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 THE RESPONDENT'S REQUEST FOR AN ORDER

THAT THE COMPLAINANT SUBMIT TO AN INDEPENDENT PSYCHOLOGICAL EXAMINATION

Ruling No. 4

2002/12/18

MEMBER: Dr. Paul Groarke

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I. THE APPLICATION BEFORE ME

[1] The following ruling deals with the Respondent's request for an order that the Complainant submit to an independent psychological examination. The Notice of Motion also contained an application for the production of documents under Rule 6 of the *Interim Rules of Procedure*. As the request for a psychological examination raises important legal questions, I advised the parties that I would rule separately on the matter.

[2] I should begin by saying that the Respondent has put the Complainant's psychological condition at the time of the alleged harassment into issue. At paragraph 51 of its particulars, it states:

51. We are of the view that Ms. Day's medical records and generally her medical history are highly relevant to the issues of liability and damages. With respect and liability, we expect that Ms. Day's pre-existing medical/psychiatric conditions (including a diagnosis of schizophrenia and prior sexual abuse) could weigh heavily on her interpretation and reaction to the dynamics of her personal relationship with Mr. Hortie.

In its oral and written submissions on the Motion, the Department of National Defence denied that the alleged circumstances "could amount to harassment as alleged or at all." It submitted that the Complainant's problems stemmed "largely - if not solely - from pre-existing psychiatric/psychological conditions which medical records indicate may include schizophrenia".[(1)]

[3] The Respondent has taken the position that the Complainant was suffering from a psychological disorder when the allegations of harassment were made. As a result of this disorder, she felt that she was being harassed. It may seem a strong word, but the essential suggestion is that she was experiencing delusions. It follows that there is a clinical element in the present case that distinguishes it from the cases that usually come before the Tribunal. As a result, the Commission's concern that my ruling will have a "chilling" effect on other Complainants seems misplaced.

[4] I have received written submissions from the parties on two occasions, along with two affidavits from the Respondent. This has been supplemented by oral argument. The Complainant, like the Commission, opposes the application. Her concern is not with her psychological history, but with information regarding her current psychological condition, which she is not willing to share with the other parties. The individual Respondent has chosen not to make submissions.

II. JURISDICTION

[5] The first issue that needs to be dealt with is whether I have the jurisdiction to make the kind of order that the Respondent is requesting. The Commission has argued that there is "no clear statutory authority" for the Tribunal to order a psychological examination. As far as I can see, there is nothing in the *Canadian Human Rights Act* or the *Interim Rules* that contemplates such an order. The question is accordingly whether the Tribunal has the ancillary power to make such an order.

[6] I should make it clear at the outset that the issues that arise in the context of a psychological examination may not arise in the instance of less intrusive medical orders. I will accordingly leave it to other Tribunals to deal with those issues when they arise. The Respondent has suggested that this Tribunal has already granted the order requested in the present case, in *Lee v. Department of National Defence* C.H.R.T. (June 29, 2001), but as I understand that case, that order was essentially granted on consent. When I raised the possibility of a consent order at the last sitting, the parties were unable to agree.

[7] I might also note that the Respondent has advised the Tribunal that the Complainant agreed, on at least two occasions, to submit to an independent psychological assessment. There is no explanation as to why this changed, but that is beside the point. The Complainant is representing herself and I can only deal with the position she adopted in her oral and written submissions.

III. THE POSITION OF THE RESPONDENT

[8] The Respondent relies on section 50(1) of the *Canadian Human Rights Act*, which states that the Tribunal "shall give all parties . . . full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations. " The argument is that this implicitly gives the Tribunal the authority to order an independent medical examination. In addition, the Respondent relies on section 50(3), which gives the Tribunal the powers of a superior court in relation to a hearing of the inquiry. It also appears to be relying on the statutory prescription in section 48.9 of the *Act*, which states that proceedings before the Tribunal "shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." There is also some reference to the *Interim Rules*.

