

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2021 CHRT 35

Date: October 5, 2021

File Nos.: T2635/1121, T2636/1221, T2637/1321

Between:

SM, SV and JR

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Paul Singh

Table of Contents

I.	Background	1
II.	Legal framework	1
III.	Analysis	3
	A. There is a real and substantial risk that matters involving public security will be disclosed.....	3
	B. The Tribunal is satisfied that the order is necessary because reasonable alternative measures will not prevent the risk.....	4
	C. The need to prevent disclosure outweighs the societal interests that the inquiry be conducted in public.....	4
IV.	Orders made.....	5

I. Background

[1] The Complainants SM, SV, and JR, who are of South Asian descent and self-identify as visible minorities, are police officers employed by the Respondent Royal Canadian Mounted Police (“RCMP”). Their complaints centre on the RCMP’s failure to promote them while they worked at an RCMP unit in Toronto, Ontario (the “Unit”) and on the alleged systemic racism in the Unit’s promotional processes generally. This, they say, constitutes discrimination contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (“*CHRA*”) on the basis of color, national or ethnic origin, race, and/or religion.

[2] The RCMP denies discriminating against the Complainants during the promotional processes at issue, or at all, and denies any systemic policy or practice of denying promotional opportunities to the Complainants or members who identify as visible minorities in the Unit.

[3] The RCMP has filed a motion to anonymize the Complainants’ names in the title of proceedings and to designate certain other information as confidential on the basis that disclosure of this information would be injurious to national security and to sensitive RCMP operations. The Complainants consent to a confidentiality order and have reached an agreement with the RCMP on the scope of the order sought. The Canadian Human Rights Commission (the “Commission”) takes no position on the motion.

[4] For reasons that follow, I am satisfied that a confidentiality order on the terms sought by the parties is reasonable and necessary in the circumstances and grant the RCMP’s motion on the terms set out below.

II. Legal framework

[5] Section 52 of the *CHRA* provides broad powers to the Tribunal to take any measures and make any orders it considers necessary to ensure the confidentiality of the inquiry in certain circumstances.

[6] Section 52 of the *CHRA* provides that:

(1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

(a) there is a real and substantial risk that matters involving public security will be disclosed;

(b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

(c) there is a real and substantial risk that disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or

(d) there is a serious possibility that the life, liberty or security of a person will be endangered.

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

[7] The recent Supreme Court of Canada decision in *Sherman Estate v. Donovan*, 2021 SCC 25 ("*Sherman Estate*") informs the statutory analysis the Tribunal must undertake on a motion for a confidentiality order. The Supreme Court in *Sherman Estate* set out a newly modified three-part test for discretionary orders limiting the open court principle. In order to succeed in seeking a limit on presumptive court openness, it must be established that:

- 1) court openness poses a serious risk to an important public interest;
- 2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[8] The newly modified, three-part *Sherman Estate* test, which is consistent with the test set out in s. 52(1) of the *CHRA*, applies to the various types of discretionary limits on

openness, including a sealing order, a publication ban, an order excluding the public from a hearing, as well as a redaction order: *Sherman Estate* at para. 38

[9] The Supreme Court based this three-step test on the previous two-step test set out in its earlier decision in *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (“*Sierra Club*”), which provided that a confidentiality or sealing order should only be granted when:

- 1) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and,
- 2) the salutary effects of the confidentiality order, including the right of civil litigants to a fair trial, outweigh its deleterious effects on the right to free expression, which includes the public interest in open and accessible court proceedings.

[10] The Tribunal has previously accepted the Supreme Court’s test in *Sierra Club* as helping to inform the statutory analysis for seeking confidentiality orders under section 52(1) of the *CHRA*: see, for example, *White v. Canadian Nuclear Laboratories*, 2020 CHRT 5

III. Analysis

[11] For reasons that follow, I am satisfied that the RCMP meets the test set out in s.52(1) of the *CHRA* as informed by *Sherman Estate*.

