Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 15
Date: May 5, 2022
File Nos.: T2516/7320 and T2703/7921

Between:

A.B. and Daniel Gracie

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Catherine Fagan

Contents

I. INTRODUCTION

[1] This ruling of the Canadian Human Rights Tribunal (CHRT or Tribunal) concerns the motion of the Complainants for confidentiality orders to protect the identity of the Complainants and all potential witnesses who are sexual offenders.

[2] In this ruling, the Complainant in Tribunal file number T2516/7320 is referred to as "Complainant A" and the Complainant in Tribunal file number T2703/7921 is referred to as "Complainant B", and together, they are referred to as the "Complainants".

[3] The Complainants, both Indigenous federal offenders, allege discrimination by the Respondent, Correctional Service Canada (CSC), for its systemic failure to provide timely, culturally-specific rehabilitative correctional programming to Indigenous prisoners, and to do so in a non-discriminatory manner, as required by the *Corrections and Conditional Release Act* (CCRA) and the *Canadian Human Rights Act*, RSC 1985, c. H-6 (CHRA). The Complainants allege that the CSC's policies and practices are discriminatory and contribute to the increasing disproportionate incarceration of Indigenous people and the ongoing gap in correctional outcomes between Indigenous and non-Indigenous offenders. More specifically, both Complainants say that they were denied access to a program called the Indigenous High Intensity Sex Offender Program (I-HISOP) within the meaning of section 5 of the *CHRA* on the basis of race.

[4] Given the nature of this I-HISOP, there will necessarily be references throughout these Tribunal proceedings to the fact that the Complainants are sexual offenders. However, although the complaint is still in early stage in the case management, there is nothing in the record to suggest that the details regarding the sexual offences are relevant to their claim of discrimination based on race.

[5] Complainant A is an Indigenous transgender woman who was recently released on statutory release to a Community Correctional Centre run by CSC, where she is supervised under strict conditions.

[6] Complainant B is an Indigenous cis-gender man who has been designated as a "dangerous offender" under Part XXIV of the *Criminal Code* and is serving an indeterminate

sentence. He will not be released from prison unless and until the Parole Board of Canada finds that his risk is manageable.

[7] There are also at least two, and possibly more, witnesses that the Complainants intend to call who are also Indigenous federal offenders serving sentences for sexual offences (Sexual Offender Witnesses). These witnesses also claim being denied access to culturally-specific sex offender programming, including the I-HISOP.

[8] Due to the severe stigma associated with being a known sex offender, both within the prison system and in broader society, the Complainants claim that there is a real and substantial risk that the disclosure of the Complainants' and/or Sexual Offender Witnesses' identities through these proceedings will cause them severe and undue hardship, making their life in prison more difficult and dangerous, and undermining their opportunities for rehabilitation and successful reintegration when released from prison.

[9] Therefore, the Complainants have made a motion before this Tribunal seeking orders pursuant to section 52(1)(b) and (c) of the CHRA to:

A) Anonymize the names of the Complainants, by having them referred to by random initials in all further motions, written and oral submissions, hearings, discussions, rulings and decisions over the course of these proceedings, as well as in the style of cause;

B) Redact the Complainants' identifying personal information in all documents, including, without limitation, names, dates of birth, home addresses and communities, email addresses, telephone numbers, social media accounts, names of family members, and photographs or images of the Complainants (Identifying Information);

C) Ban the publication of the Complainants' Identifying Information;

D) Ban the publication of any information pertaining to the specific offence histories of the Complainants that could identify them, not including the list of Criminal Code offences for which each of the Complainants has been sentenced;

E) Ban the publication of information pertaining to the Indigenous family history of Complainant B that may tend to identify him, not including identifying Complainant B as Indigenous or that he was adopted by a non-Indigenous family;

F) Anonymize the names of any Sexual Offender Witnesses by having them referred to by random initials in all further motions, submissions (both written and oral), hearings,

discussions, rulings and decisions over the course of these proceedings, as well as in the style of cause;

G) Redact the Sexual Offender Witnesses' identifying information in all documents;

H) Ban the publication of the Sexual Offender Witnesses' identifying information; and

I) Ban the publication of any information pertaining to the specific offence histories of the Sexual Offender Witnesses that could identify them, not including the list of Criminal Code offences for which each of the Complainants has been sentenced.

