

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2024 CHRT 103

**Date:** September 18, 2024

**File Nos.:** T2516/7320 and T2703/7921

**Between:**

**A.B. and Daniel Gracie**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Aboriginal Legal Services**

**Interested party**

**- and -**

**Correctional Service Canada**

**Respondent**

**Ruling**

**Member:** Catherine Fagan

## **I. INTRODUCTION**

[1] This ruling concerns a motion of the complainants requesting confidentiality orders to protect the identity of a proposed witness, referred to in this ruling as E.F.

[2] The complainants in this matter are both Indigenous federal offenders. They allege discrimination by the Respondent, Correctional Service Canada (CSC), for its systemic failure to provide timely, culturally specific rehabilitative correctional programming to Indigenous prisoners and to do so in a non-discriminatory manner, as required by the *Corrections and Conditional Release Act* and the *Canadian Human Rights Act*, RSC 1985, c. H-6 (CHRA). The complainants allege that the CSC's policies and practices are discriminatory and contribute to the increasing disproportionate incarceration of Indigenous people and the ongoing gap in correctional outcomes between Indigenous and non-Indigenous offenders.

[3] The proposed witness, E.F., is an Indigenous transgender woman in the custody of CSC.

[4] For the reasons below and as further detailed in its orders, the Tribunal grants the complainants' motion.

## **II. PROPOSED WITNESS**

[5] The proposed witness is an Indigenous transgender woman who has been in the custody of CSC at both its Bath and Warkworth institutions.

[6] E.F. is also a complainant in another unrelated matter before this Tribunal (HR-DP-2856-22), in which the Tribunal issued a confidentiality order protecting her anonymity and assigned her the pseudo-initials "E.F." (see *E.F. v. Correctional Service of Canada*, 2023 CHRT 15). The orders requested in this matter are similar, and the Tribunal granted the orders on the same factual and contextual basis.

[7] One of the matters in dispute in these complaints concerns whether it is a reasonable accommodation for CSC to require Indigenous individuals to transfer from Bath Institution to Warkworth Institution in order to receive culturally specific Indigenous correctional programming.

[8] If this motion is granted, E.F. will provide evidence about her experience as an Indigenous transgender prisoner at Warkworth Institution compared to Bath Institution, including treatment by frontline staff, prisoner culture, facilities, privacy and safety, and access to programs.

### III. LEGAL FRAMEWORK

[9] Court proceedings are presumptively open to the public. This also applies to human rights hearings, and there is a statutory presumption under s. 52 of the CHRA that inquiries before the Tribunal will be conducted in public. The constitutional guarantee of freedom of expression protects court openness. As stated by the Supreme Court of Canada on various occasions, including in *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman Estate*] at para 30, open courts are essential to the proper functioning of Canadian democracy.

[10] However, Canadian law recognizes that there are times when discretionary limits on court openness need to be established to protect other public interests where they arise. The need for this flexibility in applying the open court principle to the Tribunal is set out in s. 52 of the CHRA. It provides broad powers to the Tribunal to take any necessary measures and make any orders to ensure the inquiry's confidentiality in certain circumstances.

[11] This motion relates specifically to s. 52(1)(c) of the CHRA, which provides that:

(1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

...

(c) there is a real and substantial risk that disclosure of personal or other matters will cause undue hardship to the persons

involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

[Emphasis added.]

[12] In *Sherman Estate*, the Supreme Court of Canada reiterated the high bar that must be met to limit court openness and sets out a three-part test for confidentiality orders. As such, to succeed in seeking a limit on presumptive court openness, it must be established 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.)

[13] The three-part *Sherman Estate* test is generally consistent with s. 52(1) of the CHRA and may be used by the Tribunal to inform the statutory analysis for seeking confidentiality orders under s. 52 of the CHRA (*SV, SM, JR v. RCMP*, 2021 CHRT 35).

#### **IV. SUMMARY OF POSITIONS**

[14] The complainants are essentially requesting the following confidentiality orders pursuant to s. 52(1)(c) of the CHRA:

- a) The proposed witness must be referred to as E.F. throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;
- b) E.F.'s identifying information, including her preferred name, dead name (name given at birth), the names of her family members and her date of birth (collectively referred to as "Identifying Information"), shall be kept confidential throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;

- c) E.F.'s Identifying Information shall not be disclosed to anyone except the Tribunal, Tribunal Secretariat personnel, members of the parties' litigation teams, their clients in this matter, and prospective or actual witnesses; and
- d) The Registry is instructed to identify any Identifying Information filed in the official records of this proceeding. Such information is to be redacted from any public access request for the documents which contain it.

