

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-007-06

IN THE MATTER OF THE *HUMAN RIGHTS ACT*, R.S.N.B., 1973, c. H-1 1

AND IN THE MATTER OF A COMPLAINT PURSUANT TO SECTION 3 OF THE ACT

BETWEEN:

Warren McConnell

Complainant

- and -

Brunswick News Inc.

Respondent

**RULING ON THE APPLICATION FOR DISCLOSURE OF THE COMPLAINANT'S
PSYCHOLOGICAL RECORDS AND TREATMENT NOTES**

BEFORE:

G.L. Bladon, Vice-Chairperson

APPEARANCES:

For the Human Rights Commission:

Chantal L. Gauthier, Esqe.

For Warren McConnell:

Dan Leger, Esq

For Brunswick News Inc.:

Kelly VanBuskirk, Esq.

Natalie L. Godbout, Esqe.

DATE OF HEARING:

February 25, 2008

DATE:

March 27, 2008

1. BACKGROUND

1. On June 10, 2002 the complainant was terminated from his 34 year employment with the respondent. On December 3, 2002, the complainant filed a complaint under the *Human Rights Act* alleging that the termination was based on the complainant's mental disability which constituted discrimination contrary to section 3 of the *Act*.

2. The records relating to the complainant's medical condition are central to the complaint. The complainant through his counsel has now produced all relevant medical and hospital documentation with the exception of the psychological notes and records of Dr. Wendy Rogers. Dr. Rogers, a psychologist, began treating the complainant in December 1997 when he was hospitalized for depression and suicidal thoughts. She has continued to be involved in his subsequent medical care including his hospitalization in early 2000 and again in July 2000. She was consulted by the respondent directly concerning the complainant's return to work in October 2001.

3. Counsel for the complainant consents to the release of the psychological records and treatment notes including "session notes and raw data." The complainant does not object to their production. The objection comes from Dr. Rogers who refused to produce the notes and records until summoned to do so by this Board. The Board sealed the documents upon their receipt pending this Ruling on their disclosure.

4. Dr. Rogers' objection to the disclosure of her treatment notes and records appears to lie in the need for a fully informed consent from the patient, i.e. that the consent be obtained without coercion, that the patient fully appreciate the possible consequences of disclosure and the need for discretion in the use of the notes to avoid misinterpretation or misuse.

2. ANALYSIS

5. In this proceeding, the complainant claims, *inter alia*, monetary damages for discrimination based on mental disability. Obviously, the nature and extent of that disability is a key issue

that the complainant has chosen to litigate. Dr. Rogers' involvement with the complainant, over a lengthy period of time, places her in possession of relevant information, some of which is no doubt contained in her records and treatment notes. The integrity of the litigation process proceeds from the premise that all relevant evidence must be made available and carefully scrutinized in order that the ultimate determination by the Tribunal is both fair and just. Without the disclosure of material medical information, that process is put at risk. As to Dr. Rogers' specific concern, it is reasonable to assume in a litigation context that counsel has fully advised his client of the consequences of production of medical records absent any suggestions to the contrary.

6. This issue has been canvassed by many Courts including the Supreme Court of Canada in *M. (A). v. Ryan* [1997 CanLII 403 \(S.C.C.\)](#), (1997), 143 DLR (4th) 1. The matter was simply put, however, by Justice Southin at the Court of Appeal level – [1994] BCJ at para. 45:

“[para 45] In considering whether to make an order compelling disclosure of private documents, whether in possession of a party or a non-party, the Court ought to ask itself whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion. There need not be a privilege against testimony in the classic sense for this to be a relevant question. By “private documents” I mean documents which are not public documents. I do not limit this question to what might be thought of as personally embarrassing documents.

[para 46] On the one hand, a person who has been injured by the tort or breach of fiduciary duty of another ought not to be driven from the judgment seat by fear of unwarranted disclosure a sort of blackmail by legal process. If such a thing were to happen, the injured person would be twice a victim.

[para 47] But, on the other hand, a defendant ought not to be deprived of an assessment of the loss he actually caused, founded on all relevant evidence. It would be as much a miscarriage of justice for him to be ordered to pay a million dollars when, if all the relevant evidence were before the court, the award would be for one-tenth that sum, as it would be for the injured person to feel compelled to retire from the field of battle because of a demand for documents containing intensely personal matters of little relevance.

[para 48] There is no perfect balance to be struck between these competing considerations in this or any other case.”

7. In my view the circumstances of this case favour the disclosure of Dr. Rogers' complete psychological records and treatment notes. It must be remembered, however, that this disclosure

is limited to the purposes of this proceeding and the parties and their counsel are deemed to undertake not to use the material for any other unrelated purpose.

8. Copies of the records & notes will be made available to the parties by the Board if the respondent's motion to dismiss for delay fails.

Dated at Fredericton, NB, this 27th day of March 2008.

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G. L. BLADON
VICE-CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD