

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 3

Date: January 29, 2024

File Nos.: T2747/12321; HR-DP-2868-22

Between:

Nicholas Dinardo

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Services Canada

Respondent

- and -

Native Women's Association of Canada, CAEFS, and West Coast LEAF

Interested Parties

Ruling

Member: Catherine Fagan

I. OVERVIEW OF REQUESTED AMENDMENTS

[1] The Complainant in this case is Nicholas Dinardo. Mx. Dinardo self-identifies as an Indigenous, Jewish, Two-Spirit transfeminine woman who uses gender-neutral pronouns.

[2] Mx. Dinardo has filed two human rights complaints against Correctional Service Canada (CSC), the Respondent, before this Tribunal (Tribunal file numbers T2747/12321 and HR-DP-2868-22). The Tribunal has consolidated the two complaints to be heard in a single inquiry. In these complaints, Mx. Dinardo alleges past and ongoing harassment and discrimination while in custody of CSC.

[3] On February 12, 2024, the hearing begins.

[4] On January 15, 2024, Mx. Dinardo brought a written request to allow the following amendments to their Statement of Particulars (“SOP”):

- a) Removal of allegations on which Mx. Dinardo is no longer relying and remedies which they no longer seek (struck through paras. 152, 160-165, 220, 252(l)-(n) of their proposed amended SOP) (the “Removal Amendments”);
- b) Addition of allegations that CSC retaliated against Mx. Dinardo following the filing of their human rights complaints, including by preventing the November 2023 hearing from going forward (new paras. 5, 34, 173-185, 191, 200-201, 205, 210, 234-238, 244 of their proposed amended SOP) (the “Retaliation Amendments”);
- c) Amendments to account for the fact that Mx. Dinardo is no longer in custody and for the advancement of time (paras. 6, 34, 70, 107, 250(c), (d), (f)-(j) of their proposed amended SOP) (the “Timing Amendments”); and
- d) Increasing the compensation sought by Mx. Dinardo (para. 253 of their proposed amended SOP) (the “Quantum Amendment”).

[5] CSC replied to Mx. Dinardo’s letter on January 18, 2024. In this response, CSC consented to the Removal Amendments and opposed the Retaliation Amendments. CSC took no clear position on the Timing Amendments and the Quantum Amendments, instead requesting that the amendment requests that do not have the consent of both parties be dealt with after the upcoming hearing dates of February 12 – 15, 2024, when Mx. Dinardo will be providing their testimony.

[6] Mx. Dinardo replied to the January 18 letter on January 22. CSC replied to the January 22 letter also on January 22.

[7] The Canadian Human Rights Commission (the “Commission”) took no position to the requested amendments. The Interested Parties, who are only participating in the systemic aspects of the complaints, also took no position.

[8] For the reasons that follow, the first two sets of amendments are granted. The last two sets of amendments will be addressed after the February 2024 hearing dates.

II. LEGAL FRAMEWORK

[9] In *Peters v. Peters First Nation*, 2023 CHRT 58 (para 9) (“*Peters*”) and *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc*, 2013 CHRT 24 (paras 16-17), this Tribunal highlights the considerable discretion that s. 48.9(2) of the Canadian Human Rights Act gives it in managing proceedings, including granting or dismissing motions to amend a complaint. As stated in paragraph 9 of *Peters* (citing *Canada (Attorney General) v. Parent*, 2006 FC 1313 at para. 30 (“*Parent*”)), the Tribunal has the discretion to permit amendments, namely if granting them serves the interests of justice by helping to identify the issues in dispute.

[10] However, the Tribunal must carefully assess any potential prejudice granting the amendment would cause to other parties. Paragraph 10 of *Peters* clarifies that the other party will not suffer any prejudice if the party can prepare itself and argue its position on the new issues being raised (also *Parent* at para. 40).

[11] Additionally, amendments must not transform the complaint into an entirely new one. This means there must be a nexus, in fact and in law, between the initial complaint and the proposed amendment (*Peters* at para 10 and *Tran v. Canada Revenue Agency*, 2010 CHRT 31 at paras 17-18).

[12] In *Peters*, the Tribunal explained that to allow amendments the Tribunal must adopt a balanced approach: “[a]mendments will be allowed where the balance of convenience favours the party seeking the amendment.”

[13] As well, in all aspects of a proceeding, including amendment requests, the Tribunal and the parties must be guided by the principle of proportionality (*Temate v. Public Health Agency of Canada*, 2022 CHRT 31 at paras 8-15).

