Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 27
Date: August 14, 2020
File Nos.: T2218/4017, T2282/3718 and T2395/5419

Between:

Ryan Richards

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Edward P. Lustig

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I. Context

[1] This ruling addresses a motion brought by the Correctional Service of Canada (CSC) to strike portions of Ryan Richards' Statement of Particulars (SOP), the entirety of R. Richards' Amended SOP, and portions of the Commission's Amended SOP, (collectively referred to as the "impugned portions of the SOPs" as identified in paragraph 26 below) and to prevent the Canadian Human Rights Commission (Commission) from calling a proposed expert witness.

[2] This motion arises in the context of case management. The purpose of case management is to assist the parties in coming to a final resolution of the human rights complaint before the Tribunal in an informal and expeditious manner that respects all parties' rights to natural justice (*Canadian Human Rights Act,* RSC 1985, c. H-6 [*CHRA*], s. 48.9).

II. Background

[3] CSC is the Respondent in three complaints Mr. Richards filed with the Commission and that the Commission referred to the Tribunal. All three complaints have been joined to be heard together in this inquiry, and are collectively referred to as "the complaints".

[4] Mr. Richards identifies as a Black Sufi Muslim. He is an inmate in CSC's custody. Mr. Richards' mother, Beverley Halls, is assisting him in this matter, in particular as it relates to email correspondence. Mr. Richards continues to take substantive steps in his representation and appears to have handwritten his substantive submissions on this motion while incarcerated.

[5] The Commission is fully participating in this proceeding in accordance with s. 51 of the *CHRA*.

[6] The first complaint, with a Commission file number 20121069 and Tribunal file number T2218/4017, was received by the Commission on February 17, 2012. The original summary of the complaint identifies religion and sex as the prohibited grounds of discrimination. As of March 21, 2017 and prior to the complaint being referred to the

Tribunal, an amended summary of the complaint identifies the prohibited grounds of discrimination as religion, sex, race and colour. The Commission conducted an investigation in which CSC participated. In the course of the investigation, the Commission canvased the parties' positions on whether the Commission should decline to consider the complaint under section 41 of the *CHRA*. In a letter dated July 26, 2017, the Commission referred the complaint to the Tribunal for an inquiry. The referral letter attached the complaint form, including the amended summary of the complaint. The Commission sent a letter to Mr. Richards the same day informing him of the referral decision. The Commission indicates, and CSC does not dispute, that a similar letter was sent to CSC. Neither the referral letter to the Tribunal nor the letter to Mr. Richards indicates any limitation on the scope of the complaint referred to the Tribunal. No party sought a judicial review of the Commission's decision to refer the complaint to the Tribunal.

[7] In general terms, the first complaint alleges multiple incidents in four of CSC's institutions: Fenbrook Institution, Springhill Institution, Dorchester Institution and Matsqui Institution. The bulk of the incidents allegedly occurred at the Springhill Institution. The incidents allege a connection between religion and security classification, disrespect of religious objects, harassment for wearing religious headgear, lack of support for and access to prayers, lack of accommodation of religious practices, being targeted for being Muslim, transfer to a maximum security institution because of religion, derogatory comments based on religion, lack of access to a medical and religious diet, damage to Muslim and Black Inmates and Friends Association books, consistent lockdowns during Black Heritage Month, being subjected to worse conditions in segregation, experiencing institutional violence, and sexual harassment.

[8] The second complaint, with a Commission file number of 20150411 and Tribunal file number of T2282/3718, was received by the Commission on June 15, 2015. The original summary of the complaint identifies retaliation as the prohibited ground of discrimination. As of August 29, 2017, an amended summary of the complaint identifies the prohibited grounds

of discrimination as retaliation, harassment and adverse differential treatment.[1] The Commission conducted an investigation in which CSC participated. The Commission's consideration of section 41 of the *CHRA* also applied to this complaint. In a letter dated June 5, 2018, the Commission referred the complaint to the Tribunal for an inquiry. The referral letter attached the complaint form, including the amended summary of the complaint. The Commission sent letters to Mr. Richards and CSC the same day informing them of the referral decision. Neither the referral letter to the Tribunal nor the letters to the parties indicates any limitation on the scope of the complaint referred to the Tribunal. No party sought a judicial review of the Commission's decision to refer the complaint to the Tribunal.

[9] The introduction to the second complaint refers to problems experienced at Matsqui Institution and alleges denied access to the Commission and the courts and actions that have affected Mr. Richards' health. The incidents allege problems with diet, removed legal documents and denied access to legal resources, obstructing the filing of a complaint, confrontational and provocative behaviour by correctional officers, and inadequate healthcare services. Some of the incidents specifically refer to problems arising because of Mr. Richards' religion while others indicate, as context, his attempts to help Black and Muslim inmates.

[10] The third complaint, with a Commission file number of 20171002 and Tribunal file number of T2395/5419, was received by the Commission on November 16, 2017. The complaint form signed by Mr. Richards states that the grounds of discrimination are race, colour and religion. The summary of the complaint adds disability as an additional ground. The Commission conducted an investigation in which CSC participated. In a letter dated June 28, 2019, the Commission referred the complaint to the Tribunal for an inquiry. The referral letter attached the complaint form, including the amended summary of the complaint. The Commission sent letters to Mr. Richards and CSC the same day informing them of the referral decision. Neither the referral letter to the Tribunal nor the letters to the parties

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[1] While a version of the complaint form the Commission provided the Tribunal by email on January 23, 2019 did not include the amended summary page, the original version submitted to the Tribunal did.

indicates any limitation on the scope of the complaint referred to the Tribunal. However, a letter from the Commission to CSC dated November 27, 2017 indicates "the allegations in paragraph 2 of the complaint will not be investigated as these are Official Language issues." No party sought a judicial review of the Commission's decision to refer the complaint to the Tribunal.

[11] The introduction to the third complaint raises concerns about retaliation and discrimination on the basis of language and religion at both Donnacona Institution and Archambault Institution. The first section of the complaint alleges problems with Mr. Richards' diet, which is described as a medical and religious diet. The second section of the complaint alleges challenges accessing services in English and a lack of support from Mr. Richards' parole officer.

[12] The Commission filed its SOP addressing the first two complaints on March 1, 2019, while Mr. Richards filed his SOP on April 30, 2019. Mr. Richards filed an Amended SOP on August 1, 2019 addressing the third complaint, while the Commission filed an Amended SOP on August 16, 2019.[2] CSC filed its SOP on May 18, 2020.

[13] On December 24, 2019, the Commission provided notice that it intended to call an expert witness, Dr. Akwasi Owusu-Bempah. The Commission indicated the proposed testimony would include, among other things, "the application of institutional discipline, use of force, security classification, segregation/isolated and restrictive conditions of confinement, the availability of culturally relevant correctional programming and their impacts on federally incarcerated black inmates."

[14] On February 13, 2020, CSC filed this motion with the Tribunal. As noted in more detail below, the Tribunal requested CSC to provide more clarity to assist the Tribunal in identifying exactly which passages of the SOPs it sought to have the Tribunal strike. In an

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[2] Mr. Richards' Amended SOP can be properly understood as a supplementary SOP as it adds new allegations to a new document rather than adding the additional allegations in a copy of the document that repeats the initial SOP. This decision refers to the document as Mr. Richards' Amended SOP to reflect the title on the document and the language that seems to be more often used by the parties.

email dated April 7, 2020 responding to this request, CSC provided additional submissions in support of its motion. The Commission and Ms. Halls, on behalf of Mr. Richards, objected to the supplementary submissions. In an email dated April 8, 2020, CSC reiterated its additional arguments and indicated that it had intended to raise those arguments in its reply submissions. In an email dated April 8, 2020, the Tribunal requested that Mr. Richards and the Commission include any arguments about the use the Tribunal should make of these emails in their motion submissions.

[15] The Tribunal will consider the additional arguments in CSC's April 7 and 8, 2020 emails as part of CSC's reply submissions. This is consistent with CSC's indication in its April 8, 2020 email that it originally intended to raise these issues as part of its reply. In addition, Mr. Richards' handwritten submissions are dated March 16, 2020. There is no indication that Mr. Richards received a copy of the April 7 and 8, 2020 emails to update these submissions nor that it would have been feasible for him to do so. Mr. Richards is receiving correspondence in hard copy and is not included on the emails. It is appropriately the parties' usual practice to provide hard copies of legal submissions directly to Mr. Richards as well as a copy to Ms. Halls. Treating CSC's April 7 and 8 emails as reply submissions most accurately reflects how they appear to have been received by Mr. Richards.

