

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 11

Date: March 20, 2023

File No.: T2311/6618 & HR-DP-2878-22

Between:

Tracy Mercier

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Colleen Harrington

Table of Contents

I.	Ms. Mercier’s Complaints.....	1
II.	November 15, 2022 CMCC.....	2
III.	The Commission’s Motion.....	4
IV.	Analysis.....	4
	A. Culturally and Trauma-Informed Proceedings	5
	B. The Commission’s Proposed Schedule	8
	C. Request for Peremptory Deadlines.....	10
	D. Notification of the Individual Perpetrator	12
V.	Conclusion	13

I. Ms. Mercier's Complaints

[1] The Complainant, Tracy Mercier, has filed two human rights complaints against her employer, Correctional Service of Canada ("Respondent" or "CSC") alleging discrimination and harassment on the basis of her sex, race, national or ethnic origin, and disability. Her complaints allege both individual and systemic discrimination by CSC.

[2] Ms. Mercier's first complaint alleges that CSC failed to protect her and to provide her with a harassment-free workplace following alleged sexual assaults by a fellow correctional officer at a federal correctional facility in British Columbia. The first complaint was referred to the Tribunal by the Canadian Human Rights Commission ("Commission") in June of 2018, as part of a group of complaints made by female employees against CSC. With the exception of Ms. Mercier's case, all of the complaints were also made against other respondents, including several individuals. Attempts were made to mediate this group of complaints, although Ms. Mercier eventually opted out of this process. Her complaint was then held in abeyance by the Tribunal until it was severed from the other complaints at her request, in June of 2022. This permitted Ms. Mercier's complaint to proceed on its own to an inquiry.

[3] Ms. Mercier's second complaint relates to allegations that CSC refused to implement her doctor's recommendations to accommodate her post-traumatic stress disorder ("PTSD") upon her return to work. She says her PTSD resulted from the facts underlying her first complaint. This complaint was referred to the Tribunal by the Commission on September 27, 2022.

[4] The Respondent acknowledges that Ms. Mercier was sexually harassed by her co-worker on two occasions and that he made offensive and inappropriate comments about her disabilities. However, CSC does not agree that it discriminated against her in the way it responded to her harassment complaint or in its attempts to return her to work.

[5] At a Case Management Conference Call ("CMCC") in this matter on November 15, 2022, Ms. Mercier advised the Tribunal that her second complaint had recently been referred to the Tribunal and she wished to join both complaints so that they could proceed to a hearing together. The parties agreed to speak to one another following the CMCC to

determine whether they agreed to join the complaints and how this would affect the case management proceedings. The complaints were joined, with the consent of all parties, on November 24, 2022, by an order of the Tribunal. The parties have filed amended Statements of Particulars (“SOP”) to include the second complaint.

II. November 15, 2022 CMCC

[6] At the November 15, 2022 CMCC, several other case management-related items were also discussed, including: the Respondent’s documentary disclosure requirements; ensuring that a trauma-informed process is followed with respect to this complaint; and the scheduling of hearing dates.

[7] With regard to the disclosure of documents, I note that the discussion during the CMCC related to Ms. Mercier’s first complaint only as she did not bring up her second complaint until the end of the CMCC. The Respondent stated that it anticipated providing the documents from Ms. Mercier’s personnel file (relating to the individual aspect of her complaint) by December 5, 2022. The Commission had previously requested documents from the Respondent relating to allegations of systemic discrimination. The Respondent was unable to provide a precise timeline in which this disclosure could be provided to the other parties, although it did explain its rather cumbersome process involved in producing documents for litigation.

[8] The Respondent indicated it would take at least four to five months to produce the large number of documents requested by the Commission. The Commission asked the Tribunal to order the Respondent to provide all of its documents by the end of December 2022. It also asked the Tribunal to make this deadline peremptory, so that there could be consequences if CSC failed to comply with the deadline, including that the Tribunal could make negative inferences at the hearing.

[9] The Respondent said the Commission’s proposal was not realistic and that a request for peremptory deadlines should be made in a motion and not be determined in a CMCC. The Commission’s counsel adamantly opposed the suggestion that a motion should be filed,

given the agreement that there would be an expedited process with respect to this complaint.

