Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Roger Desmarais

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

File No.: T1617/16310
Member: Réjean Bélanger
Date: February 25, 2014
Citation: 2014 CHRT 5

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I. Overview

[1] The facts related to this complaint have the potential to raise important and complex issues regarding the treatment of inmates with mental disabilities under the care and control of Correctional Service of Canada (CSC). The scope of these issues and their implications is at the core of the present motion.

II. Complaint

[2] On March 12, 2008, Ms. Doreen Lothian, the legal guardian of the Complainant, Mr. Roger Desmarais, made a complaint to the Canadian Human Rights Commission ("the Commission") alleging that CSC discriminated against Mr. Desmarais based on intellectual/mental disability and family status contrary to section 5 of the *Canadian Human Rights Act* (*CHRA*).

[3] The complaint alleges that this discrimination occurred, on a continuing basis, during two different federal sentences that CSC was responsible for administering: the first sentence being from November 13, 2001 to November 12, 2003; and, the second sentence from December 20, 2005 to December 19, 2007.

[4] In addition, the complaint alleges that the discrimination against Mr. Desmarais was a "reflection of a systemic issue regarding the treatment of intellectually disabled offenders and in particular for those without adequate family support."

[5] The complaint indicated that there was sufficient evidence, at that point in the proceedings, to indicate that there was a possibility that the systemic issues, which existed when Mr. Desmarais alleged he experienced discrimination, still exist.

[6] On November 22, 2010, David Langtry, Deputy Chief Commissioner of the Commission informed the parties, by letter, of its decision:

> "...the Commission decided, pursuant to section 49 of the *Canadian Human Rights Act* (*CHRA*), to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
>
> the issues raised by this complaint are indicative of possible systemic barriers to the treatment and rehabilitation of inmates with mental disabilities and as such, further inquiry by the Canadian Human Rights Tribunal is warranted.
>
> […]
>
> For your information, either party to a complaint can ask the Federal Court to review a Commission's decision under subsection 18(1) of *the Federal Courts Act*."

[7] On August 16, 2012, the Commission provided the Tribunal with its Statement of Particulars, in which it further defined the ongoing systemic discriminatory practices that, it argues, are at the core of the discrimination suffered by Mr. Desmarais. These include:

(a) Placing inmates with mental disabilities in segregation, and its adverse effect on their physical and mental well-being;

(b) The lack of programming tailored to the needs of intellectually disabled inmates;

(c) Policies involving the assessment of risk and security classification; and

(d) Processes involved in obtaining informed consent to obtain information on an inmate with an intellectual deficiency or mental illness.

III. Motion

[8] On July 26, 2013, the Respondent filed a motion to strike part of the complaint. More specifically, the Respondent submits that this Tribunal should quash the systemic discrimination aspects of this inquiry or, in the alternative, limit their scope to the relevant periods of time, i.e. from 2001 to 2003 for the issues focused on the administrative segregation practices at CSC and

the alleged lack of programming for intellectually disabled inmates, and from 2004 to 2006 for the allegations based on the policies applicable to the assessment of risk and security classification.

[9] The Respondent further requests, in the alternative, that the disclosure of evidence related to the allegations of systemic discrimination be limited to those documents which defined the existing situation while the Complainant was imprisoned under the supervision of CSC.

IV. Facts

[10] Mr. Desmarais, who was born on October 2, 1982, has been diagnosed with an overall IQ of 56, which accords with the DSM-IV designation of "mental retardation," and he is illiterate.

[11] In 2001, when the Complainant was 18 years old, he was convicted of three sexual offences and one count of breaking and entering, and was sentenced, *inter alia*, to a term of imprisonment of two years in a federal penitentiary and three years of probation, with the strong recommendation that he be transferred to the Philippe Pinel Institute of Montreal ("Pinel") for treatment.

[12] In the course of the trial, the judge, who wanted to ensure that Mr. Desmarais would be transferred to Pinel after sentencing, called Mr. Bigras as a witness, who was a CSC classification officer.

[13] In his testimony, Mr. Bigras associated Mr. Desmarais with being a member of a group of federal inmates who had significant intellectual deficits. Mr. Bigras, who had never met Mr. Desmarais, indicated that he knew little about Mr. Desmarais beyond his IQ. Nevertheless, he predicted that Mr. Desmarais would not go to a minimum security prison but could end up in Port Cartier maximum-security prison, and would most likely be reviewed for a detention order. The following are some of the statements made by Mr. Bigras:

> "Excusez, je sais que [...] je connais un peu ses délits. Je n’ai lu aucun rapport puis je sais un peu la [...] au cause de son quotient intellectuel, ça se limite ça
>
> [...]
>
> On n’a pas toujours l’encadrement à la détention en protection où on les envoie en isolement préventif […]"[1].