[9] In its written submissions, the Respondent quotes from my own ruling in *Rogers v. DeckX (2),* **2002/04/17, at para. 11,** where I stated:

The rationale behind the rule in the civil courts is apparently that it puts plaintiffs and defendants on an equal footing in dealing with the medical issues in a case. Although I

am expressing no opinion on the jurisdictional issue, there may be room for such an argument under section 50(1) of the *Canadian Human Rights Act*. That subsection places an obligation on a tribunal to "give all parties to whom notice has been given a full and ample opportunity . . . to appear at the inquiry, present evidence and make representations." Since the standard under section 50(1) is fairness, the argument would presumably be that the Respondent cannot participate fairly in the process without an examination. A Respondent would have to establish that the order is necessary if it is to have "a full and ample opportunity" to participate in the inquiry.

This only goes so far. As I stated in the ruling, I merely wanted to acknowledge that there was room for an argument on the issue.

[10] It will be evident that there are competing interests in the application before me. The first is the legitimate need to address the issues in the case. In its written submissions, the Respondent argues that it is "necessary" to assess the Complainant's "mental condition at material times and the effect - if any - of the alleged harassment."[(2)] Although it only deals with the production of medical documents, I accept the principle in *McAvinn v. Strait Crossing Bridge Ltd.*, C.H.R.T. (March 1, 2001), where Mr. Deschamps held that medical information must generally be produced if it is relevant to an issue in a hearing. This does not answer the issue before me, however, which is whether the Tribunal has the power to compel a party to submit to an examination. It is the power of the Tribunal over the Complainant's person that is in issue.

[11] The argument is that the Tribunal's power to "ensure a just and fair hearing" includes the power to order a psychological examination, where that is necessary. This is simply a matter of fair play. At paragraph 33, the Respondent argues that this power:

. . . is one which is properly exercisable within the inherent jurisdiction of the Tribunal unless there is specific language to negate this authority. (See *Re University of British Columbia et al.*) The *CHRA* does not contain specific language negating the authority of the Tribunal to make an order for psychological assessment. In fact, the provisions indicate that the Tribunal has an inherent authority to make such an order in appropriate cases.

The argument that the Tribunal has "inherent jurisdiction" is a novel one. The idea seems to be that the Tribunal has certain natural powers, which can be used to regulate the conduct of the parties. The idea that these powers can be exercised, in the absence of any statutory inference to the contrary, probably comes from the courts. [(3)]

[12] The Respondent relies primarily on the ruling of the labour arbitrator in *Re U.B.C. and Association of University and College Employees, Local 1* (1984), 15 L.A.C. (3d) 151. This decision holds that an arbitrator has the "inherent jurisdiction" to order a psychological assessment when it is impossible to hold a fair hearing without it. It is important to be precise, however, and it is inaccurate to say that the arbitrator ordered the grievor to submit to an examination. The arbitrator directed the grievor to attend a psychiatrist, but stipulated that the grievance would be stayed if he chose not to do so.

One of the significant differences between the *UBC* case and the present case is that the arbitrator ordered the employee to attend a psychiatrist agreed to by the employer and the union. Here, the Respondent made it clear that it wished to nominate its own psychologist.

[13] The approach adopted by the arbitrator in the *UBC* case has its origins in the English authorities. The *locus classicus* in the caselaw is apparently found in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 All E.R. 127 (C.A.), where Lord Denning said, at p. 129, that a court can "order a stay if the conduct of the plaintiff in refusing a reasonable request [for a medical examination] is such as to prevent the just determination of the cause." The English rule apparently developed because the English courts did not have the legislative or regulatory resources to order medical examinations. This is not the case in Canada, though the same strategy has at least occasionally been followed in cases where the matter is not canvassed in legislation or the *Rules of Court*.[(4)]