III. REMOVAL AMENDMENTS

[14] Given the consent of CSC to the Removal Amendments, the Tribunal grants this request.

IV. TIMING AMENDMENTS AND QUANTUM AMENDMENTS

[15] CSC has not provided a clear position on the requested Timing Amendments and Quantum Amendments.

[16] The February hearing dates are just over two weeks away, leaving insufficient time to receive submissions from the parties and to issue a ruling before the upcoming hearing. At the same time, none of the parties wish to postpone it. Fortunately, decisions on these amendments are not essential to be able to proceed with the testimony of Mx. Dinardo. Therefore, these requests will be dealt with following the February hearing dates once the position of CSC is clear.

V. RETALIATION AMENDMENTS

[17] Given the ample submissions provided by Mx. Dinardo and CSC on the Retaliation Amendments and given the need for clarity on the case before the Tribunal before the testimony of Mx. Dinardo, the Tribunal will rule on these requested amendments, under Rules 5 and 8 of the Canadian Human Rights Tribunal Rules of Procedure.

[18] For reasons set out below, the Retaliation Amendments are granted.

[19] Mx. Dinardo's retaliation claim relates to:

- a) CSC's alleged placement of Mx. Dinardo in isolation following the filing of their complaint;

- b) CSC's alleged conduct to prevent Mx. Dinardo from testifying at the hearing scheduled in November 2023 by:
- i. holding Mx. Dinardo in the Structured Intervention Units at Kent Institution, a maximum-security federal penitentiary;
 - ii. refusing to hold the hearing at Kent Institution;
 - iii. refusing to transport Ms. Dinardo to an alternate location to provide testimony; and
 - iv. refusing to transfer Mx. Dinardo to the Regional Treatment Centre – Pacific to allow the hearing to proceed; and
- c) CSC's alleged failure to assist Mx. Dinardo with release planning.

[20] Simply put, Mx. Dinardo argues that the Retaliation Amendments should be allowed because they (1) are clearly linked to the allegations giving rise to the original complaints and (2), at the very least, give rise to a tenable claim for retaliation.

[21] On the other hand, CSC takes the position that the last-minute amendments are prejudicial to CSC as it adds new factual allegations and legal issues less than a month before the start of the hearing. CSC also points out that some of the new allegations concern the period between October 2020 and November 2023 and so the retaliation complaint could have been made years or months earlier. I will take each argument in turn.

A. Is there a nexus between the complaints and the requested Retaliation Amendments?

[22] I find there is a nexus in fact and law between the alleged retaliatory conduct of CSC and the original complaints. Mx. Dinardo's original complaints allege various forms of adverse treatment by CSC while they were incarcerated. Similarly, the retaliation allegations concern conduct by CSC against Mx. Dinardo while they were incarcerated during the same federal sentence.

[23] More specifically, the retaliation allegation related to Mx. Dinardo's placement in isolation following the filing of their complaint is linked to allegations in the current complaints. Mx. Dinardo has already alleged that CSC placed them in isolation for extended

periods both before and after the filing of the complaint. The new amendments allege retaliation based on facts already pled.

[24] Similarly, the alleged conduct of CSC preventing Mx. Dinardo from testifying at the hearing scheduled in November 2023, as well as the alleged failure of CSC to carry out adequate release planning, are sufficiently related to the original complaints regarding adverse treatment in the provision of correctional services during the same federal sentence.

[25] At this early juncture, I emphasize that I am not rendering any determination regarding the substantive validity of these new allegations. These are merely allegations to an amended SOP.

B. Will the Respondent be able to prepare itself adequately for the new issues raised?

[26] The Respondent indicated its concern that the timing of these proposed amendments just a few weeks before the testimony of Mx. Dinardo does not provide it with adequate opportunity to collect documents and information in order to prepare an amended SOP and to properly cross-examine Mx. Dinardo on the newly raised issues and allegations.

[27] The Tribunal is sensitive to the need to ensure procedural fairness for all parties and to ensure CSC is given full and ample opportunity to defend the allegations against it. Ideally, the Complainant would have pursued the amendments at an earlier time. However, there are ways to proceed which would allow the Retaliation Amendments while ensuring procedural fairness for CSC.

[28] During the February hearing dates, CSC will have three days to cross-examine Mx. Dinardo. Between now and the date of the cross-examination, CSC will have time to review the allegations of Mx. Dinardo related to the Retaliation Allegations set out in their affidavit provided on January 15, 2024, and to work on preparing its cross-examination. Of course, this is a complex case, and a significant amount of time will be required to prepare for the entirety of the cross-examinations given the number of allegations. Therefore, if CSC is not

able to fully cross-examine Mx. Dinardo on the Retaliation Allegations during the February hearing dates, Mx. Dinardo may be recalled to complete the cross-examination.