[16] The Commission filed its submissions on April 22, 2020. The Tribunal received, via the Commission, an electronic copy of Mr. Richards' handwritten submissions on the same date. Mr. Richards' submissions are dated March 16, 2020.

[17] Ms. Halls filed additional submissions on April 29, 2020, after the Complainant's deadline for filing submissions. The focus of these submissions is to provide additional information on intended witness testimony, which the Tribunal requested through case management. The Tribunal will, accordingly, address these submissions through ongoing case management rather than in adjudicating this motion.

[18] CSC filed its reply submissions late on May 4, 2020 and provided some minor corrections to its reply on May 6, 2020.

[19] While the Tribunal recognizes the challenges parties face in conducting litigation in the present circumstances, the Tribunal urges all parties to try their utmost to respect deadlines. The Tribunal reminds parties that it may decline to consider late submissions where doing so would prejudice another party's right to a fair process or added delay risks jeopardizing hearing dates.

A. Impugned Portions of the SOPs

[20] When CSC brought this motion to strike on February 13, 2020, it initially identified the impugned portions of the SOPs as follows:

> 48) The Complainant's SOP goes further and beyond what is included in the Complaints (the portions that are further and beyond the complaint are underlined).
>
> a) The Complainant's SOP refers to the following discrimination issues that, according to the Complainant, need to be inquired by the Tribunal:
>
> i) CSC took discriminatory measures that impacted my security classification; [paras 21-23][3]
>
> …
>
> iv) CSC systematically mistreats Black and Muslim inmates; [paras 30-45]
>
> …
>
> [CSC's] underlined
>
> b) The Complainant's SOP refers to the following public remedies in which many are not related to the Complaints (the portion that are further and beyond the complaint are underlined).

[3] Paragraph references added for ease of cross-referencing.

> i) Security Classification [paras 92-95]
>
> ii) Segregation [paras 96-98]
>
> iii) Institutional charges and use of force [paras. 99-105]
>
> …
>
> vi) Accommodation policies and practices [para. 109]
>
> vii) Access to religious services for Muslim inmates [paras 110-113]
>
> …
>
> ix) Data Collection and Reporting [paras 117-119]
>
> [CSC's] underlining

49) Because of the insufficient Nexus, the lack of proportionality with the Complaints and the procedural fairness principle, the following passages and references of the Complainant's SOP should be struck out:

> a) the discrimination issues of "security classification" referred to at 48 a) i); [paras 21-23]
>
> b) the discrimination issues of "systematically mistreats Black and Muslim inmates" referred to at 48 a) iv); [paras 30-45]
>
> c) remedies of "security classification" referred to at 48) b) i); [paras 92-95]
>
> d) the remedies of "segregation" referred to at 48) b) ii); [paras 96-98]
>
> e) the remedies of "accommodation policies and practices" referred to at 48) b) vi); [para 109]
>
> f) the remedies of "access to religious services for Muslim inmates" referred to at 48) b) vii); and [paras 110-113]

> g) the remedies of “Data Collection and Reporting” referred to at 48) b) ix). [paras 117-119][4]
>
> …
>
> 51) Accordingly, for the same reasons of the procedural fairness principle, the absence of a sufficient Nexus and the lack of proportionality with the Complaints, as expressed above in section 49 of the present motion, among other things, the following passages and references of the [Amended] SOP of the Commission should be struck out:
>
> > a) the discrimination issues of “security classification”; [paras 19-20]
> >
> > b) the discrimination issues of “systematically mistreats Black and Muslim inmates”; [paras 27-38]
> >
> > c) the remedies of “security classification”; [para 88]
> >
> > d) the remedies of “segregation referred”; [para 89]
> >
> > e) the remedies of “accommodation policies and practices”; [para 93]
> >
> > f) the remedies of “access to religious services for Muslim inmates”; and [para 94]
> >
> > g) the remedies of “Data Collection and Reporting” [para. 98]

[21] CSC also requested that the entirety of Mr. Richards’ Amended SOP be struck.

[22] The Tribunal, in an email dated March 6, 2020, requested CSC to provide a strikethrough version of the SOPs that identified, by means of a strikethrough, the precise portions of the SOPs that CSC wished to strike. The Tribunal followed up on this request by email on March 17, 2020. The Tribunal identified a lack of precision in which passages CSC

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[4] CSC also identified, at paragraph 3 v) of its submissions, that it wished to strike “Institutional charges and use of force”. However, CSC did not further particularize this request for relief with any more precise passages it sought to have struck in paragraphs 48, 49 and 51.

wished to strike and noted “The Tribunal is not comfortable guessing the Respondent’s intentions.”

[23] On April 7, 2020 the Tribunal inquired of CSC whether it had provided the strikethrough version of the SOPs and requested that CSC provide the strikethrough version by April 9, 2020 so that Mr. Richards and the Commission had this information when submitting their materials in response to CSC’s motion to strike.

[24] On April 7, 2020 the CSC provided an email that, among other things, identified the following impugned portions of the SOPs:

> Complainant’s [Amended][5] SOP
>
> - striking of the complete [Amended] Complainant’s SOP
>
> Commission’s [Amended] SOP
>
> - subparagraphs 19 and 20, of the Commission’s [Amended] SOP and their respective title
> - subparagraphs 88 (Security Classification), 89 (Segregation) and 93 (Data collection and reporting) and their respective titles
> - striking the title “CSC took discriminatory measures that impacted Mr. Richards’ security classification”
> - Striking subparagraph 37, 38 of the Commission’s [Amended] SOP
>
> Complainant’s SOP
>
> - subparagraphs 42 of the Commission’s [Amended] SOP [*sic*] and their respective title

[5] CSC refers to the Complainant and Commission’s Additional, rather than Amended, SOPs. For ease of reading and consistency with the titles on the documents, this decision consistently refers to these documents as Amended SOPs.

- subparagraphs 88 (Security Classification), 89 (Segregation) and 98 (Data collection and reporting) and their respective titles

[25] In addition to the error referring to the Commission's Amended SOP instead of the Complainant's SOP, paragraphs 88, 89 and 98 do not correspond to the identified headings in the Mr. Richards' SOP. Similarly, paragraph 93 of the Commission's Amended SOP does not correspond to its identified heading. The Tribunal regretfully agrees with the Commission that "it is still not entirely clear … exactly what sentences or paragraphs [CSC] seeks to strike".[6]

[26] For the purpose of this motion, the Tribunal will consider the CSC's request to strike the impugned portions of the SOPs identified below:

Mr. Richards' SOP

- Paras. 21-23 under the heading "CSC took discriminatory measures that impacted my security classification"
- Para. 42 under the heading "CSC systematically mistreats Black and Muslim inmates"
- Paras. 92-95 under the heading "Security Classification"
- Paras. 96-98 under the heading "Segregation"
- Paras. 117-119 under the heading "Data Collection and Reporting"

Mr. Richards' Amended SOP

- The entirety of the document

Commission's Amended SOP

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[6] Commission's Motion Submissions, para. 25.

- Paras. 19-20 under the heading “CSC took discriminatory measures that impacted Mr. Richards’ security classification”
- Para. 37-38 under the heading “CSC systematically mistreats Black and Muslim inmates”
- Para. 88 under the heading “Security Classification”
- Para. 89 under the heading “Segregation”
- Para. 98 under the heading “Data Collection and Reporting”

[27] Despite the lack of precision and errors on CSC’s part in identifying the passages it wants struck, the Tribunal notes that Mr. Richards and the Commission substantively addressed these topics and portions of the SOPs in responding to the motion to strike. In particular, the Commission identified similar and slightly broader passages it believed CSC wanted struck.[7] Neither Mr. Richards nor the Commission indicated CSC’s lack of specificity hindered their ability to respond to the motion.

III. Summary of the Parties’ Positions

B. CSC’s Position

[28] CSC submits that the jurisdiction of the Tribunal is linked to the complaint. CSC argues that evidence should not be considered by the Tribunal if there is not a sufficient connection between the complaint and the evidence. Similarly, the Tribunal should not admit evidence that is not proportionate to the complaint or exceeds the boundaries of the complaint. CSC contends that the current scope could result in examining each and every one of CSC’s administrative processes despite the limited scope of the complaints. CSC

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[7] Commission’s Motion Submissions, para. 25. Although CSC, in its reply submissions indicated that this passage was a “mischaracterization of the remedy that is supposedly sought by the Respondent,” (CSC’s Reply Motion Submissions, para. 124) CSC did not provide further particulars about what passages it sought to have struck or indicate which passages the Commission erroneously suggested CSC sought to have struck.

argues that failing to limit the scope of the complaints would create procedural unfairness for CSC and would undermine the efficient administration of justice.