A. **There is a real and substantial risk that matters involving public security will be disclosed**

[12] Disclosure of identifying information and investigative information would pose serious risks to public security, namely national security and the sensitive nature of the RCMP operations (“Operations”) performed by the Unit and a related unit, as recognized under the *Canada Evidence Act*, RSC 1985, c C-5 ss 37(1), 37(4.1)-(5), 38 and 38.04(1). See also *Dominion Investments (Nassau) Ltd v. Canada* 2005 FC 254 at paras. 16-19.

[13] I have not particularized the nature of the Operations as part of the confidentiality order made.

[14] The serious and substantial risks posed by disclosure of identifying information and investigative information to these important public interests are grounded in the compelling and uncontested affidavit evidence filed by the RCMP Inspector in charge of the Unit, which establishes that disclosure of identifying and investigative information could jeopardize RCMP Operations, national security, and officer safety.

B. The Tribunal is satisfied that the order is necessary because reasonable alternative measures will not prevent the risk.

[15] The confidentiality order agreed to by the parties is the least intrusive option available that achieves the objectives of protecting this information from disclosure to the public and the public's interest in an open inquiry into the complaints. There is no reasonable alternative measure to the order sought.

[16] In particular, the confidentiality order would only result in anonymization of the Complainants' names in the title of proceedings and redaction of identifying information and investigative information from the public version of the documents filed with the Tribunal. The balance of the information contained in these documents would remain public. Moreover, the Complainants, the Commission, and the Tribunal will have access to the redacted information such that the confidentiality order would not reasonably affect the fairness of the inquiry into the complaints.

C. The need to prevent disclosure outweighs the societal interests that the inquiry be conducted in public

[17] The important public interest in protecting national security and the integrity of the RCMP Operations that the granting of a confidentiality order would support outweighs any negative effects of the order.

[18] The order will protect RCMP Operations by allowing the RCMP to continue to effectively gather evidence relating to serious criminal activities in Canada, including threats to national security.

[19] The effect of the order is minimal as it only slightly narrows the parameters of the public nature of the Tribunal's inquiry into the complaints.

IV. Orders made

[20] For reasons set out above, I make the following orders:

- 1) An order anonymizing the Complainants' names in the title of proceedings and referring to the Complainants by their initials; and
- 2) A confidentiality order in the form appended to this decision.

Signed by

Paul Singh
Tribunal Member

Ottawa, Ontario
October 5, 2021

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Date: October 5, 2021

File Nos.: T2635/1121, T2636/1221, T2637/1321

Between:

SM, SV and JR

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Confidentiality Order

Member: Paul Singh

THIS TRIBUNAL ORDERS THAT:

[1] In this Confidentiality Order (the “Order”), the Complainants, the Canadian Human Rights Commission (the “Commission”), and the Respondent (the “RCMP”) are referred to in the singular as a “Party” or in the plural as the “Parties”.

[2] “Unit” and “Related Unit” means the RCMP units to which this confidentiality order applies. “Operations” means the work conducted by these Units.

[3] “Confidential Information” means any document, thing, information or evidence produced or disclosed in any affidavit, on any cross-examination, motion, or in the course of this proceeding that contains non-public and confidential information and is designated by a Party as “confidential” in accordance with the procedure herein.

[4] “Confidential Information,” for the purposes of this proceeding, shall include any: a) identifying information that could identify the Complainants and other members of the RCMP conducting Operations and b) investigative information that could reveal details of previous or ongoing Operations. In that regard,

1. Identifying information includes:

- a. A member’s name; and
- b. The fact that a member conducts or may have conducted Operations work.

2. Investigative information includes:

- a. The names of the Unit and Related Unit;
- b. Any description of the Operations conducted by the Unit and Related Unit;
- c. Information about specific Operations investigations, including the subject of the investigation, the geographic location, and the timeframe; and
- d. Information about Operations techniques.

[5] A Party, when it reasonably believes it will be disclosing or has disclosed Confidential Information, shall through its Counsel designate such information as Confidential Information in the manner set out in this Order. Thereafter, the Confidential Information shall be governed by the terms of this Order, subject to the right of the non-

producing Party to challenge the designation of the information as Confidential Information.

