Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 12
Date: April 12, 2022
File Nos.: T1848/7812-T1850/8012

Between:

CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CORRECTIONAL SERVICES OF CANADA

Respondent

- and –

NATIVE WOMEN'S ASSOCIATION OF CANADA

Interested Party

Ruling

Member: Jennifer Khurana

OVERVIEW

[1] The Canadian Human Rights Commission (the "Commission") and the Canadian Association of Elizabeth Fry Societies (CAEFS) want to file further updated Statements of Particulars (SOPs).

[2] Since the parties filed their last version of SOPs, there have been several legislative and policy changes as well as court proceedings relating to one of the alleged discriminatory practices set out in the complaints, namely the use of segregation and isolation to separate prisoners from the general inmate population. The Commission and CAEFS want to update their SOPs to reflect these developments and to make other corrections and changes to their particulars. They consent to the filing of each other's proposed SOPs.

[3] The respondent, Correctional Service of Canada (CSC), consents to the proposed changes to the SOPs, except for amendments that refer to legislative changes to the *Corrections and Conditional Release Act* (CCRA) and to the implementation of Structured Intervention Units (SIUs) in women's institutions.

[4] I am granting the Commission and CAEFS's motions to file their updated SOPs in the form they propose. My reasons for this decision follow.

BACKGROUND

[5] CAEFS filed two complaints with the Commission in 2011 ("the complaints") alleging that CSC discriminates against women in the federal prison system based on sex, race, national or ethnic origin, religion and/or disability. The first complaint alleged discrimination in relation to security classification and risk assessment tools; the use of segregation, and isolated and restrictive conditions of confinement; failing to provide access to mental health care and appropriate accommodation; and denying access to programming, particularly for Indigenous women and women with mental health issues. The second complaint was filed on behalf of federally-sentenced Indigenous women and alleged that they are denied access

to Indigenous spiritual, cultural and social practices, with reference to the particular experiences of overclassified and isolated Indigenous women.

[6] The Commission referred these complaints to the Tribunal in 2012. With respect to the issue of segregation, the Commission's referral decision discusses the "allegations regarding the ongoing discriminatory impact of segregation on women inmates". The referral decision goes on to find that "[t]he issue of whether there should be a general rule prohibiting the use of segregation for inmates with mental disabilities or whether, as CSC suggests it is sufficient to assess the mental health of inmates on admission to segregation and monitor it throughout, turns on expert evidence and warrants further inquiry".

[7] Since these complaints were referred to the Tribunal, the parties have filed SOPs, and revised and updated their particulars, most recently in 2018. Since then, constitutional challenges to the *Corrections and Conditional Release Act* (CCRA) launched in the courts in British Columbia and Ontario led to judicial findings that provisions of the CCRA regarding administrative segregation violated the *Charter of Rights and Freedoms*. The federal government subsequently repealed sections of the CCRA that provided for administrative segregation. It introduced structured intervention units (SIUs) as an alternative way of managing inmates who cannot remain within the mainstream prison population. It made corresponding changes to Regulations, Commissioner Directives and policies that address the implementation of SIUs.

[8] CSC opposes the proposed amendments that relate to the abolition of administrative segregation and that reference the use of SIUs. It argues that these changes amount to fresh complaints about SIUs that have no factual or legal link to the original complaints referred to the Tribunal for inquiry. It says allowing the amendments would be prejudicial to the respondent and inconsistent with the public interest.

[9] While CSC has made changes to its practices through the implementation of SIUs, the Commission submits that the new regime has not addressed the underlying discrimination that results from the imposition of isolated and restrictive conditions of confinement. Rather, it argues that SIUs may reflect some of the same or similar

characteristics and grounds-based adverse effects that led to the elimination of administrative segregation. CAEFS likewise submits that SIUs may function similarly to administrative segregation.

ISSUE

1) **Should the Tribunal allow the Commission and CAEFS to file updated Statements of Particulars in the form they propose**?

DECISION

[10] Yes. I find there to be a sufficient nexus between the proposed amendments relating to SIUs and the original complaints. CSC will have the opportunity to refute these allegations by amending its own particulars and leading evidence as part of its defence at the hearing. The proposed amendments do not add a new complaint and do not constitute a new line of inquiry. Concerns about the amended SOPs prolonging an already extremely voluminous and time-consuming disclosure process can be addressed in case management. The Commission and CAEFS are expected to make their requests in a proportionate way and to work together to address CSC's concerns about outstanding disclosure.

REASONS

[11] The Tribunal must provide parties with a full and ample opportunity to present evidence and make legal representations on the matters raised in the complaint (*Canadian Human Rights Act,* R.S.C. 1985, c. H-6, (the "Act") s. 50(1).

