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

BETWEEN:

AMANDA DAY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL DEFENCE

AND MICHAEL HORTIE

Respondents

RULING ON PRODUCTION OF DOCUMENTS

Ruling No. 3

2002/12/06

MEMBER: Paul Groarke

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I. THE NOTICE OF MOTION

[1] The following reasons deal with the Respondent's Notice of Motion requesting the production of documents. In addition to hearing oral argument, I received written submissions from the parties.

A. The Documents Relating to Remedy

[2] As the parties are aware, I have already directed that the hearing will proceed in two stages. In the first stage, we will deal with liability. This means that there is no reason to deal with the request for documents relating to remedy or damages at this time. In the present case, at least, it is better to put those requests aside for the moment.

[3] It follows that there is no need to deal with the documents listed in rows 3, 4, 10, 11 and 12 of the table provided in the Respondent's written submissions.

B. The Request for Contact Information

[4] There is also a request for addresses and phone numbers in rows 8 and 13 of the same table. The Respondent apparently wishes to contact the mother and former common law husband of the Complainant. In my view, these requests go beyond the natural scope of disclosure, and would require the Complainant to take an active role in the preparation of the Respondent's defence.

[5] This brings in its own question of dignity. The Complainant is entitled to the autonomy which any litigant enjoys and will have to choose for herself whether she wishes to assist the Respondent. As I see it, my role is restricted to the supervision of the process and does not extend to the relationship between the parties. I do not believe that it would be proper to make such an order unless there were reasons to believe the Complainant was deliberately obstructing the process.

II. THE PRODUCTION OF DOCUMENTS

[6] Now let me turn to the production of documents. On this issue, I should stress that a Tribunal needs to begin by recognizing that its primary obligations lie in the need to protect the fairness and integrity of the legal process. This will generally require full and ample disclosure. Any exceptions should be seen as qualifications carved out of the general rule.

[7] The Commission has submitted that the Tribunal should proceed in four stages. I am uncomfortable with its reliance on the process followed in the criminal courts, which deal with a different set of interests, and find it more convenient to set this out in three simple steps. Although I have modified the procedure somewhat, the three basic steps follows:

1. The Tribunal should determine whether the information is "likely to be relevant".[(1)] The material must be probative and "arguably relevant" to an issue in the hearing. This is meant to prevent production for purposes which are "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming".[(2)]

2. The Tribunal must then apply the *Wigmore* criteria, and consider any other issues that may have a bearing on disclosure, without examining the documents. If there is no compelling reason to maintain the privacy of the documents, they should be released. I do not accept that there is any need for the Tribunal to examine documents in each and every case.

3. If the Tribunal is unable to resolve the matter without examining the material, I agree that it should inspect the documents. In doing so, it should again apply the *Wigmore* criteria, consider any other legal or constitutional issues, and decide whether the documents should be produced.

In the final step of this process, it may be helpful for the party which wants the documents protected to draw the Tribunal's attention to passages or individual documents that concern it.

[8] There is no reason to be unduly rigid or mechanical in following such a procedure. If a document is obviously privileged, there is no reason to consider other questions. There will also be cases where a Tribunal will be unable to determine whether documents are arguably relevant without inspecting the contested documents.

[9] I also feel obliged to say that it would be imprudent to examine documents unless there are compelling reasons to do so. As a general rule I believe that a Tribunal should avoid looking at documents which may not come before it in the course of the hearing. If it is possible to decide a question like privilege without inspecting documents, it is accordingly preferable to do so.

[10] I want to reject any suggestion that privilege has been breached when a body like the Tribunal inspects such documents. While I agree that a Tribunal should always be sensitive to the understandable desire of the parties to maintain the privacy of the material in their possession, this takes a very literal view of the doctrine of privilege. It would seem to me that the Tribunal and its Members are removed from the sphere in which the concerns regarding privilege arise. In my view, sections 50(3)(a) and 50(3)(c) of the *Canadian Human Rights Act* at least implicitly give the Tribunal the power to inspect documents. Any other position would undermine the trust and confidence that a tribunal must enjoy, if it is to adequately fulfil its public duties. It would also run directly against the public interest, which requires that a tribunal have a free hand in this area.

A. The WCB Files

[11] Let me now turn to the remaining documents. The Respondent already has any substantive material from the WCB files which it might require. I cannot see how the rest

of the files bear on the question of liability. As a result, I am not satisfied that the files requested in row 1 of the Respondent's chart are likely to be relevant to the hearing.

B. The Current Medical Files

[12] The same reasoning applies to the request for documents in row 13 of the chart, which seeks the release of "updated records of all [medical or psychological] practitioners since April of 2002." The Commission joined with the Respondent in submitting that the Complainant should release these documents, as part of an "ongoing duty of disclosure".

[13] I do not agree. This is information of the most personal nature and the Complainant has expressed real concerns about the use of such material. She is firmly of the view that the medical information that she has already released was used, without her permission, in an application for guardianship. I have not reviewed the correspondence on the case file regarding this issue and would prefer not to do so. I nevertheless know enough about the situation to sympathize with her feelings of betrayal.

[14] The most important point may well be that the Complainant's right to privacy extends to the use of any information that is released. It is clear from section 50(1) of the *Canadian Human Rights Act* that the purpose of disclosure before the Tribunal is for the purpose of ensuring that all of the parties have an ample opportunity to present their cases. If the parties desire such information for other reasons, the integrity of the system of justice as a whole requires that this be dealt with openly and explicitly, in the appropriate forum. There may be exceptional cases, but the basic rule is that medical or psychological information obtained by an order of the Tribunal is not to be used for a collateral purpose.