[29] CSC raises a concern that a failure to ensure the evidence at the Tribunal properly relates to the complaint could result in a situation where a complaint relating to a narrow incident morphs into a broader inquiry by the Tribunal into a potentially unrelated issue. Improperly expanding the scope of the complaint at the Tribunal would be akin to allowing a new complaint that had not properly passed through the Commission process.

[30] CSC relies on sections 40(1), 41(1), 41(1)(a), 43(1), 44(1), (2) and (3) of the *CHRA* to support the point that the Commission investigation and the Tribunal process are limited by the scope of the complaint. CSC relies on *Kanagasabapathy v. Air Canada*, 2013 CHRT 7; *Canadian Postmasters and Assistants Association v. Canada Post Corporation*, 2018 CHRT 3 [*Postmasters Association*]; *Tabor v. Millbrook First Nation*, 2013 CHRT 9 [*Tabor*] and *Casler v. Canadian National Railway*, 2017 CHRT 6 for the proposition that the Tribunal has the jurisdiction and obligation to limit the scope of a complaint, including when an amendment to a complaint is sought.

[31] CSC argues that proportionality is an important consideration in determining the scope of the inquiry. In this case, CSC submits, the essential nature of the complaint as religious discrimination, the speculative nature of the alleged discrimination and Mr. Richards' credibility issues all impact the proportionality analysis. CSC indicates that Tribunal Rule 1(1) requires proceedings to occur in an efficient manner. CSC relies on former Chief Justice Beverley McLachlin's extrajudicial comments for the proposition that proportionality is a foundational concept in litigation ("Proportionality, Justification, Evidence and Deference: Perspectives from Canada," *Judicial Colloquium 2015* at the Hong Kong Court of Appeal).

[32] CSC summarizes the complaints. In its summaries, CSC asserts the number of alleged incidents that relate to grounds of race, religion and sex. CSC also asserts the number of incidents that relate to discipline, use of force, security classification, segregation

and religious and cultural accommodation. CSC does not identify which specific incidents it is referring to in each category.

[33] CSC also interprets Mr. Richards' Amended SOP and asserts that it involves a large number of incidents of which a limited number relate to race or religion while the remainder are not related to any prohibited ground of discrimination. CSC does not identify which specific incidents it is referring to in each category. CSC views adding these incidents to the complaint as creating a substantially new complaint that bypasses the referral process through the Commission.

[34] CSC asserts that many of the alleged incidents in Mr. Richards' Amended SOP were addressed in a Quebec Court decision, described in the next section.

[35] CSC argues that any document related to security classification should be rejected or struck on the basis that the issue of security classification does not have a nexus with the complaints and the issue was unsuccessfully raised in *Richards c. Giordano (Établissement Archambault)*, 2018 QCCS 4271, confirmed 2019 QCCA 560 [*Richards QCCS*].

[36] CSC argues that these decisions addressed Mr. Richards' change in security classification from medium to maximum security and his transfer to a maximum security institution. The court found that the security classification and transfer decisions were justifiably based on Mr. Richards' behaviour.

[37] CSC submits that the previous consideration of security classification matters makes it vexatious to again raise the matter before the Tribunal.

[38] CSC identifies the intended subjects of Dr. Owusu-Bempah's evidence to include the effect on Black inmates of the application of institutional discipline, use of force, security classification, segregation/isolation and restrictive conditions of confinement, and availability of culturally relevant programming.

[39] CSC argues that Dr. Owusu-Bempah's proposed expert evidence does not have a sufficient link to the complaints and goes beyond the complaints and SOPs. The evidence is not proportionate because the complaints are essentially about religious rather than racial

discrimination, the complaints have not been proven, and the disproportionate evidence will create additional costs and delays. In the event that the Tribunal does not reject the proposed expert evidence in its entirety, CSC requests that the Tribunal limit the scope of the evidence only to those topics for which there is sufficient evidence of discrimination.

[40] CSC relies on its proportionality rationale and argument for striking the impugned portions of the SOPs to also justifying excluding the proposed expert evidence. Further, CSC objects to the admission of the expert evidence when no discrimination based on race has been demonstrated. CSC raises concerns that the cost and time of expert reports is not justified given the lack of reliable evidence, including the credibility issues of Mr. Richards as a witness.

[41] CSC relies on *Christoforou v. John Grant Haulage Ltd.*, 2016 CHRT 14 for the proposition that *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 articulates the correct test for determining whether an expert witness should be permitted to provide evidence at the Tribunal. The proponent of the evidence must first establish the four threshold requirements of admissibility: relevance, necessity, absence of an exclusory rule and a properly qualified expert. The second step requires the decision-maker to exercise discretion to determine whether the proposed evidence, having met the threshold admissibility criteria, is sufficiently beneficial to justify the various risks and costs of hearing it (*White Burgess* at paras 23-24).

(i) Reply Submissions

[42] In its April 7, 2020 email, CSC provides a more detailed analysis of the impugned portions of the SOPs. CSC argues that the heading in the Commission's Amended SOP "CSC took discriminatory measures that impacted Mr. Richards' security classification" is overly broad for the evidence presented. CSC contends that the title of the section should not influence the scope of the inquiry.

[43] Similarly, the email outlines objections to paragraph 19 of the Commission's Amended SOP because it is based on Mr. Richards' mistaken belief that the pictures of him

in his security file affected his security classification and the complaints did not raise concerns about security classification in this context.

[44] Similarly for paragraph 20 of the Commission's Amended SOP, CSC contends Mr. Richards never alleged a discriminatory lack of programming. As for the allegations related to institutional discipline, CSC indicates it will provide the lengthy list of institutional discipline charges faced by Mr. Richards in its SOP. CSC contends that Mr. Richards grieved many of these charges through the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*], such that re-litigating them amounts to an abuse of process. Further, reviewing these decisions after the passage of significant time denies CSC the opportunity to properly defend its actions. Similarly, security classification issues can be addressed through the *CCRA* through a process capable of considering *Charter* issues. CSC contends that courts have recognized the specialized expertise of the *CCRA* process and have rarely intervened.

[45] CSC provides more details of its concerns about the portion of the SOPs alleging "CSC systematically mistreats Black and Muslim inmates". In particular, the evidence does not demonstrate systemic mistreatment based on race as only one paragraph refers to systemic racial discrimination, which is based on Mr. Richards' beliefs. CSC requests that paragraph 42 of Mr. Richards' SOP and paragraphs 37-38 of the Commission's Amended SOP be struck on the basis that there is no reference to parole support or inmate programming in the complaints other than part of the third complaint. CSC indicated the Commission previously took the position this portion of the complaint related to official languages and would therefore not be pursued.

[46] In the email, CSC elaborates on its reasons for requesting to strike remedies related to security classification, segregation and data collection and reporting from the SOPs. CSC asserts these remedies go beyond the complaints and there is a lack of proportionality in requesting data reporting and collection.

[47] Similarly, in its April 7, 2020 email, CSC summarizes its concerns with Mr. Richards Amended SOP as containing new facts based largely on Mr. Richards' feelings and impressions and bypassing the investigative process of the Commission.

[48] In its formal reply submissions, CSC asserts that it is essentially aiming to limit the scope of the proceedings to the allegations contained in the three complaints. It identifies its main arguments as the requirement to maintain proportionality and the requirement that there is a sufficient connection between the allegations and the complaints.

[49] CSC refers to *Moore v. British Columbia (Education)*, 2012 SCC 61 [*Moore*] for the proposition that an inquiry must be appropriately focused, including that the remedies must be within the scope of the complaint. CSC asserts that *Moore* prevents the allegation of systemic discrimination from expanding an inquiry beyond the scope of a complaint.

[50] CSC provides additional documentary evidence. It summarizes a letter from the Commission indicating that the Commission was not investigating the official languages portion of the third complaint. It also provides correspondence demonstrating a dispute between CSC and the Commission about whether CSC was responsive during the investigation. CSC reiterates its position that it is not responsible for delaying the investigation. CSC provides email correspondence of disputes between the parties about the appropriate scope of the complaint, including an itemized request for disclosure from the Commission.

[51] CSC indicates that its response to the Commission's submissions equally applies to similar issues raised by Mr. Richards in his submissions. In addition, CSC contends Mr. Richards is asking the Tribunal to re-examine the results of *Richards QCCS*; expand the scope of the inquiry to consider security classification despite adequate alternative remedies; and contends that the adverse treatment suffered by Mr. Richards is not discriminatory because of his extensive disciplinary file.

