CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

JOHANNE GUAY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ROYAL CANADIAN MOUNTED POLICE

Respondent

RULING ON PRELIMINARY QUESTIONS

2004 CHRT 34
2004/11/18

MEMBER: Michel Doucet

[TRADUCTION]

[1] The Tribunal has before it several preliminary issues raised by the parties regarding a complaint filed on September 23, 2002 by Johanne Guay (the "Complainant") with the Canadian Human Rights Commission (the "Commission") in which she alleged that the Royal Canadian Mounted Police (the "Respondent") discriminated against her contrary to sections 7 and 14 of the *Canadian Human Rights Act* R.S.C. 1985, c. H-6 (the "*Act*").

[2] In their motions, the Complainant and the Commission seek an amendment to the complaint form to add allegations of retaliation contrary to section 14.1 of the *Canadian Human Rights Act* R.S.C. 1985, c. H-6 and an order amending the complaint to add three new respondents.

[3] The Respondent requests that the style of cause be changed to show the Attorney General of Canada as the respondent instead of the Royal Canadian Mounted Police. It also seeks an order serving several physicians and the Royal Canadian Mounted Police Health Services with a subpoena *duces tecum*, ordering them to disclose the Complainant's medical records, clinical study notes, consultation reports, test results and laboratory examination results between January 1, 2000 and the present. Alternatively, it seeks an order requiring the Complainant to agree to this disclosure. It also seeks an order requiring the Complainant to disclose the names of all health professionals that treated her between January 1, 2000 and the present and that they be served with a subpoena *duces tecum*.

[4] The Respondent also seeks an order requiring the Complainant to disclose the notes she took during her conversations with Inspector Marc Proulx and all other relevant notes she may have in her possession.

[5] Finally, it seeks an order extending the communication time set out in Rule 6(1) of the *Canadian Human Rights Tribunal Interim Rules of Procedure* to 30 days following receipt of the health information sought.

I. PRELIMINARY ISSUES RAISED BY THE COMPLAINANT AND THE COMMISSION

A. First issue: amendments to the complaint form to add allegations of retaliation contrary to section 14.1 of the *Act*

[6] The Complainant and the Commission made a motion pursuant to Rule 3(1) of the *Canadian Human Rights Tribunal Interim Rules of Procedure*. The purpose of the motion is to amend the complaint to add the ground of retaliation set out in section 14.1 of the *Act*. They allege that, subsequent to the filing of the complaint signed by the Complainant on September 23, 2002, the Respondent, by the actions of its employees, took retaliatory action against the Complainant.

[7] In *Schnell* v. *Machiavelli and Associates Emprize Inc. and Micka*, rendered on April 25, 2001, the Tribunal set out in paragraph 12 the test to apply in such a case:

With respect to the Commission's application to amend the complaint, the test as enunciated by this Tribunal is whether the nature of the allegations of retaliation are linked, at least by the complainant, to the allegations giving rise to the original complaint. The fact that the proposed amendment involves a different section of the Act in issue in the original complaint does not deprive the Tribunal of jurisdiction to allow such an amendment. There is a discretion in the Tribunal to amend the complaint to deal with additional allegations, provided that sufficient notice is given to the respondents to enable them to properly defend themselves.

[8] In its written submissions, the Respondent did not object to the amendments requested by the Complainant and the Commission, provided that it receives sufficient notice enabling it to reply to the new allegations.

[9] Since the hearing in this case has been postponed to March 8, 2005, there is no question that the Respondent has enough time to reply to the new allegations.

[10] Therefore, the Tribunal grants the Complainant's and the Commission's motion. It also gives the Respondent 21 days from the date of the present decision to submit a written response to these new allegations, if it so desires.

[11] The complaint is hereby amended to include the allegation of retaliation in accordance with section 14.1 of the *Act*.

B. Second issue: order amending the complaint to add three new respondents.

[12] The Commission and the Complainant seek an order adding Messrs. Marc Proulx, Normand Goulet and Denis Fortin as respondents. The Complainant and the Commission allege that these individuals are responsible for the harassment that the Complainant claims she was subjected to and that they committed retaliatory action against the Complainant after the complaint was filed with the Commission.