[10] The commitment to proceed expeditiously arose out of a request by the Commission in July of 2022 for the Tribunal and parties to respect all deadlines set in this matter and to not seek extensions of time or file unnecessary motions, while expediting the timelines for all steps in the litigation, including a hearing. I accepted that the Commission was asking the Tribunal to make a directive to ensure that all steps to mitigate delay were being taken as early in the case management process as possible. I recognized and agreed that this complaint should proceed expeditiously to an inquiry in light of the delay Ms. Mercier had experienced at the mediation stage.

[11] During the November 15 CMCC, the Commission also reiterated the importance of utilizing a trauma-informed approach in the case management of this complaint because Ms. Mercier is an Indigenous person who has experienced sexual assault in her workplace. The Commission said the delay Ms. Mercier had experienced since her complaint was filed has impacted her mental and physical health and her ability to return to work.

[12] Ms. Mercier spoke about how the complaint process has been negatively affecting her. She agreed that scheduling hearing dates would provide her with the assurance that the complaint is moving toward a conclusion. The Commission indicated it was in the process of identifying an expert on the trauma-informed approach and, once it had identified someone, would work with the parties to get consent for a plan to proceed in a trauma-informed way. The parties and Tribunal all agreed to proceed in a trauma-informed way and accepted the Commission's proposal.

[13] At the CMCC I issued directions to the parties to keep the complaint moving forward as expeditiously as possible. This direction was informal, not in the form of an order, which allowed the parties to work together where possible to come up with a process and schedule to keep the complaint moving forward. The Commission had proposed setting hearing dates in the fall of 2023 and Ms. Mercier accepted this proposal. Following the CMCC, the parties were to provide their availability for hearing dates in the fall of 2023 so that the first two to three weeks of the hearing could be scheduled. Once the hearing start date was established

the Commission was to propose a deadline for the disclosure of the Respondent's documents related to the allegations of systemic discrimination. I stated that if the parties could not agree on deadlines amongst themselves, I could be asked to impose them.

III. The Commission's Motion

[14] On November 18, 2022, rather than following the Tribunal's directions, the Commission filed a Motion. The Motion asks the Tribunal to make several orders relating to the issues that were discussed during the CMCC. This came as a surprise given the Commission's position that parties should refrain from filing Motions unless absolutely necessary.

[15] In its November 18, 2022 Motion, the Commission seeks an order:

1. That the proceedings be carried out, and all related decisions be made, in a culturally and trauma-informed way;
2. That the schedule proposed by the Commission for the litigation steps leading up to and including the hearing be accepted;
3. That CSC's deadlines be made peremptory;
4. That the individual who sexually assaulted Ms. Mercier in the workplace not be notified of the present Tribunal proceedings; and
5. That Ms. Mercier's two complaints be joined.

IV. Analysis

[16] All five of the issues that are the subject of the Commission's Motion were discussed at the CMCC on November 15, 2022 and were either agreed upon or subject to directions that were issued by the Tribunal. Dealing with these issues through the case management process was in keeping with the agreement by the parties and the Tribunal to proceed expeditiously. It was also consistent with the Tribunal's legislative requirement to conduct its proceedings "as informally as expeditiously as the requirements of natural justice and the rules of procedure allow" (section 48.9(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [CHRA]).

[17] Motions should only be filed when there is a procedural or substantive matter that cannot be resolved amongst the parties or when there is a need for an order from the Tribunal with respect to a contested issue. In this case, where an informal process was followed during which these issues were addressed and a path forward was established, filing this Motion was unnecessary and has led to further unnecessary delay.

[18] I have issued a separate direction with timelines relating to the hearing of this complaint, including the hearing start date and deadlines for disclosure and the preparation of expert reports. Below I will address each of the issues the Commission has raised in its Motion, with the exception of the issue of joining Ms. Mercier's two complaints. As previously indicated, this was dealt with promptly following the November 15, 2022 CMCC by way of an order of the Tribunal.

