

**Canadian Human Rights Tribunal Tribunal canadien des droits de la
personne**

BETWEEN:

PHYLLIS McAVINN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STRAIT CROSSING BRIDGE LIMITED

Respondent

REASONS FOR DECISION

Ruling No. 3
2001/01/03

PANEL: Pierre Deschamps, Chairperson

[1] The tribunal is seized of a request by which the respondent seeks to have subpoena duces tecum issued by the tribunal in relation to individuals or bodies possessing health care information on the complainant. The respondent argues that it is entitled to obtain such information in view of the claim for pain and suffering of the complainant. At this point in time, the complainant refuses to voluntarily consent to the release of the information sought by the respondent.

[2] The resolution of the present issue requires a balancing of the right of the complainant to confidentiality and privacy with the respondent's rights to provide a full defence and answer to the present complaint.

[3] In principle, the physician-patient relationship is clothed with confidentiality (1). Courts have over the years, recognized confidentiality as essential in promoting open communication between physician and patient. This said, a patient may waive his right to confidentiality of health care information and his right to privacy (2).

[4] A patient may expressly waive his right to confidentiality or privacy or, by his actions, be found to have impliedly waived it (3). The right of a person to confidentiality thus ceases when that person puts his or her health in issue by claiming damages in a legal proceeding.

[5] As stated by Madam Justice Picard in *Hay v. University of Alberta Hospital et al.*, '[t]he 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' (4). As in any civil suit (5), in a human rights proceeding, justice requires that a respondent be permitted to answer the complainant's case and defend against it. If the complainant puts his health in issue, the respondent is entitled to obtain relevant information on the complainant's health status which may affect the complainant's claim.

[6] However, the production of medical or health care information in such proceedings will be subject to the test of arguable relevance, not a particularly high bar, in light of the evidence before the tribunal. As stated in *Biederman v. Banfai* (6), '[t]here must be some relevance and the party seeking production must demonstrate a nexus between the information or document sought and issues in dispute (...)'.

[7] If a document is considered arguably relevant by the tribunal, the latter will have the responsibility of determining if the complainant's privacy rights and right to confidentiality outweigh the probative value of the documents requested by the respondent.

[8] As stated by Mr. Justice Cory in *Cook v. Ip et al.* (7) '[t]here can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the court. This is essential if justice is to be done between the parties. Wherever damages are claimed for injuries suffered, a review of the medical records is of vital importance to a court's decision'. Mr. Justice Cory further added: 'No doubt medical records are private and confidential in nature. Nevertheless, when damages are sought for personal injuries, the medical condition of the plaintiff both before and after the accident is relevant' (8).

[9] In a human rights proceeding, when claiming compensation for pain and suffering, a complainant implicitly accepts some intrusions upon his privacy as well as the possibility that the respondent will be able to access his medical records and files or, put more broadly, his personal health information. This does not, however, entail that the complainant grants the respondent a licence to delve into private aspects of his life which are not related to his claim or are not arguably relevant for the proper disposition of the litigation (9).

[10] In principle, the party moving to gain access to the personal health information of someone is only entitled to get that information which the evidence shows is or could be arguably relevant to the proceedings.

[11] In the case at bar, the Commission and the Complainant did not assert any privilege with respect to the personal health care records or files pertaining to Ms. McAvinn at the time of disclosure. However, they now object to the unrestricted disclosure of such files and records.

[12] In the present proceeding, the evidence shows that the complainant consulted Dr. Senan Cusack, her family physician, in 1992 because she was experiencing pain in her shoulders, was anxious and depressed. There is also evidence before the tribunal that Ms. McAvinn again consulted Dr. Cusack, in 1997, because she was experiencing pain in her shoulders, was anxious and depressed. There is however no evidence that Ms. McAvinn consulted Dr. Cusack before 1992. The tribunal finds that the records of Dr. Cusack related to the medical condition of Ms. McAvinn between 1992 and 2000 are arguably or likely relevant to the present case.

[13] Furthermore, the evidence shows that Ms. McAvinn consulted Dr. Christopher Stewart, a psychiatrist, in 1997 because she felt depressed. There is however no evidence before the tribunal that Ms. McAvinn consulted Dr. Stewart before 1997. The tribunal finds that the records of Dr. Stewart related to the medical condition of Ms. McAvinn between 1997 and 2000 are arguably or likely relevant in view of Ms. McAvinn's claim for pain and suffering.

[14] As to the medication that Ms. McAvinn was prescribed by her family physician, the evidence shows that she was not able to recall precisely, during her cross-examination, which medication was prescribed to her by Dr. Cusack after she consulted him in 1992 and for what period of time. The tribunal finds that knowledge of what medication was prescribed and for what period of time is arguably or likely relevant in the context of Ms. McAvinn's claim for pain and suffering.

