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NEEDING CLOSURE ON DISCLOSURE: THE APPLICATION OF R. v. STINCHCOMBE IN HUMAN RIGHTS PROCEEDINGS

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I. INTRODUCTION

Human rights commissions were first introduced in this country as an alternative mechanism to address complaints of discrimination. From the outset, human rights proceedings were designed to operate differently than criminal proceedings. While criminal courts assess the guilt or innocence of an accused using the reasonable doubt standard of proof, boards of inquiry assess evidence according to the balance of probabilities. Moreover, the boards of inquiry are mandated to compensate the victims of discrimination, and not necessarily to punish the discriminators.

Despite these differences, boards of inquiry and courts alike have started, in recent years, to compare criminal and human rights proceedings and to hold human rights commissions to the same standards of conduct as criminal prosecutors. This has been especially evident with respect to the subject of disclosure. More specifically, the issue of disclosure in the context of human rights proceedings has been dramatically affected by the Supreme Court of Canada's decision in R. v. Stinchcombe.¹

In Stinchcombe, the Supreme Court ruled that the prosecution in criminal trials has a duty to make full disclosure to the defence prior to trial. Despite the fact that this case dealt specifically with the duty of disclosure in criminal cases dealing with indictable offenses, some courts and tribunals have applied the Stinchcombe standard to human rights proceedings. This comment will examine

the issue of disclosure in the human rights context by examining the approach to disclosure that existed prior to the *Stinchcombe* decision and then proceeding to analyze cases that have either applied or rejected the *Stinchcombe* approach in the context of human rights proceedings.

II. DISCUSSION

1. The Pre-*Stinchcombe* Approach

Prior to *Stinchcombe*, human rights boards of inquiry operated under the principle that there was no common-law right to discovery and that any duty of disclosure thus had to be statute-based. As a result, most of the cases dealing with disclosure in human rights proceedings involved the interpretation of statutes such as Ontario's *Statutory Powers Procedure Act*. Section 8 of the SPPA states:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

In *Veljko Dubajic et al. v. Walbar Machine Products of Canada Limited*, M. R. Gorsky, who was the sole member of the Ontario Board of Inquiry, discussed the role of disclosure under section 8:

> My view of s. 8 of the Act [*Statutory Powers Procedure Act*, S.O. 1971, c. 47] is that it was introduced to regulate one aspect of procedural natural justice which must be followed by certain tribunals including a Board of Inquiry appointed pursuant to s. 14(a)(i) of the Code. Whatever the scope of the information which must be furnished, its purpose is to define the issues and thereby prevent surprise by enabling the party against whom the

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3 SPPA, R.S.O. 1990, c. S. 22, s.8.
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allegations are made to prepare for the hearing. [emphasis added]5

Gorsky stated clearly that the duty of disclosure under section 8 of the SPPA was in no way equal to a right to pre-hearing discovery:

[Unlike discovery in the Supreme Court, the information does not include facts or documents which might, in turn, result in the obtaining of evidence which could assist in making the party's case.

I would agree with the statement of S. N. Lederman, in his decision, dated March 11, 1976, in the case of Re Nembard and Manrade and Caneruop Manufacturing Limited, where he said at pp. 22-23, in commenting on the meaning of s. 8 of the Act:

Prior to the hearing, a respondent therefore is entitled to receive sufficient information about the allegations to enable him to prepare his answer to them. This section does not, however, refer to advance notice of documentary evidence but merely to reasonable particularity of allegations... 6

A similar approach was adopted in Salomon v. Searchers Paralegal Services.7 In Salomon, the respondent requested that the Board of Inquiry issue a summons compelling the Ontario Human Rights officer who investigated the complaint to appear and produce several documents prepared during the course of the investigation. The respondent also requested that the Commission be made to provide the names of two witnesses it intended to produce at the hearing. Both requests were rejected by the Ontario Board of Inquiry, F. H. Zemans. Zemans stated:

I find that the respondents are not entitled to production of the additional documents that they have requested, for the following reasons. Firstly, section 8 of the SPPA is

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5 Veljko Dubajic., supra note 4 at D/229.
6 Ibid. at D/230.
not broad enough to encompass pre-hearing discovery. It requires only disclosure of 'reasonable information.' There is no legislative provision for pre-hearing discovery of documents.

It is worth noting that these documents could be inadmissible on other, independent grounds. Although I am not making any specific findings as to privilege at present, it is quite possible the documents the respondents are seeking would be privileged and therefore not producible.

I specifically would find that the names of witnesses are within the form of privilege in Canada referred to by the Canadian courts as the 'work product' or the 'lawyer's file.'

Salamon indicated that the investigation file was potentially insulated both as a result of the absence of a duty to disclose and as a result of the existence of privilege. This privilege, it was suggested, may have extended from the investigation file to the names of witnesses who were to be produced at the hearing, so long as the parties knew the substance of the case. Salamon became the benchmark for cases dealing with pre-hearing disclosure prior to Stinchcombe.

The pre-Stinchcombe approach was summarized by Zemans, the Board of Inquiry in *Ontario (Human Rights Commission) v. Ontario (Ministry of Education)*:

The Ontario case law would be clear that:

1. The complaint must contain all the 'essential elements' including identification of the complainant and the victim or the class being discriminated.

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8 Salamon, supra note 7 at D/4164-D/4165.
2. The respondent must be aware of all matters which form a ‘substantial part of the facts material to the issues.’ Evidence in support of those facts need not be divulged.

3. The respondent must be provided with sufficient information to allow it to prepare to meet all the allegations against it.

This list amounted to little more than disclosure of the particulars of the alleged offence and certainly did not include full disclosure. Interestingly, however, Zemans noted that while discovery was by no means required by statute, “Ontario boards of inquiry have on numerous occasions expressed the view that full and frank disclosure before a hearing is desirable.” [emphasis added]

2. The Post-Stinchcombe Approach

Without a doubt, the issue of disclosure in human rights proceedings has been dramatically effected by the Supreme Court of Canada’s decision in Stinchcombe. However, the response of boards of inquiry to Stinchcombe has not been uniform. Some boards have adopted Stinchcombe as applicable to the human rights context, while others have rejected it as inapplicable as a result of the differences between criminal law and human rights proceedings.

i. Stinchcombe Denied

Some of the earliest cases after Stinchcombe rejected its applicability to the human rights context. In Roosma v. Ford Motor Co. of Canada (No. 3),¹² the respondents argued that the Ontario Human Rights Commission should be prevented from tendering the report of a forensic accountant as evidence because the Commission had not previously disclosed this material to the respondents. The Ontario Board of Inquiry, Peter Mercer, ruled that previous disclosure of the evidence, though desirable, was not necessary under the statute. In so ruling, Mercer rejected the applicability of Stinchcombe to the human rights context. Mercer stated:

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¹¹ Ibid.
I do not accept this argument. Had the Commission been both able and inclined to provide earlier disclosure of the report, that would have been desirable. However, there is no duty in law on the Commission to disclose a report intended to be entered in reply prior to the closing of the respondent's cases. Nor is the analogy with the Crown's duty in Stinchcombe particularly apt; the Commission's role under the Ontario Human Rights Code [S.O. 1981, c. 53] is indeed not to be merely adversarial but these proceedings are also clearly civil and not criminal.\(^\text{13}\)

A similar ruling was made by W. Gunther Plaut, the Ontario Board of Inquiry in Waterman v. National Life Assurance Co. of Canada (No. 1).\(^\text{14}\) Plaut noted:

The question of the relation between criminal and human rights law was recently considered by Prof. T. Brettel Dawson in an interim decision under the Code, in the matter of Hall v. A-1 Collision and Auto Service and Latif (unreported, dated August 28, 1992, at 22 [now reported 17 C.H.R.R. D/204 at D/210, para 34]):

A Board of Inquiry does not determine 'guilt' but rather assigns responsibility for a discriminatory act or practice. For these reasons alone, I believe that it is unwise to readily analogize grounds of complaint in human rights legislation with conduct controlled by the criminal law and to apply protections developed in the criminal law context to other contexts.\(^\text{15}\)

Plaut later elaborated on this point:

In the instant case, and in the administration of the Code in general, the investigation is not surrounded by the prosecutorial aura associated with the police. . . .