[6] All designations of Confidential Information shall be made in good faith by the designating Party. The inadvertent failure to designate Confidential Information at the time it is disclosed does not constitute a waiver of the right to designate Confidential Information, such that a producing Party may designate Confidential Information after disclosure has been made, provided that such designation is made forthwith upon the discovering of such failure.

[7] Any Confidential Information that a Party seeks to file with this Tribunal shall be segregated from other information and documentation and shall be submitted in sealed envelopes, clearly marked as confidential, and displaying the following notice:

**CONFIDENTIAL INFORMATION
PURSUANT TO THE ORDER OF THIS TRIBUNAL DATED OCTOBER 5,
2021, IN FILE NOS. T2635-1121 / T2636-1221 / T2637-1321 THIS
ENVELOPE SHALL REMAIN SEALED IN THE TRIBUNAL FILES AND
SHALL NOT BE OPENED EXCEPT IN ACCORDANCE WITH THE
TERMS OF SAID ORDER OR UPON FURTHER ORDER OF THE
TRIBUNAL AND ALL SUCH SEALED ENVELOPES SHALL NOT BE
OPENED EXCEPT BY THE TRIBUNAL AND ITS STAFF.**

[8] When filing documents that include Confidential Information, the Parties shall at the same time file with the Tribunal a public version of the documents, from which Confidential Information shall be removed or redacted, and which document shall be publicly available.

[9] A copy of both the public and confidential version of the subject document(s) shall be served on the other Parties three (3) days prior to the filing of the documents with the Tribunal, to allow the other Parties time to make any appropriate objections to the serving Party's designation of the information as Confidential Information.

[10] In the event of a challenge by a non-producing Party to the designation of information as Confidential Information, the producing Party shall have the burden, on a balance of probabilities, of establishing that the information is, in fact, confidential.

[11] At any examination, cross-examination or other matter before a reporter in this proceeding, where evidence is given or documents are produced that are designated by a Party to contain Confidential Information, the Parties shall request that the reporter prepare a public version of the transcript, from which Confidential Information is removed or redacted, and a complete version containing the Confidential Information, to be kept confidential in the manner described above.

[12] All documents, exhibits, and things that contain unredacted Confidential Information shall be marked on each page or on the first page thereof with the following notice:

CONFIDENTIAL

Subject to Confidentiality Order in File Nos. T2635-1121 / T2636-1221 / T2637-1321 dated October 5, 2021.

[13] In the absence of written permission from the Party who disclosed Confidential Information, Confidential Information shall not be disclosed to anyone except the Tribunal, Tribunal Secretariat personnel, stenographic and video reporters, engaged in the within proceeding, and the following firms and individuals:

- 1) The Complainants, the Commission, and the RCMP;
- 2) Nelligan O'Brien Payne, counsel for the Complainants, and designated support staff;
- 3) The Department of Justice, counsel for the RCMP, and designated support staff;
- 4) Counsel for the Commission and designated support staff; and,
- 5) Such other persons as the Parties may agree in writing or as the Tribunal may order.

[14] The Confidential Information shall be used solely for the purpose of this inquiry and may not be used for any other purpose, subject to any further order of this Tribunal.

[15] A Party may apply to the Tribunal to modify or vacate the restrictions on disclosure imposed by this Order as applied to any specific item or items of Confidential Information.

[16] Subject to any further order of this Tribunal, the termination of this proceeding shall not relieve any person to whom Confidential Information was disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such information in accordance with the provisions of this Order. The provisions of the Order shall continue after the final disposition of this inquiry.

[17] Upon final termination of this proceeding, each Party shall destroy within sixty (60) days all items containing Confidential Information pursuant to this Order. Notwithstanding the above, counsel for the Parties may keep one (1) copy of Confidential Information in their files.

Signed by

Paul Singh
Tribunal Member

Ottawa, Ontario
October 5, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2635/1121, T2636/1221, T2637/1321

Style of Cause: SM, SV and JR v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: October 5, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Malini Vijaykumar, for the Complainants

Caroline Carrasco, Brittany Tovee and Aby Diagne, for the Canadian Human Rights Commission

Kathryn Hucal and Jennifer L. Caruso, for the Respondent