CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MICHELINE MONTREUIL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN FORCES

Respondent

RULING

MEMBER: Karen A. Jensen

2006 CHRT 42
2006/10/12

[1] This is a ruling on a motion presented by the Canadian Human Rights Commission (the Commission) requesting that the Tribunal order the Respondent, the Canadian Forces (the CF), to disclose material for which a claim of privilege has been asserted.

[2] The motion is made in the context of a complaint filed by Ms. Micheline Montreuil. Ms. Montreuil considers herself to be a transgendered person. In her complaint, she alleges that the CF discriminated against her on the basis of her sex and perceived disability when they refused to allow her to enlist in the Forces in 1999.

[3] During the Tribunal's case management process, the CF indicated that they intended to present expert medical evidence. The Tribunal directed the CF to provide the parties with a copy of the expert's report by April 24, 2006.

[4] Three days before the report was due, the CF requested an extension of the deadline for filing the expert report. In his request for an extension, counsel for the CF indicated that he had recently been assigned to the file and that in discussions with the expert, Dr. Pierre Assalian, it was decided that the scope of the report needed to be broadened. It was also determined that Dr. Assalian should interview Ms. Montreuil.

[5] The Tribunal granted the request for an extension and a new date of June 23, 2006 was set for the production of Dr. Assalian's report. The CF provided a copy of Dr. Assalian's report to the parties on June 22, 2006.

[6] The Commission sought further disclosure from the CF of documents that were prepared by, or addressed to Dr. Assalian in conjunction with the expert report. The documents in question are the following:

a) all reports, whether complete or preliminary, prepared by Dr. Pierre Assalian on or before April 24, 2006;

b) all communications, correspondence and/or exchanges of any nature without exception between the Canadian Forces and Dr. Assalian that contributed to the formulation of the expert opinion;

c) all other documents created by Dr. Assalian in the context of the present case.

[7] The Respondent refused to provide the requested documents claiming that they were immune from disclosure by virtue of the right to professional secrecy.

[8] The Commission then brought the present motion before the Tribunal. At the hearing on the motion, the Commission argued that the Tribunal should apply the common law rules regarding privilege against disclosure. According to these rules, the CF had waived its claim of privilege to the requested documents when it produced Dr. Assalian's report and stated that they would be calling him as a witness at the hearing.

[9] The Respondent replied that, according to Quebec law, the CF did not waive its right to the confidentiality of the requested documents when it produced Dr. Assalian's Expert Report.

[10] Section 50(4) of the *Canadian Human Rights Act* stipulates that the Tribunal may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence. We are not, however, at the stage in this process where the admissibility of evidence is being determined. We are at the disclosure stage of the inquiry process.

[11] Rule 6(1)(e) of the Tribunal's *Rules of Procedure* requires each party to serve and file a list of all documents in the party's possession "for which privilege is claimed". The French version of Rule 6(1)(e) requires the parties to indicate the documents in their possession for which "un privilège de non-divulgation" is invoked. To be clear, I take the terms "privilege" (in English) and "privilège de non-divulgation" (in French), as they are in the *Rules*, to include the concept of "professional secrecy" as that term is used in Quebec law.

[12] Rule 6 of the Tribunal's *Rules of Procedure* does not require the parties to produce the actual documents for which privilege is claimed. I am of the view that if a claim of privilege is challenged at the disclosure stage of the process, the Tribunal is not obliged to conclusively determine whether the claim of privilege is properly asserted or not. In circumstances such as the present case, where the issues are complex and where no evidence has been adduced with respect to the documents in question, it would not be prudent in my view, to make a definitive ruling on whether the documents are subject to a claim of privilege.

[13] Privilege is a fundamental right which should not lightly be abrogated (*Smith v. Jones*, [1999] 1 S.C.R. 495 at para. 74). In Quebec, strong and generous protection is afforded to the right of professional secrecy *(Foster Wheeler Power Co. v. Société*

municipale de gestion et d'élimination des déchets (SIGED) Inc., 2004 SCC 18 at para. 41).