[14] The arbitrator in the *UBC* case also refers to an unreported decision, *B.C. Hydro and Int'l Brotherhood of Electrical Works, Local* 258 (June 16, 1981), which appears to take a different view of the matter. There, the arbitrator relied on *Re Thompson and Town of Oakville* (1963), 41 D.L.R. (2d) 294 Ont. H.C.J.), at 302, where Chief Justice McRuer held:

We start with the general principle of law as stated in 26 Hals., 3rd ed., p. 18, para. 25: 'A medical practitioner, who examines a person against his will and without authority to do so, commits a trespass.' . . . A medical examination involves the confidence of the doctor if he is your own physician, but it is otherwise if he is making the examination on behalf of another. The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must depend on either contractual obligation or statutory authority.

Although the arbitrator in the *UBC* case distinguishes *Thompson*, I am less inclined to do so and it seems to me that the thinking behind these remarks is sound. The security, integrity and privacy of the person are beyond the ordinary reach of an adjudicative body. This notion of the person includes the intellectual and psychological attributes of the person.

[15] The Respondent has also referred to the principles applied by the civil courts in dealing with requests for medical examinations. The general argument is that a medical examination puts the parties on an equal footing, in dealing with the issues in a trial. The courts favour full disclosure, which promotes a just determination of the cause. The difference is that these orders are usually granted under the auspices of legislation or the *Rules of Court*. The contemporary view in Canada appears to be that such provisions are remedial and should be broadly construed.[(5)] In situations where there is no explicit power, the courts have often taken it upon themselves to exercise their inherent jurisdiction in favour of such orders.[(6)]

IV. THE POWERS OF THE TRIBUNAL

[16] I believe that there are two sides to the present inquiry. One requires an examination of the Tribunal's powers. The other requires an examination of the Complainant's rights and interests. I do not believe that it is possible to determine the scope of the Tribunal's powers without examining the nature of these interests.

[17] The authority of the Tribunal to order a psychological assessment might come from the Tribunal's power over its own procedure. The Tribunal is master of its own process. It has the authority to supervise the disclosure of evidence and order its production. Although there are no discovery provisions in the *Interim Rules*, the *Canadian Human Rights Act* contemplates such a possibility and I think the Tribunal must enjoy some authority in such an area. I am hesitant, however, to say that the request for an independent medical examination goes to the Tribunal's process. In most circumstances, at least, I think it is important to maintain the distinction between the procedure before the Tribunal and the ancillary process of collecting evidence.

[18] From a practical perspective, if nothing else, I do not see how the order for an independent examination comes, properly speaking, within the parameters of the process before me. It accordingly seems to me that the decision to issue such an order takes a Tribunal outside its authority over its own process. I do not know where this process ends and some ancillary process begins, but the Tribunal's authority is limited to its "own" process. I cannot see how my authority to supervise the hearing process gives me any authority to compel the Complainant to undergo a medical or psychological examination by a third party, which would take place entirely outside the control of the Tribunal. This cannot be considered part of the inquiry and takes a Tribunal outside the boundaries of the *Act*.

[19] The Respondent has nevertheless argued that the Tribunal's powers extend to the collection of evidence. It submits that the "principles of natural justice and fairness" require "that a party be adequately equipped to speak to the allegations made against it and *to gather such evidence that will allow it to make its case.*"[(7)] (Italics added.) There may be another source of such an authority, however, which has been set out by the arbitrator in the *UBC* decision, *supra*. I think it is revealing to consider why the arbitrator took the stance he did. As I understand it, the real problem in the case was that the arbitrator did not have the formal powers that an adjudicator would normally enjoy over the production of documents and related matters. He therefore had no choice but to find some implicit or corollary power that gave him the authority to require a psychological assessment. He would otherwise be unable to secure a full and fair hearing for the parties.

