Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 27
Date: June 26, 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

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I. Context

[1] This is a ruling on Dr. B's request for a confidentiality order in relation to her motion to quash a subpoena issued by the Tribunal to her for the medical records of her patient the Complainant, Ms. Egan. I ruled on the motion in *Egan v. Canada (Revenue Agency)*, 2019 CHRT 8 (the "2019 Ruling").

II. Background

[2] As a part of her motion to quash a subpoena, Dr. B requested, *inter alia,*

> A confidentiality order pertaining to the disposition of the motion pursuant to s. 52(1)(c) pf the *Canadian Human Rights Act* (the "*CHRA*")

[3] Dr. B's position respecting her request for a confidentiality order on the motion included the following submissions:

- Dr. B noted that s. 52(1)(c) of the *CHRA* allows the Tribunal to take any measures and make any order necessary to ensure the confidentiality of the inquiry if the Tribunal is satisfied that "there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest [in a public inquiry]".
- Dr. B cited *Clegg v. Air Canada,* 2017 CHRT 27, in which the Tribunal noted that a balance must be struck between confidentiality and the societal interest in a public hearing (at para. 47).
- Dr. B also pointed to other cases in which the Tribunal granted requests for confidentiality orders, *Kelsh v. Canadian Pacific Railway,* 2015 CHRT 24 and *Day v. Department of National Defence and Michael Hortie,* 2003 CHRT 12.
- Dr. B submitted that there is a "real and substantial risk" that disclosure of any information pertaining to the Medical Records will cause harm to Ms. Egan. Dr. B further submitted that even the mere consideration of the Medical Records by the Tribunal presents a serious risk to Ms. Egan's mental and/or emotional health, in particular to her treatment and recovery. In addition, it risked destroying the psychotherapeutic relationship between Ms. Egan and Dr. B, as well as the trust the Ms. Egan had placed in Dr. B as her treating physician.

[4] Ms. Egan's and CRA's positions on the confidentiality order requested on the motion were summarized as follows in para. 25 of the 2019 Ruling:

> [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.

[5] At paragraph 73 of the 2019 Ruling, I ordered as follows:

> [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.*

[6] In response to the Order, Dr. B on April 23, 2019 requested the following:

i) That her name, and any other identifying information relating to her, in the Ruling of February 21, 2019, be anonymized (e.g. replaced with "Dr. B"), should the Ruling be made public. As this Tribunal has already recognized, "CRA is agreeable to anonymizing names in the decision to protect and safeguard the information of third parties" (para. 25).

ii) That her affidavit submitted on the motion, including its exhibits, in its entirety, be subject to a complete confidentiality order insofar as these documents remain in the public Tribunal file. These documents reference Dr. B directly and include personal health information.

iii) That all written submissions on the motion, all of which reference Dr. B directly and her evidence on the motion, including personal health information, also be subject to a complete confidentiality order insofar as these documents remain in the public Tribunal file.

iv) That her Medical Records, subpoenaed and produced to the Tribunal in accordance with its Ruling of February 21, 2019, in their entirety, be subject to a

> complete confidentiality order insofar as these documents remain in the public Tribunal file, but for access ordered by the Tribunal to the parties once the present adjournment in this matter is lifted. In this vein, the CRA will ultimately have access to information it seeks in the Medical Records. Moreover, pursuant to the *Personal Health Information Protection Act, 2003,* S.O. 2004, c. 3, Sched. A, by their nature, the Medical Records are personal health information that must remain confidential. As such, there is no principled reason as to why the Medical Records, even in their redacted form, should be made publicly available as part of the Tribunal file in this matter.

III. Summary of Dr. B's Submissions

[7] The further particulars provided by Dr. B on April 23, 2019 note that Dr. B's limited participation in Tribunal proceedings was as a result of her professional obligations as a treating physician to limit any harm done to her patient, Ms. Egan, as a result of the production of Ms. Egan's medical records.

[8] Having been put in this position, Dr. B submits it is reasonable for her name and any other identifying information be anonymized in the ruling, for example, by referring to her as "Dr. B". She notes that the 2019 Ruling acknowledges that "CRA is agreeable to anonymizing names in the decision to protect and safeguard the information of third parties".