II. SUMMARY OF CONCLUSIONS

[10] For the reasons below and as further detailed in its order, the Tribunal grants the Complainants' motion in part, as follows:

A. Complainant A's name shall be anonymized;

B. Complainant A Identifying Information and Offence History shall be kept confidential;

C. The parties are to refrain from mentioning Identifying Information and Offense History of Complainant B and Sexual Offender Witnesses where it is not relevant to the issues in dispute in this matter.

III. LEGAL FRAMEWORK

[11] Court proceedings, including those of this Tribunal, are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression. As stated by the Supreme Court of Canada on various occasions, open courts are essential to the proper functioning of Canadian democracy.

[12] However, Canadian law recognizes that there are times when there needs to be discretionary limits on court openness in order to protect other public interests where they arise. The need for this flexibility in the application of the open court principle for the CHRT is set out in section 52 of the CHRA. It 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.

[13] 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
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> (a) there is a real and substantial risk that matters involving public security will be disclosed;
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> (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;
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> (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).

[14] The recent Supreme Court of Canada decision in *Sherman Estate v. Donovan,* 2021 SCC 25 [*Sherman Estate*] reiterated the high bar that must be met to limit court openness. *Sherman Estate* informs the statutory analysis the Tribunal must undertake on a motion for a confidentiality order and sets out a newly modified three-part test for such orders. 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;
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> 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,
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> 3. as a matter of proportionality, the benefits of the order outweigh its negative effects. (*Sherman Estate* at para 38.)

[15] The newly modified, three-part *Sherman Estate* test, which is generally 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).

[16] This Tribunal further explained the application of the *Sherman Estate* test to inform the statutory analysis for seeking confidentiality orders under section 52(1) of the CHRA in *SV, SM, JR v. RCMP*, 2021 CHRT 35.

IV. SUMMARY OF POSITIONS

A. Complainants

[17] The Complainants explain that the status of being a known sexual offender is one that carries a particularly intense form of stigma, both within prison culture and in the broader community. For this reason, individuals who have previously committed sexual offences are uniquely vulnerable to harm from publicity and media attention. They state that the physical safety, mental well-being, correctional progress, rehabilitation, and successful reintegration of sexual offenders often depends on their ability to maintain a low profile and avoid public attention.

[18] The Complainants argue that there is a real and substantial risk that the disclosure of the Complainants' and/or Sexual Offender Witnesses' identities will cause them severe and undue hardship, making their life in prison more difficult and dangerous, and undermining their opportunities for rehabilitation and successful reintegration. They claim that the need to prevent disclosure outweighs the societal interest that the identities of these individuals be made public.

[19] They further argue that there is a real and substantial risk to the fairness of the inquiry if the Complainants' and the Sexual Offender Witnesses' identities are not protected. Any publicity, they claim, would be destructive and would provide the Respondent with a tactical advantage in this proceeding, and thus potentially deterring witness participation or precipitating premature resolution on unfavourable terms. They say this would undermine

the purposes of the CHRA and the public interest in even highly stigmatized Indigenous offenders being willing to participate in legitimate human rights complaints.

[20] To support their claim of the real and substantial risk that the disclosure of the Complainants' and/or Sexual Offender Witnesses' identities will cause them severe and undue hardship, the Complainants filed six (6) affidavits, including affidavits by both Complainants, two (2) potential Sexual Offender Witnesses, one affidavit by Laura Sumner, a law student and one affidavit by Catherine Latimer, the Executive Director of the John Howard Society of Canada.

[21] These affidavits outline with some detail the nature of the hardship that sexual offenders experience both in the prison system and once they are released, including the importance of sexual offenders maintaining a low profile while in the prison and during reintegration into the broader society.

B. Respondent

[22] The Respondent opposes the requests for anonymization of the Complainants' and witnesses' identities and for publication bans pertaining to details of the individuals' offence histories. It argues that the Complainants' submissions give too little weight to the importance of the open court principle and the presumption that court and tribunal proceedings will proceed publicly.

[23] The Respondent points out that much of the information the Complainants want protected is already public since it has been the subject of proceedings in open court and numerous media reports that remain publicly accessible.

[24] Given the broad nature of the requested orders and the evidence provided, the Respondent further argues that if the Tribunal accepts the motion as requested, it would be endorsing the notion that anyone convicted of serious sexual offenses is entitled to anonymity orders and publication bans, regardless of their individual circumstances. It argues this would be wrong in law, and inconsistent with the open court principle and the Tribunal's jurisprudence.