[20] Looked at in this manner, the arbitrator was enlarging the doctrine of necessary powers rather than advancing a claim to inherent jurisdiction. I cannot help but feel that a term like "ancillary jursidiction" or "incidental jurisdiction" would be more accurate and less provocative than the term "inherent jurisdiction". In this more restricted sense, I think there is considerable merit in the Respondent's submissions concerning the jurisdiction of the Tribunal. I say this because, in my view, the jurisdiction of the

Tribunal derives more from the Tribunal's mandate under the *Canadian Human Rights Act* than from the literal wording of the *Act*. This mandate is broad, remedial, and quasi-constitutional. In my view, the Tribunal has all the incidental powers that are necessary to carry out the role that the legislation has assigned to it.

[21] From this perspective, the more significant aspect of the Tribunal's authority may well lie in its obligation to proceed "informally and expeditiously" under s. 48.9 of the *Act*. There might seem to be other sources of auhtority under section 50 of the *Canadian Human Rights Act*, since that section gives the Tribunal some of the powers of a superior court. It also gives a Tribunal the power to decide procedural or evidentiary questions. These powers appear to be restricted to the hearing itself, however, and I do not see anything in the section that would extend the Tribunal's reach as far as a psychologist's consulting room. I do not believe the Human Rights Tribunal enjoys "inherent jurisdiction" and the decisions from the superior courts are of limited assistance in this area. As I see it, the powers are there to assist the Tribunal in carrying out its duties and do not change the character of the institution.

[22] The Respondent has also relied on the *Interim Rules*, but the word "interim" speaks for itself and I have commented elsewhere that the present rules have no statutory force. (8) It may be that, once the rules are passed, they enlarge the Tribunal process. At this point in time, however, the reality is that they function more as guidelines than as rules. This nevertheless raises a pointed issue in the present context: because if one asks where the Tribunal obtains its current authority to order the production of documents or deal with a host of other procedural matters, the answer cannot lie in the rules, since they have yet to be passed. So where does the Tribunal obtain the interim authority to deal with such matters? I think the answer can be found in the ancillary or incidental jurisdiction of the Tribunal, without which an informal body cannot carry out its proper functions.

[23] All a term like "ancillary jurisdiction" means in this context is that a body with a more informal mandate has the authority to do what is necessary to ensure a fair hearing, in accordance with the provisions of the *Act*. Unlike the courts, which take their powers from their own inherent authority, this authority inheres in the process contemplated by the *Act* rather than the character of the Tribunal. The basic statutory role of the Tribunal is set out in the provisions of section 50(1), which requires the Tribunal to give the parties a "full and ample opportunity" to present their cases. This sets out the natural scope of the Tribunal's authority. It is the fairness of the process before the Tribunal that must be consulted, in determining whether the Tribunal has the authority to issue an order that extends, strictly speaking, beyond the process. This is a pragmatic standard that cannot be reduced to rigid rules.

[24] None of this should be taken too far. There are many limits on the ancillary authority of the Tribunal, which does not give the Tribunal the more general powers enjoyed by the courts. It is clear, however, that Parliament cannot have intended that the Tribunal be without the essential authority that it needs to fulfil its responsibilities and uphold the *Act*. This is in keeping with the quasi-constitutional nature of the *Act*, which calls for a large and liberal interpretation. The question before me, as I see it, is whether these powers

extend as far as the requested order. In order to answer that question, I think it is necessary to examine the nature of the interests that would be imperilled by such an order.

V. THE NATURE OF THE COMPLAINANT'S INTEREST IN PRIVACY

[25] I believe that there are constitutional interests that need to be consulted in determining the ambit of the Tribunal's powers in the present case. The Supreme Court of Canada has made it clear that a legal body should be reluctant to order the disclosure of personal information regarding the medical and psychological history of a party. This raises serious issues, and I do not believe it is in the interests of justice or fairness to order the Complainant to make such a disclosure unless it becomes necessary to do so. A Tribunal should naturally act with caution in a case where *Charter* rights may be engaged.