A. Culturally and Trauma-Informed Proceedings

[19] In its Motion, the Commission asks the Tribunal not to wait for it to find an expert to make this a trauma-informed and culturally appropriate proceeding. It proposes various pre-hearing measures and safeguards that the Tribunal may immediately put into place to mitigate further prejudice to Ms. Mercier. It says that these measures are proposed with the objective of creating processes that recognize and are informed by the experiences of Indigenous people.

[20] These proposed measures include: seeking input from Ms. Mercier at all stages, including with respect to special ceremonies or cultural orientation; ensuring she is offered accommodations; providing a predictable, reliable and transparent environment so that Ms. Mercier knows what to expect of the process and feels assured that deadlines will be met; ensuring there are consequences if deadlines are not met; ensuring Ms. Mercier can safely raise during the process whether she is being affected by trauma; seeking to simplify and expedite the litigation as much as possible; and interacting with civility, integrity and humility.

[21] In her submissions, Ms. Mercier notes that she has not asked for any cultural or trauma-based supports in the proceedings, but she agrees with the Commission's proposal.

[22] The Respondent states that it has agreed to proceeding in a trauma-informed way since it was first raised and agrees to the recommendations proposed by the Commission. It does not believe an expert is required to assist the parties and Tribunal.

[23] In its reply submissions, the Commission states that it has brought this Motion “to put its concerns on record and in an effort to ensure that the present proceeding is carried out expeditiously, fairly, and in a culturally and trauma-informed way. It is the Commission’s view that this goal cannot be achieved informally without the direction of this Tribunal given the history of delay and missed deadlines in this proceeding.”

[24] The Commission also says that, as far as it is aware, there is no precedent from the Tribunal where similar measures were put in place for a self-represented Indigenous party who is a survivor of sexual assault and who identifies as facing trauma. It says that direction from the Tribunal, informed by an expert, will assist in achieving fairness in this matter and in subsequent matters.

[25] I note that it is not the purpose of a Motion to put one’s concerns “on record.” The parties can do this during CMCCs and through their correspondence with the Tribunal, as well as in their SOPs. All of these form part of the Tribunal’s official record. To the extent that the Commission felt there were specifics to be determined arising out of the CMCC, these could have been addressed less formally, for example by an email or letter asking for direction or clarification.

[26] The Tribunal regularly ensures its process accommodates the needs of the parties before it. Rather than relying on a “precedent” with respect to how a particular participant before the Tribunal should be treated, the Tribunal acts in accordance with human rights principles by treating participants in its proceedings as individuals with their own unique needs. So long as the Tribunal ensures that all parties before it are treated with fairness, the Tribunal can modify the proceedings as necessary to ensure that any participant who has experienced trauma feels safe, respected and comfortable during the inquiry. This includes the case management process. Participants should feel comfortable to tell the Tribunal if there are adaptations the Tribunal can make to its process. At the same time, parties should

ensure they have any required resources in place to assist them as they advance their human rights complaints through the hearing process.

[27] With regard to ensuring its proceedings are culturally appropriate, many of the parties who appear before the Tribunal are Indigenous and the Tribunal welcomes requests that ensure parties feel heard and respected during the proceedings. The Tribunal receives and accommodates requests by Indigenous participants for ceremonies and to otherwise ensure that the proceeding is carried out in a culturally respectful and appropriate way. Ms. Mercier should feel welcome to advise the Tribunal how it can ensure the process, including the hearing, is respectful of her Indigenous culture.

[28] All parties and the Tribunal have agreed to proceed in a trauma-informed way. The Tribunal has read and listened to Ms. Mercier's concerns and will continue to do so. Ms. Mercier is doing an admirable job as a self-represented Complainant, meeting her deadlines and ensuring her positions are clearly communicated to the Tribunal and parties. I have no reason to doubt she will communicate her needs on an ongoing basis.

[29] The Tribunal agrees with the Commission's recommendations and is of the view that most would be followed in the normal course of a proceeding in any event, especially one involving self-represented parties. The Tribunal will ensure that the recommendations set out in the Commission's Motion are implemented as appropriate during the case management process.

