Complaint under the Human Rights Act, R.S.N.S. 1989, c.214, as amended by S.N.S. 1991, c.12

Case Number: 04-00-0145

Proceedings brought by the Nova Scotia Human Rights Commission

Involving:

Dwayne McLellan Complainant

- and -

MacTara Limited Respondent

DECISION:

BAN ON PUBLICATION REQUEST

I am sitting as a one member Human Rights Board of Inquiry to inquire into the complaint of Dwayne McLellan dated November 2000, against MacTara Limited, having been nominated pursuant to the process set out in the *Boards of Inquiry Regulations*, s.1 - 6, and appointed to do so pursuant to s.32A of the *Human Rights Act*, R.S.N.S. 1989, c.214, as amended by S.N.S. 1991, c.12.

We have heard evidence from the complainant, Mr Dwayne McLellan, and from Mr Andrew Wright, currently the Operations Manager of

MacTara Limited, a producer of kiln dried dimension lumber and wood pellets located in Musquodoboit, Nova Scotia. We are in the midst of hearing direct evidence from Bernadette Willigar, currently the Human Resources Manager at MacTara. That evidence is being led on direct by counsel representing MacTara, Ms Bernadine McCauley.

This complaint has involved evidence from Mr McLellan asserting a workplace back injury in February 2000 at MacTara. Subsequent to that injury, reports were made to MacTara about Mr McLellan's prognosis and abilities while recovering. The evidence thus far has indicated that Mr McLellan was given different work for a period of time after the February complaint, but then was terminated by MacTara on April 4, 2000. Mr McLellan has asserted that he was terminated because of a claim by MacTara that his mild degenerative disc disease made him "prone to injury". Although the significance of the alleged disc disease is still a live issue in these proceedings, the substance of Mr McLellan's complaint is that MacTara had a duty to accommodate him at the workplace with respect to his physical abilities, rather than terminating him. By terminating him, he says, MacTara discriminated in respect of employment on account of an actual or perceived physical disability. That is the *prima facie* basis of the complaint falling within s.5(1)(d), (o) of the *Human Rights Act*.

It is as a result of that claim by Mr McLellan that MacTara had a duty to accommodate him that the issue for decision has arisen. Human rights jurisprudence does require accommodation of physical

disability to the point of undue hardship. Undue hardship has been defined in the following terms:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

Shirley v. Eecol Electric (Sask.) Ltd. (2001), 39 C.H.R.R. D/168 (Sask. Bd. Inq.).

Ms McCauley for MacTara has indicated that she wishes to lead evidence relevant to this factual issue of undue hardship. The nature of the evidence would be financial statements from MacTara which would tend to support evidence already given by Bernadette Williger about the financial viability of MacTara. The request is that the documentary financial information would be provided to the Board, as well as to the other parties for use at the hearing during the evidence of Bernadette Williger. While all parties would get to look at the document and review the figures on it, only the Board would get to keep the document. The Board could use the document to make findings of fact, but it is asked that any specific numbers should be kept confidential because they are confidential business information that could be valuable to competitors. It was said that the public does not need to have the information. Counsel for MacTara indicated that there

is no plan to call anyone else to explain the numbers in the document. I have not seen the document.

Mr McLellan submitted that the document should be submitted and be public.

Mr Michael Wood, Q.C., acting for the Human Rights Commission, did not oppose MacTara's request. He did speak about his experience with other Boards of Inquiry where either irrelevant or health information was involved. I understand from his submissions that in the case of the irrelevant information, it never really formed part of the record before the Inquiry upon which a decision was expected to be made. In the case of the health information, the evidence was acquired during a closed hearing, but such information as was necessary to the decision was expected to be used in the decision and find publication that way.

Despite requests to counsel for further authority on the point, I have received none. That reflects my own research, which suggests that this may be a matter of some uniqueness. It is certainly different from the cases referred to by Mr Wood.

Having considered the matter since last Thursday afternoon, I have decided that I do not have jurisdiction to make the order requested by MacTara. *The Human Rights Act*, s.34(7) provides that:

> 34(7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

The Human Rights Act, s.34(1) also provides that:

> 34(1) A board of inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the Public Inquiries Act.

The *Public Inquiries Act*, R.S.N.S. 1989, c.372, provides in s.4 and s.5 as follows:

> 4. The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing, or on solemn affirmation if they are entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.

> 5. The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court.

The *Public Inquiries Act* gives the Board the authority to summon witnesses, require them to give evidence, and to produce documents and things. As the Board, I have the same power to enforce attendance and to compel testimony and document production as a Supreme Court Judge. That does not give me authority to order a ban on the publication of evidence, in my view.