[52] CSC indicates that it does not understand the purpose of the submissions by Ms. Halls.

[53] CSC criticizes the Commission for providing an insufficiently particularized argument and treating the three complaints globally rather than individually. In particular, CSC is concerned that the Commission is taking a global perspective on the scope of the inquiry rather than identifying how individual allegations of discrimination that support the scope of

the complaint are presented in the SOPs. In fact, CSC states that the Commission did not provide a single example of how one of the impugned issues related to the complaints. CSC contends that considering a global complaint rather than three separate complaints allows a broader scope of any one complaint to inappropriately enlarge the scope of the other complaints. Similarly, the fact that one alleged incident may relate to a particular ground of discrimination or topic does not mean that all the incidents do.

[54] In addition, CSC alleges that evidence the Commission quotes in its submissions are taken out of context. CSC asserts that the Commission did not consider the issue of proportionality in its submissions.

[55] Finally, CSC provides an itemized response to the Commission's submissions. CSC's objections frequently assert the Commission has mischaracterized one or more of the complaints, CSC's submissions or the supporting evidence. CSC often suggests that a correct interpretation of the issues can be determined by referring back to its initial motion materials. In one instance, CSC contends that the Commission is misrepresenting the relief CSC requests on this motion. Elsewhere, CSC denies it is engaged in an improper attack on the Commission's referral decision by indicating that it accepts the Commission's referral decision and providing various procedural details aimed at demonstrating CSC's cooperation with the investigative process. While CSC consented to combining the complaints in a single inquiry to facilitate an efficient adjudicative process, that does not amount to consent to increase the scope of the complaints. CSC contends that the complaints present a series of unconnected events and that they cannot be systemically linked because CSC employees do not have access to all aspects of the file to use it to perpetuate discrimination or retaliation. Similarly, the fact that one incident has a racial aspect does not indicate that there is a racial element to all of the complaints. CSC frequently presents variations on the argument that the scope of a complaint cannot be expanded indefinitely. CSC requests that the scope of the inquiry be determined now rather than have it postponed on prematurity grounds.

C. Position of Mr. Richards

(ii) Submissions by Mr. Richards

[56] Mr. Richards asks the Tribunal to dismiss CSC's motion in its entirety. He identifies that the case highlights that Black inmates suffer abuse and harassment and experience retaliation when they complain.

[57] Mr. Richards asserts that the scope of the inquiry has grown beyond the initial complaint he submitted because of CSC's retaliation against him. Segregation, inmate charges, and security classification were part of CSC's retaliation. The ability to amend the SOP permits the Tribunal to consider ongoing human rights violations. He cites *Ethnicity and Human Rights in Canada* by Evelyn Kallen on Canada's international human rights obligations under the *International Covenant on Civil and Political Rights* and the ability of individuals who have exhausted domestic legal recourses to seek to have a case heard at the United Nations Human Rights Committee.

[58] Mr. Richards objects to the request to exclude racial discrimination from the complaint and limit the complaint to religious discrimination. He identifies that he is a Black man. He challenges the suggestion he lacks credibility and anticipates that the evidentiary record will support his position. He suggests that racial discrimination can be more subtle than religious discrimination. Expert evidence will demonstrate that his mistreatment by CSC is consistent with systemic mistreatment of Black inmates. He cites Beatrice Vizkelety in *Proving Discrimination In Canada* explaining the difference between prejudice, based on intention, and discrimination, based on an effect. He asserts that he has evidence of disproportionate security classification and risk assessment of Black inmates compared to White inmates that CSC is unable to explain.

[59] Mr. Richards contests CSC's argument that his security classification was addressed through the Quebec Courts. In particular, the judgements only addressed one security classification decision and did not address security classification more broadly. He identifies an informal policy of requiring inmates convicted of murder to spend a minimum of two years

in a maximum security institution. This policy had an adverse effect on young Black inmates who were disproportionately subjected to such sentences and because it exposed Black inmates to racial violence from other inmates. Mr. Richards indicates that there is a relation between his November 22, 2019 transfer from Cowansville to Donnacona and his allegation of sexual assault and sexual harassment. Further, Mr. Richards raises additional concerns about the judgements based on the quality of representation received by his then counsel but he concedes that the issues raised in that particular *habeas corpus* application and appeal are not before the Tribunal.

[60] Mr. Richards contests that the inmate grievance process provides an adequate alternative remedy. Mr. Richards contends that well over 90% of his complaints and grievances are denied by CSC and that the process provides an opportunity for staff to retaliate. He argues the process is neither procedurally fair nor legally binding. He cites *Spidel v. Canada (Attorney General)*, 2012 FC 958 and *May v. Ferndale Institution*, 2005 SCC 82 for the various shortcomings in the grievance process.

[61] In response to CSC's procedural fairness arguments, Mr. Richards raises concerns about CSC's cooperation during the Commission's initial investigation of the complaint and CSC's failure to abide by deadlines during both the Commission process and before the Tribunal. He also alleges CSC engaged in perjury. Given the nature of this alleged conduct, it would be inappropriate to grant CSC's motion. It would also be counter to the good and efficient administration of justice if any part of the case were to be struck without any explanation of CSC's conduct. He cites *Proving Discrimination In Canada* for the proposition that a respondent's failure to provide an explanation of alleged discrimination may support an inference that the respondent's evidence would have been adverse. He cites *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29; *Therrien (Re),* 2001 SCC 35 and *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471 for the requirements of procedural fairness.

[62] Regarding the expert evidence, Mr. Richards indicates Dr. Owusu-Bempah's education, experience and insight put him in a position to provide evidence necessary to the case. The statistical evidence is particularly difficult to adduce through other means. The

complainant cites *R. v. Mohan*, 1994 CanLII 80, [1994] 2 SCR 9; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302; *Merck & Co. Inc. v. Apotex Inc.*, 2005 FC 755; and *AB Hassle v. Canada (Minister of National Health and Welfare)*, 2002 FCA 421 for the role of expert evidence. He cites the section on the purpose of statistical evidence from *Proving Discrimination in Canada*.

(iii) Submissions by Ms. Halls

[63] In her submissions, Ms. Halls outlines testimony and evidence she intended to provide at the hearing. She also outlines in general terms some of the issues other family members will testify to at the hearing.

D. Commission's Position

[64] The Commission opposes the entirety of the relief sought by CSC.

[65] The Commission understands CSC's motion to amount to a request to strike any references to policies, practices and systemic discrimination. In particular, the Commission views CSC's motion as targeting individual and systemic discrimination issues relating to security, systemic aspects of mistreatment of Black and Muslim inmates, and various systemic remedies.

[66] The Commission frames this motion as raising two issues. The first is whether the Tribunal should significantly limit the scope of the inquiry on a preliminary basis and dismiss the allegations of racial and systemic discrimination which have been referred for inquiry. The second issue is whether Mr. Richards and the Commission should be deprived of a full and ample opportunity to present evidence and legal positions relevant to the inquiry and the subject matter of the complaints.

[67] The Commission argues that the Tribunal's powers to strike Statements of Particulars on a preliminary basis should only be exercised in the clearest of cases. This case does not constitute one of those clearest of cases. The Commission suggests that

CSC's request is to exclude questions of whether negative stereotypes about Black men have played a role in Mr. Richards' treatment and to exclude a consideration of whether CSC's practices and policies have disproportionate adverse effects on Black and/or Muslim inmates. This request would deprive the Commission of its ability to present its public interest case. The complaint would be reduced to an individual complaint about access to a religious diet.

[68] The Commission identifies the Tribunal's statutory obligation, confirmed through the Rules of Procedure and case law, to ensure that each party has a full and ample opportunity to be heard. Accordingly, CSC's arguments about Mr. Richards' credibility and insufficient evidence of racial discrimination are not sufficient to support a motion to strike the Statements of Particulars. Similarly, the Quebec Court's adjudication of one security classification does not justify foreclosing the Tribunal from examining the CSC's administration of security classifications.

[69] In arguing that the Tribunal's powers to strike Statements of Particulars on a preliminary basis should be exercised cautiously and only in the clearest of cases, the Commission identifies similar situations in *Connors v. Canadian Armed Forces,* 2019 CHRT 6 [*Connors*]; *AA v. Canadian Armed Forces,* 2019 CHRT 33 [*AA*]; *Desmarais v. Correctional Service of Canada,* 2014 CHRT 5 [*Desmarais*]; and *Sugimoto v. Royal Bank of Canada,* 2006 CHRT 2 in which the Tribunal did not strike the SOPs at issue.

[70] The Commission argues that all of the impugned portions of the SOPs flow from the allegations in the complaints. The complaint forms represent only the starting point of the complaint that will inevitably be elaborated on through new facts and circumstances that arise and clarification in the SOPs. In determining whether a portion of the SOP is sufficiently related to the complaint, the Tribunal must consider whether the allegation has a reasonable nexus or connection to the underlying complaints. The Tribunal must consider both the complaints and the Commission's referral letter to determine the real issues at stake between the parties.

[71] The Commission submits that the portions of the SOPs CSC seeks to have struck are grounded in the complaints that raise issues of individual and systemic discrimination and discrimination on the intersecting characteristics of race, colour, religion and disability. The Commission identifies a number of events documented in the first complaint that allege racial and systemic discrimination against Black and Muslim inmates including those described in paragraph 7 above. The Commission indicates that the Complaint form stipulates the grounds of religion, sex, race, colour and disability.

[72] The Commission summarizes a number of allegations in the second complaint including those described in paragraph 9 above. The Commission indicates that the complaint form stipulates retaliation, harassment and adverse discrimination.

[73] The Commission summarizes the incidents in the third complaint including those described in paragraph 11 above. The Commission indicates that the complaint form stipulates the grounds of race, colour, religion and disability. The Commission notes that Mr. Richards' Amended SOP describes events post-dating his third complaint that describe ongoing discrimination similar to what is described in the complaints and that therefore have a sufficient nexus with the complaints.

[74] The Commission contends that its Amended SOP properly sets out the material facts on which it will rely. The Commission indicates that there are real references to systemic discrimination in the complaints and SOPs.

[75] The Commission contends, again, that the Quebec courts considering one classification decision does not bar the Tribunal from considering individual and systemic discrimination issues relating to security classification. The Commission argues that by requesting the Tribunal to strike references to race, systemic discrimination and security classification, the CSC is seeking to deny the Tribunal the opportunity to consider intersecting grounds of discrimination. Case law indicates it is important to consider intersectionality in cases raising multiple grounds of discrimination. The Commission indicates that CSC acknowledged that racial discrimination allegations were part of the complaints before the Commission during the Commission's investigation. This is reflected

in CSC's response to the investigation report on May 1, 2017 where CSC indicated "Mr. Richards alleges experiencing religious and racial discrimination, as well as sexual harassment."

[76] The Commission contends that the proposed expert evidence and passages of the Commission's Amended SOP provide necessary context and additional particulars to support the systemic allegations. Defining complaints broadly to cover the factual background and context is particularly important where there are systemic discrimination allegations as those are notoriously difficult to prove. The Commission cites *Murray v. Immigration and Refugee Board*, 2018 CHRT 32 [*Murray*]; *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789 (FCA) [*PSAC*] and *Starblanket v. Correctional Service of Canada*, 2014 CHRT 29. In this case, it is necessary for the Tribunal to have a complete picture of how negative stereotypes about Black and Muslim inmates may have affected Mr. Richards' security classification, institutional charges and lack of access to parole.

[77] The Commission argues there is no justification to strike the Commission's requested public interest remedies on a preliminary basis. The purpose of the *CHRA* of promoting and safeguarding substantive equality cannot be achieved without adequate remedies both for individual complainants and for preventing future discrimination. The Commission argues that the *CHRA* indicates that the appropriate remedies are only considered after the evidence in the case has been considered. If CSC objects to the public interest remedies requested by the Commission, it is appropriate to raise that objection at the end of the hearing. Barring systemic remedies at this stage creates the possibility that systemic discrimination will be found but the Tribunal will be precluded from granting a corresponding remedy. The Commission submits that it is necessary to examine CSC's policies and practices in order to determine the true source of discrimination suffered by Mr. Richards. International and domestic reports, including by the Office of the Correctional Investigator identify discrimination on the basis of race in the correctional system.

[78] The Commission opposes CSC's request to exclude Dr. Owusu-Bempah's proposed expert testimony. The Commission submits that the proposed testimony relates directly to

the complaints and SOPs allegations of discrimination on the basis of race or colour. Further, there is no requirement to prove an allegation of individual discrimination before exploring systemic allegations. Such a process would deprive complainants of the opportunity systemic discrimination evidence can provide to support their particular allegation of discrimination. Further, the Commission contends that it is premature to exclude the expert's testimony as it is inappropriate for the Tribunal to conduct a substantive review of the merits of the allegations at this stage and the Tribunal does not have the benefit of reviewing the expert's report.

[79] The Commission submits that CSC's motion is an improper collateral attack on the Commission's decision to refer the complaints, in their entirety, to the Tribunal for adjudication. The Commission decided to refer the entirety of all three complaints to the Tribunal. The complaints include allegations of racial and systemic discrimination which were canvased during the Commission's investigation. It is not necessary for the complaints to be fully fleshed out during the Commission's investigation. There is nothing in this case that indicates the Commission only referred a limited portion of the complaints to the Tribunal. If CSC wanted to challenge the scope of the complaints referred to the Tribunal, CSC ought to have sought judicial review of the Commission's referral decisions.

[80] The Commission raises additional arguments in response to CSC's April 7 and 8, 2020 emails. The Commission submits that CSC's position that the pictures of Mr. Richards in religious attire had no effect on his security classification is an argument for CSC to advance at a hearing on the merits rather than a reason to strike a portion of the SOPs. Second, the Commission contends that CSC's argument that the *CCRA* provides an adequate alternative remedy is improper because it constitutes a collateral attack on the Commission's decision to refer the complaint after due considerations of those arguments and CSC has not provided an adequate legal and evidentiary record for such an argument. Finally, the Commission argues that its references to Mr. Richards as a Muslim Anglophone in Quebec do not constitute an attempt to pursue a linguistic claim but rather provides relevant context to the correctional programming available to him.

IV. Issues

[81] The motion raises the following issues:

A) Should the impugned portions of the SOPs be struck as being beyond the scope of the complaints?

B) Should Dr. Owusu-Bempah be prevented from providing expert evidence on the basis the proposed evidence goes beyond the scope of the complaints?

V. Analysis

[82] For the reasons that follow I am dismissing CSC's motion.

[83] The essence of the CSC's motion is that allegations and evidence of racial and systemic discrimination, including those addressing security classification and the alleged systemic mistreatment of Black and Muslim inmates, are not reasonably connected with and are disproportionate to what was alleged in the complaints. As such, CSC contends they have been improperly included in the impugned portions of the SOPs and should, on a preliminary basis and prior to the hearing of this case on the merits, be struck by the Tribunal as they are beyond the scope of the complaints that were investigated by the Commission and referred to the Tribunal for an inquiry. Further, according to the CSC, remedies related to security classification, segregation, institutional charges and the use of force, accommodation policies and practices, access to religious services for Muslim inmates and data collection and reporting should also be struck from the impugned portions of the SOPs for the same reason. Finally, the CSC says that filing of evidence of the proposed expert witness Dr. Owusu-Bempah by the Commission, dealing with racial and systemic discrimination in the prison system, also lacks a reasonable nexus to the complaints and should therefore, at this stage be refused by the Tribunal, as being beyond the scope of this inquiry.

[84] Under section 49 of the *CHRA* the Tribunal has jurisdiction to hear complaints referred to it by the Commission for an inquiry. The Tribunal's general powers in conducting

an inquiry are set out in section 50(2) and 50(3) and include the authority to "decide any procedural or evidentiary question arising during the hearing". In accordance with section 50(1) and Rule 1 of the Tribunal's *Rules of Procedure* the Tribunal has a statutory obligation to ensure that each party to a complaint has a full and ample opportunity to be heard.

[85] The Tribunal has the authority to amend, clarify or determine the scope of the original discrimination complaints, provided that no prejudice is caused to other parties (*Connors* at paras. 6-7). As part of the Tribunal's authority to determine the scope of the complaint, it has the power to strike portions of the SOPs that exceed the proper scope of the complaint (*Postmasters Association*).

[86] In exercising the power to strike particulars on a preliminary basis in advance of a full hearing, as is requested by CSC in this motion, the Tribunal must do so cautiously and only in the "clearest of cases" (*Desmarais* at para 83; see also *Buffet v. Canadian Armed Forces*, 2005 CHRT 16 at para 40).

[87] As a matter of procedural fairness as well as efficiency and in accordance with its statutory mandate under section 50 of the *CHRA*, the Tribunal will not strike factual assertions that are relevant to the inquiry until a full evidentiary record is established at a hearing, especially in cases where the issues of fact and law are complex and interconnected (*Desmarais* at paras. 55-56; see also *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras 141-142).

[88] A description of the approach that the Tribunal takes and the principles it relies on in considering motions to limit the scope of an inquiry is found in *AA* at paras 55-59 which read as follows:

> [55] This case does not involve a request for an amendment, as the paragraphs and references in question are already in the SOP and Reply and are now being requested to be struck out. As such, this case is the reverse of a case for an amendment; nevertheless many of the principles that apply in cases involving a request for an amendment also apply to this case.

[56] A complaint is the starting point under the *CHRA* for invoking the process that eventually can lead to an inquiry by the Tribunal on a referral by the Commission. Most often, a prospective complainant like AA files a complaint without any independent legal advice or assistance. At this point the complainant is simply setting out his story on a prescribed summary form about what he says has transpired to his knowledge as at that time to make him believe that he has been discriminated against under the *CHRA* and that the discrimination may continue.

[57] It is well established that human rights laws are considered to be quasi-constitutional and need to be interpreted in a broad and purposeful manner in order to give full effect to the rights of individuals to live their lives free from discrimination. Given this context, a complaint should not be unduly restricted by form over substance or by legalisms over practical realities.

[58] While the complaint gives rise to the investigation by the Commission and ultimately the referral to the Tribunal, if warranted, it is not a pleading. The pleadings are the Statements of Particulars and Reply as they flush out the case for the purpose of setting the terms for the adjudicative stage of the inquiry by the Tribunal in its search for the truth with respect to the real and essential matters in dispute.

[59] That said, there must be some factual foundation in the complaint that establishes a reasonable nexus with what is in the Statement of Particulars rather than a brand new allegation not reasonably connected to anything in the complaint and hence essentially a new complaint. In determining the scope of an inquiry when that issue arises, as it has in this case, the Tribunal must look at both the complaint and the Commission's request for an inquiry. As stated in *Casler* at paras. 7 to 11:

> [7] The Tribunal's role is to inquire into complaints referred to it by the Commission (see ss. 40, 44, 49 of the *Act*). Therefore, the scope of a complaint and whether to allow an amendment thereto is determined by examining the original complaint and the Commission's request for an inquiry, which generally includes a letter from the Chief Commissioner, the original complaint and a Summary of Complaint form prepared by the Commission. In performing this examination, the Tribunal is ensuring that there is a link

to the allegations giving rise to the original complaint and that it is not bypassing the Commission's referral mandate under the *Act*. In other words, a determination of scope or amendment cannot introduce a substantially new complaint that was not considered by the Commission (see *Canada (Attorney General) v. Parent*, 2006 FC 1313 at para. 30 ("*Parent*"); *Kanagasabapathy v. Air Canada*, 2013 CHRT 7 at paras. 29-30 ("*Kanagasabapathy*"); and, *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 9 ["*Gaucher*"]).

[8] That said, it must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. It raises a set of approximate facts that call for further investigation by the Commission. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement".

[9] Indeed, the original complaint does not serve the purposes of a pleading in the Tribunal's adjudicative process leading up to a hearing. Rather, it is the Statements of Particulars filed with the Tribunal that set the more precise terms of the hearing. As long as the substance of the original complaint is respected, the complainant and Commission can clarify and elaborate upon the initial allegations before the matter goes to hearing (see *Gaucher* at para. 10).

[10] The role of the Tribunal in a motion such as the present is to consider the documentation and submissions regarding the scope or amendment sought; determine what the substance of the complaint is; and, decide whether the definition of scope or the amendment sought is connected to the substantive complaint and required to enable the Tribunal to inquire into the real issues in dispute. In doing so, it is not the Tribunal's role to reconsider the Commission's investigation or its decision to refer a complaint in light of the investigation. That jurisdiction rests exclusively with the Federal Court (see *Waddle v. Canadian Pacific Railway and Teamsters Canada Rail Conference*, 2016 CHRT 8 at paras. 32-38).

> [11] As with all its actions, in making determinations as to scope and amendment the Tribunal must respect the principles of natural justice and ensure that each party has a full and ample opportunity to present their case (see ss. 48.9(1) and 50(1) of the *Act*). If an amendment results in real and significant prejudice to a party, and that prejudice cannot be cured, the amendment should not be allowed (see *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT) at para. 20).

As also stated in *Gaucher* at paras. 9 to 13 where it was stated as follows:

> [9] The jurisdiction of the Tribunal under the *Canadian Human Rights Act* comes from the fact that the complaint has been referred by the Commission. This provides the general context in which any request for an amendment must be considered. The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.
>
> [10] This is only one aspect of the matter however. I think that one needs to be conscious of the reality of the situation, in examining an application for an amendment. The complaint form is there primarily for the purposes of the Commission. It is a necessary first step, which raises a set of facts that call for further investigation. The complaint form provides an important starting point and is inherently approximate. It was never intended to serve the purposes of a pleading in adjudicative process leading up to a hearing. It is the Statements of Particulars, rather than the original complaint, that set the more precise terms of the hearing.
>
> [11] The parties must be aware that there is nothing unusual in the request for an amendment. The forms that come before the Tribunal are usually drawn up before the Complaint has been properly examined and all the relevant facts are on the table. It is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement. As long as the substance of the

original complaint is respected, I do not see why the Complainant and the Commission should not be allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing.

[12] I think that human rights tribunals have adopted a liberal approach to amendments. This is in keeping with the *Canadian Human Rights Act*, which is remedial legislation. It should not be interpreted in a narrow or technical manner. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.J. No. 75 (QL), at para. 50, for example, the Supreme Court approved of an amendment to a complaint that "simply brought the complaint into conformity with the proceedings". I think that I am presented with a similar situation. It is merely a matter of ensuring that the form of the complaint accurately reflects the substance of the allegations that were referred to the Tribunal.

[13] The Federal Court has also endorsed this approach. In *Canadian Human Rights Commission et al. v. Bell Canada* 2002 FCT 776, at para. 31, Justice Kelen suggests that the rule before the Tribunal and the Federal Court should be the same. The jurisprudence in human rights:

> ...is echoed in the decisions of the Federal Court with respect to amendments to pleadings under Rule 75 of the *Federal Court Rules*, 1998. I refer to the case of *Rolls Royce plc v. Fitzwilliam* (2000), 2000 CanLII 16748 (FC), 10 C.P.R. (4th) 1 (F.C.T.D.), where Blanchard J. set out as a general rule that proposed amendments should be allowed where they do not result in prejudice to the opposing party...
>
> Justice Kelen then quotes the Federal Court of Appeal, in *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 (F.C.A.) at p. 10, to much the same effect. As long as they can be tracked back to the facts and allegations that went before the Commission, and do not prejudice the Respondent, amendments should be allowed. This assists all of the parties in

> “determining the real questions in controversy between the parties”.

[89] All three complaints in this case have been joined to be heard together in this inquiry. As such, in my view, the contents of all three complaints referred by the Commission to the Tribunal need to be analysed together as a whole, not separately, to try to understand what the real issues at stake are in this case. This is true not only to sort out what individual allegations of discrimination are properly part of the inquiry but also, given the allegations of systemic discrimination respecting race, colour and religion, to determine whether those allegations are properly part of the inquiry. Similarly, it is necessary to consider all three complaints globally when considering whether any of the allegations of individual discrimination were in part caused by CSC’s policies, practices and behaviour that are alleged to cause systemic discrimination. The latter point is important because the *CHRA* specifically provides in section 3.1 that a discriminatory practice may include "the effect of a combination of prohibited grounds". The Federal Court of Appeal in *Turner v. Canada (Attorney General)*, 2012 FCA 159 at paragraphs 48 and 49 elaborated on the importance of considering intersecting prohibited grounds of discrimination:

> [48] … The concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination. When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge.
>
> [49] … though the primary focus of a complaint of discrimination may be race, the analysis of that primary ground must not ignore the other grounds of complaint, such as disability, and the possibility that compound discrimination may have occurred as a result of the intersection of these grounds.