[25] It further submits that the Complainants' request for redaction of other specified personal information is premature and that the relevance of much of the information is unclear, as is the extent to which any of it will be adduced as evidence. The Respondent notes that it is willing to work with the Complainants and the Canadian Human Rights Commission to ensure an appropriate evidentiary record is before the Tribunal, while taking into account the Complainants' concerns about specific personal information. If the parties cannot agree on redaction of specific items, the Respondent suggests that the parties may seek rulings from the Tribunal at that time.

[26] The Respondent does not oppose the Complainants' request for a publication ban regarding personal information that may ultimately become evidence in these proceedings, including Complainants' Indigenous family history. However, it suggests that this request is also premature.

[27] Finally, the Respondent states that at an appropriate time, the media should be notified of the publication ban requests, so that its members may determine whether to make submissions in response.

C. Commission

[28] The submissions of the Canadian Human Rights Commission have a particular focus on the vulnerability of trans individuals, which, it argues, puts such individuals, such as Complainant A, at a real and substantial risk of undue hardship in the event of disclosure of certain personal and other information.

V. ISSUES

[29] This ruling addresses the following issues:

(1) Should the names and identifying information of the Complainants and some of their witnesses be kept confidential because there is (i) a real and substantial risk that the disclosure of this information will cause undue hardship to them (s. 52(1)(c) of the CHRA) or (ii) there is a real and substantial risk to the fairness of the inquiry (s. 52(1)(b) of the CHRA) that outweighs the societal interest that this inquiry be conducted in public?

(2) Should the media be notified of this motion for a confidentiality order?

VI. ANALYSIS

A. Section 52(1)(c) of the CHRA

[30] After reviewing the Complainants' detailed submissions and affidavits, the Tribunal is convinced by the Complainants' statements regarding the intense stigmatization of sexual offenders, and how this stigma puts sexual offenders at greater risk for harm while in prison and when they are released from prison and attempt to reintegrate into society, including increased barriers to housing, employment and so on.

[31] What was less clear from the submissions and evidence is that disclosure of their identities through the CHRT process would create a real and substantial risk of undue hardship to the Complainants and/or the Sexual Offender Witnesses (as per s. 52(1)(c) of the CHRA). Regarding the impact of a public CHRT process, most of the submissions and evidence amount to general statements of the need of sexual offenders to maintain a low profile and that increased attention by potential media reports could result in increased hardship.

[32] Although the risk of undue hardship from disclosure of the Complainants' and Sexual Offender Witnesses' identities through the CHRT proceeding itself does not need to be certain (R.L. v. Canadian Railway Company, 2021 CHRT 33), general statements are not sufficient to demonstrate a real and substantial risk. Given the nature of their offences, the Complainants already face barriers and hardship because of the stigma related to their offences. This is not the question at issue in this ruling. The question is whether there is a real and substantial risk that the disclosure of their identities through the CHRT proceeding itself will cause undue hardship.

[33] Catherine Latimer notes at paragraph 17 of her affidavit the higher rates of murder and violent attacks against prisoners convicted of sex offences. This is a sad statistic that will weigh heavy on the Complainants and the Sexual Offender Witnesses throughout their lives. However, the Tribunal has not seen any evidence that identification in a CHRT process will significantly exacerbate this already existing reality.

B. Public nature of information and considerations regarding media coverage

[34] The Complainants anticipate that there will be significant media coverage of their hearing because of the public concern pertaining to anti-Indigenous discrimination. They worry that this would put an intense spotlight on them, both within prison and out, and could turn them into a high-profile inmate or ex-inmate with increased scrutiny from officials of the Respondent and the public. However, at this point there is nothing before the Tribunal to indicate the likelihood of high media coverage of this case. There are claims of systemic anti-Indigenous discrimination made by the Complainants, but this may or may not elicit significant interest. Again, the principle of open courts is constitutionally protected because the transparency it provides is essential to building and maintaining public trust. Limitations must pass a very high bar, as mandated by our country's highest court.

[35] It is quite possible that there will be little or no media coverage on the hearing in this case. On the other hand, it is also possible that there will be media interest in the proceeding, which will significantly increase the likelihood of significant coverage. If the latter is the case, it is always possible for the Complainants to make another motion to the Tribunal, given that, at that point, the media coverage and increased attention focused on the Complainants will be more certain, which could alter the analysis of whether there is a real and substantial risk that disclosure will cause undue hardship.

[36] As already mentioned, both Complainants and the Sexual Offender Witnesses were convicted of sexual offences. As such, their criminal hearings were public and related documents and judgements are of public record. At least for the Complainants, their criminal cases were subject to media reports at the time, which may be easily found online. These news articles include their names, photographs of their faces, and a variety of other specific personal information about them and their offences.