[30] In light of the commitment to proceed in a trauma-informed manner, counsel should be aware of their own conduct and should do their best not to make case management meetings more divisive than necessary, given that we are all working together in these meetings to proceed to the hearing as expeditiously as possible.

[31] Proceeding in a less formal manner would have been faster, more considerate of the Tribunal's and the parties' time and resources, and overall more in line with a trauma-informed process than engaging in a litigious procedure such as a Motion.

B. The Commission's Proposed Schedule

[32] The Commission proposes deadlines for certain steps to occur prior to the hearing, including the Commission's deadline for will-say statements from its experts, CSC's disclosure deadline, deadlines for expert reports, and hearing dates for an estimated 6-week hearing.

[33] The Commission says the Tribunal should accept its deadlines in accordance with the agreement that the hearing be expedited. It says that further delay in pre-hearing steps is not consistent with a trauma-informed process.

[34] Ms. Mercier agrees with the Commission's position. She included with her submissions an "Impact statement" about how she has been negatively affected by her experience while working at CSC and after filing the complaints, including through the Tribunal process.

[35] CSC says that, in general with respect to deadlines, it is guided by Ms. Mercier's stated desire to have this hearing scheduled as soon as possible. It says it has agreed to hearing dates beginning in September of 2023, as proposed by the Commission. CSC states that, in order to be prepared for a hearing then, and for the hearing to be focused, the parties should consider simplifying the proceeding in a manner led by Ms. Mercier. CSC proposes having a further discussion with Ms. Mercier and the Commission about streamlining the hearing, either in a CMCC or in another process. It states that, once a plan is made with Ms. Mercier's input in mind, it would be in a better position to know what documents it needs to produce and can begin producing them. The Commission rejects this proposal and calls CSC's proposal to simplify the hearing process an "improper collateral attack" on the scope of the complaint.

[36] CSC submits that all parties are trying to move this matter towards a hearing or resolution and statements that further polarize the parties hinder that process. It proposes a "rolling" or ongoing production of documents, with a new list every six weeks until six weeks before the hearing. It suggests this will allow the parties to continuously receive its collection of documents until it is complete, instead of all at once. CSC says this will give the parties a longer time to review its documents and, if it is able to produce its documents sooner, it will

certainly do so. CSC also proposes its own schedule for expert reports and books of documents.

[37] In its reply submissions, the Commission says that a party cannot withhold documents and produce them at their discretion, which is what CSC proposes with its rolling disclosure. The Commission notes that CSC, like all parties, has an ongoing duty to produce relevant documents and materials that are created or come into its possession after initial disclosure is produced. It says that permitting rolling disclosure will create a problematic precedent that encourages delay and fosters inequality between parties. It says that this also interferes with a fair process, as it could lead to a situation where the other parties do not have an adequate opportunity to prepare their case or respond.

[38] The Commission argues that the Tribunal should draw an adverse inference from the fact that CSC did not address all ten points set out by the Commission in its request that its proposed schedule be followed. It also argues that the Tribunal should draw a negative inference from CSC's refusal to "address the significant prejudice set out by Ms. Mercier, resulting from on-going delay and a lack of measures or consequences to control the same." It says the Tribunal must remedy the prejudice and put measures in place to ensure all parties are on equal footing.

[39] I asked the parties at the November 15, 2022 CMCC to provide their availability to start this hearing in the fall of 2023, following which I asked the Commission to propose a deadline for the Respondent's disclosure working backward from the hearing start date. If it had done so, and there was disagreement with what was proposed by the Commission, this could have been dealt with in a less formal way, and I would have provided direction or an order for the Respondent's disclosure deadline. Instead, the Commission filed this Motion.

[40] I have no intention of drawing negative inferences from the fact that the Respondent did not address all ten points the Commission set out in its Motion. The Respondent chose to keep its submissions succinct and focused on the timing of its disclosure, which is in keeping with the goal of proceeding expeditiously. If the Commission and Ms. Mercier wish to argue that the Tribunal should draw negative inferences in relation to the Respondent's conduct, they can do so in their submissions following the hearing of the evidence.