[12] It is well-established that the Tribunal may allow a party to amend an SOP at any stage to ensure they properly and fairly reflect the issues in dispute between the parties to a complaint and to determine the real questions in controversy between the parties. Human rights proceedings are open to refinement as new facts and circumstances come to light (*Letnes v. RCMP*, 2019 CHRT 41 at para 5 [*Letnes*]; *Casler v. Canadian National Railway*, 2017 CHRT 6, at paras 8-9).

[13] Neither a human rights complaint nor SOPs are equivalent to pleadings in civil litigation. These documents, including proposed amendments, must be approached in a

manner which is flexible and which is neither narrow nor technical (see, for example, *Carpenter v. Navy League of Canada*, 2015 CHRT 8 at paras 40 and 63 [*Carpenter*]). The function of an SOP is to put the opposite party on notice about the position the party will take, the kind of evidence it proposes to adduce at the hearing, and the case the opposite party will have to make (*Carpenter* at para 48).

[14] An amendment must be linked to the original complaint and must not cause prejudice to the other parties that cannot be remedied (*Letnes* at para 6; *Blodgett v .GE-Hitachi Nuclear Energy Canada Inc*, 2013 CHRT 24, at paras 16-17 [*Blodgett*]). An amendment cannot introduce a substantially new complaint, as this would bypass the referral process mandated by the *Act* (see, for example, *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at paras 15 and 16; *Tabor v Millbrook First Nation*, 2013 CHRT 9 at para 5 [*Tabor*]; *Blodgett* at para 17).

[15] In determining whether to allow an amendment, the Tribunal does not embark on a substantive review of the merits of the proposed amendment (*Tabor* at para 5, *Constantinescu v Correctional Service Canada*, 2018 CHRT 17 at para 5).

[16] The Tribunal has generally found that no prejudice will exist for an opposing party where they were on notice of the issue prior to the motion to amend, no hearing dates are set, and they have a full chance to respond to amendments through their own amendments and at the hearing (*Carpenter* at para 114 and *Tabor* at para 14). In some cases, the Tribunal has considered whether denying the proposed amendment would waste time and resources and whether it would be in the public interest for the complainant to bring a new complaint to address an issue (see *Matson, Matson and Schneider (néeMatson) v Indian and Northern Affairs Canada*, 2011 CHRT 14 at para 18 [*Matson*]).

A. There is a sufficient nexus in fact and law to allegations in the complaints

[17] In my view, the proposed amendments are linked in fact, law, and substance to the essence of the complaints. Allegations of systemic discrimination related to isolated and restrictive conditions of confinement have been part of these proceedings since their outset.

[18] The complaints concern CSC's alleged discriminatory practices against federally sentenced women, including the practice of removing a prisoner from the general prison population and placing her in a condition of confinement that is more isolated and restrictive than the usual conditions. In 2011, when the complaints were filed, this was managed through the regime known as administrative segregation. The complaints refer to what was then called the Management Protocol (the "Protocol"), a set of operational guidelines that CSC put in place from 2003 to 2011 to assist in the management of certain high-risk prisoners that utilised the administrative segregation regime. Although CSC had rescinded the Protocol when the complaints were filed, administrative segregation was still ongoing at the time, as recognised by the Commission in its decision to refer the complaint.

[19] Further, as noted in paragraph [6] above, when the Commission referred the complaints to the Tribunal, it was aware that the Protocol had been rescinded and was concerned more generally with the practice of "segregation", as opposed to the specific statutory or policy vehicle used. It used more general language in its referral decision, noting "the ongoing discriminatory impact of segregation on women inmates".

[20] I do not accept CSC's argument that the complaints were only concerned with what was termed "administrative segregation" and that allowing the proposed amended SOPs would go beyond the scope of these complaints. Further, I do not find that changing the legislative scheme necessarily severs the nexus between the essence of the complaints and the Commission and CAEFS's proposed amendments. In my view, the essence of the complaints is a concern about the alleged discriminatory effect of CSC's operations and policies and the practical consequences of those policies for inmates, rather than a focus on the specific wording of the legislation.

[21] CAEFS submits that its proposed amendments with respect to SIUs are inextricably linked to the original complaints both by the factual matrix which led to legislative change and by what it alleges are ongoing conditions of discrimination underlying these changes. It relies on the Tribunal's approach in *Matson*, in which the complainants sought to amend their SOPs following legislative amendments which they said did not resolve the underlying discriminatory issue. In allowing the amendments, the Tribunal found that "[t]he Complaint, in its essence, has not changed, however the legislation has changed" (*Matson* at para 17).

The Tribunal also concluded that despite the legislative changes, a reasonable and logical nexus existed between the complaints and the amended particulars, and the changes did not raise anything new for the respondent (*Matson*, at para 18).

