of Medical Information — one for a "Psychiatric Condition" and one for "ADHD" — to assist the CAF in determining the Complainant's "medical suitability" for enrolment. In the ADHD form, Dr. James indicates the Complainant has never been diagnosed with ADHD and that he has none of the listed symptoms relating to inattention, hyperactivity or impulsivity. On the Psychiatric Condition form, Dr. James indicates he had provided the Complainant with "CBT" treatment that was discontinued in February of 2005. He says that, after the ten months of treatment, no follow-up was required and his risk of recurrence was low. In an accompanying letter, Dr. James says he has no hesitation in recommending the Complainant to become a member of the CAF.

[49] There is no mention of the Complainant's learning disability in these documents.



**(e) May 16, 2012 Dr. James letter in support of the Complainant's application for a firearms licence**

[50] The letter says the Complainant had received treatment for symptoms of anxiety and mood disorder in the past that responded well to treatment. He says the Complainant, "has not experienced any further episodes of mental illness since [February of 2005]." He confirms that he met with the Complainant in May of 2012 and says he has no symptoms of any mental disorder.

[51] There is no mention of a learning disability in this letter.

**(f) June 1, 2009 Dr. Warner letter "To Whom It May Concern"**

[52] Dr. Warner says the letter is an addendum to his report on the Complainant's past psychiatric condition. He says the Complainant came under his care in 2002 when he was being treated for a mixed mood and psychotic disorder, for which he was prescribed antipsychotic medication, although he did not fit the diagnostic criteria for a specific disorder. He says this medication was discontinued in 2005 without a recurrence of symptoms. The letter says that, due to the uncertainty of his diagnosis, he could not comment on a future prognosis or the effect of "severe life-threatening stress" on the likelihood of recurrence in the future. He suggests that Dr. Shaw, the psychiatrist, might have the necessary expertise to address such questions.

[53] There is no mention in this letter of a learning disability.

**(g) October 29, 2015 Dr. Warner letter regarding limitations at work and workplace accommodations**

[54] It is not clear who the intended recipient of this letter is, although Dr. Warner says it is, "in response to a written communication addressed to [the Complainant] requesting limitations at work and some documentation that is required for work place accommodations." The letter says the Complainant has been diagnosed with a type of disability that affects learning and processing of information. Specifically, he has difficulty learning new information, it takes him longer than most to process new information, and he

may need repetition to learn adequately, although once information is learned he is reasonable at retaining it. Dr. Warner says the Complainant is slow in communicating his thoughts and ideas in writing and he requires extra time for proof-reading and correcting mistakes.

[55] There is no mention of the Complainant's psychiatric history or mental health in this letter.

**(h) November 12, 2015 Dr. Baker letter writing in support of the Complainant's application to the CAF**

[56] The letter repeats the information about the Complainant's learning disability that was contained in Dr. Warner's October 29, 2015 letter. It also says, "the likelihood of him passing the current aptitude test without accommodations" for his learning disability is low. Dr. Baker says, "Please therefore consider making accommodations for his testing to account for this or consider waiving the test if appropriate."

[57] There is no mention of the Complainant's psychiatric conditions in this letter.

**(iii) Decision**

[58] Aside from the undated Dr. Shaw summary, none of the above documents provides any connection between the mental health conditions for which the Complainant received psychological or psychiatric care, and any condition that *may* affect his ability to learn.

[59] However, while the Complainant draws a line between his learning disability, on the one hand, and, "any psychiatric or psychological condition or his psychological wellbeing", on the other hand, and insists there is no link between the two, I understand the CAF to actually be referring — although perhaps not in the clearest possible way — to three different types of "conditions" that have affected the Complainant, either presently or in the past:

- 1) It refers to **psychiatric and psychological conditions** and treatments, which I understand to mean mental illnesses or mental disorders requiring psychiatric and/or psychological treatment that the Complainant received from Dr. Shaw and

Dr. James up until 2005. Dr. James treated the Complainant for what he describes in his April 2010 information to the CAF as mild depression and intermittent anxiety associated with adjustment disorder that responded well to cognitive behavioural therapy (CBT). In his undated summary Dr. Shaw diagnosed the Complainant with Generalized Anxiety Disorder, Social Anxiety Disorder, Dysthymic Disorder, and affect dysregulation and he prescribed medication to treat agitation and anxiety.