[14] The Complainant served his first term from November 13, 2001 to November 12, 2003.

[15] The Complainant was first incarcerated at the Regional Reception Center where his case was assessed in view of determining the appropriate security classification. CSC assigned the Complainant a medium level classification and determined that he should be incarcerated at La Macaza, an institution in the Québec region, which has a number of programs for sexual offenders.

[16] The CSC assessment process identified Mr. Desmarais as requiring:

> “intensive treatment specifically targeting the needs of intellectually challenged sexual offenders, and a long-term, consistent follow-up plan for community reintegration”.[2]

[17] In February 2002, Pinel refused to accept Mr. Desmarais for admission.

[18] Also in February 2002, Mr. Desmarais was refused by the CSC Regional Mental Health Unit (“RHMU”), as it reportedly did not have the “appropriate structure or treatment opportunities for an Anglophone, low-functioning sexual offender”.[3]

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[1] A -2 Court of Québec, Criminal Chamber, Transcript of testimony of Mr. Bigras before Justice Vaillancourt, 2001-10-03 at pp. 31-35
[2] A-3 CSC, Psychological initial assessment, J. Drugge 2002-01,-11, p. 5
[3] A-4 CSC, Psychological activity notes of J. Drugge 2002-01,-11, p. 5

[19] On April 10, 2002, the Complainant was transferred to administrative segregation at La Macaza because he had been sexually exploited by other inmates and had been the object of complaints for “compulsive masturbation”. According to a CSC psychological report, Mr. Desmarais was unable to participate in the sex offender treatment program at La Macaza institution due to “problems related to his mental retardation”.[4]

[20] The Complainant was kept in administrative segregation for a period of 11 months.

[21] In October 2003, the Complainant was once again transferred to administrative segregation, this time after he had threatened an employee.

[22] The Complainant was released on November 12, 2003, after completing his sentence.

[23] Since 2003, the Complainant has been under a protective regime of tutorship (guardianship).On June 7, 2007, the Quebec Superior Court appointed Ms. Doreen Lothian as Mr. Desmarais’ legal guardian.

[24] In July, October and November of 2005, the Complainant was arrested for several breaches of probation, as well as for resisting arrest.

[25] On December 21, 2005, the Complainant was sentenced, *inter alia*, to a term of incarceration of two years with regard to these arrests. He served this second term of incarceration from December 21, 2005, to December 20, 2007.

[26] Given his history, the Complainant was assessed as a maximum security inmate. However, his transfer to a maximum security institution was suspended when CSC requested his transfer to Pinel.

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[4] A-35 CSC, Psychological report, J. Desmarais, 2003-11-02 p. 5

[27] On or about February 7, 2006, the Complainant was granted admission to Pinel, where he was transferred in April 2006 and where he remained until the completion of his term of incarceration.

[28] On March 19, 2008, the Complainant, through his guardian, filed a complaint with the Commission, alleging discrimination pursuant to section 5 of the *CHRA*.

[29] On April 12, 2011, in the course of new criminal accusations for events of a sexual nature that took place after the Complainant's second term of incarceration, the Complainant was declared unfit to stand trial by the Court of Québec, Criminal Chamber.

[30] On July 26, 2011, the *Tribunal Administratif du Québec* (TAQ) affirmed the Court of Québec's decision that the Complainant was unfit to stand trial and ordered that he be detained.

[31] On September 10, 2013, the TAQ, which each year reviewed the Complainant's situation to determine if he had become fit to stand trial, declared that he had become fit to stand trial and sent his case back to the criminal court.

[32] As a result of this decision, Mr. Desmarais was in the provincial detention at Rivière-des-Prairies, while awaiting his return to court scheduled for September 21, 2013.

V. Arguments

A. Respondent's Position

(i) The Supreme Court of Canada's decision in *Moore* supports limiting the scope of the present complaint

[33] The decision rendered on November 9, 2012, by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61, is at the core of the Respondent's position. The following paragraphs describe the Respondent's interpretation of the *Moore* decision.

