HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Emily Carasco

Applicant

-and-

University of Windsor and Richard Moon

Respondents

INTERIM DECISION

Adjudicator: Naomi Overend

Date: July 25, 2012

File Number: 2010-06245-I

Citation: 2012 HRTO 1451

Indexed as: **Carasco v. University of Windsor**

WRITTEN SUBMISSIONS

Emily Carasco, Applicant	)	Mary Eberts, Counsel
University of Windsor, Respondent	)	Raj Anand, Counsel
Richard Moon, Respondent	)	Freya Kristjanson and Amanda Darrach, Counsel

INTRODUCTION

[1] This matter, which involves the applicant's failed bid to become the Dean of the University of Windsor Law School, is scheduled to proceed to hearing commencing on August 21, 2012. In anticipation of the upcoming hearing, the parties have filed a series of interrelated Requests for Order During Proceeding (Form 10) ("Request"), which can be summarized as follows:

> 1. The applicant filed a Request, dated June 18, 2012, asking for an order that the respondent provide her with unredacted copies of correspondence between the Chair of the Search Committee and the applicant's three co-authors of a book on immigration law.
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> 2. The applicant filed a second Request, dated July 3, 2012, seeking (a) production of documents from the respondent over which privilege on the basis of the *Wigmore* principles is claimed, and (b) full copies of documents which were redacted on the basis of the *Wigmore* privilege. This latter Request has subsumed the June 18, 2012 Request in that it includes the documents sought in that Request as well as others. The University of Windsor (the "University") opposes this Request, while the individual respondent takes no position on the Request, except as noted below.
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> 3. In response to the July 3, 2012 Request, the individual respondent brought a Request on July 6, 2012, asking that, until the issue of privilege set out above is determined, certain documents filed by him at the Tribunal remain sealed. No other party has filed a Response to the Request for Order ("Response").
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> 4. The applicant brought a third Request, dated July 16, 2012, asking that I strike certain paragraphs from the University's Response and bar certain portions of evidence to be called by the individual respondent in the event that above-referenced documents are found to be privileged. She also Requests that the individual respondent be barred from leading evidence with respect to an issue not properly before the Tribunal. The respondents have not yet filed Responses to this Request.

DECISION AND ANALYSIS

Wigmore Privilege and Striking Portions of the Response

[2] In its disclosure of arguably relevant documents, the University refused to

produce certain documents on the basis that they were privileged under the *Wigmore* test. It also redacted several other documents on the basis of *Wigmore* privilege so that identifying information was removed. The general categories of redacted information appear to be as follows: (1) information which might disclose the identity of individual members of the Search Committee, other than the Chair, in documents internal to the work of the Search Committee; (2) information which might disclose the identity of persons who provided comments or criticism about the applicant to the Search Committee; and (3) information which might disclose the identity of the other candidates.

[3] There are exceptions to the above claims. For example, information identifying the Chair of the Search Committee, Dr. McCrone, was apparently not redacted. Likewise, information concerning the identity of the personal respondent was also not redacted. I understand also that, with respect to the final phase of the search, information concerning the other short-listed candidate was not redacted. In any event, it is my understanding that the applicant is not seeking information concerning the other candidates.

[4] The University asserts privilege over this excluded or redacted information on the basis of the *Wigmore* criteria, which the Supreme Court of Canada describes in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 20:

> First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[5] Despite the fact that the parties have filed lengthy written submissions on the application of the *Wigmore* test to the circumstances of this case, I am not in a position to make a determination about the expectations of privacy, the necessity of confidence to the relationships involved and the importance of the relationships to the public good.

Moreover, having not heard any evidence from the parties, I am not in a position to undertake the weighing exercise envisioned in the fourth step.

[6] It is possible that, had the applicant's Requests been brought well in advance of the hearing dates, some of this evidence could have been elicited in a preliminary hearing. However, there is no time to contemplate such a step given the lateness of the Requests. I would note that the applicant's Brief of Supporting Documents was only delivered to the Tribunal on July 19, 2012. Moreover, counsel for the University is not available to participate in such a hearing between now and the scheduled hearing dates.

[7] Having regard to all of the circumstances, in my view the most fair, just and expeditious manner of proceeding is to hear the applicant's case-in-chief prior to determining this issue. Indeed, it may be appropriate to hear some of the respondents' evidence (namely, the evidence of Dr. McCrone and Professor Moon) before hearing further submissions on this issue. I will give further direction to the parties as appropriate.

[8] I note that the Rule 1.7 of Rules of Procedure of this Tribunal gives me the leeway "to determine and direct the order in which evidence will be presented." Notwithstanding the applicant's interest in obtaining access to all the documents sought at this stage of the proceeding, I have taken into account that much of the information sought by her is for the purpose of cross-examination of respondent witnesses. Should new information ultimately be disclosed when these requests are determined the applicant will have an opportunity to address this either by way of the right of reply or as may otherwise be determined at the time, having regard to the submissions of the parties.

[9] Given that I have not ruled on the applicant's Request for production of the material over which the *Wigmore* privilege is claimed, it is not appropriate or necessary for me to address the applicant's alternative position that portions of the University's Response be struck or that testimony called by the individual respondent be limited.

[10] I will address the applicant's remaining Request, concerning whether it is appropriate for the individual respondent to call evidence addressing the *substance* of the plagiarism allegations, at the hearing itself.

Sealing Order

[11] The individual respondent advises that he has filed documents with the Tribunal in accordance with his disclosure obligations under Rule 16.3 over which the University is claiming privilege. Until such time as the Tribunal rules on the privilege issue, the individual respondent asks that these documents remain sealed and he be excused from delivering them to the other parties.

[12] In light of my decision deferring determination of the Applicant's Request on the privilege issue, and the remaining parties' silence on this issue, the individual respondent's Request for a sealing order is granted.

ORDER

[13] In summary, I have issued the following orders/direction:

> a. The Request for production of unredacted documents over which the University is claiming the *Wigmore* privilege is deferred to a time to be determined by the Tribunal, after the applicant's case-in-chief.
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> b. The Tribunal will address the applicant's request to bar the individual respondent from calling evidence on the substance of the plagiarism allegation at the hearing.
>
> c. The Request to seal the documents of Professors Galloway and Macklin until such time as the above Request for production is heard is granted.

Dated at Toronto, this 25th day of July, 2012.

"Signed by"

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Naomi Overend
Vice-chair