[15] The other matter that concerns me is the simple issue of relevance. I fail to see how these records are necessary to establish what occurred, principally between 1994 and 1996, while the Complainant was at the Department of National Defence. I realize that the Respondent has taken the position that the Complainant was suffering from a psychological disorder of some form at the time. The other parties are already in possession of abundant medical information, however, which extends to April of this year, and I do not accept that any of the parties are significantly disadvantaged by the failure to obtain the more recent information.

[16] Even if that were the case, however, it is plain that the Complainant's right to maintain the privacy of this personal information outweighs any interest that the other parties may have in its disclosure. In my view, the request for the Complainant's current medical records is far more invasive than the request for her medical history and raises more pressing legal and constitutional issues.

C. The Documents from Alcoholics Anonymous and the Ministry

[17] This takes me to those documents that give rise to questions of privilege. Without enunciating the *Wigmore* criteria in detail, I do not accept that the Respondent is entitled to the information from *Alcoholics Anonymous*, which is requested in paragraph 9. I accept the Commission's view that there is a pronounced public interest in protecting the privacy of such information. The Complainant was entirely within her rights to protest that any information in the possession of Alcoholic Anonymous was elicited on the understanding that it will remain private.

[18] I am, moreover, concerned that the Respondent merely wants to attack the credibility of the Complainant. It may be necessary to explore the psychological history of the Complainant, but her reputation is not in issue, and the Respondent has not established that this material is arguably relevant. I should add that this kind of information is more properly elicited at the hearing by a subpoena *duces tecum*, since that would also give *Alcoholics Anonymous* an opportunity to address the issue.

[19] Although there is no need to consider the documents requested in paragraphs 10 and 11 of the table, since they deal with remedies, I also accept the Commission's view that the public has a distinct interest in protecting the confidentiality of the records of the Ministry of Children and Family Development. This public interest arises independently of the Complainant's interest in maintaining the privacy of these documents. Both of these interests outweigh any interest that the Respondent has demonstrated in their disclosure.

D. The Files Relating to the Other Complaints

[20] Then there are the documents that must be disclosed. I accept that the union files, listed in row 2 of the chart, are relevant to the question of liability. I say "relevant" advisedly: as I understand it, they deal explicitly with the allegations before me. The same kind of observation applies to the files of the B.C. Human Rights Commission and the Saanich Police Department, which are listed in rows 5 and 6. These files all deal, one way or the other, with allegations of sexual harassment that the Complainant made during the period in question. It is not enough to say that they are "arguably relevant" to the complaints. They are very relevant.

E. The Complainant's Psychological History

[21] The psychological state of the Complainant while she was at the Department of National Defense has been put in issue in paragraph 51 of the Respondent's particulars. Although it is contested, I also accept that the Complainant's psychological history is "arguably relevant". This is not a case where the Respondent is gratuitously invading the private life and personal history of a victim whose psychological state is not in question.

[22] The Complainant has been very fair on this issue. Although she feels that she should be entitled to review any documents before they are released, Ms. Day has stated that the "whole story" should be before the Tribunal. I agree with that sentiment. She nevertheless feels that she should be entitled to review the documents before they are released. I have

no difficulty with this suggestion. In my view, a closer examination of the requested material will ensure that individual documents are arguably relevant and meet the *Wigmore* criteria.

[23] As I understand it, Ms. Day has already signed the necessary releases with regard to the files of the B.C. Human Rights Commission, the Saanich Police Department, and her medical history. Those releases instruct the relevant authorities to release the files to the Tribunal. When we receive the files, we will provide Ms. Day with copies. Although I have asked her to refrain from writing on the documents, she is welcome to highlight any passages that she feels should be protected from disclosure. I will inspect the documents after she has done so, and release the documents to which the Respondent is entitled.

F. The Commission's Files

[24] This takes me to the Commission's files. I am troubled by the Commission's position, which was that the Respondent had not established that the information on the two files was arguably relevant. This is no reflection on Ms. Chapman, who appeared as agent for the Commission, and provided helpful assistance to the Tribunal.

[25] As it turns out, one of the complaints before me refers specifically to these files. I accept the position of counsel for the Respondent, who argued that this makes them material facts in the hearing. I nevertheless feel obliged to say that the position taken by the Commission was unnecessarily adversarial. The Commission cannot simply take the position that the documents are not likely to be relevant, and insist that the Respondent establish otherwise, when it is well aware that the Respondent would take a different position on the matter. In such a situation, the Tribunal has a right to expect a certain candour from counsel, who have a professional obligation to maintain the integrity of the process.

[26] I have already directed the Commission to provide the Respondent with the two files. If there is anything on those files that the Commission is not willing to disclose, for whatever reason, it is welcome to provide the Tribunal with the material that it wishes to excise. I will review the material and decide whether it should be released to the Respondent. In the unlikely event that argument is required, the parties may request it.

[27] As I indicated to counsel at the last sitting, I do not want to see the present process degenerate into a battle by correspondence, as it has in the past. If there are further issues that need to be addressed, I have asked the parties to set another day aside, before the hearing starts. If that is not possible, I will deal with any remaining issues on the first day of the hearing. I have made it clear that I am not prepared to adjourn the hearing, which is peremptory on all the parties.

"Original signed by"

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Paul Groarke

OTTAWA, Ontario

December 6, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NOS.: T627/1501 and T628/1601

STYLE OF CAUSE: Amanda Day v. Department of National Defence and Michael Hortie

RULING OF THE TRIBUNAL DATED: December 6, 2002

APPEARANCES:

Amanda Day On her own behalf

Leslie Reaume For the Canadian Human Rights Commission

Michael Gianacopoulos and Sharan Sangha For Department of National Defence

Michael Hortie On his own behalf

1. [1] *R v. O'Connor* [1995] 4 S.C.R. 411, at para. 19.

2. [2] *Ibid*., para 24.