[9] She further requests that her affidavit, supporting exhibits, and the written submissions of all parties be subject to a complete confidentiality order, in order to limit harm to her patient.

[10] Finally, Dr. B requests that the Medical Records that she produced to the Tribunal be subject to a complete confidentiality order. Dr. B says this request is further supported by the *Personal Health Information Protection Act,* which provides that personal health information must remain confidential.

IV. Summary of Response of the Respondent, CRA

[11] CRA says that s. 52(1)(c) of the *CHRA* recognizes the need to balance the societal interest in public proceedings with the risk that disclosure will cause undue hardship to

persons involved *(Amanda Day v. Canadian Human Rights Commission and Department of National Defence et. Al,* 2003 CHRT 12) ("*Day*").

[12] CRA notes the open court principle is key to the independence and impartiality of the justice system. The principle has been described as a "hallmark" of a democratic society and is inextricably tied to freedom of expression *(A.B. (Litigation Guardian of) v. Bragg Communications Inc.,* 2012 SCC 46 (this is cited by CRA – see also *Vancouver Sun (Re),* 2004 SCC 43 at para. 23)). According to CRA, judges and adjudicators have repeatedly held that the presumption in favour of open court proceedings fosters public confidence in the integrity of the judicial system and in the administration of justice.

[13] CRA notes that the CHRT does not have a practice direction on the anonymization of its decisions; however, the Human Rights Tribunal of Ontario ("HRTO") does: the *Practice Direction on Anonymization of HRTO Decisions.* Under the HRTO Practice Direction, there are two circumstances in which initials will be used instead of names to anonymize individuals mentioned in HRTO decisions. First, the HRTO will anonymize the names of children under the age of 18, or the names of other participants if it is necessary to protect the identity of a child. Second, the HRTO will anonymize names in exceptional circumstances to protect the confidentiality or personal or sensitive information where it considers appropriate to do so.

[14] The CRA highlights three decisions of the HRTO. In *C.M. v. York Regional District School Board,* 2009 HRTO 735, the HRTO said it an open justice system is necessary so that the actions of those responsible for interpreting and enforcing the law may be subject to public scrutiny. Moreover, it is a serious matter to be accused of breaching the Ontario *Human Rights Code,* and parties should generally not be able to make or defend allegations from behind a veil of anonymity, assured they will not be identified if they are found not credible, their allegations are rejected or they are held to have violated the *Code.*

[15] In *Mancebo-Munoz v. NCO Financial Services Inc.,* 2013 HRTO 974, the HRTO recognized that human rights applications often include personal information and that it will

look for “exceptional conditions of sensitivity or privacy necessitating anonymity” before granting such an order (at para. 6).

[16] Finally, the CRA says the party seeking the publication ban bears the onus of proving that there is a real and substantial risk to the hearing’s due process and/or deleterious implications to confidentiality. The “Tribunal must be satisfied that the personal and public interests collate in favour of safeguarding privacy, thereby outweighing the principle of disclosure and the desirability of a transparent human rights process” *(Visic v. Elia Associate Professional Corporation,* 2011 HRTO 1230 at para. 10).

[17] CRA agrees that Ms. Egan’s sensitive personal health information should be protected pursuant to s. 52(1)(c) of the *CHRA.* However, CRA opposes Dr. B’s request to have her own name anonymized in any part of the Tribunal record.

[18] CRA submits that Dr. B is not truly a third party to the proceedings before the Tribunal. Dr. B’s submissions on the underlying motion state that it “is about Dr. B’s rights and obligations <u>as a treating physician and custodian of Ms. Egan’s personal health information”</u> (emphasis added by CRA).

[19] CRA notes that Dr. B’s submissions on the underlying motion to quash the subpoena did not indicate that she wished to have her own name anonymized. Rather, her submissions at that time requested a confidentiality order “because there is a ‘real and substantial risk’ that disclosure of any information pertaining to the Medical Records will cause harm to <u>Ms. Egan”</u> (Dr. B’s factum at para. 41, emphasis added by CRA).