[13] In support of its motion, the Commission maintains that Marc Proulx and Normand Goulet were referred to in the complaint, and they were questioned by the Commission's investigator. It adds that the addition of these new parties, with respect to the retaliation, was not reasonably foreseeable at the time the complaint was filed but that it has now become necessary to dispose of this aspect of the complaint.

[14] According to the Commission, if the Respondent, as the employer of these individuals, is indeed responsible for the discriminatory acts that they may have committed in the course of their employment under section 65 of the *Act*, the fact still remains that they are discrete persons.

[15] The Respondent argues that the addition of the three members of the Royal Canadian Mounted Police is unnecessary and will only complicate the proceeding and unnecessarily prolong the hearing.

[16] In *Desormeaux* v. *Ottawa-Carleton Regional Transit Commission*, T701/0602, October 2, 2002, vol. 1, p. 46, the Tribunal pointed out that paragraph 48.9(2)(*b*) of the *Act* specifically contemplates the addition of parties to the proceedings before the Tribunal. Subsection 48.9(2) also provides for the Tribunal to make rules of procedure governing the procedure before it.

[17] Two of the Tribunal's relatively recent decisions deal directly with this issue: *Syndicat des employés d'exécution de Québec-Téléphone, Section Locale 5044 du SCFP* v. *Telus Communication (Québec) Inc.*, 2003 CHRT 31 (hereafter "*Telus*") and *Brown* v. *National Capital Commission*, 2003 CHRT 43 (hereafter "*Brown*").

[18] In *Telus*, the Tribunal indicated that, although the *Act* gives the Tribunal the power to add parties to a proceeding when the Tribunal deems it appropriate, the legislative context surrounding this discretionary power argues for a measure of restraint or caution. The Tribunal pointed out that the *Act* provides for, in dealing with complaints of discrimination, a carefully developed process of investigation and inquiry in which both the Commission and the Tribunal have clearly defined roles. The addition of parties during a proceeding before the Tribunal deprives the new respondent of the benefit of certain means of defence it can normally have access to at the stage of the screening of a complaint by the Commission, notably the possibility of having the complaint dismissed without the need for an inquiry.

[19] The Tribunal found, at paragraph 30, that "the forced addition of a new respondent once the Tribunal has been charged with inquiring into a complaint is appropriate...if it is established that the presence of this new party is necessary to dispose of the complaint before the Tribunal and that it was not reasonably foreseeable, once the complaint was

filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint" [translation]. In *Telus*, the Tribunal refused the addition of the third party, namely the Syndicat des Agents de Maîtrise de Québec-Téléphone (the "SAQT"). The Tribunal believed that the impleading of the SAQT would be prejudicial to it from a procedural fairness standpoint.

[20] In *Brown*, the Tribunal indicated that it can add a party when such a measure is necessary to decide all of the matters in dispute or provide a complete and effective solution of the matter before it. The member added another factor, which in his view is more significant than the question of foreseeability. He stated that the purpose of the *Act* is to remedy discrimination and that the Tribunal's power to add parties must be subordinated to that purpose. Human rights proceedings have a constitutional component that is often missing in civil proceedings. Since the litigation before the Tribunal is public interest litigation, the rules regarding the addition of parties must reflect the mandate of the Tribunal, which is to provide an effective remedy for discrimination. In *Brown*, the addition of a new party was requested not because the party was considered directly liable for the discrimination, but rather because it was considered essential for a more appropriate enforcement of the decision against the original respondent.

[21] The original party in *Brown* was the National Capital Commission (the "NCC"). It became evident during the hearing that the solution to the problem that the Tribunal had to resolve would probably be found in an adjacent building belonging to the Department of Public Works. Although Public Works and the NCC are separate in law, they are both creatures of the Federal Crown. The addition of Public Works was permitted because it would allow for a more appropriate enforcement of the decision.