The *Boards of Inquiry Regulations*, s.7 and s.8, provide:

> 7. In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.
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> 8. A hearing of the Board of Inquiry shall be public, but a Board of Inquiry may exclude members of the public during the whole or any part of the hearing if it considers such exclusion to be in the public interest.

These regulations re-affirm s.34(1) of the *Act* that an inquiry is to be a *public hearing*. If something is truly privileged under

the law of evidence, the Board may not receive it nor accept it. The evidence in issue is here is not of that character.

I am also aware that there is a public information and educational component to the consideration of human rights issues. To that end, s.34(9) of the *Human Rights Act* provides:

> 34(9) A board of inquiry shall file with the Commission the record of the proceedings, including the decision and any order of the board and the Commission may publish the decision and any order in any manner it considers appropriate.

After my work as a Board of Inquiry is done, an appeal may be launched pursuant to s.36 of the *Act*. The Commission must then forward "the record" to the Court of Appeal. That record would include any document introduced as an exhibit in these proceedings. This, to me, is a further indication that, without statutory or regulatory authority, I have no jurisdiction to make a continuing order banning publication of something that is introduced into evidence before me.

While I am not insensitive to the assertion that any information produced at a hearing may be misused, I am governed by the *Act* and *Regulations*. I do not see that I have jurisdiction to issue a publication ban on evidence that may provide the factual foundation for a conclusion that I may be asked to draw, and to explain in a decision. If "undue hardship" becomes an issue that I have to decide, and if others are to understand what does or does not constitute "undue hardship" in the circumstances of this case, I would have to explain it as MacTara's evidence explains

it to me. I am reinforced in the conclusion that I have no authority to order the ban requested by the following observations.

Unlike a statutory body such as someone sitting as a Board of Inquiry under the *Human Rights Act*, Supreme Court Judges have inherent powers. However, even they require specific statutory authority to make limited publication bans on proceedings. For example, the *Matrimonial Property Act*, R.S.N.S. 1989, c.275, s.14(3) provides in relation to financial disclosures that:

> (3) Where, in the opinion of the court, the public disclosure of any information contained in a statement filed under subsection (1) would constitute a hardship to a spouse, the court may order that the statement and any cross-examination thereon be treated as confidential and not form part of the public record.

In addition, the *Judicature Act*, R.S.N.S. 1989, c.240, as amended by S.N.S.1992, c.16, s.58 and S.N.S.1997(2nd Sess.), c.5, s.6, and S.N.S.1998, c.12, s.9, provides in sections 32D and 37 as follows:

> Open court
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> 32D Subject to Section 37 and any other Act, whether of the Legislature of the Province or of the Parliament of Canada, that applies to proceedings in the Supreme Court (Family Division), a judge of the Supreme Court (Family Division) shall hear a matter in open court unless after considering
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> (a) the public interest in hearing the proceeding in open court;

(b) any potential harm that may be caused to any person if matters of a private nature were disclosed in open court; and

(c) any representations made by the parties,

the judge is of the opinion that the matter should be heard, in whole or in part, *in camera*.

Exclusion of public from court

37 Where a judge of the Supreme Court at any proceeding deems it to be in the interest of public morals, the maintenance of order or the proper administration of justice, he may order that the public be excluded from the court.

As a Board of Inquiry, I therefore only have authority under s.8 of the *Regulations* to exclude members of the public from the hearing. I only have that authority when I consider such exclusion to be in the public interest. Is it in the public interest to do so here?

In *The Edmonton Journal v. Attorney General for Alberta*, 1989 CarswellAlta 198, 45 C.R.R.1, [1989] 2 S.C.R. 1326, 102 N.R. 321, 64 D.L.R.(4th) 577, [1990] 1 W.W.R.577, 103 A.R. 321, 41 C.P.C.(2d) 109, 71 Alta. L.R.(2d)273 (S.C.C.) the constitutional legitimacy of statutory publication restrictions on court proceedings were in issue. The legislation purported to restrict publication of documents filed in the proceedings, as well as some of the proceedings in open court. While I do not need to deal with the freedom of expression issues that are raised by such bans, the decision is useful here because of the comments made about why open court proceedings are of value to society.

First, openness is more conducive to truth than secrecy. Justice Cory reviewed the following sources at paragraphs 81 to 83:

> 81 The importance of the concept that justice be done openly has been known to our law for centuries. In Blackstone's Commentaries on the Laws of England (1768), Book III, c. 23, at p. 373, the following observation appears:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk ...

