Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 39
Date: September 7, 2023
File Nos.: T1848/7812; T1849/7912

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

I. OVERVIEW

[1] The Complainant, the Canadian Association of Elizabeth Fry Societies (CAEFS), filed two complaints on behalf of all federally sentenced women (FSW) alleging that Correctional Service of Canada (CSC), the Respondent, discriminates in providing correctional services in the federal prison system based on sex, race, national or ethnic origin, religion or disability, contrary to section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act"). These complaints are not brought on behalf of any individual women, nor do they seek remedies for specific incidents of alleged discrimination.

[2] The first complaint alleges discrimination in relation to security classification and risk assessment tools, the use of segregation and isolated and restrictive conditions of confinement, mental health services and appropriate accommodation, and access to programming. The second complaint was filed on behalf of federally sentenced Indigenous women (FSIW) and alleges that CSC denies them access to Indigenous spiritual, cultural and social practices, with reference to the particular experiences of overclassified and isolated Indigenous women.

[3] Administrative segregation was abolished in 2019 as part of legislative changes to the *Corrections and Conditional Release Act* (CCRA). The federal government introduced Structured Intervention Units (SIUs) as an alternative way of managing inmates who cannot remain within the mainstream prison population. After these changes were made, the Canadian Human Rights Commission (CHRC) and the CAEFS sought to amend their Statements of Particulars (SOPs) to include allegations that SIUs perpetuate the discrimination caused by administrative segregation, and in particular for FSIW and FWS with mental health disabilities. I allowed the Commission and the CAEFS to file amended SOPs in *Canadian Association of Elizabeth Fry Societies v Correctional Services of Canada*, 2022 CHRT 12 ("the SIU ruling"), finding that the proposed amendments were sufficiently connected to the initial complaints, which included allegations about the ongoing discriminatory impact of segregation on women inmates.

[4] The Commission filed a motion asking the Tribunal to order CSC to produce documents related to SIUs as well as updates of other policy documents. The Commission intends to call an expert, Dr. Kelly Hannah-Moffat, to testify about SIUs, among other things. It says that Dr. Hannah-Moffatt needs the materials to evaluate the conditions of detention since SIUs were implemented.

[5] CSC wants the Tribunal to dismiss the motion and says that the requests are unnecessary and unreasonably broad. It also submits that disclosing individual institutional records of the FSW who have been transferred to a SIU raises a number of privacy and security concerns given the highly personal and sensitive content of the requested materials. CSC proposes producing a reasonable and discrete number of individual files of the FSW who consent to the disclosure of their personal information. It argues that limiting disclosure will help make exceptionally broad proceedings more manageable, particularly given that over 67,000 documents have already been produced in these complaints.

[6] The CAEFS agrees with the Commission and says that CSC is trying to improperly narrow the scope of the complaints through the disclosure process.

[7] I have set out my orders below regarding the next steps in this file. I am also strongly encouraging the parties to consider engaging in settlement discussions either on their own or through a Tribunal-assisted mediation or mediation-adjudication.

II. ISSUE

[8] Should the Tribunal order the production of the documents that the Commission requests in the form it seeks in its motion and reply?

III. DECISION

[9] Yes, but only in part. I will review the aggregate data produced and a subset of the records requested before issuing any further direction on how to proceed.

[10] I am not persuaded that the production of detailed individual institutional files of every federally sentenced woman who has been transferred to a SIU is necessary for the CAEFS

and the Commission to make their cases fairly. Allowing the Commission's requests in their entirety will impact the timely and effective adjudication of this inquiry. Further, I have concerns about the privacy and security of the women at the heart of these complaints. They did not choose to be part of these proceedings, and, in ordering the production of their individual files as requested by the Commission, deeply personal information would be disclosed to a number of individuals.

[11] CSC will produce the aggregate data it proposed to release as well as a limited number of individual files from FSW, as set out below. The parties will work together and agree on a sample of files for CSC to provide to counsel and the Tribunal. These files are not to be disclosed to any potential witnesses, or anyone else, including the interested party, until further order from the Tribunal.

[12] After I review the records, I will convene the parties to a case management conference call (CMCC), prior to which they will be required to file a joint proposal regarding any further disclosure of individual files beyond the sample. The parties will include their proposal for the safeguarding of the privacy, security and safety interests of the FSW at issue in these complaints. I will review the materials and the parties' proposal before determining whether further production is to be ordered and, if so, in what form.