[41] At the same time, I do not accept the Respondent's proposal that rolling disclosure up to six weeks prior to the start of the hearing is acceptable. This would not be fair to the Commission or to Ms. Mercier, who are entitled to timely disclosure in order to prepare for the hearing. The Commission intends to call three experts who need to review the disclosure related to the systemic allegations prior to preparing their reports.

[42] The Commission does not seem to share the Respondent's view that the hearing can be simplified or focused through discussion between the parties, despite it being one of their recommendations for a trauma-informed proceeding to seek "to simplify and expedite the litigation as much as possible [and] encourage the parties to narrow the issues in dispute through agreement." In any event, this should not lead to a delay in the Respondent's document disclosure.

[43] I have set out a schedule, including dates for the commencement of the hearing and deadlines for disclosure and expert reports, in a letter of direction to the parties, separate from this Ruling.

C. Request for Peremptory Deadlines

[44] This is the third time the Commission has asked the Tribunal to make CSC's deadlines peremptory. The first time was in July of 2022 when it also requested an expedited hearing, which was agreed to by all parties and the Tribunal. I did not consider it necessary to make the Respondent's deadlines peremptory at that time, when the Commission was asking all parties to make a commitment to meet their deadlines and not ask for further extensions of time. I indicated that, if it appeared that delay was becoming an issue in the case management and inquiry process, any party could raise this with the Tribunal and, if necessary, further measures could be taken.

[45] The Commission renewed its request for peremptory deadlines at the November 15, 2022 CMCC. As previously indicated, I asked instead that the parties work together to establish timelines, working backward from hearing dates that would be scheduled in the fall of 2023.

[46] The Commission says in its Motion that it is asking that the Respondent's deadlines be made peremptory because it is "deeply concerned about the delay caused by CSC in this matter." It included a chronology with its submissions setting out steps that have been taken in the proceeding since the complaint was referred to the Tribunal.

[47] The Commission suggests that consequences for a failure to meet peremptory deadlines could include the following: not being permitted to file documents that have not been produced so far; negative inferences being drawn by the Tribunal; a finding of costs against CSC; or other measures the Tribunal may order pursuant to Rules 9 or 10 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021, SOR/2021-137 [Rules of Procedure]*.

[48] The Complainant agrees with the Commission's position.

[49] The Respondent says it understands the Commission's concerns about the need to move this matter towards resolution or a hearing and will do all that it can to meet its deadlines. It says it does not take the matter of its deadlines lightly and recognizes the Tribunal's duty to proceed in an expeditious manner.

[50] The Respondent says that, as Rule 9 of the Tribunal's *Rules of Procedure* effectively makes Tribunal-imposed deadlines mandatory, upon penalty of a remedial order or other consequences, an order mandating that its deadlines be treated as peremptory is unnecessary.

[51] I agree with the Respondent that Rule 9 effectively makes the Tribunal's deadlines mandatory. The Commission's chronology does not show that, since my decision in July of 2022, the Respondent has shown a pattern of missing Tribunal-imposed deadlines or behaved in such a way that an order for peremptory deadlines has become necessary. However, if the Respondent fails to meet the deadlines established for its disclosure, the Tribunal will consider how to proceed and what consequences may be appropriate, at that time.

D. Notification of the Individual Perpetrator

[52] At the November 15, 2022 CMCC, the Respondent raised the issue of whether, as a matter of procedural fairness, the individual who it acknowledges sexually harassed Ms. Mercier should be notified about this proceeding. The Respondent was inquiring as to whether the Tribunal or Commission had a process in place to address such situations. Ms. Mercier indicated she was opposed to this, as she became upset even hearing his name. The parties were encouraged to think about this and, if necessary, it could be discussed at a future CMCC.

[53] In its Motion, the Commission says there is no duty on the Tribunal or Commission to notify the individual of the present proceeding and asks the Tribunal to make this decision through a trauma-informed lens.

[54] In her submissions to the Commission's Motion, Ms. Mercier suggests that the Respondent is trying to intimidate her by using the individual's name in its SOP and by raising the issue of notifying him during the CMCC.

[55] The Respondent says it did not propose at the CMCC that the individual be notified. Rather, it was simply asking whether the Commission or the Tribunal had a process for notifying the individual or others in his position. It says it is satisfied that it has raised the issue from a procedural fairness perspective and will not notify him.