82 This principle has been recognized by the United States Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979). Stewart J., writing for the majority, said this (at p. 386, n. 15):

> As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *and* criminal matters".

In the United States this principle is not restricted to hearings. The principle embraces the recognition of the existence of a common law right "to inspect and copy public records and documents, including judicial records and documents": see *Nixon v. Warner Communications Inc.*, 435 U.S. 589 at 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978).

83 In Canada this court has emphasized the importance of the public scrutiny of the courts. It was put in this way by Dickson J., as he then was, writing for the majority in *A.G.N.S. v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, 26 C.R. (3d) 193, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181 :

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J.

> in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:
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> > Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.
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> He then went on to discuss the application of that same principle to court records. He observed that Canadian law differs somewhat from the law of England, which appears to take a more restrictive approach towards the publicity of documents. He said this at p. 189:
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> > Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.
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> I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

Second, an open process informs the public about not only the specific cases being heard and decided, but how public institutions are functioning. Again, Justice Cory's decision at para.85 stated:

> 85 There is another aspect to freedom of expression which was recognized by this court in *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, (sub nom. *Chaussure Brown's Inc. v. Que. (P.G.)*) 19 Q.A.C. 59, 90 N.R. 84. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say, as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

And, at paras.88 - 89, in discussing the implications of a publication ban, Justice Cory stated:

> 88 The sweeping effect of the prohibition can be readily seen. The term "or in relation to a marriage" is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance. All are matters of public interest yet the evidence given on

> any of these issues cannot be published. The dangers of this type of restriction are obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial cause, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning might be expected. These are matters of great importance to those concerned with the application of family law. It is information people might wish to have before they even consider consulting a lawyer. The very people who would seem to have the greatest need to know of family court proceedings are prevented from obtaining important information by the provisions of s. 30.
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> 89 As well, the comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly? How will it know whether remarks might have been made, for example, that a wife should submit to acts of violence from her husband or that a wife should endure the verbal abuse or blows of her husband? The community has a right to know if such remarks are made, yet if there is no right to publish, the judge's comments may be hidden from public view. Thus it can be seen that the effect of s. 30(1) is to repress the publication of important aspects of court proceedings. The prohibitions are unnecessarily extensive.

It is in the public interest for the public to be informed about the nature of court proceedings, the kind of evidence heard in those proceedings, and how decision-makers deal with that evidence. The Supreme Court of Canada was dealing with restrictions on the publication of family law matters specifically. It is my view that the same rationales apply to keep all elements of human rights proceedings public.

This is a hearing inquiring into an alleged violation of human

rights. The *Human Rights Act* is public legislation, and the Human Rights Commission is a public institution. Both are infused with the purpose of recognizing equal and inalienable rights that belong to "all members of the human family", proclaiming a common standard for achievement of basic human rights by "all Nova Scotians", affirming the principle that "every person" is free and equal in dignity and rights, recognizing that "all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons": s.2, *Human Rights Act*.

In my view, how an employer responds to a human rights issue, and why they responded as they did, is a matter of legitimate public interest on the part of the general public, other employers and other employees. Justice Cory also addressed this issue more specifically at para.108 of the *The Edmonton Journal* case:

> 108 Counsel for the Attorney General for Alberta argued that s. 30(2) was necessary in order to ensure a fair trial of actions and to protect the privacy of individuals. It may well be that in certain situations those considerations will require the court to take measures to ensure that some portions of the documents filed in judicial proceedings are not published. Nevertheless, the provision is far too broad. The legislation would ban the publication of court documents that might have a wide public interest and would prevent the public from knowing about a great many issues in which discussion should be fostered. For example, all actions involving government agencies, administrative boards and tribunals would seem to have a far greater interest for the public than most private

> litigation. Even in private actions the public might have an interest in knowing the submissions put forward in claims such as those for wrongful dismissal or for personal damages. . . .

Justice Cory did recognize that a Court is able to use its supervisory power over its own record to make restraining orders in appropriate cases: para.111. A Board of Inquiry has no such power in my view. In fact, the record of proceedings appears to pass into the control of the Commission upon the rendering of a decision: *Human Rights Act*, s.34(9) and s.36(2).

Therefore, I will not make any order excluding the public from the hearing because I have not been satisfied that it is in the public interest to do so.

I will also not make an order banning the publication of any evidence submitted to this Inquiry since I do not believe that I have jurisdiction to do so.

Having made these rulings, I leave it to counsel for MacTara to choose whether or not to proceed with the introduction into evidence of the document in issue.

Dated this 25th day of May, 2004

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Donald C. Murray, Q.C.
Board of Inquiry