[29] There is also no need to complete the production of documents related to the Retaliation Amendments prior to the February hearing dates. In their submissions, Mx. Dinardo agreed to receiving such production following the upcoming hearing dates. After February, the next hearing dates are scheduled in May with other blocks of dates reserved throughout 2024. This gives CSC time to complete the production of documents, determine any additional witnesses it would like to call and amend its SOP in response to the Retaliation Amendments.

[30] The Tribunal is satisfied that the Respondent will not be unjustly prejudiced by the additional Retaliation Amendments given the measures to ensure procedural fairness.

C. Proportionality

[31] As raised by the Respondent, the parties have been working for months to narrow the scope of the hearing and have been successful in significantly reducing the number of alleged incidents before the Tribunal. CSC argues that the requested amendments would take us backwards by further expanding the complaints.

[32] Although the Retaliation Amendments will indeed expand the litigation, the expansion need not be substantial, and the seriousness of the allegations weigh in favour of allowing them.

[33] Proportionality also weighs in favour of granting the amendments because disallowing the amendments would require Mx. Dinardo to bring the allegations through a new separate human rights complaint before the Commission. Given my finding that the retaliation claim has a nexus to the original complaint, it is not necessary, nor proportional, for this claim to be made in a separate proceeding.

[34] Related to the issue of proportionality, CSC objects to portions of Mx. Dinardo's affidavit dated January 15, 2024, containing allegations related to the proposed amendments (paragraphs 343-354). CSC states that the inclusion of these paragraphs was

procedurally inappropriate because there has been no ruling on the proposed amendments. I agree that this is procedurally irregular and would typically be an improper order of things. However, the request for leave was filed on the same day as the affidavit. Given the very short timeline before the beginning of Mx. Dinardo's testimony, it is fair to assume the Complainant took this approach to ensure the parties and the Tribunal had the full affidavit with sufficient time to review it before the hearing, should the amendments be granted. Had the Tribunal disallowed the amendments, the issue would have been easily remedied by removing the allegations from the record, as suggested by the Respondent in their letter dated January 25, 2024.

[35] As a final point, regarding the retaliation allegation related to the November hearing dates, the Respondent argued that the conduct of this litigation, such as scheduling by counsel and Tribunal staff, should not substantively be before the Tribunal in this proceeding. In this, I agree. Bringing in the conduct of legal counsel would be an inappropriate expansion of the original complaints. A significant inquiry such as this should not be sidetracked by making this an issue in dispute. However, the Retaliation Amendments focus on the conduct of CSC, and not legal counsel. It is expected that the parties respect this distinction. More generally, the Tribunal highlights the importance of maintaining courteous communication to foster a respectful proceeding.

VI. ORDER

[36] The Tribunal therefore makes the following orders:

- a) On consent, the Removal Amendments to the Complainant's SOP are allowed;
- b) The requested Timing Amendments and Quantum Amendments to the Complainant's SOP will be dealt with after the hearing dates of February 12-16, 2024;
- c) By February 26, 2024, the Respondent and the Commission (should they take a position) are required to provide their position to the requested Timing Amendments and Quantum Amendments and to provide any submissions;
- d) By March 4, 2024, the Complainant must provide any reply submissions regarding the requested Timing Amendments and Quantum Amendments;

- e) The Retaliation Amendments are allowed;
- f) If necessary, the Respondent may recall the Complainant to complete its cross-examination on the Retaliation Amendments following the February hearing dates; and
- g) Following a decision of this Tribunal on the Quantum Amendments and the Timing Amendments, the Complainant, the Respondent and the Commission are to propose dates for the production of documents related to the amendments and for the production of the Respondent's and Commission's amended SOP.

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
January 29, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2747/12321; HR-DP-2868-22

Style of Cause: Nicholas Dinardo v. Correctional Services Canada

Ruling of the Tribunal Dated: January 29, 2024

Date and Place of Hearing: February 12-15, 2024

Victoria, British Columbia

Appearances:

Nicole Kief, Jessica Magonet, David Taylor, and Christopher Trivisonno, for the Complainant

Julie Hudson and Genevieve Colverson, for the Canadian Human Rights Commission

Ezra Park, Matt Huculak, and Charmaine De Los Reyes, for the Respondent