[26] I have already stated that the Complainant's primary concern on the present application is not with the psychological history of the Complainant, which is relevant to the question of liability. Her concern is with information relating to her current psychological state, which is not in issue in these proceedings. It may be helpful to say that I do not believe it is feasible to direct a psychologist or psychiatrist to refrain from examining the Complainant's current condition, in exploring her condition at the time the allegations were made. One does not have to be an expert in the field to know that this is not a congenial way of proceeding.

[27] I do not believe it is enough to consider the express provisions in the *Act*. As counsel for the Commission suggested in oral argument, the values underlying the *Act* must be consulted. The law of human rights, the Commission submitted, is based on the dignity and value of the person. Human Rights Tribunals should therefore respect the autonomy of the individual and protect the dignity of the person. This includes a certain measure of privacy. A Tribunal faced with an application from one of the parties should consider whether the requested order would further these values.

[28] I agree with this submission. While our law regulates the relations between individual persons, and even invests them with duties, it also recognizes the essential freedom to which every individual is entitled. This is significant, in the present context, because the act of compelling an individual to undergo a medical examination is inherently coercive. The physical and psychological integrity of the individual is an essential aspect of the person. The courts have always been sensitive to issues that bring this integrity into question, whether in the case of the *parens patriae* jurisdiction, orders that call for medical intervention, or other issues.

[29] These kinds of issues have become that much more pressing with the advent of the *Charter of Rights and Freedoms*. Although I do not wish to discuss the relationship between the *Charter of Rights* and the *Canadian Human Rights Act*, I am of the view that

the values underlying the *Charter*, in a legal system like our own, must inform the approach taken in other areas of the law. This is particularly true in the case of human rights, which are designed to protect, preserve and promote the dignity of the person. In the present case, I believe it is manifest that the concerns enunciated by the courts under sections 7 and 8 of the *Charter* assert themselves in the context of an order for a psychological examination. Although the Commission has also raised section 15, the subject of equality rights can be considered in another case.

[30] The leading case in the area is *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, where the Supreme Court recognized that the psychological integrity of the individual comes within the right to "security of the person" under section 7 of the *Charter*. The judgement of the majority accepts the premise that the *Charter* applies to human rights proceedings. The specific issue before the court was accordingly whether the psychological integrity of the individual respondent was sufficiently affected to trigger such a right. Although I do not feel it is necessary to address the matter, it will be apparent that the immediate case also raises issues with respect the right to liberty.

[31] As I understand it, the majority in *Blencoe* has accordingly imported the considerations that arise under section 7 of the *Charter* into the human rights process. At paragraph 84, Justice Bastarache referred to *R. v. O'Connor*, [1995] 4 S.C.R. 411 and held that this includes a reasonable expectation of privacy:

In *O'Connor*, at para. 110, L'Heureux-Dubé J. listed the cases in which the Court "expressed sympathy" for the idea that s. 7 includes a right to privacy. But she concluded that people have only a "reasonable expectation of privacy" (emphasis deleted) because privacy "must be balanced against legitimate societal needs" (para. 117).

This does not dispense with the matter, however. I take this to simply mean that there is no explicit right to privacy in the *Charter*, which still affords a considerable measure of protection for the privacy of the person.

[32] The majority in *Blencoe* relied on *R. v. Mills*, [1999] 3 S.C.R. 668, in stating that the disclosure of counselling records would constitute such a significant interference with a victim's psychological integrity that it would trigger the rights under section 7. At paragraph 85, Justice Bastarache wrote:

Where the therapeutic relationship between a sexual assault complainant and his or her physician is threatened by the disclosure of private records, this Court has recently held that security of the person is implicated . . . this is because the therapeutic relationship between doctor and patient is crucial to the patient's psychological integrity. This relationship must be protected to safeguard the mental integrity of patients and to thereby aid victims in recovering from their trauma.

The cases dealing with the disclosure of counselling records are also "animated", in the words of Justice Bastarache, by the principles under s. 8 of the *Charter*.