[56] This request by the Commission does not properly belong in a Motion. There is no decision for the Tribunal to make.

[57] I do not agree that the Respondent's counsel raised this issue as an intimidation tactic, as Ms. Mercier alleges. They were simply asking a question about procedural fairness. Proceeding in a trauma-informed way does not mean that the Respondent cannot ask questions or that the Tribunal can proceed in a way that is unfair to any party. However, we can work together to ensure that issues are raised in a sensitive manner.

[58] I note that the Respondent continues to include the name of this individual in its correspondence with the Tribunal and the parties. Given that Ms. Mercier has expressed how upset she feels even to hear his name, I would encourage the Respondent to stop

including his name in its correspondence with the parties, especially given that doing so is not necessary and it is likely causing Ms. Mercier further stress and discomfort. I do note that the Respondent has begun to give Ms. Mercier notice when this individual's name appears in documents that it is disclosing to her, which is helpful.

[59] The Tribunal will certainly consider proposals to ensure that this matter proceeds in a way that does not trigger Ms. Mercier through the use of this individual's name. This can be discussed during the next case management meeting or through written correspondence. This is what was decided at the November 15, 2022 CMCC in any event.

V. Conclusion

[60] The Commission states in its submissions that ensuring a predictable and timely process is trauma-informed. I agree. A predictable and timely process can be developed informally during a CMCC or through a Tribunal direction. It need not arise out of a Motion. In the present case, filing a Motion has had the effect of causing delay.

[61] While the Commission suggested that the Tribunal could issue its ruling on this Motion in a CMCC, I note that I did issue directions on the issues raised in this Motion during the November 15, 2022 CMCC. Yet the Commission proceeded to file this Motion. The Commission has also argued that the Tribunal must make its decision with respect to this Motion in a much shorter period than that set out in the Tribunal's *Rules of Procedure*, because this is an expedited process.

[62] An expedited process does not mean that the Tribunal must always place this matter ahead of its other files. To do so would be unfair to the other parties who are waiting for rulings, decisions or directions. The Tribunal does not have unlimited time and resources. All of the complaints before the Tribunal are important and the Tribunal has a statutory obligation to proceed expeditiously with regard to all of its matters.

[63] In *Letnes v RCMP*, 2022 CHRT 32 (CanLII), the Tribunal reiterated the importance of proceeding promptly and efficiently, while also recognizing the need to conserve its limited resources by not "deciding every issue that could arise in an inquiry":

[20] A recent decision rendered by the Supreme Court of Canada, *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 states, at para.46, that decisions by administrative decision makers need to be rendered promptly and efficiently. It adds that inordinate delay in administrative proceedings is contrary to the interests of society and undermines a key purpose for which administrative tribunals were created, i.e. expeditious and efficient decision making.

[21] In *Chen v. Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 6287 at para 12, the Ontario Divisional Court mentions the inevitable delays from bringing additional procedural motions and failing to work out issues with opposing counsel.

[22] The present Tribunal adds that proceedings before it shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow, according to section 48.9(1) of the [CHRA]. The [Tribunal's *Rules of Procedure*] also refers to informal, expeditious and fair principles.

[23] The Tribunal does not have unlimited resources when deciding every issue that could arise in an inquiry. The rules of natural justice and procedural fairness will always prevail, but the Tribunal must take into account the principle of proportionality and its limited resources.

[64] The parties must be aware that filing unnecessary Motions about issues that could be dealt with less formally through the case management process can lead to delay not only in the present matter, but in other files before the Tribunal. Engaging in a more litigious process such as filing a Motion is not in keeping with a trauma-informed approach and should be avoided in the future, unless it is absolutely necessary.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
March 20, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2311/6618 & HR-DP-2878-22

Style of Cause: *Mercier v Correctional Service of Canada*

Ruling of the Tribunal Dated: March 20, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Anshumala Juyal, Julie Hudson and Brittany Tovee, for the Canadian Human Rights Commission

Tracy Mercier, for herself

Lisa Riddle, for the Respondent