[15] The complainants provided written submissions on this motion. CSC, the Canadian Human Rights Commission, and the interested party, Aboriginal Legal Services, did not object to the motion and have not provided submissions. However, all parties submitted an agreed statement of facts in regard to the circumstances of E.F.

[16] Further, to support the implementation of the requested orders, if granted, all parties have agreed to file a joint book of documents to be entered as exhibits at the hearing and will apply appropriate redactions before filing those documents or any other documents with the Tribunal or seeking to have them entered into evidence.

[17] The complainant argues that the confidentiality orders are necessary because there is a real and substantial risk that the disclosure of the E.F.'s identity through this Tribunal proceeding would cause her severe and undue hardship such that the need to prevent disclosure outweighs the societal interest that her identity be made public. The complainants support this argument with the following submissions:

- a) E.F. is not a public figure and not publicly out as transgender outside of prison;
- b) Due to the nature of her criminal charges, E.F.'s criminal proceedings were the subject of a publication ban and her name was anonymized in the style of cause for those proceedings;
- c) No information appears to be currently available about E.F., her gender identity or her criminal offences online;
- d) E.F. has been referred for gender affirming surgery and hopes to have the option to live as her chosen gender upon release without being outed online or necessarily identifiable as transgender;
- e) E.F.'s privacy with respect to her transgender identity is at the core of the personal dignity interests which the public has an interest in protecting, in accordance with *Sherman Estate*;

- f) As an Indigenous transgender woman in prison, E.F. faces heightened risks of stigma and being targeted for abuse and ridicule in relation to her gender identity;
- g) She also faces greater risks of stigma and abuse upon her eventual release and reintegration into the community; and
- h) The importance of the rehabilitation and successful reintegration of Indigenous offenders are values that lie at the core of the Respondent's statutory mandate, as well as at the core of human rights.

## V. ISSUES

[18] This issue in this ruling is whether the Identifying Information of E.F. should be kept confidential because there is a real and substantial risk that the disclosure of this information will cause undue hardship to her (s. 52(1)(c) of the CHRA).

## VI. ANALYSIS

[19] After reviewing the complainants' submissions and the agreed statement of facts, the Tribunal is of the opinion that there is a real and substantial risk that exposing E.F.'s identity through this proceeding would cause her severe and undue hardship. This risk engages personal dignity interests that the broader public has an interest in safeguarding. The Tribunal also accepts that the requested confidentiality orders are reasonable and necessary to protect her from such undue hardship.

[20] This Tribunal previously made confidentiality orders in this proceeding in regard to complainant A.B. for reasons and circumstances that are similar to those at issue in the present motion (*A.B. et al. v Correctional Service of Canada*, 2022 CHRT 15). As such, the reasoning in that ruling in regard to complainant A.B. applies in the context of the present motion. In particular, the Tribunal wrote at paras 40-43:

[40] The Tribunal considers that the transgender identity of Complainant A is of particular significance for the determination of whether she faces a real and substantial risk of undue hardship should her identity be revealed.

[41] Sadly, transgender identity still carries a high level of stigma in our society. The continuing disadvantage, discrimination, extreme stigma and prejudice experienced by trans individuals is well known (*XY v. Ontario*

(*Government and Consumer Services*), 2012 HRTO 726). The risks of undue hardship were outlined in the Ontario Human Rights Commission's *Policy on preventing discrimination because of gender identity and gender expression*. Although this policy of the OHRC isn't binding on the Tribunal, it is a useful document to quote for contextual purposes. It notes:

[...] "trans" people are one of the most disadvantaged groups in society. They routinely experience prejudice, discrimination, harassment, hatred and even violence [...] Trans people face these forms of social marginalization because of deeply rooted myths and fears in society about people who do not conform to social "norms" about what it means to be female or male. The impact is significant on their daily lives, health and well-being.

[...] In 2010, the Trans PULSE Project conducted a detailed survey with 433 trans people across Ontario. Trans people reported barriers and discrimination in accessing employment and medical care. (...) Two-thirds said they had avoided public spaces that everyone else takes for granted such as malls or clothing stores, restaurants, gyms and schools because of a fear of harassment, being "read" (perceived as trans), or "outed." Washrooms were the most commonly avoided space. Over their lifetime, 77% reported they have had suicidal thoughts and 43% had attempted suicide.

[42] In the opinion of this Tribunal, the transgender identity of Complainant A falls within what the Supreme Court of Canada has identified as protected privacy interests in *Sherman*, namely "the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity." (*Sherman Estate* at para. 34).