[33] The court in *Mills*, at paragraph 80, upheld the view of Justice La Forest J. in *R. v. Duarte*, [1995] 1 S.C.R. 30, at 53-54, where he stated that "this freedom not to be compelled to share our confidences with others is the very hallmark of a free society." The court went on to approve of the remarks of Justice Sopinka in *R. v. Plant*, [1993] 3 S.C.R. 281, at 293, where he stated:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.

It seems to me that the Human Rights Tribunal should respect the same "biographical" core of information that the Supreme Court has sought to protect in these decisions.

[34] I think it is axiomatic that the concerns expressed by the Supreme Court under sections 7 and 8 of the *Charter of Rights* arise in the situation before me. The decision in *Mills* holds that an order from a court for the production of counselling records under sections 278.1 and 278.91 of the *Criminal Code* constitute a seizure within the meaning of section 8 of the *Charter*. If counselling records come within the protections of the *Charter*, so does the process behind them. I cannot see any meaningful distinction between such a process and a psychological examination, even if the examination is limited to a diagnostic purpose. The decision of the Supreme Court in *Hunter et al. v. Southam*, [1984] 2 S.C.R. 145, established early on that section 8 should be broadly and liberally construed. The character of the examination is exploratory, and I think the legal meaning of the word "search" might be broad enough to include the extraction of personal information from a reluctant patient.

[35] It is evident that a psychological examination presents difficulties that do not arise in the context of a simple physical examination. Such an interview cannot take place without the trust and confidence of the Complainant. This raises additional concerns. It would be naïve to think that an examining psychologist--who is acting, in these circumstances, on behalf of the Complainant's legal adversaries--would not be in a position of authority over the Complainant. The Complainant will be asked to reveal the most sensitive and personal information, and share her intimate feelings with the psychologist. I am concerned about her vulnerability in this situation, particularly in a situation where she resents being exposed in this manner. Whatever the exact nature of the Complainant's rights or expectations under sections 7 and 8 of the *Charter*, they certainly cover the information in question and I am not prepared to give the Respondent a licence to search through that information.

[36] The information regarding the Complainant's current psychological state is of the most personal nature and easily comes within that category of personal or biographical information that deserves constitutional protection. In the circumstances, I think it would be imprudent for a body like the Tribunal to assume it has such invasive powers. The Tribunal is a statutory body, and while its enabling legislation is quasi-constitutional, that legislation must itself be interpreted in accordance with constitutional values. While there

is no preamble to the *Canadian Human Rights Act*, the *Act* is based on the principle of human dignity and respect for others, regardless of their individual circumstances. I believe that this includes a respect for privacy and the constitutional values that protect the privacy of the individual.

[37] All of this engages the Complainant's interest in privacy, wherever that may originate. It is notable that some of the same concerns are reflected in the international law. The Tribunal in *Stanley v. R.C.M.P.* (1987), 8 C.H.R.R. D/3799 (C.H.R.T.), at para. 30166, for example, found that Canada's decision to sign the *International Covenant on Civil and Political Rights* (2200A XXI) provides "support for the notion that the interest in personal privacy should be considered very important". Artile 17.1 of the Convention states that no one shall be "subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . ." This kind of provision provides a contextual or purposive element that seems particularly appropriate in interpreting human rights legislation. A Tribunal should be sensitive to these universal values.

[38] I believe that the *Canadian Human Rights Act* must be interpreted in a manner consistent with the values of the person. I cannot say whether the situation would be different if there was an explicit statutory provision permitting an order for an examination. That was the case in *Vancouver School District No. 39 v. B.C.T.F* (2001), 98 L.A.C. (4th) 385, where an arbitrator ruled that no section 7 rights were engaged by the operation of section 92 of the British Columbia *School Act*, which permitted a school board to dismiss an employee for failing to undergo an examination by a psychiatrist. The Respondent is not the Complainant's employer, however, and I cannot see how any of the concerns in that case arise before me. There is no legislative provision before me, however, and I see no reason to believe that Parliament intended to give the Tribunal such a power.