[13] I am also strongly suggesting the parties reconsider the possibility of mediation or mediation-adjudication as an alternative to what will undoubtedly amount to lengthy and costly litigation in a multi-year proceeding. Collaborative efforts to resolve some or all of the issues in these complaints would allow the parties to work together far more quickly. It will also allow them to consider a range of creative options in complaints that seek broad, systemic change and policy reform. The parties may identify creative solutions that go beyond what the Tribunal may even be able to order if the CAEFS were successful in establishing discrimination.

IV. THE COMMISSION'S REQUESTS

[14] The Commission filed a motion for production requesting several categories of documents. After reviewing CSC's response, I convened a CMCC because it appeared

CSC did not dispute the production of some of the requested materials. I also asked the Commission and the CAEFS to specifically address CSC's arguments about privacy, confidentiality, security, proportionality and delay in their replies.

[15] I directed the parties to create a summary table of the Commission's outstanding requests, including the reasons why CSC opposed their production and replies from the CAEFS and the Commission. I asked them to include the total time and resources CSC estimated would be required to produce the requested documents.

[16] Together with its reply submissions, the Commission included an affidavit from its proposed expert witness and a new Annex A setting out the Commission's alternate requested relief. The reply prompted CSC to request the right to file a brief sur-reply because of the affidavit and new relief sought and the Commission to file a sur-sur-reply.

[17] I will not address every argument raised by the parties in their motion materials. I have only dealt with what is necessary to set out a path forward at this stage of the proceedings.

A. The Commission's requests

[18] It appears there are four remaining categories of documents for which the Commission is seeking a Tribunal order:

1. All data and records shared by CSC with the Implementation Advisory Panel (IAP) concerning women's institutions and all information requests made of CSC by the IAP;

2. Decisions made by the Independent External Decision Makers (IEDMs) regarding SIUs at women's institutions since November 30, 2019;

3. Reports created under paragraphs 32(3), 34(2), 37(2) and 37.3(4) of the CCRA concerning women's institutions; and

4. Material documents on which CSC intends to rely in its SOPs and at the hearing, focusing on current policies and procedures.

[19] The Commission sought alternative relief through an annex it added to its reply. It wants CSC to produce individual offender information for every woman transferred to a SIU

in a women's institution, including details of the offender's mental health, any and all incidents of suicidality, and details of the offender's personal interactions while in the SIU. According to the Commission, this list is based largely on the information it says that its expert needs to prepare her report. The Commission included an affidavit from Dr. Hannah-Moffatt in support of its request.

V. ANALYSIS

[20] Parties must be given a full and ample opportunity to present their case (s. 50(1) of the *Canadian Human Rights Act* (the "Act")). This includes the right to the disclosure of all arguably relevant information held by the opposing party so that each party knows the evidence it is up against and can prepare for the hearing (*Egan v. Canada Revenue Agency*, 2019 CHRT 8 at para. 4). The Tribunal's Rules require parties to disclose a copy of all documents in their possession that relate to a fact, issue or form of relief that is sought in the case, including those identified by other parties (Rule 23 of the Tribunal's Rules of Procedure). This obligation is ongoing (*SM et al v Royal Canadian Mounted Police*, 2022 CHRT 11 and Rule 24 of the Tribunal's Rules of Procedure).

[21] The threshold for disclosure is arguable or possible relevance, which is not particularly high. A party seeking the production of a document must show that there is a rational connection between the document it seeks and the issues raised in the complaint. See, for example, *T.P. v. Canadian Armed Forces*, 2019 CHRT 19 at para. 11 ("*T.P.*") *Turner v. CBSA*, 2018 CHRT 1 at para. 30 ("*Turner*"). Requests for disclosure should not be speculative or amount to a fishing expedition (*Egan v. Canada Revenue Agency*, 2017 CHRT 33 at paras. 31-32 ("*Egan*") and *Turner* at para. 30).

[22] Beyond arguable relevance, the Tribunal must also consider other possible interests such as confidentiality and privilege. Documents that are arguably relevant may not be ordered disclosed, or conditions may be placed on their disclosure if there are privilege or privacy concerns to be addressed. The Tribunal can take measures to protect privacy interests in different ways by limiting disclosure or putting conditions on the disclosure.

(See *White v. Canadian Nuclear Laboratories*, 2020 CHRT 5 at paras 9-10; *T.P*. at para. 37, *Egan* at paras. 34 and 50 and *Yaffa* v. Air Canada, 2014 CHRT 22 at para 12).

[23] While arguable relevance is not a high threshold, it is meant to prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious and time consuming (*Brickner v Royal Canadian Mounted Police*, 2017 CHRT 28 at para 5).

A. Arguable relevance

[24] I accept that the documents requested are arguably relevant to the allegations that the use of isolation and restrictive conditions of confinement have particular adverse impacts on FSIW and FSW with mental health disabilities. The threshold for arguable relevance is low, and the complaints are broad. I have already found that allegations of systemic discrimination related to isolated and restrictive conditions of confinement have been part of these proceedings since their outset (*SIU Ruling* at paras 17-30). It is not difficult to find a rational connection between the documents sought about SIUs and the complaints. They are systemic, cover multiple grounds and include four broad categories of allegations that relate to many aspects of the carceral conditions of all FSW in Canada, including the use of isolated and restrictive conditions of confinement.

[25] But arguable relevance is not the only factor for me to consider. The hearing process must be fair, balanced and proportionate. I also have concerns about the privacy and safety interests of the FSW whose records would be disclosed and who are not parties to these proceedings.

B. Proportionality

[26] CSC submits that the CAEFS and the Commission are treating this inquiry as complaints of 89 different persons, without identifying any particular federal offender complainant or victim. It says that the veil of a “systemic complaint” cannot be used to expand document production to what amounts to a fishing expedition for evidence about every federal offender in any women’s institution, anywhere in Canada, at any point in time since 2011 or earlier. It submits that the time and resources required to produce these

documents are disproportionate to their potential value and will bog down these already delayed proceedings.

[27] The Commission says that its requests do not amount to a fishing expedition because there is already publicly available information that suggests Indigenous women are disproportionately represented in isolation under the SIU regime. It says that the SIU data will show the results of the system and will prove how this subset of FSW are adversely impacted by SIUs.

[28] CSC takes the position that some documents are minimally or not arguably relevant and that proportionality requires all actors in the justice system to conduct themselves to reduce the time and costs associated with legal proceedings as much as possible. This can warrant imposing limits within a proceeding (*Temate v. Public Health Agency of Canada*, 2022 CHRT 31 at paras 8-16). It submits that the Commission is effectively seeking individual institutional file documents for each of the 89 (or more) federal offenders who have been transferred to a SIU in a women's institution in at least 149 different transfers since the SIU regime began in 2019.

[29] According to CSC, the parties' shared goal should be a fair, workable and timely hearing, to the extent possible. I agree. The Commission and the CAEFS have not persuaded me that their approach strikes the appropriate balance between their right to make their case and the need for efficient and fair proceedings at this time. I have other concerns about the privacy, safety and security interests of FSW set out below.

[30] The Commission submits that its requests are specific, proportionate and that the number of women in SIU placements is low. It argues that the public interest and the inquiry requires CSC to dedicate the resources required to disclose the data.

[31] According to the CAEFS, it would be inappropriate for the Tribunal to allow CSC to transform systemic inquiries into a few cases of individualized discrimination by limiting its production of arguably relevant documents. It relies on *Desmarais v. Correctional Service of Canada,* 2014 CHRT 5 [*Desmarais*] in which the Tribunal found it needed to consider evidence of systemic discrimination against intellectually disabled inmates. The CAEFS also submits that it would be a legal error for the Tribunal to decline to consider systemic

evidence, relying on the Federal Court's decision in *Canada (Human Rights Commission) v Canada (Department of National Health and Welfare*), 1998 CanLii 7740 at paras 17-22.

[32] *Desmarais* does not assist. In *Desmarais*, CSC sought to strike the systemic discrimination aspects of the inquiry and also wanted the disclosure of evidence related to the allegations of systemic discrimination to be limited to those documents which defined the existing situation while the complainant was imprisoned under the supervision of CSC. In this case, CSC consents to producing aggregate data and a subset of the files, just not the entirety of individual institutional files for every FSW at issue in these complaints.

[33] Further, I am not declining to order production or refusing to consider systemic evidence. I agree that systemic evidence includes operation-wide practices, policies, statistics and data which may demonstrate patterns of conduct, as reflected in my orders below. I am, however, considering how to contain what will become an entirely unmanageable proceeding, without any limits and case management direction.

[34] I accept the Commission and the CAEFS' submissions that there is a basis for these requests. I also accept the CAEFS' submission that the Tribunal's job is to conduct an inquiry into complaints the Commission refers to it (s.49(1) and 49(2) of the *Act*), including systemic allegations, and that it can make orders to prevent discrimination if a complaint is substantiated. The Tribunal does not have the authority to control the nature or volume of complaints that the Commission refers to it for an inquiry. But I do not accept that limiting disclosure is inappropriate simply because these are systemic complaints with no individual complainant.

[35] Parliament chose to delegate decision-making in specialized areas such as human rights to administrative tribunals and expects them to proceed expeditiously and efficiently (*Dorey et al*, 2023 CHRT 23 at paras 28, 32, citing *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at paras 46 and 64). Conducting proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow is not only appropriate, but also an obligation under s. 48.9(1) of the Act. Further, imposing reasonable limits to disclosure to ensure the Tribunal process is manageable and providing case management direction is the job of an adjudicator. "Systemic" does not mean that there

is no limit to how this proceeding will be run. It also does not transform an adversarial process in the context of litigation into a Royal Commission.

[36] Further, it is not in the public interest, nor in the interest of the FSW on whose behalf these complaints are brought, to ignore that this Tribunal is neither mandated nor has the resources to run a limitless proceeding, whether in disclosure or later on in the process. Doing so would paralyze the Tribunal and extinguish its already scarce resources. This will not only impact these proceedings but will also affect other parties waiting to have their cases heard and decided. This is not in the public interest, nor does it advance the purposes of the Act I am bound to apply. Joint positions, collaboration, and effective case management are necessary for the proper functioning and stability of the administration of justice, including at this Tribunal. All parties will have to make choices in the context of this litigation, and I will direct them to do so over the course of these proceedings. For example, the parties were expected to make remaining disclosure requests in a proportionate way (*SIU Ruling* at para 10).

[37] I acknowledge the importance of pre-hearing disclosure where all the materials are held by one party. In this proceeding, CSC has the care and control of all documentation pertaining to FSW. I also acknowledge that pre-hearing disclosure must be proportionate to the nature and complexity of the proceedings. The issues underlying these complaints have significant public interest implications and involve a number of allegations about the carceral conditions of FSW. But failing to properly manage these proceedings will not assist in their effective adjudication or resolution.

[38] I must also balance the probative value of the records sought in relation to the time, cost and other interests involved in their production, including those of the FSW. I have set out some parameters and provided direction below in my findings on each of the specific categories of materials sought by the Commission.

C. Privacy and security concerns

[39] CSC submits that the individual institutional records should not be disclosed for safety and security reasons, without at a minimum notifying the offenders or getting their

consent to disclose highly personal information. CSC included a sworn affidavit from Marie-France Lapierre, the Director in CSC's Women Offender Sector, together with its motion response. Ms. Lapierre notes that the production of the records could raise security risks if offenders are identifiable, particularly given the small number of FSW in Canada, the even smaller number of individuals who have been transferred to SIUs and the breadth of personal information contained in SIU records. She says that redacting the data and documents in order to mitigate the risk of offenders being identifiable would require a very high degree of expertise. In addition, CSC says that the SIU-related documents contain so much personal information about FSW and others, including family members, that redaction would render their contents meaningless.

[40] The Commission and the CAEFS argue that there is no requirement to obtain the consent of the 89 FSW at issue. They say the exemptions set out in sections 8(2)(c) and (d) of the *Privacy Act* apply because the requested documents relate to CSC's disclosure obligations under the Tribunal's Rules and because CSC is a litigant represented by the Attorney General of Canada. Further, the Commission says that if CSC thought that the consent of the FSW was required, it should have started trying to obtain that consent from the individual women.