[37] Based on the written submissions and affidavits of the Complainants, it also appears that there is a general knowledge among inmates and prison guards that the Complainants are sexual offenders, which has resulted in social exclusion and violent attacks. This is lamentable because, as stated by Catherine Latimer, it significantly reduces their ability to rehabilitate. However, given that inmates and prison personnel are already aware of their

identity and their criminal records, it puts into question whether they will experience hardship due to their names being identified in their CHRT process.

[38] The Supreme Court in *Sherman Estates* tells us that it is not necessary for information to be completely out of the public domain in order for the individual to whom it relates to benefit from a privacy interest. For example, it writes at paragraph 81:

> It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally R. v. Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; UFCW, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 U.T.L.J. 305, at p. 346).

[39] In the case at issue, the identities of the Complainants and several details of their offences are clearly in the public domain and are easily accessible to any member of the public with Internet access. While this is not a complete bar to being able to access certain limits to the open court principle, the Complainants would have to demonstrate that the disclosure of their identity in the CHRT proceeding would exacerbate the harm they already suffer as a result of the stigma related to their offences. As mentioned above, the Tribunal has not seen any evidence of this. The extent to which the Complainants' information is already in the public domain in fact significantly puts into doubt the existence of a real and significant risk of undue hardship.

(i) Particular considerations for Complainant A

[40] The Tribunal considers that the transgender identity of Complainant A is of particular significance for the determination of whether she faces a real and substantial risk of undue hardship should her identify be revealed.

[41] Sadly, transgender identity still carries a high level of stigma in our society. The continuing disadvantage, discrimination, extreme stigma and prejudice experienced by trans individuals is well known (*XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726). The risks of undue hardship were outlined in the Ontario Human Rights Commission's *Policy on preventing discrimination because of gender identity and gender expression.* Although this policy of the OHRC isn't binding on the Tribunal, it is a useful document to quote for contextual purposes. It notes:

> […] "trans" people are one of the most disadvantaged groups in society. They routinely experience prejudice, discrimination, harassment, hatred and even violence […] Trans people face these forms of social marginalization because of deeply rooted myths and fears in society about people who do not conform to social "norms" about what it means to be female or male. The impact is significant on their daily lives, health and well-being.
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> […] In 2010, the Trans PULSE Project conducted a detailed survey with 433 trans people across Ontario. Trans people reported barriers and discrimination in accessing employment and medical care. (…) Two-thirds said they had avoided public spaces that everyone else takes for granted such as malls or clothing stores, restaurants, gyms and schools because of a fear of harassment, being "read" (perceived as trans), or "outed." Washrooms were the most commonly avoided space. Over their lifetime, 77% reported they have had suicidal thoughts and 43% had attempted suicide.

[42] In the opinion of this Tribunal, the transgender identity of Complainant A falls within what the Supreme Court of Canada has identified as protected privacy interests in *Sherman*, namely "the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity." (*Sherman Estate* at para. 34).

[43] According to the evidentiary record before the Tribunal, it seems that Complainant A's transgender identity is not currently public knowledge, and this fact did not form part of details published by the media at the time of her sentencing. She is also an Indigenous

transgender woman, which again heightens the chance of being stigmatized and targeted. Additionally, she was very recently released from prison and is currently transitioning to living in broader society, which is a particularly vulnerable and difficult period in the reintegration and rehabilitation of an offender. These characteristics of Complainant A are essential to the Tribunal's determination that, in her case, disclosure of this information through the inquiry would put her at a real and substantial risk of undue hardship, which outweighs the societal interest that the inquiry be conducted in public.

(ii) Potential Sexual Offender Witnesses

[44] As explained above, the Complainants argue that they, and all named and potential Sexual Offender Witnesses should be granted the requested confidentiality orders. They argue for the need for such a broad order because of the severe stigma and risk of hardship that any sort of attention could bring to any sexual offender who may provide evidence. Even if the Tribunal agreed to the existence of a risk of undue hardship by disclosure, in balancing that risk with the societal interest of a public inquiry it would conclude that the requested order to encompass all potential Sexual Offender Witnesses, which, at this very early stage of the proceeding, include the named Sexual Offender Witnesses, is far too broad. Such an order would essentially create a new broad category of individuals that could benefit from anonymization, without requiring each person to prove a real and substantial risk of undue hardship based on their unique circumstances. Such a broad exception would be too significant an infringement on the open court principle and a departure from current caselaw.