VI. POSSIBLE RESOLUTIONS OF THE ISSUE

[39] There may be reasons for another Tribunal to revisit the issue of an independent examination in the future, where a medical or physical disability is in issue. I suspect that there will be cases where it is difficult if not impossible to determine damages, for example, without a medical report. I am not convinced, however, that the Tribunal has the authority to compel a party to submit to an independent medical examination. This does not leave the Tribunal without resources to deal with the present issue.

[40] There may be situations where it is sufficient to draw an adverse inference against a complainant who is unwilling to submit to an examination. There is ample law on such a mode of proceeding, much of it in the criminal courts. There is also the possibility set out in *Lee*, where Mr. Sinclair ruled that the Complainant and Commission would not be allowed to lead psychological evidence, if the Complainant refused to see a psychiatrist. Each case must be considered in the context of its own facts. I do not believe that the *Lee*

order is practicable in the present case, where psychological evidence appears to be the mainstay of the Respondent's case. It is not an issue for the Complainant.

[41] There may be cases where a Respondent will be unable to prepare and properly present its case without a medical examination. If a Complainant refuses to subject herself to an examination, in such a situation, I believe that a Tribunal would have the authority to stay its own process. This is in keeping with the inherent authority - I use the term "inherent authority" gingerly - of any adjudicative body to protect the integrity and fairness of its own process. To this extent, at least, I believe the Tribunal is in the same position as other adjudicative bodies. I do not see how a Member can proceed to a hearing in good conscience, knowing that the hearing is unfair.

[42] I do not believe that there is any reason to resort to such drastic measures in the immediate case. I believe the test set out by Lord Denning, *supra*, is sufficient to decide the issue. Is it possible to decide the issues between the parties without an independent medical examination? I think the answer is yes.

VII. THE PROCEDURE TO BE FOLLOWED AT THE HEARING

[43] The Complainant does not want to share her current medical records with the other parties and I see no reason why she should be compelled to do so. None of the parties have suggested that there is any issue of competency before me, which would raise other concerns. I have already ruled that the other parties are entitled to her medical history, on the understanding that it reflects on her psychological state when the allegations were made. They have the Complainant's medical records for the time in question, for the time before that, and for a considerable time since. I cannot see why they need more.

[44] The procedural problem consists of keeping the focus of the inquiry on the psychological state of the Complainant when the allegations of harassment were made, and avoiding unnecessary excursions into her present circumstances. I see no reason why the human rights system cannot borrow from other areas of the law, where it offers a convenient and practical means of resolving these kinds of issues. The situation before me is like the situation that comes before the criminal courts, where the defence takes the position that the accused was in a certain psychological state when the relevant events occurred. The only difference in the present case is that it is the opposing party that is adopting this position.

[45] Although the criminal law has run into unsettled waters on the issue, the general rule has always been that the evidence of what the accused was experiencing at the time must be before the court. This is usually accomplished by having the accused testify. A psychologist or psychiatrist listens to the evidence, along with the court, and subsequently takes the stand, in order to provide expert evidence as to the psychological state of the accused at the time that the events occurred. This is usually based on a hypothetical question. Given that the accused had certain experiences, and a certain

history, is there reason to believe that the accused was suffering from a psychological disorder at the relevant time?

[46] I see no reason why this procedure cannot be followed in the immediate case. Any expert retained by the Respondent will have full access to the Complainant's medical and psychological history. The expert will also have the opportunity to hear the evidence of the Complainant, and raise any questions, through counsel, that are necessary to make a diagnosis. Although I am concerned with the privacy of the current information, I recognize that this may require some clarification of any ongoing condition that the Complainant may suffer. It is all a matter of degree.