\(^{13}\) Roosma, supra note 12 at D/195.
\(^{15}\) Ibid. at D/175.
Respondent counsel has implied that there may be evidence in the officer's notes which is withheld because it is favourable to the respondent, and that therefore, as in Stinchcombe, supra, the notes ought to be produced.

Personal experience leads me to believe that this implication is unjustified. The officer comes to the investigation without any apprehension of who is right and who is wrong. The Commission becomes a partisan only after the Commissioners, by vote, agree that a prima facie infringement of the Code has occurred and therefore ask the Minister to appoint a board of inquiry. Until then, the commission is an impartial searcher for the truth. Its agents and officers may not always carry out their tasks to perfection, and certainly often are seen as antagonists by potential respondents, but the kind of truth shading of which the police in Stinchcombe were suspected should not be laid at the door of the Commission.

Finally, Crane v. McDonnell Douglas Canada Ltd. also provided an interesting analysis of the contrasts between criminal cases and human rights cases. Crane did not deal directly with the issue of disclosure, but rather was concerned with the application of section 7 of the Charter of Human Rights and Freedoms to the human rights complaint process. John McCamus, the Board of Inquiry in the case, rejected the analysis of the Saskatchewan Court of Appeal, which had accepted the application of section 7 of the Charter to human rights complaints in Kodellas v. Saskatchewan Human Rights Commission. Instead, McCamus ruled that section 7 of the Charter is particularly unsuited to human rights proceedings.

Thus, for example, a human rights complaint may be filed as of right and, therefore, unlike the laying of a criminal charge, implies no suspicion on the part of an investigating authority that wrongdoing has occurred.

16 Waterman, supra note 14 at D/175.
Secondly, unlike criminal prosecutions, the identity of complainants and respondents in human rights cases are treated as confidential, at least in the early stages of an investigation. Thirdly, a human rights proceeding is not a prosecution 'by the state for a public offence involving punitive sanctions.' The board of inquiry has no power to fine or incarcerate respondents. Board orders are compensatory in nature. Further, boards of inquiry have no authority to impose pre-trial custody or bail conditions. In short, the civil proceedings under the Human Rights Code are, in these respects, quite unlike criminal proceedings with respect to their impact on 'life, liberty and security of the person.'

McCamus first two points have been eclipsed by subsequent developments in human rights law; the third point, which focuses on the compensatory nature of human rights proceedings, remains relevant and important. Indeed, it seems that most of the judgments that refused to apply Stinchcombe in a human rights context did so because human rights proceedings are specifically designed to be compensatory and not punitive in nature.

ii. Stinchcombe Applied

While the application of Stinchcombe to human rights proceedings was rejected in these earlier cases, it has been accepted in more recent cases. The most important board of inquiry decision that has applied Stinchcombe is Christian v. Northwestern General Hospital (No. 2). In Northwestern Hospital, the respondent hospital, which had been accused of systemic discrimination, requested disclosure of certain documents. The Ontario Human Rights Commission claimed these documents were privileged because they related to conciliation efforts or were accumulated in preparation for litigation. The Board of Inquiry found that, due to the seriousness of the allegations, the doctrine of disclosure established in Stinchcombe should be applied despite the fact that Stinchcombe was a criminal case and this was a human rights case:

[I]t appears to me that the allegations are very serious indeed, with the potential if made out, to ruin

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20 Crane, supra note 17 at D/426.
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reputations, and cast over the future career prospects of anyone found to have so discriminated.

In a case such as this, I have decided that the Stinchcombe doctrine, supra, ought to be applied. The exclusion of the element of surprise in the interest of the fairness of a hearing is, I believe, now required. Thus, any relevant materials not otherwise privileged ought to be disclosed to counsel for the respondents.22

In addition, the Board of Inquiry distinguished between the investigation, conciliation and prosecution stages of the human rights process. The Board ruled that, unlike documents from the conciliation and prosecution stages, documents from the investigation stage are not privileged:

I prefer the reasoning of the panel in Dudnik, (supra at D/334) which separates the investigation stage from the subsequent conciliation stage, and, I would add, from the third, "prosecution" stage, which arises once a board of inquiry has been appointed. In my view, the panel in Dudnik is correct that documents, including statements reduced to writing, would only very exceptionally be privileged at the investigation stage.23

The Board of Inquiry's decision in Northwestern Hospital was upheld on appeal by the Ontario Court of Justice:

The applicant equates proceedings under the Human Rights Code to the civil rather than the criminal process. It is in our view significant that in civil proceedings the 'full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice.' The important principle enunciated by Mr. Justice Sopinka is that 'justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.'