[22] Similarly, in these proceedings, CAEFS and the Commission allege that while the legislative framework has changed, the substance of their concerns about isolating and restrictive conditions of confinement, have not.

[23] CSC suggests that the facts underlying *Matson* are distinguishable from these proceedings, due at least in part to the fact that the complainants in that case were unrepresented and were not lawyers. It suggests that the Commission and CAEFS are sophisticated parties who advanced a complaint that was about administrative segregation, and that they only started shifting the nature of their complaints when the government began to address the very concerns they had with administrative segregation.

[24] In my view, the essence of the allegations about isolation and segregation in these proceedings has remained consistent. Further, “sophisticated” litigants or not, CAEFS and the Commission could not have been expected to know, in 2011, what the government would do to replace administrative segregation, or what it would be called, or indeed, whether the underlying concerns that led to the filing of the complaint would remain. Rather, they continue to take the position that their allegations stand, and it will be for the Tribunal to determine whether their claims have any basis in fact and law.

[25] CSC noted that the Tribunal issued a decision in early 2021 in the case of *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2 [*Karas*]. In *Karas*, the Tribunal considered whether Mr. Karas and the Commission had impermissibly expanded the scope of the complaint in their SOPs. Mr. Karas filed a complaint alleging that the respondents’ deferral period for blood donors and its policy on men who have had sex with men was discriminatory against homosexual men by reason of their sexual orientation. The Tribunal did not find that Mr. Karas had intended to include women and trans individuals in his complaints. It did not find a sufficient nexus to include new alleged victims (women and trans individuals) as well as new prohibited grounds of discrimination (sex and gender identity and expression).

[26] In my view, the facts of *Karas* are entirely distinguishable from these proceedings. CAEFS – both when it filed the complaint - and now - alleges that CSC's practices, including those related to isolating and restrictive conditions of confinement, are overlapping and inter-related in their effects, contributing to poor correctional outcomes, and difficulties for women accessing services, including mental health care and programming. They also allege these practices can lead to prolonged sentences, particularly for women with disabilities and/or who are Indigenous.

[27] I reject CSC's arguments that the proposed amendments constitute brand new allegations, tantamount to the filing of a new complaint that bypasses the screening, investigation and referral process required by the *Act*.

[28] The substance of the complaints is what matters. In my view, CSC's characterisation of the complaints is too narrow, focusing on the specific regime that was in place in 2011 and ignoring their essence. The proposed amendments are warranted and address the "real questions in controversy" between the parties and substance of the complaints, irrespective of the specific wording used to describe the regime in place then – or now.

[29] While CSC submits that CAEFS and the Commission have already obtained the remedy they sought from the beginning, namely the elimination of the administrative segregation regime, I agree with CAEFS's submission that the remedy they have been seeking since the beginning is broader. In one of the complaints, CAEFS requested that CSC be ordered to stop using segregation as a "living unit", whether it was referred to as administrative segregation, Management Protocol or "*any other prisoner management strategy with similar effects*" (see Complaint #2010 1024, at page 6, Tab 2A of CAEFS's Motion Materials) [emphasis added].

[30] Finally, CSC denies that SIUs perpetuate the administrative segregation regime. It submits that the legislative and other regulatory and policy changes, have rendered the allegations on segregation moot. But this motion is not the place to argue the substance of the claims or the alleged discriminatory practices themselves, whatever the name of the legislative scheme. This will be for the Tribunal to determine after the parties have had the opportunity to make their cases and present their evidence.

B. No prejudice to CSC

[31] Further, I do not find that there is any real and significant prejudice caused to CSC that cannot be remedied. I find that CSC has had sufficient notice of the proposed amendments and will have the opportunity to respond by filing its own amended particulars.

[32] I do not accept that CSC does not know the case it has to meet or that this has opened "a new and unanticipated route of inquiry" as CSC contends (*Gaucher v Canadian Armed Forces*, 2005 CHRT 1 at para 18). The Commission and CAEFS have continued to consistently allege that CSC's practice of removing a prisoner from the general prisoner population and into more restrictive and isolated conditions of confinement is discriminatory and that there are overlapping concerns related to other CSC practices addressed in the complaints. This is not a surprise and is most certainly not unanticipated, even if the legislative scheme has changed.

[33] I also accept CAEFS' submission that both previous sets of SOPs challenge the implementation of segregation in prisons for women and its impact on women, regardless of the specific model through which segregation is implemented. In its 2018 SOP, CAEFS defines "segregation" in federal prisons for women as including solitary confinement, maximum security units, "secure units", mental health monitoring and all other forms of isolation and separation from the general prison population that carry similar effects.