- 2) The CAF also refers to the Complainant's **learning disability**. The 2001 Psycho-Educational Report notes that he was diagnosed with a learning disability with marked delays in gross and fine-motor skills "at age 5-11", and says that the 2001 test results did not, "place him within Ministry Guidelines for Severe Learning Disabilities at this time". Dr. Warner and Dr. Baker both refer specifically to his learning disability in their letters.
- 3) Finally, the CAF refers to the Complainant having a "**permanent cognitive intellectual disability**". The 2001 Psycho-Educational Report indicates that the School Psychologist conducted testing for general cognitive ability, concluding that he had a cognitive ability level at the low end of the Average range. Also, in the undated Dr. Shaw summary, the Psychiatry Summary indicates a diagnosis of "Mild MR"<sup>28</sup>, while the Psychology Summary contains the results of a test for "Intelligence".

[60] While the CAF argues that each of the Complainant's past psychiatric conditions of general and social anxiety disorder, mood disorder, psychotic and adjustment disorder and depression for which he received treatment in the past, "can affect a learning disability and any requirements for accommodation"<sup>29</sup>, the CAF provides no evidence to support this assertion. If Dr. Pinkus' report eventually confirms this allegation, the CAF may renew its request that such medical records be produced. At this time, I do not see a link between the Complainant's learning disability and his past mental health conditions for which he last received psychiatric and psychological treatment in 2005, and so decline to order him to produce the psychiatric and psychological records requested.

[61] However, while his learning disability and what the CAF calls his "cognitive intellectual disability" may be unrelated (and I have no evidence one way or the other at this stage), according to his Statement of Particulars, the Complainant is arguing that, but

<sup>28</sup> In a previous Motion the Complainant explained that "MR" stands for what was previously referred to as "mental retardation", although I will not use this term further.

<sup>29</sup> *Supra* note 20 at para.3.

for the failure to accommodate his learning disability, he would have been admitted to the CAF. If the discrimination is proven, he says he will request that the Tribunal order that he be made a member of the CAF on the first reasonable occasion, pursuant to subsection 53(2)(b) of the *Act*, and award financial compensation for lost wages under subsections 53(2)(b) and (c) of the *Act*. I agree that the CAF should be permitted to respond to the Complainant's allegation and am of the view that, at least at the disclosure stage, the CAF is entitled to all records relating to any conditions or disabilities that may affect the Complainant's ability to successfully complete the CFAT.

[62] The Commission says that the CAF has not shown that medical documents from the above-named health professionals who treated or assessed the Complainant in the early to mid-2000s would have any possible relevance in examining the impact the CFAT has had on the Complainant, or others with learning disabilities, in 2014. However, if it is possible that not only his learning disability, but also a cognitive intellectual disability, has impacted the Complainant's ability to successfully complete the CFAT, the CAF should be provided with the relevant medical records relating to this disability as well. I am satisfied that the Psycho-Educational Report establishes the necessary link between the Complainant's cognitive ability and his ability to successfully complete the CFAT, given the accommodations he received in school in the form of resource support in relation to both his learning disability and his cognitive ability. As such, I will order the Complainant to disclose records relating to a cognitive intellectual disability, including any records held by Dr. Shaw and the Adolescent Psychiatry Unit, Surrey Memorial Hospital relating to his diagnosis of "mild MR" and the Psychology Summary in the undated Dr. Shaw summary.

[63] I note that Dr. Pinkus is assessing the Complainant and preparing a report for the purpose of the Tribunal's inquiry into this complaint and I am hopeful that the report will clarify the terminology and explain whether the Complainant's learning disability is related to what the Respondent refers to as the cognitive intellectual disability. I understand that the CAF may also wish to retain an expert once it has had a chance to review Dr. Pinkus' report and I agree with the CAF and the Commission that the CAF should be permitted to view the documents Dr. Pinkus refers to in preparing her report. The Commission does not believe Dr. Pinkus is reviewing records of the type requested by the CAF (aside from

those relating to a learning disability). However, following this Ruling and Order, if it is determined that Dr. Pinkus has reviewed any records that have not already been disclosed by the Complainant, and the Complainant objects to providing such documents to the Respondent, the Complainant should provide a copy of the disputed documents to the Tribunal for review and I will determine whether they should be provided to the CAF, with or without redactions.