[22] In the present case, the three new respondents that the Commission and the Complainant wish added are employees of the Respondent. In this regard, section 65 of the *Act* states the following:

65. (1) Sous réserve du paragraphe (2), les actes ou omissions commis par un employé, un mandataire, un administrateur ou un dirigeant dans le cadre de son emploi sont réputés, pour l'application de la présente loi, avoir été commis par la personne, l'organisme ou l'association qui l'emploie.	**65**. (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.
(2) La personne, l'organisme ou l'association visé au paragraphe (1) peut se soustraire à son application s'il établit que l'acte ou l'omission a eu lieu sans son consentenent, qu'il avait pris toutes les mesures nécessaires pour l'empêcher et que, par la suite, il a tenté d'en atténuer ou d'en annuler les effets.	(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[23] In its written arguments, the Commission states that these employees are persons separate from the Respondent. It added that, according to section 4 of the *Act*, anyone found guilty of discriminatory practices may be subject to specific orders.

[24] The Complainant is not seeking any particular remedy from these plaintiffs. The Respondent did not raise a defence for them based on subsection 65(2). Obviously, if the Respondent had raised such a defence, my decision on the addition of the parties could have been different.

[25] Their discriminatory acts are one and the same as those alleged against the Respondent, and no evidence was submitted demonstrating that these acts were committed outside their employment. Thus, if it is established that the acts or omissions of its employees are discriminatory because they were committed in the course of their employment, they will be deemed, for the purposes of the *Act*, to have been committed by the Respondent.

[26] Moreover, the Tribunal cannot ignore the fact that the Commission and the Complainant could reasonably have foreseen, at the time of filing the complaint and during the investigation, the addition of these parties. At the time, they chose not to add them. Adding them now, with no formal complaint having been brought against them, deprives them of the opportunity to present certain grounds of defence before the Commission pursuant to sections 41 and 44 of the *Act*.

[27] The Tribunal is not satisfied that the addition of these respondents is necessary for the disposal of the complaint and, contrary to the decision in *Brown*, their presence is not essential for a more appropriate enforcement of the decision that would be made against the Respondent.

[28] The request from the Commission and the Complainant for adding three new parties is denied.

II. PRELIMINARY ISSUES RAISED BY THE RESPONDENT

A. First issue: amendment to the style of cause

[29] The Respondent brought a motion to amend the style of cause so that the "Attorney General of Canada" is designated as the respondent The current style of cause identifies the "Royal Canadian Mounted Police" as the respondent. The Respondent claims that only the Attorney General of Canada may appear in judicial proceedings to reply to acts committed by members of the Royal Canadian Mounted Police.

[30] It adds that the capacity to sue and be sued is reserved solely for natural persons and corporations. Since the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 does not give the Royal Canadian Mounted Police a distinct legal personality, it therefore does not have the capacity to sue and be sued. It adds that the RCMP is not a "person" and thus cannot not be a party to a complaint under the *Canadian Human Rights Act*.

[31] Section 3 of the *Royal Canadian Mounted Police Act* stipulates that:

3. Est maintenue pour le Canada une force de police composée d'officiers et autres membres et appelée Gendarmerie royale du Canada.	**3**. There shall continue to be a police force for Canada, which shall consist of officers and other members and be known as the Royal Canadian Mounted Police.

[32] The Commission does not object to this motion. The Complainant maintains that the Attorney General of Canada is not her employer and that the amendment should not be granted.

[33] In *Plante* v. *Royal Canadian Mounted Police*, 2003 CHRT 28, the Tribunal had before it a motion very similar to the present one. In granting the Respondent's motion in that case, the Tribunal indicated that "a review of the jurisprudence cited by the respondent, as well as the relevant provisions of the *Crown Liability Act*, discloses that the respondent is correct, and that the complainant's case should properly be brought against the Attorney General of Canada (representing the Royal Canadian Mounted Police)."

[34] I can understand how the Respondent's request may appear to the Complainant, but I believe that the Respondent's motion deals solely with the legal formalities of disputes to which the federal government is a party and that the Complainant will not suffer any prejudice as a result. Changing the style of cause will not impair the Complainant's capacity to present her arguments or the remedy that would be awarded to her if her complaint is sustained.