[34] The *Moore* case is centered on allegations of discrimination by the Province of British Columbia against Jeffrey Moore, a child with a severe learning disability, whose needs for intense remedial instruction were not met by the public school system during a period of fiscal restraint in that province.

[35] Throughout its reasons, the Supreme Court emphasizes the necessity to focus a claim of discrimination "during the relevant period": *Moore* at paras. 35, 37, 50 and 51. It also stresses that a Tribunal's remedies must be "sustainable given the actual scope of the complaint": *Moore* at para. 56. This decision has shed new light on cases where allegations invoked "systemic discrimination" to enlarge the scope of an individual claim. The Respondent argues that since *Moore*, this is no longer possible.

[36] The Respondent submits that, in light of this recent decision, the Courts and the Tribunal must ensure that inquiries by the Tribunal remain centered on the specific circumstances of the complainant. Whatever systemic conclusions are drawn in a particular case must therefore flow directly from these personal circumstances.

(ii) The present facts to do lend themselves to a finding of systemic discrimination

[37] The Respondent states that the present facts do not open the door to findings of systemic discrimination, and that the Complainant's allegations only relate to the first period of incarceration and to a short portion of the second period of incarceration.

[38] More specifically, the Respondent submits that the Tribunal's examination of CSC's practice of placing inmates with mental disabilities in administrative segregation should be limited to practices in place at CSC in 2001-2003, and for a few days in April 2006, when the Complainant was put into administrative segregation. The Respondent notes that the Complainant was never subjected to prolonged periods of administrative segregation during his second period of incarceration.

[39] Regarding CSC's alleged lack of programming for intellectually disabled inmates, the Respondent submits that the inquiry should be limited to the first term of incarceration of the Complainant, as he was transferred to Pinel shortly after he was incarcerated for the second time, and was thus not in need of a program dispensed by CSC.

[40] The Respondent further submits that the Tribunal's examination of the applicable policies involving the assessment of risk and security classification should only be centered on the Complainant's two periods of incarceration as different practices may or may not have developed after April 2006, and are not relevant to evaluate the circumstances specific to the Complainant.

[41] In response to the Commission's allegation that the CSC's processes for obtaining the informed consent of an inmate with an intellectual deficiency or mental illness so as to access personal information are discriminatory, the Respondent contends that this issue should also be restricted to the Complainant's two periods of incarceration.

[42] The Respondent argues that the scope of the Tribunal's inquiry into the complaint should be restricted in this manner as the Complainant has ceased to be under the responsibility of CSC since 2007, and that whether the Complainant will ever become under the care of CSC in the future remains unlikely, hypothetical, and ultimately, lies mostly with the Complainant himself. Furthermore, as the Respondent will in all likelihood never again be found fit to stand trial, it follows that he would not gain any personal benefit from an inquiry into the evolution of practices and policies at CSC. The Respondent submits that it would therefore be useless for the Tribunal to look at current CSC practices and to oversee the implementation of ameliorative measures, as, like Jeffrey Moore who would not re-enter the public school system, the Complainant will most likely never re-enter a federal penitentiary.

[43] The Respondent submits that, as set out in *Moore*, the inquiry should focus on the individual discrimination that the Complainant would have suffered during the long, past periods, during which he was under the supervision of CSC. To extend the inquiry into CSC's

previous and current policies on each one of the four grounds of discrimination alleged in the complaint would be akin to transforming the Tribunal into a Royal Commission and would shift the focus of the inquiry too far beyond the Complainant's specific circumstances. The Respondent submits that this interpretation of *Moore* is supported by the recent Supreme Court of British Columbia decision *British Columbia v. Mzite*, 2013 BCSC 116 (*Mzite*) and the Court's statement at paragraph 54 which reads:

> As an adjudicator of the particular claim before it, the investigation of practices at VIRCC that resulted in interruptions of medication would be directed to the period of Mr. Mzite's incarceration. If a discriminatory practice was found to exist at the time, it could not be assumed that any remedy individual to Mr. Mzite would have remedial consequences for others in his circumstances after a lapse of two years from the date of Mr. Mzite's release from VIRCC. The weight given to the allegation of systemic discrimination in determining the public interest in accepting this extremely late-filed complaint suggests an improper purpose, namely an investigation into the practices of the provision of medication to prisoners at VIRCC as of December 2010 and later, at least twenty months after the discriminatory acts alleged by Mr. Mzite. This, coupled with the aforementioned errors in assessing the reason for delay, I find is patently unreasonable.