[90] As noted in paragraph 67 above, the Commission contends that the exclusion, as requested by CSC in this motion, of questions of whether negative stereotypes of Black Muslim men played a role in the treatment of Mr. Richards would deprive it of its ability to present its public interest case and be given a full and ample opportunity to be heard at a preliminary stage of the proceeding in advance of a hearing of the case on the merits. As

quoted in paragraph 7 above, in reviewing and interpreting the complaints, within the context of the *CHRA* and the law and principles referred to above, including the *CHRA*'s status as quasi-constitutional law, a broad and purposeful approach must be adopted and the complaints should not be unduly restricted by form over substance or by legalisms over practical realities. However, in deciding a preliminary motion to limit the scope of the inquiry, such as in this case, the Tribunal must still determine whether a reasonable link or nexus exists between the allegations in the complaints referred and the impugned particulars and evidence sought to be struck, so that new complaints are not adjudicated, bypassing the role of the Commission in investigating and referring the complaints to the Tribunal (*Tabor* at para. 5). Despite dismissing this motion, the Tribunal does not presume that the incidents of discrimination alleged by Mr. Richards are linked by systemic discrimination nor a common racial thread, as that will have to be proved by Mr. Richards and the Commission at the hearing.

[91] It is not contested that CSC provides correctional services to inmates and it must, accordingly, do so in a manner that is not discriminatory. Otherwise, it can be found to be in violation of section 5 of the *CHRA* for denying a service and of section 14 for harassment and of section 14.1 for retaliating for filing a complaint. These are the sections of the *CHRA* identified in the complaints in this case.

[92] CSC submits that, because of its view that Mr. Richards lacks credibility, his assertions concerning some of the events and incidents that he says took place at the various institutions and that he and the Commission allege were discriminatory should not be considered in this case. Needless to say, at this stage of the proceedings, I have not heard any evidence and am unable to make any findings of credibility with respect to Mr. Richards or with respect to the veracity, accuracy or relevance of any of the assertions made. That is the point of having a hearing so that the Tribunal may assess the credibility of witnesses under oath, make findings of fact after receiving relevant evidence and then apply the law in ruling on the merits of the case, including remedies, if applicable. Nothing in this ruling is intended to deprive the parties of a full, fair and expeditious hearing on the

merits of the complaints referred to the Tribunal by the Commission where facts and allegations will have to be proved in order to succeed.

[93] CSC also submits that various assertions made by the other parties respecting discrimination in the security classification, segregation and discipline of Mr. Richards at the institutions are assertions that are not open to the Tribunal to determine, as they have been already litigated; and, as well, as there is an alternative forum under the *CCRA* within which to challenge these decisions rather than by the Tribunal.

[94] In my opinion, the one security classification decision which was the subject of a decision by the Quebec Superior Court against Mr. Richards, upheld by the Quebec Court of Appeal, does not deprive the Tribunal of its authority under the *CHRA* to make a decision in this case, including with respect to the allegations concerning ongoing security classification issues, if it finds in this motion that there is a sufficient nexus with the complaints and referrals to be properly within the scope of this inquiry. In any case, the Quebec court decisions appear to be much narrower and the same incident does not appear to be directly raised in the impugned portions of the SOPs sought to be struck.

[95] Nor, in my opinion, does the existence of an alternative forum under the *CCRA* deprive the Tribunal of its authority to make a decision in this case, including with respect to the allegations concerning ongoing security classification issues, if it finds in this motion that there is a sufficient nexus with the complaints and referrals to be properly within the scope of the hearing. Case law has clearly established that the *CHRA* as human rights law is quasi-constitutional law and as such is not subordinate to other legislation. Further, there are strong precedents stating that it is for the Commission to decide if a complaint should be diverted for an adequate alternate remedy. In the context of the *CHRA*, the Commission has a role in deciding not to pursue complaints that could be more appropriately addressed under a different Act (s. 41(1)). In *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, 2001 FCT 1115, the Federal Court determined that the Tribunal did not have the authority to review a decision of the Commission under s. 41(1) of the *CHRA*. The Tribunal has confirmed this approach in *Pequeneza v. Canada Post*

Corporation, 2016 CHRT 21 and confirmed that the Federal Court's conclusion is not limited to the Commission's discretionary decisions.

[96] The Tribunal is authorized under the *CHRA* to adjudicate complaints involving alleged discrimination that are referred to it by the Commission, following investigation of the complaints by the Commission, including cases where inmates have allegedly been denied a fair security classification process by the CSC, based upon a prohibited ground of discrimination. In this case the CSC has unsuccessfully raised objections during the investigation of the complaints by the Commission under both paragraph 41(1)(b) of the *CHRA,* claiming that Mr. Richards' complaints could be dealt with under the *CCRA*, and under paragraph 41(1)(d), claiming that many of Mr. Richards' concerns have been resolved and are therefore vexatious. While CSC acknowledged that allegations of systemic discrimination were before the Commission and objected to the allegations of systemic discrimination being considered during the investigation of the complaints, the Commission decided to deal with the complaints and referred the complaints **in whole** to the Tribunal for an inquiry. The CSC did not challenge any of the Commission's decisions by way of an application for judicial review.

[97] CSC submits there is no basis to include allegations of systemic discrimination in relation to Black and Muslim inmates within the scope of this inquiry, as these allegations are not properly connected to the complaints and, additionally, are based on only a few allegations in the complaints that have disproportionately and wrongfully been increased and inflated in the impugned portions of the SOPs sought to be struck. As such, CSC contends that it would be unfair, disproportionate and wastefully time consuming for the Tribunal to require CSC to respond to these systemic allegations. CSC argues that it would require its institutional policies and practices to be examined through a plethora of institutional documents and witnesses as part of this inquiry when the incidents cited in the complaints that the other parties use to base their systemic allegations on are few and related to Mr. Richards' treatment personally not to the treatment of a class of inmates generally.

[98] CSC has the onus of demonstrating, on the balance of probabilities in this motion, that the Tribunal, at this preliminary stage of the proceedings, without hearing any evidence, should exercise its authority to strike the various paragraphs of the SOPs referred to in paragraph 26 above and to refuse to allow the evidence of Dr. Owusu-Bempah to be filed. In order to succeed with its motion, CSC has to establish that it is clear in this case that in examining the complaints and referrals from the Commission to the Tribunal, there is an insufficient nexus with the complaints to allow the impugned paragraphs to stand and to allow the expert evidence to be filed.

[99] As noted in paragraphs 6 to 11 above, the complaints that were referred to the Tribunal by the Commission alleged the denial of services and adverse differentiation on the grounds of race, colour, religion, sex, and disability and also made allegations of retaliation and harassment under the *CHRA*. As well, as noted in paragraph 96 above, CSC acknowledged that allegations of systemic discrimination were before the Commission during the investigation of the complaints and, despite objections from CSC, the Commission decided to deal with the complaints and referred the complaints **in whole** to the Tribunal for the inquiry. Had the CSC wished to challenge these decisions by the Commission on the basis that there was insufficient detail to justify the referral of the whole of the complaints, including the systemic allegations, it could have done so by applying to the Federal Court by way of a judicial review to eliminate or limit the referrals. In this regard, I agree with the Commission's submissions at paragraph 79 above.

[100] The CSC chose not to challenge any of the referrals and, in so doing, has left itself in a position in this motion of now arguing that, despite the inclusion in the referral letters of all of the allegations referred to in paragraph 99 above, the impugned portions of the SOPs as well as the proposed expert evidence do not have a sufficient nexus to the allegations in the complaints to justify their examination at the hearing of this inquiry. It is hard to see how in these circumstances one can make the case now that the Commission's investigation process into these allegations in the complaints was bypassed or that it failed to investigate or refer to the Tribunal for this inquiry systemic discrimination allegations relating to race, colour and religion. It is also hard to imagine how the Commission could now be so fully

engaged in this case as a party to the proceedings in this inquiry for the purpose of representing the public interest and seeking systemic remedies unless it was fully satisfied that it had investigated this aspect and clearly referred it to the Tribunal for this inquiry. That said, it is still necessary to review the complaints in detail to see if the necessary nexus with the impugned paragraphs of the SOPs and the proposed expert evidence exists.

[101] Given the above comments, I have examined the complaints, including the referral letters to the Tribunal from the Commission and the impugned portions of the SOPs sought to be struck to see whether there is a nexus sufficient to support their continued inclusion and I elaborate on the results of this examination in paragraphs 102 to 107 below.

[102] In the first complaint, in addition to the incidents referred to in paragraph 7 above, there are a number of events documented that allege racial and systemic discrimination against Black and Muslim inmates. For example, that there was no heat provided in the section of the institution where Muslims inmates were housed, that the multi-faith Chaplain refused to accommodate Friday prayers for Muslim inmates, that threats of segregation were made for asking about showers for practicing Muslims, that CSC employees made Islamophobic comments and damaged books for Muslim and Black inmates, that cultural needs of Black inmates were not being met, that there were unjustified lockdowns imposed every Black History month, that there was racial and religious profiling affecting Mr. Richards' security file with pictures of him wearing religious attire and that he was physically mistreated including water boarding and chocking for seeking a medical/religious diet.