[43] According to the evidentiary record before the Tribunal, it seems that Complainant A's transgender identity is not currently public knowledge, and this fact did not form part of details published by the media at the time of her sentencing. She is also an Indigenous transgender woman, which again heightens the chance of being stigmatized and targeted. Additionally, she was very recently released from prison and is currently transitioning to living in broader society, which is a particularly vulnerable and difficult period in the reintegration and rehabilitation of an offender. These characteristics of Complainant A are essential to the Tribunal's determination that, in her case, disclosure of this information through the inquiry would put her at a real and substantial risk of undue hardship, which outweighs the societal interest that the inquiry be conducted in public.

[21] The Tribunal acknowledges that E.F., as an Indigenous transgender prisoner, is highly vulnerable and could face extreme stigma and prejudice if her identity were exposed. It is crucial for her human dignity that she has some control over when, how and to whom she discloses her gender identity. These vital dignity interests outweigh the societal interest that her identity be made public. For this reason, Canadian and provincial human rights tribunals have frequently granted anonymity orders for transgender complainants, including prisoners (see e.g., *E.F. v. CSC*, 2023 CHRT 15; *A.B. et al. v. CSC*, 2022 CHRT 15; *XY v. Ontario (Government and Consumer Services)*, 2010 HRTO 1906; *A.B. v. Hamilton (City)*, 2015 HRTO 745; *Hogan v. Ontario (Ministry of Health & Long Term Care)*, 2003 HRTO 6; *K.M. v. Sunnybrook Health Sciences Centre*, 2012 HRTO 1505; *AB v. Mad Max Windsor Inc. et al.*, 2020 HRTO 407; *RA v. Dr. Raza Khan Medicine Professional Corporation et al.*, 2014 HRTO 1274 ; *A.B. v. Elementary Teachers Federation of Ontario*, 2018 HRTO 1224; *X v. Hot Mess Salon*, 2019 BCHRT 24; *A. v. Integrity Roofers*, 2017 HRTO 919; *N.M. v. St. Joseph's Health Centre Toronto*, 2017 HRTO 1707; *AB v. Ontario (Education)*, 2018 HRTO 1746; *E.C. v. Ready Employment Agency*, 2015 HRTO 1342; *K.M. v. Ontario (Government and Consumer Services)*, 2015 HRTO 434; *A.B. v. Charity House (Windsor) o/a Brentwood Recovery Home*, 2018 HRTO 1607; *N.M. v. Ontario (Health and Long-Term Care)*, 2018 HRTO 17; *EN v. Gallagher's Bar and Lounge*, 2021 HRTO 240; *T.A. v. Manitoba (Justice)*, 2019 MBHR 12; *KS v. Dr. O Corp and another*, 2018 BCHRT 273; *Employee v. Life Labs (No. 2)*, 2018 BCHRT 202; *M v. B.C. (Ministry of Health)*, 2014 BCHRT 242; *JY v. Mint Tanning Lounge and others*, 2018 BCHRT 282; *JY v. Various Waxing Salons*, 2019 BCHRT 106; and *K.W. v. School District P. and another*, 2018 BCHRT 144).

[22] Finally, the Tribunal concurs that the proposed terms of the requested orders allow anonymization with minimal effect on the broader objectives of the open court principle. Additionally, there is no reasonable alternative to anonymizing E.F.'s identity that would protect her dignity and lessen the undue hardship caused by her identification.



**VII. ORDERS**

[23] The Tribunal makes the following orders pursuant to s. 52(1)(c) of the CHRA:

- A) The proposed witness must be referred to as E.F. throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;
- B) E.F.'s identifying information, including her preferred name, dead name (name given at birth), the names of her family members and her date of birth (collectively referred to as "Identifying Information"), shall be kept confidential throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions and any other documents filed in the Tribunal's official record of these proceedings;
- C) E.F.'s Identifying Information shall not be disclosed to anyone except the Tribunal, Tribunal Secretariat personnel, members of the parties' litigation teams, their clients in this matter, and prospective or actual witnesses; and
- D) The Registry is instructed to identify any Identifying Information filed in the official records of this proceeding. Such information is to be redacted from any public access request for the documents which contain it.

*Signed by*

Catherine Fagan  
Tribunal Member

Ottawa, Ontario  
September 18, 2024

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal Files:** T2516/7320 and T2703/7921

**Style of Cause:** A.B. and Daniel Gracie v. Correctional Service Canada

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Paul Quick, for the Complainants