

**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: Pierre Deschamps 2006 CHRT 54  
2006/10/30

[TRANSLATION]

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[1] The Tribunal is seized with a complaint in which it is alleged that the complainant, Micheline Montreuil, was discriminated against by the respondent, the Canadian Armed Forces, because of her sex and a perception of disability when they refused to allow her to enlist in the Forces in 1999.

[2] On October 6, 2006, the Canadian Armed Forces presented a motion for the complainant to disclose two documents, the expert report by Dr. Serge Côté, dated March 18, 1999, and the disability certificate by Dr. Jean Rodrigue, dated January 5, 1998.

[3] The complainant objected to the disclosure of these documents, claiming they were not relevant and were subject to confidentiality.

[4] This motion was first referred to Karen Jensen for adjudication. In a decision rendered October 16, 2006, the latter referred the motion back to the member assigned to hear the complaint.

[5] During the hearing of this motion, the Tribunal heard two witnesses, Dr. Pierre Assalian and the complainant, Micheline Montreuil.

## **I. POSITION OF THE PARTIES**

### **A. Position of the Canadian Armed Forces**

[6] In its request for disclosure, the respondent is requiring the Tribunal to order that the complainant disclose the information regarding her medical condition that had not been sent in support of the complainant's enlistment application of July 13, 1999, and not disclosed to the Canadian Human Rights Commission, the Canadian Forces, and the Tribunal in the present proceedings. These documents consist of the medical expert report by Dr. Serge Côté, psychiatrist, dated March 18, 1998, and the disability report by Dr. Jean Rodrigue, dated January 5, 1998.

[7] The Tribunal notes that no obligation is made under the disclosure rules to submit any particular documents to the Tribunal. Disclosure takes place between the parties to a complaint without the Tribunal being a party.

[8] In its request, the respondent claims that the complainant wrongly did not disclose these two reports that, it claims, relate to the complainant's medical condition. It claims that the complainant did not respect the meaning and scope of the Tribunal's order, rendered November 28, 2005. We will get back to this.

[9] The respondent claims that the medical information in the two documents described above have to do with the claimant's sex-change procedure and allow for the claimant's state of health to be assessed.

[10] In its written arguments, the respondent claims that the medical documents in question are essential to understanding the complainant's complete medical history.

### **B. Position of the complainant**

[11] In her written response to the respondent's request, the complainant states that the documents the respondent is seeking to have disclosed are not relevant to the case, that they are part of a labour relations file, and that they are subject to confidentiality.

[12] Moreover, the complainant states that the medical expertise of Dr. Côté does not fall into the category of documents mentioned by my colleague, Karen Jensen, in her November 28, 2005, ruling.

### **C. Position of the Canadian Human Rights Commission**

[13] The Commission's position can be found in a letter addressed to the Tribunal on October 12, 2006.

[14] The Commission supports the complainant's position regarding her refusal to disclose the two documents described above because they are not relevant to the issues in question in this complaint. The Commission argues that the medical reports were prepared strictly for a

grievance filed by the complainant against her former employer and affect only the validity of the consent the complainant gave regarding her resignation from Collège Garneau, on December 4, 1997. For the Commission, the request for disclosure of these documents is a fishing expedition.

[15] Moreover, the Commission states that the documents being requested cannot be used to support the Canadian Armed Forces decision to deny the complainant's enlistment application.

## **II. ANALYSIS**

[16] At the outset, it is important to state that it is not the complainant's general medical condition that is at issue in this case, but her medical condition concerning her identity as a transgender or transsexual person. This was clearly established in the decision rendered by my colleague Jensen on November 28, 2005; a decision that, we must remember, addressed the medical information regarding the complainant held by Dr. Serge Côté.

[17] In her decision, my colleague Jensen defined the parameters for the disclosure of the medical documents related to this case. According to her, and I quote, "...only those medical files dealing with Ms. Montreuil's involvement in the sex-change process and her sexual identity are to be disclosed." Therefore, it is not the medical documents concerning the complainant's general medical state that are relevant in this case, but those concerning the sex-change and sexual identity of the complainant.

[18] We will now look at the two documents for which the respondent is requesting disclosure.