[35] I therefore order that the respondent name be replaced with the Attorney General of Canada (representing the Royal Canadian Mounted Police).

B. Second issue: medical records

[36] On September 23, 2002, the Complainant filed a complaint with the Commission alleging that she was discriminated against by the Respondent on the basis of her disability. She alleged, among other things, that the Respondent refused to accommodate her medical condition and that she was harassed because of her disability. In her disclosure, the Complainant maintained that her supervisors required her to work days or shifts that did not take her physician's recommendations into account and that they refused to transfer her to a position more suited to her medical condition.

[37] Her disclosure of documents reveals that, in addition to her attending physician, Dr. Mireille Belzile, she also consulted Drs. John Gosselin, Bruno Laplante and Jocelyn Aubut. In the "Statement of Issues of Fact and Law," the remedies sought by the Complainant include a request for financial compensation in the amount of $20,000 for physical injuries and pain and suffering. She maintains that the Respondent's acts "cause undue stress" [translation] and "cause insomnia, exhaustion, migraines and digestive problems" [translation] to her.

[38] According to the Respondent, as soon as a party brings his/her medical condition into a dispute, he/she implicitly waives his/her right to confidentiality otherwise protecting his/her medical record and that, since this record contains information that is potentially relevant to the facts in dispute, it must be disclosed. The Respondent adds that the extent of the disability is at issue, likewise the existence and extent of the psychological and physiological signs of stress that the Complainant claims to be suffering. It thereby concludes that the information pertaining to the Complainant's medical condition is relevant.

[39] The Commission and the Complainant allege that the disclosure of the Complainant's medical records is not necessary because the Respondent has been aware of her medical condition for several years.

[40] The *Act* and the *Canadian Human Rights Tribunal Interim Rules of Procedure* codifies the rule of natural justice granting each party the right to a full and complete

hearing. This right also includes the right to the disclosure of relevant evidence in the possession or care of the opposing party. However, in a motion such as the one before us, the Tribunal must weigh the competing interests: the interests of natural justice on one hand and the individual's right to privacy and confidentiality on the other.

[41] In its amended Notice of Motion, the Respondent seeks an order for serving the Complainant's attending physicians with a subpoena *duces tecum*. The purpose of the *duces tecum* portion of the subpoena is to order third parties, who are not litigants, to produce documents that they have in their possession.

[42] Other relevant principles must also be considered before I can render my decision. First, there has to be a rational connection between the documents requested and the issues in this motion. In other words, the information sought must be arguably relevant.

[43] The request must not be speculative or amount to a "fishing expedition". The description of the documents should not be too broad or general and should be identified with reasonable particularity. Finally, the request should not be oppressive, that is, should not subject a stranger to the litigation to an onerous and far-ranging search for the documents. (See *CTEA* v. *Bell Canada*, T503/2098, Ruling No. 2.)

[44] In *Day* v. *Department of National Defence and Hortie, Ruling No. 3*, 2002/12/06**,** the Tribunal used a three-step approach to determine whether documents should be disclosed or not:

i. The Tribunal should determine whether the information is likely to be relevant, which is not a particularly high standard. There must be some relevance, and the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute. 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.

ii. The Tribunal must then 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.

iii. If the Tribunal is unable to resolve the matter without examining the material, it should inspect the documents. In the final step of this process, it may be helpful for the party requiring the documents to be protected to draw the Tribunal's attention to passages or individual documents that raise concerns.

[45] I find in the present case that the requested documents are likely to be relevant and that they could be relevant to an issue in the hearing. The Respondent has established that there is a connection between the requested documents and the issues in dispute, particularly regarding the remedies sought. In human rights proceedings, when a complainant seeks compensation for physical injuries and for pain and suffering, he/she implicitly agrees to allow a respondent to have access to medical records or, in general, personal health information. The right to confidentiality of medical records no longer exists. In the present case, the Complainant is seeking financial compensation for physical injuries and pain and suffering. The right to confidentiality is therefore overridden by the Respondent's right to know the grounds and scope of the complaint against it. In human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a Complainant's arguments. If a complainant bases the case

on his/her medical condition, a respondent is entitled to relevant health information that may be pertinent to the claim.