[15] As for Ms. McAvinn's records with the Prince County Hospital, the evidence shows that Ms. McAvinn is not totally sure if she consulted or not that institution during the period of 1992 up to

2000 for a condition which may have some bearing on the medical condition upon which her claim for pain and suffering is based. The tribunal finds that records of attendance of Ms. Phyllis McAvinn at the Prince County Hospital are arguably or likely relevant to Ms. McAvinn's claim for pain and suffering in the present proceedings.

[16] As for the information held by the Department of Health and Social Services, the evidence shows that Ms. McAvinn was not sure as to which doctors she consulted between 1992 and the present time. The tribunal finds that records of attendance of Ms. Phyllis McAvinn before any physician in the Province of Prince Edward Island are

arguably or likely relevant to Ms. McAvinn's claim for pain and suffering in the present proceedings.

[17] In view of the evidence adduced before the tribunal, the tribunal will issue subpoena duces tecum to the following individuals and bodies under the following terms :

1. South Shore Pharmacy, 211 Borden Street, Borden-Carleton, P.E.I.: records with respect to all prescriptive medications disbursed to Ms. Phyllis McAvinn from January 1, 1992 to date;

2. Dr. Christopher Stewart, 290 Water Street, Summerside, P.E.I: all documentation, records, opinions, notes, reports, analysis and information in his custody relating to any attendances by Ms. Phyllis McAvinn to/with him for any medical/psychiatric or psychological evaluation, interviews, diagnosis, treatment or prognosis from January 1st, 1997 to date;

3. Dr. Senan K. Cusack, Borden-Carleton, P.E.I.: all documentation, records, opinions, notes, reports, analysis and information in his custody relating to any attendances by Ms. Phyllis McAvinn to/with him wherein any medical evaluation, advice, interviews, diagnosis, treatment or prognosis was undertaken or conducted from January 1st, 1992 to date;

4. Prince County Hospital, 250 Beattie Avenue, Summerside, P.E.I., Attention: Janet Read, Director of Medical Records: any and all records of attendances of Ms. Phyllis McAvinn at the Prince County Hospital or its predecessor hospital from January 1st, 1992 to date, whether it be in an in-patient or out-patient basis, including any and all opinions, notes, reports, analysis and information developed in relation to same;

5. Department of Health and Social services, 335 Douses Road, P. O. Box 3000, Montague, P.E.I., Attention: Mr. Alan MacCormac, Manager Medicare Services: any and all records with respect to any attendance by Ms. Phyllis McAvinn before any doctor in the Province of Prince Edward Island from January 1st, 1992 to date, including any records relating to the date, place, identity of the doctor attended, and the purpose of the attendance;

[18] As to the request to have a subpoena duces tecum issued to Marine Atlantic pertaining to the personnel file of Ms. McAvinn, the tribunal finds that the request is premature since this issue has not yet arisen in the course of Ms. McAvinn's examination in chief or cross-examination.

[19] Furthermore, the tribunal orders that, upon production of the documents requested in the subpoenas duces tecum, the Chairperson will examine these documents and determine which ones will be admissible in evidence.

[20] This said, it must be noted that there is agreement between counsel that, if individuals and bodies are required to produce documents in relation to the subpoenas

duces tecum, the tribunal should vet the documents to determine which ones are in fact related to the medical condition in issue. The tribunal will thus be able to ensure the proper protection of the privacy and confidentiality rights of the complainant without depriving the respondent of his right to have access to all relevant information and to present a full answer and defence. The agreed process will prevent unnecessary and vexatious infringements of the complainant's rights since the tribunal will be in a position to supervise and control the procedures that must be undertaken before the production of any relevant document.

[21] For these reasons, the Respondent's request is granted in part.

1. Hay et al. v. University of Alberta Hospital et al., (1990) 69 D.L.R. (4th) 755, p. 757.
2. A.M. v. Ryan, [1997] 1 S.C.R. 157.
3. Hay et al. v. University of Alberta Hospital et al., supra, note 1, p. 758.
4. Idem, p. 762.
5. A.M. v. Ryan, supra, note 2, para. 36.
6. [2000] O.H.R.B.I.D., no 17, Decision No. 00-018-Im October 19, 2000, p.3.
7. (1986) 55 O.R. (2d) 288, leave to appeal to the Supreme Court denied.
8. Idem.
9. A.M. v. Ryan, supra, note 2, para. 38.

Pierre Deschamps, Chairperson

Ottawa, Ontario
January 3, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

TRIBUNAL FILE NO.: T558/1600

STYLE OF CAUSE: PHYLLIS McAVINN v. STRAIT CROSSING BRIDGE LIMITED

PLACE OF RULING: Summerside, P.E.I.

RULING OF THE TRIBUNAL DATED: January 3, 2001

APPEARANCES:

Lisa Goulden For Phyllis McAvinn

Leslie Reaume For the Canadian Human Rights Commission

Eugene Rossiter For Strait Crossing Bridge Limited