Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 21
Date: May 31, 2023
File No.: T2459/1620

Between:

Cathy Woodgate, Richard Perry, Dorothy Williams, Ann Tom, Maurice Joseph and Emma Williams

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

(Delivered Orally by Zoom Videoconference at a Case Management Meeting on May 31, 2023)

Member: Colleen Harrington

[1] First of all, I agree that I have the jurisdiction, as master of my own proceedings, to decide this issue, pursuant to section 50 of the *Canadian Human Rights Act*, RSC 1985, c H-6 ["*CHRA*" or "*Act*"] and the *Canadian Human Rights Tribunal's Rules of Procedure, 2021*, SOR/2021-137.

[2] In light of the requirement set out in s. 48.9 of the *Act* that hearings be conducted as "informally and expeditiously as the requirements of natural justice and the rules of procedure allow", I agree that it is fair and most efficient to proceed with this Motion on the basis of written submissions followed by an oral ruling, which I will deliver now. Thank you all for your helpful submissions, which I have carefully reviewed.

[3] I agree with the Respondent and Commission that the Complainants' application amounts to a request to reopen their case because they are asking to call additional evidence after the Respondent has called its evidence. Even though the application is being made before the Complainants have officially closed their case, this is not a request to bifurcate the hearing, and so Tribunal cases in which that has happened are distinguishable.

[4] This case is also distinguishable from other Tribunal cases where there were requests to reopen – including recent cases like *Dorais v Canadian Armed Forces*, 2023 CHRT 6 (CanLII) ["*Dorais*"] and *Marshall v Membertou First Nation*, 2021 CHRT 36 (CanLII) ["*Marshall*"].

[5] Just briefly, in *Dorais*, the hearing was over, closing submissions had been made and the Member was beginning his deliberations when the Complainant asked to reopen the case to introduce fresh evidence. The request was denied. In our case, I have not begun deliberating.

[6] In the *Marshall* case, the Complainant's case was complete when the Respondent filed a motion for non-suit, which led to the Complainant asking to reopen his case to testify. There, the Tribunal allowed the Complainant to complete his case before the Respondent called its evidence, in order to avoid a miscarriage of justice. Here, a non-suit is not at play.

[7] In the present case, the application is being made because Complainants' counsel misunderstood the Tribunal's procedure. There was a mistaken belief that remedy evidence

would be heard only after the Tribunal had made a finding of discrimination. The Complainants argue that they should not be penalized because of their counsel's misunderstanding.

[8] The Respondent is not opposed to the Complainants calling further evidence relating to remedy but argues that it should not have to call its own evidence until after the Complainants have finished calling all of their evidence. It argues that this is the only procedurally fair way to proceed.

[9] The Respondent is correct that the *CHRA* and the Tribunal's Rules are structured so that the respondent *responds* to the complainant's and Commission's cases. The Respondent is also correct that reopening a case is done only in exceptional circumstances, and the Tribunal's case law supports this assertion (including both *Dorais* and *Marshall*).

[10] The Complainants have made this application to "reopen" prior to actually closing their case. They do not want to adjourn the hearing to keep their case open in order to call this evidence before the Respondent starts calling its evidence, which is what the Respondent wants, because this will likely cause a significant delay. While the Complainants' application, if granted, will also cause some delay, they are prepared to accept this in order to be able to have a full and ample opportunity to present their case.

[11] As I agree with the Respondent's and Commission's characterization of the application as a request to reopen the Complainants' case following the Respondent's evidence, I agree that the factors set out in *Dorais* apply to determine if the inquiry should be reopened to allow the filing of additional evidence before the final decision of the Tribunal is rendered. I have analyzed each step in making this decision.

[12] I note that, in *Dorais,* the first question that a decision maker must ask was framed as, "Would the proposed new evidence, if presented, probably have changed the result of the inquiry into the complaint?" While that formulation applies to cases where the hearing is complete and the decision was not yet rendered, like in *Dorais*, or in which the trial court had already rendered its decision (which was the case in the leading Supreme Court case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59 (CanLII)), I agree with the Respondent that the more appropriate question in a case such as this, where the

request to reopen happens earlier in the proceeding is this question, which was set out by the Federal Court in *Varco Canada Limited v. Pason Systems Corp.,* 2011 FC 467 (CanLII) ["*Varco*"] at paragraph 23: If presented, could the new evidence influence the result? In other words, is the evidence relevant?