[41] The CAEFS also submits that CSC's proposal to obtain consent is practically unworkable because it does not have knowledge of or access to FSW in SIUs and that it depends on CSC to disclose the existence of and allow access to women held in SIUs. Finally, it says that fear of reprisal is a barrier to FSW participating in legal proceedings, and particularly for women who have been held in SIUs. It says that the privacy interests of FSW can be resolved through redactions and should not be used as a basis to deny production of arguably relevant information to the other parties.

[42] The Commission says that it will forego the names of women and other irrelevant personal identifiers and accept the information without extensive redactions to speed up the disclosure process. It will undertake to protect the information and will only use the disclosure for the purpose of this case in accordance with the implied undertaking rule. Although CSC set out a list of information it considers personal that should not be disclosed,

the Commission objects to CSC withholding that information because it says that it needs this to make its case.

[43] While I accept the CAEFS' submissions about the challenge to obtain FSW's consent to access their records, I am not prepared to order the production of such an extensive number of documents without carefully considering the privacy, safety and security needs of FSW. I acknowledge the *Privacy Act* provisions that the Commission and the CAEFS rely on. But I must be concerned with safeguarding the safety, privacy and security of the FSW who have had no say in this litigation. They may have had no notice that details of their personal and health histories, including attempts at suicide and other deeply personal stories about them—and even their families—may be disclosed to an expert, to the other parties and to the Tribunal. Both the CAEFS and the Commission have commented on the vulnerability of FSW.

[44] Given the nature of the information sought, including details about FSW's potential suicide risks and their psychological and medical history, I do not accept the Commission's submission that some of these concerns are speculative. These are not the musings of counsel. CSC included the sworn statement of Ms. Lapierre who works with FSW at CSC and whose experience provides a basis for these concerns which I am not prepared to disregard.

[45] While we are only at the pre-hearing disclosure stage, and I may order confidentiality measures as this inquiry moves forward, in my view, I must consider how to carefully balance the needs of the FSW at issue in these proceedings in a trauma-informed way before any of these records are more broadly disclosed. I will first review a sample of some of the documents and hear from the parties before deciding how to proceed. I will not order such broad disclosure of individual institutional files without an assurance that doing so will not cause further harm to individuals who did not pursue this litigation themselves and whose lives are controlled by others.

[46] One of the complaints is brought on behalf of FSIW. The Interested Party, the Native Women's Association of Canada, may also be able to offer some perspective and expertise

on how best to address the safety, security and privacy concerns of some of the FSIW at issue in the disclosure request.

1) All data and records shared by CSC with the Implementation Advisory Panel (IAP) concerning women's institutions and all information requests made of CSC by the IAP

[47] CSC says that the data it provided to the IAP is neither current nor specific to women's institutions. Further, what it provided to the IAP is raw data which may be difficult to understand and interpret without an in-depth knowledge of CSC's operations and data collection and reporting practices. It also has privacy and confidentiality concerns and says that it would very likely take longer than 6 months, and perhaps significantly longer than that, to extract and properly redact the data shared with the IAP. In the alternative, CSC has offered to provide up-to-date data specific to women's institutions. It proposes providing information about the name of the institution, a unique identifier, whether the offender is Indigenous or not and the reason for the SIU transfer as well as the length of the stay in the SIU.

[48] The Commission says it needs statistical data to show patterns of discrimination if they exist. It did not, however, accept CSC's proposal and says that its expert needs more data. It listed a number of elements in Annex A to its reply submissions that it is seeking for every FSW who has been transferred to a SIU. These include the individual's mental health needs, instances of self-injury or suicidality prior to their transfer to a SIU, the individual's security level, the amount of meaningful human contact provided by day, the period of time out of the cell each day and the information on how the time out of the cell was spent. It says Dr. Hannah-Moffat needs details of personal characteristics to prepare an intersectional analysis of the results, namely whether FSIW and FSW with mental health disabilities are experiencing longer stays in SIUs.

[49] According to CSC, the Commission's Annex and requests for individual offender information exceed what its own proposed expert says she needs. If what the Commission needs is data to show the results of the system and to show patterns of discrimination, it argues this detailed individual information is not required.