(iii) Conclusions with respect to s. 52(1)(c)

[45] The Tribunal agrees that disclosure of Complainant A's identifying information through the CHRT process would put her at real and substantial risk of undue hardship, given her particular circumstances as a transgender woman currently reintegrating into broader society. This real and substantial risk outweighs societal interest in a public inquiry, insofar as this information is concerned. The Tribunal also accepts that a confidentiality order with regards to Complainant A is reasonable and necessary to protect her from such undue hardship.

[46] In the case of Complainant B and the Sexual Offender Witnesses, both named and potential, the Tribunal is not convinced that disclosure of their identifying information through the inquiry process will create a real and substantial risk of undue hardship. For this reason, s. 52(1)(c) of the CHRA does not warrant a confidentiality order for them.

C. Section 52(1)(b) of the CHRA

[47] Given the finding pursuant to section 52(1)(c) that there is a real and substantial risk of undue hardship due to disclosure of certain information for Complainant A which outweighs the societal interest in a public inquiry in respect of that information and warrants a confidentiality order, the Tribunal considers it unnecessary to make a determination for Complainant A under section 52(1)(b).

[48] Regarding Complainant B, the Complainants anticipate that significant media coverage creates a real and substantial risk of harm to the fairness of the inquiry because destructive publicity would provide a tactical advantage in the litigation. Although the discussion on fairness goes beyond a review of procedural matters (*Day v. Department of National Defence and Michael Hortie*, 2003 CHRT 12 at para 6), given the discussion above on media coverage of the trial, the Tribunal considers this risk too hypothetical to constitute a real and substantial risk to the fairness of the inquiry that would require any order under s. 52(1)(b).

[49] Also, as further discussed below, the Tribunal considers the concerns of the Complainants that facts surrounding the nature of their offences could take over the hearing can be adequately addressed through case management and proper scoping of the hearing.

[50] The Complainants mention the possibility that certain Sexual Offender Witnesses will not want to testify if their names will be published. At this point, the Tribunal agrees with the Respondent that this is hypothetical and speculative. Therefore, the Tribunal does not consider it presents a real and substantial risk to the fairness of the inquiry.

[51] Finally, the measures put in place in this ruling, as well as the potential for future rulings, constitute a reasonable alternative to the orders requested regarding Complainant B and the Sexual Offender Witnesses and are the least intrusive option to address the

concerns of the Complainants while still respecting the importance of open hearings (*Sherman* at para 105 and *SM, SV and JR v. Royal Canadian Mounted Police*, 2021 CHRT 35 at paras 15-16).

D. Notification of the Media

[52] The Respondent argues that the media should be notified of publication ban requests, so that its members may determine whether to make submissions in response.

[53] There is no statutory or common law requirement for the Tribunal to notify the media of a confidentiality order or publication ban under s. 52 of the CHRA. This is a discretionary decision for the Tribunal to make, as master of its own proceedings, that is dependent on the circumstances of each case. This was confirmed by the Supreme Court of Canada in *CBC v. Manitoba*, 2021 SCC 33 at paragraph 51:

> To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

[54] The media has not approached the Tribunal about this case up to this point. Given this, and given the ample motion material before the Tribunal for this motion, the Tribunal considers it has sufficient information and does not consider it necessary to notify the media before making a ruling on the current motion.

VII. SAFEGUARDS, POTENTIAL FUTURE ORDERS AND CASE MANAGEMENT

[55] Though the Tribunal is not prepared to grant a confidentiality order to Complainant B and the Sexual Offender Witnesses, it understands and is sensitive to his concerns and those of the named potential Sexual Offender Witnesses.

[56] The Tribunal also recognizes that the record suggests that the details of the Complainants' offences before they entered prison have little relevance to its determination of their complaints. As stated by the Complainants, aspects of their histories and some of their correctional documents may well be entered into evidence, as the case concerns their rehabilitative needs and opportunities as Indigenous offenders. However, the allegations they make are largely systemic, and concern discriminatory practices and policies at the national and regional level which result in inequitable access to Indigenous rehabilitative programs, and the concentration of Indigenous resources at more restrictive prisons. Whether the Respondent's policies and practices with respect to Indigenous correctional programs are discriminatory will not turn on the details of the offences the Complainants or their witnesses committed, or other personal information by which they could be easily publicly identified.

[57] For these reasons, the Tribunal will take care not to mention any identifying information that is not relevant to the issues, be it orally or in writing, at any stage of the proceedings (see in this regard: *White v. Canadian Nuclear Laboratories*, 2020 CHRT 5 at paras 55 [*White*].