[13] I find that here, the answer is yes**.** The additional evidence proposed appears to be material to a key issue in dispute, being the potential award of public interest remedies, if the Tribunal finds that there was discrimination**.** The Respondent points out that the Complainants have not actually particularized what new evidence they seek to adduce, and it says the onus is on them to do so, and, but for this application, they have closed their case. The RCMP says a *suggestion* that they will find additional evidence is not sufficient. I disagree, but will discuss this issue further, later in this Ruling.

[14] The second question set out in *Dorais* is: Could the evidence have been obtained before the inquiry by the exercise of reasonable diligence? The answer to this question on its face is also yes. The requested remedies were laid out in paragraphs 92, 97, 99, 100 - 105 of the Complainants' Statement of Particulars and have therefore been "in play" for several years. I also accept that the failure to lead the evidence about the remedy was due to a misunderstanding of the Tribunal's process by counsel. As stated in *Marshall*, "[p]arties are usually bound by what their representatives do and the positions they take."

[15] The third question is: Do exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit additional evidence? The Federal Court in *Varco* added this question to the two-part test to consider whether there are exceptional circumstances that would justify setting aside the "due diligence" aspect of the test or at least reducing its overall importance in the exercise of discretion.

[16] Here, I accept that this is such a case. I agree with the Commission that there are extraordinary circumstances at play in this inquiry, which deals with matters that touch on the relationships between Indigenous individuals, communities and the RCMP, the investigation of historical abuse claims, and the remedies that should be awarded if discrimination is found. In this case, while the Complainants have been very ably represented (unlike the Tribunal's finding in *Marshall*), I accept that, while it is unfortunate,

errors do occur and an overly formalistic and rigid approach is not in keeping with the *CHRA's* overarching goals and the context of the case.

[17] I agree with the Commission that, in the circumstances of this case, it is critically important to ensure that the Complainants have a full and ample opportunity to have their say, and that the matter be resolved in an expeditious way.

[18] Finally, I must consider the residual question of prejudice to all parties. Again, the RCMP is not objecting to the evidence being called but asks that the hearing be adjourned so that the Complainants call all of their evidence first. There is a need to consider both the prejudice to the Complainants if I agree with the Respondent's proposal which will delay the hearing and the prejudice to the RCMP if I agree to the Complainants' proposal. Procedural fairness requires that parties know the case they have to meet and I of course take this principle seriously.

[19] The Complainants would obviously be prejudiced by not being permitted to call the expert evidence relating to the public interest remedy set out in their Statement of Particulars. This is not controversial.

[20] On the other hand, the Respondent says it will be unduly prejudiced if the Complainants' application is granted. I have carefully considered and will respond to each of the Respondent's concerns.

[21] First, the Respondent says allowing the Complainants' request will force the RCMP to present its case without knowing the case to meet. Structuring the hearing in the way proposed is "inherently prejudicial", it argues, since its case intertwines facts, the nature of the service, and remedy sought. I find that some of the prejudice is reduced by knowing about this application to reopen prior to the RCMP calling its case, unlike in other cases where all evidence was called, final submissions were made, and a party was taken by surprise by a request to reopen. Furthermore, as it is a discrete issue related to one type of remedy, prejudice can be remedied by permitting the RCMP to respond and call its own evidence and to recall its witnesses if necessary. In other words, I do not find that the Respondent will be stymied in any way in responding to the core allegation of discrimination if I allow this request.

[22] Second, the Respondent argues that allowing the Complainants to call further evidence after they have closed their case would allow them to call additional evidence to respond to the Respondent's case, which would be an unfair benefit to the Complainants. The RCMP says the legal and factual issues in the present case are complex and span a period of over 50 years. It argues that they cannot be neatly separated and compartmentalized in such a way as to view the remedies sought in the Complainants' SOP as discrete from the other issues.

[23] The Complainants say their additional evidence will not touch on more than remedies: they do not propose to call further evidence on the issue of liability through their proposed process. I find that this concern is mitigated by the fact that objections to the proposed evidence can still be made if it goes to issues outside the specific remedy. I will be alive to this and receptive to any arguments made on this basis.