It does not take a quantum leap to come to the conclusion that in the appropriate case, justice will be

22 Northwestern Hospital, supra note 21 at D/497.
23 Ibid. at D/497.
better served in proceedings under the *Human Rights Code* when there is complete information available to the respondents.

*R. v. Stinchcombe, supra*, also recognized that the ‘fruits of the investigation’ in the possession of the Crown ‘are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice be done’ ([at] 331). We are of the opinion that this point applies with equal force to the proceedings before a board of inquiry and that the fruits of the investigation are not the property of the Commission. [emphasis added] 24

The Court also agreed that the investigation stage must be distinguished from the litigation stage where a board of inquiry has been appointed. While aware that complainants may be discouraged from making complaints if they know their original statements may later be disclosed, the Court found that this would serve to make complainants take account of the seriousness of their allegations:

> However, it is of public importance as well that the complainants appreciate that allegations of racial discrimination are indeed serious and therefore should be made in a responsible and conscientious fashion. The fact that a complainant is aware that their original complaint or complaints may be subsequently disclosed, might well encourage complainants to take appropriate care in communicating their allegations. 25

It should be noted that the decision of the Ontario Court of Justice in *House* was recently followed by the Canadian Human Rights Tribunal in *Dhanjal v. Air Canada*. 26 In addition to following the precedent established by the court in *House*, the Tribunal in *Dhanjal* noted that the counsel for the Canadian Human Rights

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25 Ibid. at 78.

Commission had acknowledged the Commission's duty to provide full disclosure:

Although he communicated to us his reservations concerning the complete applicability of the Stinchcombe judgment to the Human Rights Tribunal, Mr. Pentney, the Commission's General Counsel, nevertheless told the Tribunal: 'With regard to the duty of full disclosure, trial by ambush is in no one's interest, least of all the Commission's. Commission counsel are bound to make full and timely disclosure of the evidence which is relevant and available to them, whether in the investigation file or otherwise. This extends both to evidence which tends to support the complaint and to evidence which goes against the claim.' (transcript, p. 4563)\(^27\)

The effect of Stinchcombe was also considered by the Saskatchewan Board of Inquiry in *Andreen v. Dairy Producers Cooperative Ltd. (No. 1)*.\(^28\) In *Andreen*, the respondents requested further particulars as well as access to information gathered by the Commission during its investigation. The Board ordered the Commission to provide the respondents with copies of written and signed statements from witnesses unless the Commission determined that they were not relevant to the inquiry and could cause harm to a witness by being disclosed. The Board came to this ruling after considering the effect of the Stinchcombe doctrine. The Board stated:

Although we are very mindful of the fact that the current inquiry is not a criminal procedure, we are somewhat influenced that the Commission as an agency of the state has considerable powers under the Human Rights Code. Even though it may not be a complete parallel to compare the role of the Commission with that of the Ministry of Justice, it also is not a complete parallel to treat the matters before this Board as purely private matters pertaining to private parties. Thus, we will lean

\(^{27}\) *Dhanjal, supra* note 26 at para. 195.

\(^{28}\) (1993), 22 C.H.R.R. D/58 [hereinafter *Andreen*].
toward full disclosure by the Commission of written and signed statements which it has in its possession.\textsuperscript{29}

The Board of Inquiry in \textit{Andreen} also placed the onus on the Saskatchewan Human Rights Commission to establish that any particular piece of physical evidence should not be disclosed.

Rather than placing the onus on the respondents to establish that a particular piece of physical evidence is relevant, we will place (sic) the onus on the Commission to establish that any particular piece of physical evidence should not be disclosed. If the Commission feels that any of the evidence clearly is not relevant and would be an invasion of privacy of, or would otherwise harm particular individuals, it can make its case to this Board of Inquiry. Otherwise, we order that the respondents be given reasonable access to all the physical evidence in possession of the Commission.\textsuperscript{30}

Finally, it should be noted that, while the standard established in \textit{Northwestern Hospital} mandates broad disclosure, the Board left the timing of disclosure to the discretion of the Commission.