[46] The Complainant and the Commission have not raised any arguments likely to have a bearing on my decision to order the disclosure of the documents sought.

[47] In view of the foregoing, the Tribunal shall issue subpoenae *duces tecum* to Drs. Mireille Belzile, John Gosselin, Bruno Laplante, Jocelyn Aubut and the Royal Canadian Mounted Police Health Services, ordering them to disclose to the Respondent's lawyers the Complainant's medical files, clinical study notes, consultation reports, test results and/or laboratory examination results between January 1, 2000 and the present.

[48] To protect the Complainant's right to confidentiality, it is also agreed that the Respondent's lawyers themselves shall consult these documents and shall not disclose their contents to any other individuals without prior permission from the Tribunal and without notifying the Complainant. It is also agreed that the disclosure of these documents does not mean that they are submitted as evidence and any issues in this regard shall be dealt with during the hearing. In addition, if the Complainant wishes to raise any issues regarding the confidentiality of certain information that may be contained in these documents but does not concern the present case, she is asked to inform the Tribunal as soon as possible. In such a case, upon notice to the parties, the Tribunal shall review the records to determine which information should be disclosed because of its relevance to the issues in the present dispute and which information should not be disclosed.

[49] As to the Respondent's request for an extension of the communication time set out in Rule 6(1) of the *Interim Rules of Procedure*, the Tribunal sees no reason to grant this request and orders the Respondent to proceed with this, if not already done, within seven days following this decision. If, after the medical records are filed, the Respondent must make changes to its communication, it may at that time bring a motion before the Tribunal.

C. Third issue: production of notes taken by the Complainant during conversations with Inspector Marc Proulx

[50] In her disclosure, the Complainant appears to refer to personal notes she took during her conversations with Inspector Marc Proulx. In her reply to the present motion, she adds that these notes consist almost entirely of the information in the allegations of retaliation mentioned earlier.

[51] Paragraph 6(1)(*d*) of the *Interim Rules of Procedure* requires that the parties disclose all documents in their possession for which they are not claiming any privilege and which are relevant to issues in the case. In the present case, no privilege was claimed for the notes in question.

[52] I therefore order the Complainant to disclose to the Respondent the notes taken during her conversations with Inspector Marc Proulx and which she referred to in her disclosure.

[53] My ordering the disclosure of these documents does not mean that they are admissible in evidence. This issue shall be dealt with at the hearing.

III. CONCLUSION

[54] The Tribunal grants the Complainant's and the Commission's motion and orders that the complaint be amended to include the allegation of retaliation in accordance with section 14.1 of the *Act*.

[55] The Tribunal gives the Respondent 21 days from the date of the present decision to submit a written response to these new allegations.
[56] The Commission's and the Complainant's request for the addition of three new parties is denied.
[57] The motion for the Respondent name to be replaced with the Attorney General of Canada (representing the Royal Canadian Mounted Police) is granted.
[58] The Tribunal agrees to issue subpoenae *duces tecum* to Drs. Mireille Belzile, John Gosselin, Bruno Laplante, Jocelyn Aubut and to the Royal Canadian Mounted Police Health Services, ordering them to disclose to the Respondent's lawyers the Complainant's medical records, clinical study notes, consultation reports, test results and/or laboratory examination results between January 1, 2000 and the present.
[59] The Tribunal orders the Complainant to disclose to the Respondent the notes taken during her conversations with Inspector Marc Proulx.

Michel Doucet

OTTAWA, Ontario
November 18, 2004

PARTIES OF RECORD

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DECISION OF THE TRIBUNAL DATED:	November 18, 2004

APPEARANCES:

Johanne Guay	On her own behalf
François Lumbu	On behalf of the Canadian Human Rights Commission
Alexandre Kaufman	On behalf of the Respondent