[24] Third, up until the time the application was made, the Respondent says that it believed that the Complainants would close their case before the RCMP started to present its case (as is the normal course.) It had no reason to believe otherwise and relied on this assumption when determining how to present its case. Given how far along the current proceedings are, the RCMP says it cannot restructure its case now in the manner the application contemplates. While I accept that this application will present some challenges to the Respondent, I also note that these remedies were included in the Complainants' Statement of Particulars (SOP) since June of 2020 so presumably the Respondent had prepared its case to respond to what was in the SOPs of the Complainants and Commission. This is not exactly a situation where a Party is proposing to introduce "fresh evidence" that no one was aware of until the point it is introduced. Also, the Respondent has asked to call an additional witness who was not on its witness list at a late date, whose evidence does not relate to the investigation but to how the RCMP conducts investigations now. The Respondent is also seeking a measure of procedural flexibility in its own favour, and we can discuss that later.

[25] The RCMP argues that the prejudice caused by the Complainants being able to re-open their case would not be cured by allowing it the opportunity to respond. I disagree.

[26] The Commission has argued that in the unique circumstances of this case, the potential inefficiency associated with the Complainant's request may be preferable to the alternatives of foregoing the proposed evidence or adjourning hearing dates to delay the start of the RCMP's case. I agree. In this case the Tribunal needs to balance the goal of truth-seeking - allowing all parties, but especially the Complainants in terms of this identified remedy, a full and ample opportunity to present their case - with the need to proceed expeditiously and fairly.

[27] While it may be ideal to allow the Complainants to call all of their evidence before requiring the Respondent to begin calling its evidence, permitting this to happen would mean further delay beyond that proposed by the Complainants in order to allow the calling of this additional evidence to happen and the circumstances of the complainants and witnesses in this case are such that the need to proceed expeditiously is paramount.

[28] Delay in this case has already had real consequences – in addition to the three complainants who have passed away, one witness had a stroke after testifying and one testified that he has a heart condition.

[29] Having carefully weighed all of the information and factors, I find that while there may be some prejudice to the Respondent in granting the application, the prejudice to the Complainants in not being able to call this evidence and complete the hearing in a timely manner is greater.

[30] We can proceed expeditiously and still be fair to the Respondent, even if it means it does not wait to call its whole case because protections can be put in place.

[31] The additional evidence the Complainants wish to call is limited to remedy, and really only one distinct remedy – and they have proposed calling expert evidence on this, in writing, with written cross-examination. I am not prepared to order written cross-examination unless all Parties agree to that, but we have time to figure out the process and I do not need to rule on that right now.

[32] As I mentioned earlier, one issue is that we do not know what evidence the Complainants actually intend to call and there is some prejudice to the Respondent in this

so I will also determine (as with all evidence) whether the proposed evidence will be admissible and, if it crosses any evidentiary lines, it can be excluded.

[33] In reaching my decision, I am guided by the Federal Court in *Varco*, which said at paragraph 22:

> In my view, when all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process – the search for the truth through evidence – is an overarching consideration.

[34] Having decided to allow the Complainants' request, I agree with most of the Respondent's alternative proposal set out in its submissions. The RCMP has requested that, in the alternative, should the Tribunal grant the application, it should set deadlines that provide the parties sufficient time to consider and list additional evidence and that do not prejudice the Commission or Respondent. While the Respondent laid out proposed timelines, I prefer to schedule a case management conference call or receive written submissions from all Parties before establishing such a timeline.

[35] Upon consideration of all of the submissions and the law on this question, this is my order:

> I grant the Complainants' application to reopen their case on the limited issue of remedies as laid out in paragraphs 92, 97, 99, 100 -105 of their Statement of Particulars;
>
> The Tribunal will work with the Parties to set timelines that provide the Parties with sufficient time to prepare for this such that the Respondent and Commission will not be prejudiced;
>
> I order that all of the evidence from both segments of the hearing become evidence in the whole.

[36] We can proceed with the hearing today, and as scheduled. If we need additional days to allow the RCMP to finish calling its case, we will look at our calendars on June 22, if we are not finished by then. We can also hold another CMCC in the next couple of weeks, or I can receive written suggestions from the parties about how to proceed with the additional evidence the Complainants intend to call, in terms of timelines and process.

Signed by

Colleen Harrington
Tribunal Member

Delivered Orally by Zoom videoconference at a Case Management Meeting on May 31, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2459/1620

Style of Cause: Woodgate et al. v RCMP

Ruling of the Tribunal Dated: May 31, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Karen Bellehumeur and Angeline Bellehumeur, for the Complainants

Christine Singh and Jonathan Bujeau, for the Canadian Human Rights Commission

Whitney Dunn, Mitchell Taylor KC, Nima Omidi, Zahida Shawkat, Jennifer Rogers and Spencer Slipper, for the Respondent