### **(i) Expert report by Dr. Côté**

[19] It must be mentioned here that the expert report by Dr. Côté has already been the subject of a request for disclosure in this case. In fact, the file and the evidence show that in September 2005, the respondent filed a motion for disclosure pertaining to three documents, i.e. the medical files of Dr. Serge Côté, Dr. Roland Tremblay and Dr. Martine Lehoux. At the time, the complainant objected to the disclosure of these files on the ground that they were not relevant to the allegation of discrimination the complainant made against the Canadian Armed Forces.

[20] In her decision dated November 28, 2005, my colleague Jensen found, as we stated above, that only the medical files regarding Ms. Montreuil's sex-change and sexual identity were to be disclosed. She ordered, "that the complete medical files of Micheline Montreuil (or Pierre Montreuil, as she was previously known)...from the following physicians be disclosed: Dr. Serge Côté, Dr. Roland Tremblay and Dr. Martine Lehoux." The decision by my colleague Jensen was made without her personally consulting the documents in question.

[21] Moreover, Ms. Jensen stated in her decision that to protect Ms. Montreuil's right to confidentiality, the documents were to be transmitted to counsel for the Canadian Armed Forces and not to any other person without the Tribunal first giving consent and Ms. Montreuil being notified. She also indicated that the documents could be consulted by medical experts hired by the Canadian Forces, but only for the purposes of the present case and were not to be used for any purpose that was not related to the present case.

[22] At the hearing of this motion, the parties reminded the Tribunal that it should not stray from Ms. Jensen's decision, which provided the guidelines for the debate over the medical documents that were to be disclosed by the complainant.

[23] Today, the evidence shows that Ms. Montreuil did not consult Dr. Côté in the context of a sex-change process, but as an expert to assess whether her decision to resign, in the context of a grievance Ms. Montreuil filed following her resignation from Collège Garneau on December 4, 1997, was a free and informed choice.

[24] The evidence shows that the complainant did not consult Dr. Côté as an attending physician, but as an expert. This being said, regarding the order he received to communicate the complete medical file he had on the complainant to counsel for the Canadian Armed Forces, Dr. Côté informed then-counsel for the Canadian Armed Forces, Claude Morissette, on two occasions, that he no longer had possession of the expert report concerning the grievance filed by the complainant in 1998, because he did not keep files for more than five years. However, the evidence shows that the expert report, while no longer in Dr. Côté's possession, is in the possession of the complainant and third parties identified by the complainant at the hearing.

[25] It must be noted that had it not been for Dr. Côté's practice to not keep his medical expertise files for more than five years, Dr. Côté, upon the Tribunal's order, would have communicated his March 1998 expert report to the respondent.

[26] This being said, it is important, in light of the new facts revealed by the evidence, to determine whether this expert report by Dr. Côté meets the requirements for likelihood of relevance that governs the disclosure of documents in cases of complaints of discrimination based on the *Canadian Human Rights Act*.

[27] At the outset, it is important to note that we are not at a stage in these proceedings where the Tribunal is to assess the probative value of the document in terms of the allegation of discrimination made by the complainant, but the appearance or likelihood of the document's relevance in terms of the issues at bar.

[28] The disclosure of the expert report to the respondent does not necessarily mean the document will be produced. If the respondent planned to file the document as evidence, the Tribunal would need to determine both its admissibility and its probative value, in terms of the allegation of discrimination submitted by the complainant.

[29] There is no doubt that the complainant's condition as a transgender or transsexual person is an issue in question regarding the claim of discrimination, as is the issue of her sexual identity.

[30] Therefore, inasmuch as a document relates to these two elements, transgender or transsexual condition or sexual identity, the document acquires a likelihood of relevance.

[31] It must be noted that part of the content of Dr. Côté's expert report, for which the respondent seeks disclosure, is known. In the excerpt of the arbitral sentence submitted in support of Dr. Assalian's affidavit, are the findings that appear in Dr. Serge Côté's report. The findings report on the fact that, for the first time in her life, the complainant was confronted by her double identity.

[32] Moreover, in the motion for judicial review of the arbitral sentence, there are many paragraphs on the testimony given by Dr. Côté before the arbitrator who rendered the arbitral sentence.

