

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 46

Date: October 17, 2023

File Nos.: T2635/1121, T2636/1221, T2637/1321

Between:

SM, SV, and JR

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Paul Singh

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I. Ruling

[1] The Complainants SM, SV, and JR, who are of South Asian descent, are police officers employed by the Respondent Royal Canadian Mounted Police (“RCMP”). Their complaints center around the RCMP’s failure to promote them while they worked at an RCMP unit in Ontario (the “Unit”) and on the alleged systemic racism in the Unit’s promotional processes generally. This, they say, constitutes discrimination contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (“CHRA”) on the basis of color, national or ethnic origin, race, and/or religion.

[2] The RCMP denies discriminating against the Complainants during the promotional processes at issue, or at all, and denies any systemic policy or practice of denying promotional opportunities to the Complainants or other officers who identify as visible minorities in the Unit.

[3] The issues of liability and remedy for the complaints have been bifurcated on consent of the parties, and a three-week hearing on liability is scheduled to proceed on November 14, 2023.

[4] In October 2021, I granted the RCMP’s motion, on consent of the Complainants, for a broad confidentiality order restricting public disclosure of information. The order anonymized the names of the Complainants and the Unit as well as the nature of the operations (“Operations”) conducted by the Unit on the basis that public disclosure of this information would be injurious to national security, to sensitive RCMP Operations, and to officer safety: *SM, SV, and JR v. Royal Canadian Mounted Police*, 2021 CHRT 35 (“Confidentiality Ruling”)

[5] The RCMP has now filed a motion, on consent of the Complainants, for an order that the hearing be closed to the public. The Canadian Human Rights Commission has elected not to participate at the hearing and did not provide a position on the motion.

[6] For reasons that follow, I allow the RCMP’s motion and order that the hearing scheduled to proceed on November 14, 2023 be closed to the public.

II. Legal framework

[7] Court proceedings, including those of this Tribunal, are presumptively open to the public and the open court principle is essential to the proper functioning of Canadian democracy.

[8] 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 Tribunal is set out in section 52 of the *CHRA* which provides broad statutory powers to the Tribunal to make any order it considers necessary to ensure the confidentiality of an inquiry in certain circumstances. This includes where there is a serious possibility that the safety of a person will be endangered, or where there is a real and substantial risk that matters involving public security will be disclosed, fairness of the inquiry will be impacted, or undue hardship will befall a party or witness.

[9] The Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 (“*Sherman Estate*”) reaffirmed the high bar that must be met to limit court openness. In order to succeed in limiting presumptive court openness, an applicant must establish that:

1. court openness poses a serious risk to an important public interest;
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,
3. as a matter of proportionality, the benefits of the order outweigh its negative effects.

(*Sherman Estate* at para 38).

[10] The *Sherman Estate* test, which applies to various types of discretionary limits on openness including sealing orders, publication orders, redaction orders, and orders excluding the public from a hearing, is generally consistent with, and informs the statutory analysis the Tribunal must undertake under s. 52 of the *CHRA*: *A.B. and Gracie v. Correctional Service Canada*, 2022 CHRT 15 at para. 15-16; *SV SM, JR v. RCMP*, 2021 CHRT 35 at para. 8-11.

III. Analysis

[11] As set out below, I find that the RCMP's motion for a hearing closed to the public meets the test set out in s.52 of the *CHRA* as informed by *Sherman Estate*.

A. There is a real and substantial risk that matters involving public security will be disclosed

[12] As set out in the Confidentiality Ruling, disclosure of identifying and investigative information in this case would pose serious and substantial risks to important public security interests including national security, sensitive RCMP Operations, and officer safety as evidenced by the uncontested affidavit filed by the RCMP Inspector in charge of the Unit: *SM, SV, and JR v. Royal Canadian Mounted Police*, 2021 CHRT 35 at para. 12-14

[13] I am satisfied that there is a real and substantial risk that disclosure of identifying information about members conducting Operations in the course of a public hearing, including through their identification as a Complainant or witness to these proceedings, could endanger officer safety and compromise RCMP Operations and national security.

[14] I am further satisfied that there is a real and substantial risk that disclosure of investigative information about previous or ongoing Operations investigations and techniques at the hearing, including through witness testimony and submissions, could compromise RCMP Operations and national security.

B. Reasonable alternative measures to a closed hearing will not prevent the risk

[15] I find that excluding the public from the hearing is necessary to mitigate the above-noted risks, and there are no reasonable alternative measures to protect confidential information from public disclosure.

[16] The RCMP submits, and I accept as reasonable, that witness testimony at the hearing will cover the substantive work experience of the Complainants and other members conducting the Operations. The content of this testimony is anticipated to

primarily and extensively cover information protected from disclosure to the public pursuant to the Confidentiality Ruling, including Operations investigations and techniques, and the members' involvement in the Operations.

[17] Given the broad scope of the Confidentiality Ruling and the nature of the anticipated evidence and submissions at the hearing, I find that it is not reasonably possible to mitigate the risks while conducting an effective hearing without excluding the public.

C. The need for a closed hearing outweighs the societal interests that the inquiry be conducted in public

[18] Finally, I am satisfied that the benefits of a closed hearing outweigh any negative effect on court openness.

[19] The order will protect RCMP Operations and officer safety by allowing the RCMP to continue to effectively gather evidence relating to serious criminal activities in Canada, including threats to national security.

[20] No party to the proceedings will be prejudiced by the confidentiality order made by the Tribunal as the order is directed to the public and does not impact any party. Further, the public will have access to the Tribunal's reasons for judgment following the hearing, thereby allowing the public an understanding of the Tribunal's rationale behind its ruling.

IV. Order made

[21] For reasons set out above, the RCMP's motion is allowed. The hearing scheduled for November 14, 2023 will be closed to the public.

Signed by

Paul Singh
Tribunal Member

Ottawa, Ontario
October 17, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2635/1121, T2636/1221, T2637/1321

Style of Cause: SM, SV and JR v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: October 17, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Malini Vijaykumar, for the Complainants

Kathryn Hucal and Jennifer Caruso, for the Respondent