[44] The Respondent submits that any developments that may or may not have occurred since the Complainant was incarcerated are of no relevance to the inquiry into the present complaint. The Tribunal should therefore not undergo any analysis of systemic discrimination because it would serve no useful purpose for the Complainant.

[45] The Respondent submits that while the specific facts of the *Desmarais* case do not give rise to a broad inquiry into CSC's practices, the *Starblanket* case, which is also presently in front of the Tribunal, might be a more appropriate case. The *Starblanket* case also deals with an intellectually disabled inmate who has spent prolonged periods of time in administrative segregation. However, unlike Mr. Desmarais, Mr. Starblanket is still currently imprisoned in a federal institution, or was until a short time ago.

(iii) The proper administration of justice favours limiting the scope of the present complaint

[46] Pursuant to sections 44 to 46 of the *Act*. The Respondent submits that, should the Tribunal accept to undergo a large inquiry into the practices and policies put into place by CSC since 2001, and considering that the Complainant is in no way affected by such policies, it would require a very serious commitment of the part of all parties and the Tribunal in terms of both financial and human resources, as disclosure would be exponentially wider and there would be more witnesses, both ordinary and expert.

(iv) The present motion could not have been brought sooner

[47] The Respondent alleges that it could not have judicially reviewed the Commission's decision to refer the complaint to the Tribunal on these grounds because the referral was made on November 2, 2010, which is two years before the *Moore* decision was rendered by the Supreme Court of Canada.

[48] The Respondent further submits that it could not have brought this motion sooner and contends that, in any event, neither the Complainant nor the Commission would be prejudiced by the few months delay between the date of the Supreme Court's decision in *Moore* and the date of this motion.

[49] It submits that a ruling on this Motion before the hearing is in the best interest of all parties and would be more advantageous than doing so after full disclosure and the commencement of the hearings.

(v) Orders sought

[50] For these reasons, the Respondent submits that the Tribunal should quash the allegations of systemic discrimination from the realm of its inquiry.

[51] The Respondent also asks that all requests for disclosure that do not relate to the specific circumstances of the complaint be dismissed, as they are outside the realm of the Tribunal's inquiry and thus, are not relevant.

[52] In the alternative, should the Tribunal remain convinced that there would be some benefit to a review of the allegations of systemic discrimination, the Respondent requests that such a review be limited to the specific periods of time for which the Complainant was detained in an institution under the supervision of CSC.

[53] In the alternative, the Respondent requests that the disclosure of evidence related to the allegations of systemic discrimination be limited to documents that address the situation that existed when the Complainant was imprisoned under the supervision of CSC, and not at any other time.

B. Commission's position

(i) The motion should not be granted in the absence of a hearing on the merits.

[54] The Commission disagrees with the Respondent's arguments that the scope of this complaint should be reduced and that it should not have to provide disclosure relating to alleged ongoing systemic discrimination. The Commission submits that the Tribunal is the master of its own proceedings, but must exercise its power cautiously when asked to dismiss a complaint or portions of a complaint without a hearing. The *CHRA* already includes a screening function, which is performed by the Commission. The Commission notes that the referral of the complaint to the Tribunal in no way restricted the scope of the complaint so as to exclude allegations of systemic discrimination and that the Tribunal's mandate was determined by the Commission's referral letter. Section 50(1) of the *CHRA* also states that the Tribunal "shall" provide parties with "full and ample opportunity" to present evidence and make arguments on the matters raised in the complaint. The Commission is of the view that in the present case, this includes allegations of systemic discrimination.

[55] The Commission submits that, as per *Buffet v. Canadian Armed Forces*, 2005 CHRT 16 (*Buffet*) and *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*FNCFCS*) aff'd in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, a situation such as this requires a full hearing into the facts. It relies on the words of Prothonotary Aronovitch in *AGC v. First Nations Child and Family Services et al.*, T-1753-08 (Amended Order – November 26, 2009) at p. 5 (aff'd *AGC v. First Nations Child and Family Caring Society et al.*, 2010 FC 343) (*FNCFCS 2009 Order*) where he held:

> "[t]he subject matter of the complaint being serious and complex, I agree that it should not be determined in summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue."