[50] The Commission's request, including its alternative "customized response" is denied. CSC has already confirmed that the IAP did not make any information requests of CSC specifically concerning women's institutions and that what it provided to the IAP were raw data sheets. It is not required to create documents that do not exist. CSC's proposed alternative is reasonable and allows the Commission and the CAEFS to receive up-to-date aggregate data specific to women's institutions. That aggregate data includes, among other things, the number of offenders at each security classification when transferred to a SIU, the number who are Indigenous, the length of stays in SIUs and the number of times transferred to a SIU.

[51] It is not clear from the submissions what individual elements Dr. Hannah-Moffat needs if CSC provides the aggregate data, nor to what extent highly personal individualised information for all FSW in SIUs is relevant and required.

[52] I will review the data set out in Appendix 1 of CSC's sur-reply and address this with the parties at a CMCC after hearing their joint proposals for moving forward.

2) Decisions made by the IEDMs regarding SIUs at women's institutions since November 30, 2019

[53] Under the CCRA, IEDMs have binding authority to decide whether a prisoner remains in a SIU. They can also order changes to conditions of confinement. The Commission says that it needs these decisions because they are highly relevant to how the SIU regime functions and the allegations of discrimination.

[54] In her affidavit, Ms. Lapierre explains that IEDM decisions are individualised, detailed decisions about offenders' specific circumstances that contain personal information such as whether the individual identifies as Indigenous, their social history, past and current illnesses and health concerns, prior sentences, details of their home community, security classification, correctional plan, "incompatible" offenders, affiliation with security threat groups, the circumstances that led to their transfer to SIU, and the interactions they had while in the SIU. These decisions also contain the personal information of individuals other

than the offenders, including family members, other offenders and the IEDM decision-maker. According to CSC, approximately 70 IEDM decisions have been made since 2019.

[55] CSC will produce ten unredacted IEDM decisions to the Commission and the CAEFS and to the Tribunal no later than October 20, 2023. The parties will work together to determine how to select and identify the files that CSC will provide. Failure to arrive at an agreement for how to proceed and to select the files in a timely way means that the matter will be further delayed due to the parties' inability to agree on a reasonable approach. These files must not be disclosed to any potential witnesses, or anyone else, until further order from the Tribunal.

[56] Following my review of the files, I will address a way forward with the parties after hearing from the parties, including from the Commission about the specific data elements its expert realistically needs.

3) Reports created under paragraphs 32(3), 34(2), 37(2) and 37.3(4) of the CCRA concerning women's institutions

[57] The CCRA and related Commissioner's Directives require CSC to report on the following:

a) Every instance of meaningful human contact with a prisoner in SIUs that is mediated or interposed by physical barriers such as bars, security glass, door hatches or screen (s.32(3);

b) Every instance in which a prisoner is authorized to be transferred to a SIU with the reasons for granting the authorization and any alternative that was considered (s.34(2));

c) Every instance in which a prisoner has been offered an opportunity to spend a minimum of four hours outside their cell or interact, for a minimum of two hours, with others that the prisoner refused, including the specific opportunity and any reason given for the reason, or why they have not been given such an opportunity (s.37(2));

d) Every instance of circumstances in which, because of security requirements, a visit was not face to face or took place through a cell door hatch (s.37.3(4));

[58] The Commission says it requires these reports because they will show what the conditions of confinement are in SIUs and whether prisoners are receiving the meaningful human contact required by the legislation.

[59] CSC says that there have been at minimum 149 transfers to SIUs in women's institutions and that it will take a month of full-time dedicated work to extract these records, plus additional time to review the records. They also argue that the records contain personal information that will need to be redacted and that there are similar concerns regarding privacy, safety and security as with the IEDM decisions.

[60] CSC will produce a sample of ten unredacted records to the Commission and the CAEFS and to the Tribunal no later than October 20, 2023, after having conferred with the Commission and the CAEFS to identify which files are to be provided.

[61] As set out above with respect to the Commission's second request, the Tribunal will determine what further orders to make, if any, following its review of the record, a proposal from the parties and a CMCC.

4) Material documents on which CSC intends to rely in its Statement of Particulars and at the hearing, focusing on current policies and procedures

[62] The Commission initially requested updated versions of documents already produced or agreed or ordered to be produced, on an ongoing basis. CSC said it was not feasible to do this as there have already been 67,000 documents disclosed in these proceedings. It proposed to focus on current policies and practices on which it intends to rely at the hearing.