[103] In the second complaint, in addition to the incidents described in paragraph 9 above, there are a number of events documented that allege racial and systemic discrimination against Black and Muslim inmates. For example, that Mr. Richards was assaulted for drafting grievances for Black and Muslim inmates, that CSC did not provide religious and cultural accommodations to African Canadians and Muslims, that Mr. Richards was denied his religious diet and that legal papers were removed from his cell.

[104] In the third complaint, in addition to the incidents described in paragraph 11 above, there are a number of events documented that allege racial and systemic discrimination against Black and Muslim inmates. For example, that CSC provided a religious diet for Jewish inmates but not a diet for Mr. Richards that would accommodate his Muslim beliefs and his health issues and that the CSC actions towards him were motivated in part because he was a Black English man from outside of Quebec. It should be noted that Mr. Richards' Amended SOP describes events that post-date his third complaint that describe ongoing discrimination similar to the discrimination he alleges in his complaints.

[105] There are real references to racial discrimination and systemic mistreatment of Black and Muslim inmates in the complaints and the impugned portions of the SOPs including allegations that Mr. Richards was subjected to excessive force, violence and unwarranted institutional charges that could lead to higher security classification and segregation. It is alleged that CSC's practices and policies on institutional discipline, use of force and security classification disproportionately impact Black and Muslim inmates including Mr. Richards. Once again, it is to be noted that none of these allegations identified in this paragraph or the previous three paragraphs have been proved but the allegations are there.

[106] In my opinion, using a broad and purposeful lens through which to examine the complaints and referral letters, with the impugned portions of the SOPs sought to be struck, I find that there is a sufficient nexus to allow all of the impugned portions of the SOPs to remain in place at this preliminary stage, understanding that no allegations of discrimination have actually been proven as of yet, as the merits of the allegations will be assessed at the hearing when the parties have a full and ample opportunity to provide evidence (*Saviye v. Afroglobal Network Inc. and Michael Daramola*, 2016 CHRT 18 at para 18).

[107] The essence of the complaints investigated by the Commission and referred to the Tribunal for an inquiry involve a Black Muslim inmate who alleges that he was the victim of discrimination on various compound and intersecting grounds, through a number of incidents over the years at CSC's institutions, including those related to his security classification and those caused by systemic discrimination. In my view these are not new complaints. Rather, the impugned portions of the SOPs, including the allegations of

systemic discrimination involving newer and ongoing instances, while not all included in the complaints in every case, nonetheless all have their foundation in and flow from the essence of the complaints and are sufficiently linked to the fabric of the complaints to be within the scope of the inquiry. Given the need for a purposeful analysis referred to above, they also further elaborate, particularize and provide context with respect to the essential facts and allegations that were in the complaints referred for this inquiry. This is particularly appropriate, in cases where there are systemic discrimination allegations, that are notoriously difficult to prove and often a continuing phenomenon, and in this case raise questions of whether the alleged personal discrimination is a result of a systemic problem as alleged. This is also entirely permissible in order to flush out the details of the complaints and bring them up to date to assist the Tribunal in its search for the truth in this case (*Pohill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at para 36; see also *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc*., 2013 CHRT 24 at para 57; *Itty v. Canada Border Services Agency*, 2013 CHRT 33 at paras 23-25; *Murray* at paras 57-64; *Fitzgerald v. Toronto Police Services Board*, 2019 HRTO 22 at para 96; and *PSAC*).

[108] Further, I am unconvinced that there is a clear case for striking any of the impugned portions of the SOPs at this preliminary stage of the proceedings, in advance of hearing the evidence because of any failure by the Commission to investigate any of the allegations referred to therein. The allegations, including those involving racism and systemic discrimination, were investigated by the Commission and referred to the Tribunal for an inquiry despite objections from CSC at the investigation stage and no judicial review application of the referrals was taken by CSC.

[109] I am also unconvinced that there is a clear case for striking any of the impugned portions of the SOPs on a proportionality basis as argued by CSC, even though it will require more effort by the CSC to respond to and possibly more time to adjudicate. I find no unfairness, prejudice or surprise to the CSC in allowing the case to proceed as per the current pleadings as it was aware of the racial and systemic discrimination allegations at the investigation stage. The Tribunal is focused on both expediency and on fairness. While it

may take more time and effort, if CSC is able to show at the hearing that it has not engaged in discriminatory actions, whether on an individual or systemic basis, it will succeed.

[110] In *Moore*, the Supreme Court emphasized that there is no legal distinction between systemic discrimination and individual discrimination: “The only difference is quantitative, that is, the number of people disadvantaged by the practice” (at para. 58). In all cases, the question is whether the individual suffered arbitrary disadvantage on the basis of a protected characteristic and, for remedies, whether the remedy flows from the claim. A remedy for an individual may have systemic implications. For example, a direction to test an individual claimant’s vision to determine if they are medically capable of obtaining a driver’s licence rather than making an automatic determination based on a medical condition has implications for other drivers with similar medical conditions (see *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 SCR 868). However, *Moore* explicitly stated that “the Tribunal was certainly entitled to consider systemic evidence in order to determine whether [the complainant] had suffered discrimination” (para 64) before cautioning against considering systemic issues that do not illuminate the specific dispute between the parties. Similarly, in *Desmarais*, the Tribunal found that “there is no question that evidence of systemic discrimination against intellectually disabled inmates … may support the Complainant’s individual complaint of discrimination” (para 102).

[111] In this case there are multiple grounds of discrimination alleged and referred for an inquiry that potentially intersect. I agree with the Commission's submission in paragraph 67 above that by asking the Tribunal in these circumstances, at this stage, to strike any references to race, systemic discrimination and security classification in the parties' SOPs, CSC is asking the Tribunal to ignore that these references flow from the complaints referred and that there may be an interrelationship between the different potentially intersecting grounds and the alleged impact of the CSC practices on Mr. Richards and other Black and/or Muslim inmates which is at the heart of its case on a public interest basis. As such, I believe that the issues of fact and law are complex and potentially interconnected warranting a

hearing with a proper analysis into intersectionality involving multiple grounds referred to the Tribunal for this inquiry.

[112] As well, I believe that CSC's request to strike the remedies requested by the Commission is premature at this preliminary stage as a sufficient nexus has been established, referred to above, between the allegations in the complaints and referral letters and the impugned portions of the SOPs. The Tribunal has a broad and remedial discretion to order appropriate remedies for any discrimination it may find **after** considering the evidence in a full inquiry including appropriate systemic remedies. This broad remedial discretion is intended to prevent the same or similar forms of discrimination from occurring. The Tribunal has previously held that it is appropriate to consider whether a requested remedy is appropriate **after** hearing evidence rather than as a **preliminary** matter. In particular, the Tribunal in *Emmett v. Canada Revenue Agency* 2013 CHRT 12 at paragraphs 62-63 reached this conclusion after considering that section 53(2) of the *CHRA* reads "If *at the conclusion of the inquiry* the member or panel *finds that the complaint is substantiated*, the member or panel may, subject to section 54, make an order..." (emphasis in *Emmett* at para. 62). In any event, nothing prevents CSC from objecting to the Commission's request for public interest remedies at the end of the hearing if it is not appropriate based on the evidence to grant such remedies.

[113] Finally, I am of the view that CSC's request to prevent the Commission from filing the proposed expert evidence of Dr. Owusu-Bempah is premature. The Tribunal has not received the expert report, however, it may assist the Tribunal in its inquiry into allegations of systemic discrimination in the prison system that may be attributable to the alleged personal discrimination against Mr. Richards. At this point it is not appropriate for the Tribunal to conduct a substantive review of the merits of the allegations as the proper place for that is at the hearing with all the evidence. Allowing the Commission to proceed at this time with the delivery of the proposed expert report will not mean that the Tribunal has accepted or will come to rely on that report. Those issues will be determined at the hearing and CSC will have the opportunity then to challenge the admissibility and relevance of the

report and to provide its own expert evidence to rebut the Commission's expert evidence after the experts have been qualified.

VI. Order

[114] CSC's motion is hereby dismissed in whole.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 14, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2218/4017, T2282/3718 and T2395/5419

Style of Cause: Ryan Richards v. Correctional Service Canada

Ruling of the Tribunal Dated: August 14, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

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