[33] Thus, at paragraph 137, the applicant, the teacher's union of Collège François-Xavier Garneau, claims that the arbitrator reported only a small part of the testimony given by Dr. Côté, the author of the expert report. In particular, at paragraph 137.3, the applicant stated that Dr. Côté, in his testimony, claimed that the complainant suffered from duality, anxiety and anguish.

[34] At paragraph 137.7, the applicant alleges that the respondent, the Collège, neglected to mention that Dr. Côté stated that the internal conflict of the complainant's personality between Pierre and Micheline meant that the complainant was unable to analyze all the aspects.

[35] It seems that Dr. Côté addressed the issue of the complainant's dual personality and her internal personality conflict during his testimony regarding his expert report. The Tribunal is of the view that these are two other elements that are relevant to the case opposing the complainant and the respondent.

[36] It is also important to note that it is not at this point in the proceedings that the Tribunal is to rule on the validity of the parties' opposing claims or on the admissibility or probative value of the expert report; the Tribunal must determine whether the expert report has a likelihood of relevance to the issues the Tribunal will be deciding.

[37] The Tribunal therefore finds that the expert report by Dr. Serge Côté of March 18, 1998, must be disclosed to the respondent.

[38] Before the Tribunal, the complainant argued that the report was confidential because it was medical in nature and was produced under the terms of an agreement that was also confidential.

[39] As for the confidentiality of the report, the Tribunal intends on using the same disclosure conditions that appear in Karen Jensen's decision of November 28, 2005.

[40] It must be stated here that the content of Dr. Côté's report has already been disclosed in a number of proceedings. The findings at which Dr. Côté arrived are even reproduced in the arbitral sentence.

[41] That being said, given the special circumstances of this case, this is not a reason to no longer ensure the protection of the disclosed information regarding third parties that would have no reason to read the report.

#### **(ii) Certificate of Dr. Rodrigue**

[42] Now, regarding the certificate of Dr. Rodrigue in this case, the respondent claims that the document is relevant because it relates to the complainant's sex-change process and her sexual identity.

[43] During her testimony, the complainant clearly stated the circumstances and the reasons for which the disability certificate was written by Dr. Rodrigue; reasons essentially related to the collective agreement that required such a document to be produced.

[44] In his sentence, the arbitrator Morin, who read the disability certificate completed by Dr. Rodrigue, declared that he could not rely on this document as evidence of a genuine disability. His opinion was that the certificate, produced one month after the events, appeared to conform too closely to the calendar negotiated by the parties for the agreement reached between the complainant, her union, and the Collège.

[45] At paragraph 6 of his affidavit, Dr. Assalian states having read an excerpt from the arbitral sentence dated February 4, 2000, regarding the complainant, her union and the Collège Garneau. At the hearing, Dr. Assalian admitted to not having read the decision and the arbitrator's reasons, as they appeared at Tab 4 of Exhibit RP-18 at pages 9 et seq.

[46] In the Tribunal's opinion, these pages are important for deciding on the relevance of the disability certificate written by Dr. Rodrigue in the present motion. It is unfortunate that Dr. Assalian did not read them.

[47] Upon analysis of the documents submitted, the Tribunal feels that there is no indication that the disability report written by Dr. Rodrigue contains any information whatsoever on the complainant's transgender or transsexual condition, her sex-change procedure or even on her sexual identity.

[48] It is difficult to maintain that the excerpt from the arbitral sentence produced in support of Dr. Assalian's affidavit contains any element that relates to the complainant's transgender or transsexual condition.

[49] The fact that the document was written by a general practitioner a few months before the complainant's application to enlist in the Canadian Armed Forces is not enough to establish a likelihood of relevance for the issues in question in the present case.

[50] Hence, the Tribunal does not grant the respondent's application to order the complainant to disclose the disability certificate written by Dr. Rodrigue.

### **III. DECISION**

[51] As a result, the Tribunal orders the complainant to disclose forthwith the expert report of Dr. Serge Côté dated March 18, 1988, to the respondent party.

[52] To protect the complainant's right to confidentiality, the expert report of Dr. Serge Côté shall be transmitted to counsel for the respondent. The report may be transmitted to medical experts hired by the respondent, solely for the purposes of the present case.

Pierre Deschamps

QUÉBEC, Quebec

October 30, 2006

PARTIES OF RECORD

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APPEARANCES:	
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