[58] It is also prepared to include in its order some safeguards to address the concerns of the Complainants – including Complainant B – and the Sexual Offender Witnesses (see *White* at para 4). These safeguards include a requirement to reference offence history of both Complainants and the Sexual Offender Witnesses in written submissions or communications to the Tribunal in a separate schedule to the documents being filed, in order to facilitate the separation of such information. This approach is reasonable and justified in the circumstances, given that the complaints before the Tribunal relate to race-based discrimination by the Respondent in the provision of programming, such that the offence history has little or no relevance to them. Separating the information in this fashion renders

it accessible for the purposes of context but prevents it from overshadowing the other issues in the case. In respect of Complainant B and the Sexual Offender Witnesses, it also facilitates potential redaction if circumstances may change in the future and s.52 relief becomes warranted.

[59] Worries of the case being taken over by the details of their offences can also be dealt with through proper case management and scoping of the claim and hearing. The Respondent states that it is willing to work with the Complainants and the Commission to ensure an appropriate evidentiary record is before the Tribunal, while taking into account the Complainants' concerns about specific personal information. If the parties cannot agree on redaction of specific items, the Respondent suggests that the parties may seek rulings from the Tribunal at that time. The Tribunal endorses this approach.

[60] As well, as mentioned above, if, as the case progresses, new information comes to light that could potentially alter the finding of a real and substantial risk of undue hardship because of disclosure, such as a stronger likelihood of intense media scrutiny, the Complainants are able to return to the Tribunal to request a new order based on new evidence or change in circumstances.

[61] While it is important to avoid an excessive number of confidentiality motions, it is premature to provide broad confidentiality orders when the risk of future events (such as widespread media coverage) is not yet shown to be substantial, or when the risk being discussed is for unknown individuals (potential Sexual Offender Witnesses). Therefore, while this ruling goes as far as the Tribunal considers appropriate in the circumstances, future orders are possible. Such requests could potentially be done more expeditiously by raising them during case management conference calls.

VIII. ORDERS

[62] For the purpose of the orders below, the following definitions apply:

A) "Identifying Information" means any information that may lead to the identification of Complainant A, Complainant B or the Sexual Offender Witnesses, as the case may be, including, without limitation, their names, dates

of birth, home addresses and communities, email addresses, telephone numbers, social media accounts, photographs, images or names of family members;

B) "Offence History" means any information pertaining to the specific offence history of Complainant A, Complainant B or the Sexual Offender Witnesses, as the case may be. But "Offence History" does not include the list of *Criminal Code* offences for which each of Complainant A and Complainant B, and their witnesses, as the case may be, has been sentenced; and

[63] The Tribunal makes the following order pursuant to section 52(1)(c) of the Act:

A) Complainant A must be referred to as A.B. throughout these proceedings, including in motions, submissions (both written and oral), hearings, discussions, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;

B) Complainant A Identifying Information shall be kept confidential throughout these proceedings, including in motions, submissions (both written and oral), hearings, discussions, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;

C) Where the Parties wish to make reference to Complainant A Identifying Information and Offence History in written submissions, or other written communications to the Tribunal, they are directed to segregate them in a schedule to the document being filed, and thereafter to refer to the information contained in such schedule by paragraph number as required;

D) Complainant A Identifying Information and Offence History shall not be disclosed to anyone except the Tribunal and Tribunal Secretariat personnel;

E) The Registry is instructed to identify any Confidential Information filed thus far – and to be filed in the future – in the official records of these proceedings. Such information is to be redacted from any public access request for the documents which contain it;

[64] The Tribunal further orders that the parties are to:

A) Refrain from mentioning Complainant B and Sexual Offender Witnesses Identifying Information or Offense History where it is not relevant to the issues in dispute in this matter;

B) Where the Parties wish to make reference to Identifying Information and Offence History of Complainant B or Sexual Offender Witnesses in written submissions, or other written communications to the Tribunal, they are directed to segregate them in a schedule to the document being filed, and thereafter to refer to the information contained in such schedule by paragraph number as required;

[65] The Tribunal further orders that in all cases, the audio recording of the hearing shall not be disclosed to anyone other than the parties and their counsel. Where there is a public access request for the recording, it will be addressed by the Tribunal.

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
May 5, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2516/7320 and T2703/7921

Style of Cause: A.B. and Daniel Gracie v. Correctional Service Canada

Motion dealt with in writing without appearance of parties

Written representations by:

Paul Quick, for the Complainants

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