[56] The Commission argues that the present case involves a complex set of facts and law, which raise serious issues regarding the treatment of inmates with mental disabilities. The Office of the Correctional Investigator (OCI) has, over the years, consistently reported on and expressed concern about the practice of segregation as a means to manage inmates suffering from mental illness. This view has been echoed by the Federal Court of Canada, the United Nations Human Rights Committee, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the United Nations Committee Against Torture, who have declared that the solitary confinement of mentally ill offenders constitutes a form of cruel, inhumane and degrading treatment or punishment and, in some circumstances, torture. The Commission argues that to fully appreciate these issues, a hearing into the merits of the case is required.

(ii) The complaint should not be limited to the Complainant's two periods of incarceration under the care of CSC

[57] The Commission further argues that the systemic discrimination is alleged to have occurred prior to Mr. Desmarais' incarceration, during his incarceration period and to be ongoing. It is also alleged to have affected numerous other incarcerated persons under the care and control of CSC. In light of this, the Commission submits that it would not be acceptable for the complaint to be limited to the Complainant's two incarceration periods as requests the

Respondent, particularly on the preliminary basis presently sought. In this regard, the fact that the Complainant is no longer housed in a CSC facility, that there has been a significant passage of time since he has been incarcerated under the care or control of CSC and that he was not incarcerated at the time the complaint was filed is, in the Commission's view, of no importance. Furthermore, and contrary to the Respondent's submissions, the fact that he was found unfit to stand trial in 2011 is not meaningful as he could still be returned to CSC's care and control.

[58] The Commission states that it will seek to demonstrate that the entire events experienced by Mr. Desmarais result from the application of systemic policies and/or practices by CSC. To demonstrate this, the Commission intends to put forward similar factual evidence of inmates with intellectual disabilities who were placed in solitary confinement for extensive periods of time.

[59] These include the cases of Marvin Jeffrey Tekano and Ashley Smith, the *Starblanket* case referred to by the Respondent, as well as numerous cases documented by the OCI over the last decade. This would also include reports dealing with the issue of solitary confinement issued by various United Nations human rights organizations. The Commission submits that, unless the Respondent "categorically affirm[s] that the alleged practices are no longer employed and further undertakes that they will not be employed in the future, the proper administration of justice requires the Tribunal to hear the systemic allegations [...]". The Complainant is entitled to have his day in court and to present all the evidence, including any systemic evidence, in support of his allegations.

[60] The Commission is of the view that if the Respondent intends to argue that the alleged discriminatory practices no longer occur and/or that CSC's policies have changed, the Respondent is entitled to bring this evidence as part of its case. Furthermore, should Mr. Desmarais fail to demonstrate a *prima facie* case of systemic discrimination, after having had the opportunity to fully present the evidence on this at a hearing, the Tribunal could then dismiss those systemic portions of the complaint.

[61] The Commission submits that, as was the case in *Emmett v. Canada Revenue Agency*, 2013 CHRT 12 (*Emmett*), the Respondent has not discharged its burden to demonstrate that its motion should be granted.

(iii) The purpose of the *CHRA* supports dismissing the Respondent's motion

[62] The Commission is of the opinion that the Respondent's statement that the Tribunal can neither hear allegations of systemic discrimination nor award systemic remedies is a negation of the very purpose of the *CHRA* for two reasons. The first is that it would undermine the preventive purpose of the *CHRA*. This purpose is made clear in section 53(2) of the *CHRA*, which reads:

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> > (*a*) that the person cease the **discriminatory practice** and take measures, in consultation with the Commission on the general purposes of the measures, **to redress the practice or to prevent the same or a similar practice from occurring in future**, including
> >
> > (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> >
> > (ii) making an application for approval and implementing a plan under section 17;
> >
> > [Emphasis added]

[63] The Commission contends that this section expressly authorizes the Tribunal to use its remedial power to address systemic discrimination and that its interpretation is in keeping with the words of the Supreme Court in *CN. v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 (*Action Travail*) at p. 1142:

> When confronted with such a case of 'systemic discrimination', it may be that the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met.

[64] The second reason is that, if CSC's motion were granted, the Commission submits that it would be a significant waste of public resources as other potential complainants in a situation similar to that of Mr. Desmarais would have to re-litigate the same issues raised in this case.

[65] In the *FNCFCS 2009 Order*, Protonotary Aronovitch stated:

> "There is an interest however, in allowing a full and thorough examination in the specialized forums of the Tribunal, of issues which may have impact on the future ability of aboriginal peoples to make discrimination claims."