[20] CRA says that Dr. B has not provided a basis for anonymizing her own name. CRA submits that there is no sensitive or private information in the Tribunals’ ruling about Dr. B. She has provided no reasons why the disclosure of personal or other matters will cause undue hardship to her such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public, as required under s. 52(1)(c) of the *CHRA.*

[21] In CRA’s view, the only reason to anonymize Dr. B’s name would be to protect her reputation, and there is no benefit to Ms. Egan. Further, Dr. B’s name should not be anonymized merely because of a confidentiality order is issued in relation to Ms. Egan.

CRA cites *M.C. v. London School of Business,* 2015 HRTO 635, in which the HRTO anonymized the applicant's name due to highly sensitive information about the applicant's mental health, but did not anonymize the name of the respondent. The HRTO said, at para. 89, that each party must be considered separately to determine whether each ought to be anonymized.

[22] As noted above, CRA agrees with the use of Ms. Egan's initials and the redaction of all third party personal information in the Ruling, Dr. B's affidavit and exhibits on the motion, the written submissions of the parties on the motion, and Ms. Egan's medical records. However, CRA requests any confidentiality order to "provide that the order does not affect the ability of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) or any other tribunal or party from obtaining and relying on any information it would otherwise be able to obtain in the normal course of its proceedings". CRA says a blanket confidentiality order pertaining to Ms. Egan's medical records would compromise the CRA's ability to respond to allegations in other proceedings.

V. Response of the Complainant, Ms. Egan

[23] Counsel for the Complainant indicated that he had no submissions to make.

VI. Summary of Reply of Dr. B

[24] In reply to CRA's arguments about the open courts principle, Dr. B makes four points.

[25] First, she says CRA previously agreed to anonymizing names in the Tribunal's Ruling and should now be estopped from taking a different position.

[26] Second, Dr. B distinguishes herself from a typical party to a proceeding. Rather, she contends that she is an "innocent third party" to the dispute underlying the motion. Her participation was as an interested party only, on an expressly limited basis, in relation to a "derivative matter" that is only a small part of a much larger main proceeding. She has no interest in the ultimate outcome of the Tribunal's inquiry, and is participating against her

will only as a result of her professional obligations to limit the harm done to her patient, Ms. Egan. The Tribunal's 2019 Ruling and related materials speak to the nature and scope of Dr. B's treatment of Ms. Egan, and she does not wish for her name to be publicly associated with giving such treatment. Her request for anonymization is not meant as a means for her to hide behind a "veil of anonymity" in the event her "allegations are rejected'.

[27] Third, Dr. B argues that anonymizing her name will not undermine the open court principle. She cites *Endean v. British Columbia,* 2016 SCC 42 ("*Endean*"), in which the Supreme Court said the open court principle "operates to protect the public's interest in knowing what transpires in the courtroom"; yet, the "open court principle may be limited where countervailing values are engaged". Dr. B says that if her request for anonymity is granted, justice will still be done openly. The outcome of the motion and the Tribunal's reasons will still be known, and the public's opportunity to be educated about human rights and learn about the Tribunal's processes will not be deleteriously affected in any way. Referring to Dr. B as "Dr. B." will not undermine any of these goals. Dr. B says the Tribunal has the discretion to control its own procedures, and it should exercise its discretion in this case to grant Dr. B's request.

[28] Fourth, Dr. B notes CRA's reliance on the practices of the HRTO, but says that even the HRTO recognizes that the anonymity of persons in decisions remains a matter of discretion afforded to the decision-maker. Dr. B then points to a number of CHRT rulings in which parties or individuals were anonymized: *N.A. v. 1416992 Ontario Ltd. and L.C.,* 2018 CHRT 33 at para. 29, *A.B. v. Eazy Express Inc.,* 2014 CHRT 35 at paras. 5-7, *Kayreen Brickner v. Royal Canadian Mounted Police,* 2017 CHRT 28 at para. 90, and *Kelsh v. Canadian Pacific Railway,* 2015 CHRT 24 at para. 46.

[29] Finally, Dr. B addresses the CRA's proposed exception to the confidentiality of the Medical Records so that the CRA may be able to use them to defend itself in other proceedings.

[30] Dr. B says the Medical Records were produced to the Tribunal for the narrow purpose reflected in the subpoena, and the Ontario *Personal Health Information Protection*

Act (“PHIPA”) requires that they remain confidential. Dr. B says that CRA’s request goes beyond the process for disclosure put in place by the Tribunal in previous rulings, and that CRA has requested this in order to avoid complying with *PHIPA* and the rule of other tribunals.