[64] With regard to the CAF's request that I order the Complainant to produce a report from Medical Services of British Columbia from 2009 to the present, I decline to do so. I agree that this request is overly broad and that such a report would capture medical information relating to the Complainant that is clearly not relevant to this complaint. I am ordering the Complainant to provide all documents held by Dr. Warner relating to the Complainant's learning disability, as well as any additional documents referred to by Dr. Pinkus in the preparation of her report (subject to the *caveat* described above), as well as medical records relating to a cognitive intellectual disability, and I decline to order the production of records relating to the Complainant's past psychiatric or psychological treatment for mental health issues. As such, I am of the view that the lines have been drawn around what medical records are relevant to this complaint at this time and I do not agree to allow the CAF to comb through the Complainant's history of medical treatments from 2009 to the present, looking for something it thinks may be arguably relevant to the complaint. The same applies to the College of Pharmacists, PharmaNet report. Both requests are overly broad and, in my opinion, as they lack particularity, amount to a fishing expedition.

## **V. Conclusion**

[65] I am satisfied that, for the purposes of this preliminary stage of the proceeding, the Order below achieves an acceptable balance between the Complainant's confidentiality and privacy interests in his medical information, and his obligation to disclose arguably relevant documents to the other parties.

[66] I agree with the Complainant that it is appropriate in this case to place certain conditions on the documents I am ordering to be produced, given the sensitivity of the information. I also agree that, where a medical record contains some information that is arguably relevant and some that is not, the information that is not arguably relevant may be redacted from the record prior to production. Where there is disagreement about redacted material or, where the Complainant believes that a medical document is personal, and not arguably relevant, the document may be provided to the Tribunal in order to determine whether it should be disclosed or not.

[67] For the foregoing reasons, the motion is allowed in part. I agree to order the Complainant to produce the documents set out in the Order below. All other documents requested by the CAF in this Motion are not, in my view, arguably relevant to a fact, issue or remedy sought in this matter, and I hereby dismiss the CAF's request for production of these documents.

## **VI. ORDER**

- i) That the Complainant immediately produce the following documents requested by the Respondent, namely:
- All documents, including clinical records, test results and reports, including but not limited to electronic documents, held by Dr. David Warner which relate to T.P.'s learning disability;
  - records relating to a cognitive intellectual disability, including any records held by Dr. Shaw and the Adolescent Psychiatry Unit, Surrey Memorial Hospital relating to his diagnosis of "mild MR" and to the Psychology Summary in the undated Dr. Shaw summary;
  - Any documents reviewed by Dr. Pinkus for the preparation of her report about the Complainant that have not already been disclosed;

on the following conditions:

- a) The Complainant will redact information in the documents that is not arguably relevant to his learning disability or cognitive intellectual disability;

- b) The documents will only be disclosed to counsel for the CAF and the Commission;
- c) These documents may only be relied upon for the purposes of this human rights hearing, and not for any other purpose or legal proceeding;
- d) The parties must not provide these documents to any outside person or entity without the permission of the Tribunal;
- e) If the Complainant objects to providing any documents that may fall into one of these three categories, they should be provided to the Tribunal for review and a determination as to whether they should be produced, and whether there should be any redactions; and
- f) The documents (along with all medical documents produced already) will be returned to T.P. at the conclusion of the Tribunal proceeding.
  - ii) Disclosure of these documents does not mean that they will be admissible as evidence at hearing, and any issues in this regard shall be dealt with during the hearing. If the Complainant objects to these documents becoming part of the public record, he should also raise this at the hearing.

*Signed by*

Colleen Harrington  
Tribunal Member

Ottawa, Ontario  
May 1, 2019

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2220/4217

**Style of Cause:** T.P. v. Canadian Armed Forces

**Ruling of the Tribunal Dated:** May 1, 2019

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Thomas F. Beasley, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Helen Park, for the Respondent