[63] The Commission agrees with CSC's proposal. CSC is ordered to produce those materials to the other parties no later than October 20, 2023.

No order required

Photographs of SIUs in women's institutions and CSC's offer of site visits

[64] There is no order for me to make. The Commission initially requested photographs of SIUs in women's institutions so that its expert could provide an opinion on the conditions of confinement. The records do not exist. CSC has offered to arrange a visit for the Commission's expert to tour a women's institution and its SIU, subject to reasonable safeguards. The Commission can arrange a visit for its expert directly with CSC.

VI. Mediation and agreed statements of facts

[65] Litigating broad systemic claims of discrimination in the provision of services, in this case on behalf of all FSW across Canada on multiple intersecting grounds, with no lead complainant(s) will be long, costly and involve extensive resources for everyone—the parties and the Tribunal. Mediating some or all of the issues or working to identify a more collaborative path forward may lead to a more immediate result to the benefit of all concerned. There are many ways to try and settle the complaints, sometimes involving creative and unique solutions.

[66] Some of the public interest remedies that the CAEFS and the Commission are seeking necessarily involve broad consultations and policy reform and would require operational or regulatory changes in how correctional services are delivered. While the *Canadian Human Rights Act* is broad, remedial legislation, the Tribunal is a creature of statute. There are limits to its jurisdiction and to what it can order. The Tribunal cannot remediate all injustices, nor is it an expert policy-making body, the legislature or Parliament. Further, using an adversarial system to litigate broad, systemic allegations and seek remedial requests that necessitate significant policy reform and consultation is not an easy fit. There may well be a more constructive way forward that will take less time and may be better aligned with the public interest issues raised by these complaints.

[67] Under the Act, the Tribunal conducts inquiries into complaints the Commission refers to it. I nevertheless strongly encourage the parties to consider returning to mediation or mediation-adjudication as an alternative to litigation, particularly given the nature of these complaints. The CAEFS and the Commission have made submissions about the vulnerability of FSW, and particularly FSIW and FWS with mental health disabilities. Finding

a collaborative path forward remains an option that may lead to some resolution of part of all of these complaints far more quickly and in a more holistic way. That would also be in the public interest.

[68] Although the parties have engaged in mediation efforts in the past, they can revisit this option at any time. The Tribunal can appoint a separate mediator, or I can work with the parties in mediation-adjudication, at any time.

VII. ORDER

[69] By no later than **October 20, 2023**, CSC will produce the following:

1) Aggregate statistical data about SIUs at women's institutions, as set out in Appendix 1 of CSC's sur-reply;

2) Ten (10) unredacted IEDM decisions to counsel for the Commission and the CAEFS and to the Tribunal, as set out in paragraph [55] above;

3) Ten (10) unredacted records related to reports created under paragraphs 32(3), 34(2), 37(2) and 37.3(4) of the CCRA to counsel for the Commission and the CAEFS and to the Tribunal, as set out in paragraph [60] above; and

4) Current policies and procedures on which CSC intends to rely in its SOPs and at the hearing.

[70] The Tribunal makes no order with respect to the Commission's request for photographs of SIUs in women's institutions.

[71] Following receipt and review of these materials, the Tribunal will provide further direction to the parties in advance of a CMCC.

[72] Any documents produced to the other parties or to the Tribunal subject to this order must only be used for the purpose of disclosure and for no other purpose. Documents disclosed subject to paras 69(ii) and (iii) must be kept confidential on an interim basis, pending further direction from the Tribunal. The parties may make a request for confidentiality before, or at the latest, as part of the parties' proposal following the Tribunal's review of the documents ordered in this ruling. No information may be published or disclosed

in the public domain without express order of this Tribunal or consent of the individual whose information is at issue.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, ON
September 7, 2023

Canadian Human Rights Tribunal

Parties of Record

File Nos.: T1848/7812; T1849/7912

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

Ruling of the Tribunal Dated: September 7, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Morgan Rowe, Simcha Walfish, Anna Rotman, Emily Coyle for the Complainant

Caroline Carrasco, Brittany Tovee, Laure Bourdages-Prévost for the Canadian Human Rights Commission

Banafsheh Sokhansanj, Vanessa Wynn-Wiliams, Brooklynne Eeuwes, for the Respondent