However, in the human rights context, and more particularly where, as here, an employer is among the alleged human rights violators, the timing of disclosure should be entirely in the hands of the Commission counsel, whose decisions, absent a showing of oblique motive must be respected as those of an officer in the Court. It would be poor human rights code proceedings indeed which demands too early disclosure of the statements of witnesses in a context where they were subject to harassment from those in authority. Similarly, it may be that, in a given case, witness statements will have to be edited prior to disclosure to insure that identities may not be prematurely and inappropriately disclosed.\textsuperscript{31}

\textsuperscript{29} \textit{Andreen}, supra note 28 at D/62.

\textsuperscript{30} \textit{Ibid.} at D/63.

\textsuperscript{31} \textit{Northwestern Hospital}, supra note 21 at D/497
The proper timing for disclosure was further addressed by Katherine Laird, the Ontario Board of Inquiry in *Jack v. Metro Toronto Reference Library*.

The Commission has now made full disclosure of its file. Although appropriate pre-hearing disclosure should have been made well in advance of the commencement of this hearing, a number of factors, including the retention of outside counsel, delayed disclosure after appointment of the Board. The scope of the disclosure certainly satisfies the test established in *Northwestern Hospital*, supra. In that case, the timing of the disclosure was held to be appropriately left to the discretion of Commission counsel. The timing in this case, although unfortunately late, has not resulted in prejudice to the respondents that could not be addressed by an adjournment. [emphasis added] 33

Thus, while *Northwestern Hospital* allows the Commission to determine the timing of disclosure, *Jack* indicates that disclosure should be made soon after the appointment of a board of inquiry. However, late disclosure will not be viewed as an abuse of process so long as it remains possible to correct any prejudice to the respondent through an adjournment. Furthermore, while human rights commissions continue to have discretion to limit disclosure where they feel that disclosure would subject witnesses to harassment, *Andreen* indicates that the onus is on human rights commissions to show why disclosure should not be provided.

### III. CONCLUSION

Without a doubt, the Supreme Court of Canada’s decision in *Stinchcombe* has re-oriented discussion about disclosure in human rights proceedings. Prior to *Stinchcombe*, disclosure was rarely mandated by boards of inquiry and investigation reports as well as witness statements were considered privileged information. More recently, boards of inquiry have been applying the standard of disclosure advocated in *Stinchcombe* to human rights proceedings.

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As a result, disclosure has been mandated more frequently, and information gathered at the investigation stage, including witness names, has lost its privileged status.

The arguments against the application of *Stinchcombe* to a human rights context are reflective of a broader debate concerning the role of human rights legislation in contrast to criminal law. Of these arguments, perhaps the most convincing is that human rights legislation is focused on remedying acts of discrimination not on punishing offenders. In light of this focus of human rights law, it is disconcerting to say the least, to see loose comparisons with criminal law made as frequently as has been the case in recent years.

Nonetheless, there are compelling arguments in favour of full disclosure in the context of human rights proceedings. Human rights commissions, like public prosecutors, should be focused on ensuring that justice, not necessarily a finding of discrimination, is the end result of their prosecutions. While comparing the role of police and prosecutors in the criminal system with the role of human rights commissions in human rights proceedings is not appropriate in all circumstances, it is necessary to ensure that human rights proceedings, like criminal proceedings, both are fair and appear to be fair. In the words of Bruce Wildsmith, the Nova Scotia Board of Inquiry in *Gerin v. I.M.P. Group Ltd.*: “[t]o do justice to the victims of discrimination, the Commission must provide a full measure of fairness to the alleged perpetrators.”

Full disclosure, within the bounds of reason and financial constraints, is one way to ensure that the human rights complaint process is fair and, perhaps more importantly, that it also appears to be fair to the participants and to the public. While concerns about the harassment of witnesses are well-placed, the existing case law provides enough discretion for human rights commissions to deny disclosure where it is either dangerous or not relevant.

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