[47] One of the advantages of this arrangement is that the psychologist will not be relying on extraneous evidence that is not before the Tribunal. There is more than enough in the medical record to provide the necessary basis for an expert's report, which may have to be somewhat tentative in the circumstances. It is enough if it outlines the concerns that the psychologist may have with regard to the Complainant's psychological state at the time in question. As I have said, it is for counsel to canvass any concerns and questions that the psychologist may have in cross-examination.

[48] This way of proceeding will allow the Tribunal to protect the rights of the Complainant throughout the process. It will also allow the Tribunal to ensure that legitimate issues are properly addressed.

VIII. THE REQUEST FOR A POSTPONEMENT

[49] There are two final matters that require comment. One is that I have received a very late request from the Respondent to delay the ruling on this aspect of its motion. This request came to me after I had decided to reject the application and was completing the final version of the ruling. I gather from the letter that counsel had apparently formed the view, in reading the Complainant's submissions, that some room for compromise had emerged. I do not know her reasons for believing this, but I find the Complainant's position clear and consistent. Although the written submissions from the Complainant may raise some concerns for her well-being, she is emphatic on the central issue. She is not willing to submit to an involuntary examination.

[50] The Complainant is always free to change her position and make whatever arrangements she wishes with the Respondent. I do not see why this would affect my ruling. It would nonetheless be improper to open up the issue after I have, in all reality, made my decision. There have been two if not three rounds of argument on the present issue and the rather breathless request of the Respondent comes altogether too late in the process. I am not prepared to suspend my ruling in the vague hope that it may not be needed.

[51] At this stage of the process, the application is in the keeping of the Tribunal. The parties are welcome to negotiate their way through the process, but the process has persistently broken down in the past. The Respondent complains, in its written submissions, that the Complainant has changed her mind on two occasions and there is nothing to prevent her changing her mind again. I firmly believe that the present issue needs to be settled, if only to clarify the matter before the hearing. The ruling therefore stands.

IX. NOMINATING A NEW PSYCHOLOGIST

[52] The Respondent has also sent the Tribunal a letter, along with a curriculum vitae, advising the Tribunal that it wished to nominate a different psychologist. I do not feel this was appropriate. Once argument has closed on an application, it should only be reopened in exceptional circumstances, after the other parties have been given an opportunity to address whether it should be reopened. This requires an application from one of the parties, which was never properly made.

[53] There is a reason for adopting such an approach, since the other parties could have objected that the identity of the psychologist had a bearing on the application. In the present case, at least, I think it would have been more appropriate to raise any request to nominate another psychologist after the ruling was made. I have accordingly proceeded on the basis of the original application. I would ask counsel and the parties to conduct themselves more cautiously in the future.

"Original signed by"

_____

Dr. Paul Groarke

OTTAWA, Ontario

December 18, 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 18, 2002

APPEARANCES:

Amanda Day On her own behalf

Leslie Reaume and Kathryn Chapman For the Canadian Human Rights Commission

Michael Gianacopoulos, Sharan Sangha, Anita Mekkunnel and Joyce Thayer For Department of National Defence

J. David Houston For Michael Hortie

1. [1] These quotations are taken from paragraphs 7 and 8 of the written submissions from the Department of National Defence.

2. [2] *Ibid.*, paragraph 23

3. [3] See *Société des Acadiens du Nouveau-Brunswick v. Ass'n of Parents for Fairness in Education* 1986] 1 S.C.R. 549, at 191-192.

4. [4] See *Blackburn v. Kochs Trucking Inc.* [1988] 4 W.W.R. 272 p (Q.B.)

5. [5] *See Cars v. Huk* [1992] 1 W.W.R. 86 (Alta. C.A.), for example, and *Tat v. Ellis*, (1994) 21 Alta. L.R. (3d) 7 (Alta.C.A.).

6. [6] See *McCuaig v. Halverson* [1993] S.J. No. 477 (Q.L.) (Sask. Q.B.)

7. [7] *Ibid.*, paragraph 27

8. [8] See *PSAC v. GNWT (Minister of* Personnel) (9) (July 25, 2001)