[31] Further, Dr. B argues that CRA’s request contravenes the common law implied undertaking rule, which she describes as follows (citing *Tanner v. Clark,* 2002 CanLII 62434 at para. 17):

> [17] The implied undertaking rule is a common law rule. The rule provides for an undertaking to be imposed upon a party receiving disclosure. The party in receipt must not use the disclosure for a purpose collateral or ulterior to the resolution of the issues in the action in which the disclosure is made.

[32] Dr. B cites *Goodman v. Rossi,* 1995 CanLII 1888 (ON CA) as endorsing the following explanation of the basis for the common law implied undertaking rule:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party’s documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery.

[33] Dr. B says that common law rules, including the common law implied undertaking rule, apply to the Tribunal unless they have been statutorily ousted. In the instant case, the implied undertaking rule has not been waived merely because the Medical Records have been produced to the Tribunal, and the rule should prohibit the CRA from seeking an exception to any confidentiality order that may be issued, and from using the Medical Records in other proceedings. Dr. B says that the CRA’s ability to respond to allegations in other proceedings is not of concern in this matter.

[34] If, however, the Tribunal does issue confidentiality in respect of the Medical Records subject to an exception that they may be used in other proceedings, Dr. B requests that the CRA be required to go before the Tribunal and make submissions before each proposed future use of the Medical Records, to which the Complainant and Dr. B could then reply.

VII. Issue

[35] Should Dr. B's requests, as set out in paragraph 6 of this Ruling be allowed:

VIII. Section 52(1)(c) of the CHRA

> **52 (1)** An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
>
> **(c)** there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public

IX. Analysis

[36] For the reasons that follow, I will make orders allowing the requests set out in paragraph 6 (i) (ii) and (iii) of this Ruling but not the request set out in paragraph 6 (iv).

[37] The goals of the open court principle are extremely important in establishing the independence and impartiality of the justice system and fostering public confidence in its integrity. However in exercising the discretion I have under section 52(1)(c) of the *CHRA* the cases establish that it is necessary to balance the public interest of openness and transparency with private interests of privacy, on a case by case basis (see *Day and Endean supra* and *Canadian Newspapers Co. v. Canada (Attorney General)*), 1988 CanLII 52 (SCC).

[38] With respect to Dr. B's request for anonymizing her own name, I feel that in balancing the public interest of ensuring that inquiries are conducted in public versus the desire for privacy of Dr. B to not have her name publicly associated with giving particular treatment to her patient, there is, in my opinion little, if any, harm done to the goals inherent in the open court principle by allowing Dr. B's request set out in paragraph 6 (i) of this Ruling, for the reasons set out in the last four sentences of paragraph 27 of this Ruling.

[39] With respect to the requests of Dr. B set out in paragraph 6(ii) and (iii) of this Ruling, I am satisfied on the evidence before me in this matter that Ms. Egan would suffer undue hardship if the details of her medical condition and treatment were available to the public, and it seems that the parties to this motion do not dispute that conclusion.

[40] With respect to the request of Dr. B set out in paragraph 6(iv) of this Ruling, while the Medical Records are in the possession of the Tribunal, they are sealed and not properly before the Tribunal at this time, which is quite different than if the parties were attempting to admit them into evidence. Therefore, it does not seem appropriate to consider a confidentiality order at this time. If the Medical records are disclosed to the CRA at some point, upon Dr. B's approval, they would then be subject to the implied undertaking rule. Until such disclosure occurs, in my opinion this request is premature.

X. Orders

[41] That Dr. B's name, and any other identifying information relating to her in the 2019 Ruling, be anonymized by referring to her as "Dr. B".

[42] That Dr. B's affidavit submitted on the motion, including its exhibits, in its entirety, are ordered to be kept confidential insofar as these documents remain in the public Tribunal file.

[43] That all written submissions on the motion are ordered to be kept confidential insofar as these documents remain in the public Tribunal file.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
June 26, 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: June 26, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

David Yazbeck, for the Complainant

Gillian Patterson and Nicole Walton, for the Respondent

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