[34] In any case, given the stage of the proceeding, there is no prejudice, or even potential prejudice, that cannot be cured by providing that CSC can submit its own amended SOP. It has its own case to bring and can defend itself as it sees fit. While CSC says this would not cure the prejudice it would suffer because it would be responding to a whole new route of inquiry, I have already rejected this notion and found a nexus between the proposed amendments and the complaints. If CSC's defence is that SIUs are an entirely new model that represent a full answer to the concerns raised in the complaints, it may advance these arguments at a hearing on the merits of these claims.

[35] In reply, CAEFS argues that in weighing potential prejudice, the Tribunal should consider global efficiency. In other words, if CAEFS is required to file a fresh complaint with

respect to SIUs, the parties and the public will face far greater delays and costs from being required to start anew with the Commission process.

[36] While I have already found that the proposed amendments to the SOPs are sufficiently linked to the complaints and that the CSC will not suffer any prejudice, I agree that separating out SIUs from the rest of the complaints will also result in addressing intersecting issues in a piecemeal fashion, with parallel proceedings. This will lead to other problems for the parties, and risks wasting time and money for all involved.

[37] CSC similarly filed amended versions of particulars in the past in responding to the complainant's and Commission's amended SOPs. It can do so again.

[38] Further, no hearing dates are set. There are outstanding requests for production and expert reports that remain to be exchanged. CSC will have sufficient time to prepare for the hearing, to respond to the amendments and to any evidence CAEFS or the Commission propose to introduce regarding SIUs.

[39] I acknowledge CSC's concern that it has already produced 418,000 pages of materials in response to the complaints as framed. While the landscape has changed considerably since the Commission referred these complaints to the Tribunal and since 2018, granting the Commission and CAEFS's motion is not *carte blanche* to broaden the disclosure process or any requests to a point where the case management and hearing of these complaints becomes unmanageable.

[40] I also acknowledge CSC's argument about the indeterminate nature of ongoing allegations and corresponding updates to disclosure, particularly considering the process and time taken to date in this proceeding. A practical line will have to be drawn to allow this matter to proceed, and the Commission and CAEFS are expected to work closely with CSC to narrow any outstanding disclosure requests related to SIUs or anything more recent arising from other regulatory or policy changes related to implementation of SIUs. The Commission acknowledged this concern in its motion materials and will work with the other parties to reasonably address what remains to be disclosed.

[41] I also acknowledge that there has been further delay on the part of the Tribunal and in the issuance of this ruling since this motion was filed, through no fault of the parties. The Tribunal will also work closely with the parties to make up any time lost or delays due to delays on its part and to move forward as efficiently as possible.

Interested party's request to file an SOP

[42] Finally, the interested party, the Native Women's Association of Canada (NWAC), requested a Tribunal order when these motions were filed. NWAC wants to file its own Statement of Particulars, further to the Tribunal's Ruling in 2019 CHRT 30 in which the Tribunal granted NWAC interested party status but set specific conditions, including requiring a Tribunal order to file its own SOP, cross-examine witnesses, make full written and oral submissions and respond to all motions filed by other parties in the matter. The Commission and CAEFS consented to NWAC's request, but CSC did not take a position as it wanted to have any issues related to scope determined first.

[43] As the Commission and CAEFS's motions asking to file their most recent updated SOPs are allowed, CSC is directed to advise whether it consents to NWAC's request to file its own SOP. If it does not consent, CSC is asked to provide brief submissions, not exceeding 10 pages. Following receipt of CSC's submissions, the Tribunal will determine NWAC's request, and will set filing deadlines, as appropriate, including for CSC's amended SOP and amended replies from the Commission and CAEFS.

ORDER

1. The Commission and CAEFS' motions are allowed. Their amended particulars in the form dated March 2, 2020, are accepted as filed.

2. CSC must advise whether it consents to NWAC's request to file its SOP no later than April 20, 2022. If it does not consent, or consents in part, it may provide brief submissions not exceeding ten pages, no later than April 29, 2022.

3. CSC may file a Further Updated Statement of Particulars and the Commission and CAEFS may file Amended Replies, as appropriate. Following receipt of CSC's

response to NWAC's proposed SOP, the Tribunal will determine NWAC's request and provide further direction, including filing dates for CSC's Amended SOP and Amended Replies, as appropriate.

4. The Registry will also contact the parties to participate in a case management conference call regarding the progress of these complaints.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
April 12, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1848/7812 and T1849/7912

Style of Cause: Canadian Association of Elizabeth Fry Societies v. Correctional Services of Canada

Ruling of the Tribunal Dated: April 12, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Morgan Rowe and Emilie Coyle, for the Complainant

Fiona Keith, Caroline Carrasco and Brittany Tovee, for the Canadian Human Rights Commission

Elizabeth Richards, Elizabeth Kikuchi, Tom Finlay and Vanessa Wynn-Williams, for the Respondent

Jennifer Mbang and Sarah Niman, for the Native Women's Association of Canada