[14] Therefore, I think that it is preferable in the present circumstances to assess whether the Respondent has established a plausible argument that privilege attaches to the requested documents and that it has not been waived. If it is established that the documents in question are arguably privileged, then in my view, the Tribunal should not order the disclosure of the documents in question. It will then be up to the Tribunal member or panel hearing the case on the merits to make a conclusive determination, on the basis of the evidence and arguments presented at that time, as to whether the requested documents are in fact subject to a valid claim of privilege and, therefore, inadmissible pursuant to s. 50(4) of the *Act*.

[15] The Complainant has raised the concern that if the documents are not disclosed prior to the hearing and she is successful in refuting the claim of privilege over the requested documents, she will lose the right to have these documents introduced into evidence by operation of Rule 9(3)(c) of the Tribunal's *Rules of Procedure*. Rule 9(3) of the Tribunal's *Rules of Procedure* stipulates that "(e)xcept with leave of the Panel" a party shall not introduce a document into evidence at the hearing that has not previously been disclosed. According to my reading of this rule, the Tribunal has the authority to grant leave to the complainant to introduce documents into evidence even if they have not been disclosed prior to the hearing. Therefore, should the Tribunal decide that the claim of privilege is unfounded, it may order that the documents be disclosed and entered into evidence if it is appropriate to do so.

[16] Is there a plausible argument to be made that privilege applies to the documents listed above and that it has not been waived? I think that the answer to this question is "yes". I find that there is certain logic in the following arguments presented by counsel for the Respondent.

Section 50(4) of the *Canadian Human Rights Act* does not stipulate which jurisdiction's laws of evidence are to be applied in interpreting the term "privilege".

By operation of sections 2 and 40 of the *Canada Evidence Act*, the Tribunal is required to apply the law of evidence in force in the province of Quebec in the present case.

In *Poulin v. Prat,* [1994] R.D.J. 301, the Quebec Court of Appeal stated that according to Quebec law, calling an expert witness to testify does not constitute an implicit waiver of the immunity from disclosure of the notes, rough copies, drafts and other documents created by the expert in preparation for the drafting of the final report. Similarly, immunity from disclosure of the communications between the lawyer that retained the expert and the expert is not waived by calling the expert. Rather, a party may only be said to have waived the immunity with respect to the definitive opinion which forms the basis for the expert's testimony, as well as the factual sources upon which the expert drew in formulating his or her opinion.

Poulin v. Prat has not been attenuated or modified by any subsequent decisions of the Quebec Court of Appeal or the Supreme Court of Canada. Therefore, by virtue of s. 40 of the *Canada Evidence Act*, *Poulin v. Prat* is binding upon the Tribunal.

The Respondent claims that the Commission has requested previous drafts of the expert's report, his notes and copies of correspondence between the expert and the lawyer that retained his services.

The Respondent asserts that according to *Poulin v. Prat*, all of these documents are immune from disclosure.

[17] In my view, the plausibility of the Respondent's arguments on the issues is not significantly weakened by the arguments made by the Commission and the Complainant.

[18] The Commission argued that the Tribunal should apply the common law principles regarding privilege as they were expressed by the B.C. Supreme Court in *Vancouver Community College v. Phillips, Barrat,* (1987), 20 B.C.L.R. (2d) 289 and subsequently applied in the federal context by the Federal Court of Canada, Trial Division, in *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1998), 159 F.T.R. 55. *Vancouver Community College* stands for the proposition that production from experts of documents going to substance or credibility may be required at trial when the expert is called. Assuming, however, that the common law recognizes the right to such documents at trial, there is no certainty whatsoever that such a right exists at the discovery or disclosure stage of the process (*Canadian Council of Professional Engineers v. Memorial University of Newfoundland, supra,* at para.1).

[19] For these reasons, the Commission's motion for an Order requiring the Respondent to disclose the above-noted documents is denied, without prejudice to its right to raise the issue again at the hearing into the merits of the complaint.

[20] It should be noted that my finding that the documents are arguably privileged does not mean that the documents are, in fact, privileged. It remains to be determined by the Member or panel hearing the case on the merits whether, on the basis of the evidence and arguments presented during the hearing, the requested documents are, in fact, subject to privilege and therefore, inadmissible pursuant to s. 50(4) of the *CHRA*.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario
October 12, 2006

PARTIES OF RECORD

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APPEARANCES:	
Micheline Montreuil	For herself
Ikram Warsame	For the Canadian Human Rights Commission
Guy Lamb / Pauline Leroux	For the Respondent