[66] The Commission argues that, similarly, should CSC's motion be granted, the ability of disabled inmates or any other vulnerable group in Canadian society to make meaningful future complaints that raise systemic issues will be seriously restricted, which will additionally undermine the purpose of the *CHRA* to prevent discriminatory practices.

[67] Finally, the Commission submits that it is not asking the Tribunal to carry out a 'Royal Commission' but rather, to carry out its statutory duty to hear and assess the evidence related to the allegations raised in this complaint, both of the individual and systemic nature. The Commission submits that the full inquiry into past and current government practices that this case requires is the very type of inquiry that this Tribunal, as a quasi-judicial specialized human rights body, is statutorily empowered to conduct. In support of its position, the Commission refers to the decisions rendered in *First Nations Child and Family Services Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 and *Hughes v. Election Canada,* 2010 CHRT 4.

(iv) The Moore decision does not apply in the manner argued by the Respondent

[68] The Commission submits that, contrary to the Respondent's submissions, the Supreme Court decision in *Moore* does not stand for the preposition that the Tribunal cannot enquire into

ongoing systemic practices of discrimination. In this decision, the Supreme Court was concerned with the lack of nexus between the actual scope of the complaint and the systemic remedies ordered. However, the Court did not state that a Tribunal must, in all cases, limit its inquiry and remedies to the individual complaint.

[69] The Commission also submits that the *Moore* decision is based on a specific set of facts and on the British Columbia Human Rights Code, and should be distinguished from the present case. While the complaint in *Moore* relied on systemic evidence, the complaint was not one of systemic discrimination (or a group complaint, as permitted under the BC Human Rights Code), but rather, a complaint about individual discrimination. Mr. Desmarais' complaint, on the other hand, clearly indicates that the complaint raises both individual and systemic allegations.

[70] Paragraph 7 of the complaint clearly states

> **The systemic nature of this discrimination** was demonstrated by Mr. Bigras, a CSC classification officer testifying in 2001 regarding admission into IPPM. Mr Bigras *who never met Roger or read any reports on him*, accurately predicted, solely on the basis of Roger's intellectual disability, Roger's fate inside CSC should he not be sent to IPPM as the judge wished, namely: segregation (solitary confinement); detention order denying statutory release; minimum security classification …
>
> (Emphasis in original)

[71] The Commission also notes that the fact that the ongoing application of a systemic discriminatory practice is the core of the complaint was also made clear in Section 40/41 of the Investigation Report, in the Commission's decision and referral letters and in the Statement of Particulars provided by the parties to the Tribunal. As such, the Commission submits that *Moore* does not apply in the manner argued by the Respondent because systemic allegations were clearly raised by the Complainant at the outset of the present proceedings. The Commission also submits that none of the decisions that have subsequently relied on or cited *Moore* have applied the type of interpretation advanced by the Respondent in its motion.

C. The Complainant's position

(i) The complaint should not be limited to the Complainant's two incarceration periods.

[72] The Complainant objects to the Respondent's motion that the time period for disclosure be restricted to the two incarceration periods of the Complainant, from 2001 to 2003, and from 2005 to 2007. To accept such a position goes against the principles of administrative fairness, which dictate that the time frames should, at the minimum, be the same for both the Complainant and the Respondent.

[73] The Complainant cannot accept that the Respondent would have access to significant documentation related to the history of Mr. Desmarais, from the time he was a small child up to 2013, while the Complainant would be restricted to a period of time that would be shorter than his period of incarceration. The consequence would be that the Complainant would not have access to important information related to CSC's practices and to the case management of Mr. Desmarais' situation.

[74] Furthermore, the Complainant submits that in the present circumstances, the starting of the "relevant period" should be set at the beginning of the discrimination, which is November 2001, when Mr. Bigras testified in front of the court and accurately forecasted the fate of Mr. Desmarais within CSC. Relevant disclosure should begin with the inclusion of all information upon which Mr. Bigras would have based his testimony.

[75] The Complainant adds that the end of the "relevant period" should be the time of the hearing, to prevent future discrimination.

(ii) A systemic inquiry is necessary and helpful to the Complainant's case

[76] One of the arguments raised in the Respondent's Motion to demonstrate that the systemic inquiry is neither necessary nor helpful is that there is no similarities between the present case with any other disabled inmate under CSC's supervision. CSC has never introduced any

evidence to support such an assertion and it can be inferred from this that no such evidence exists. The Respondent's reference to the *Starblanket* case, in paragraph 46 of its Motion, implies that both the *Desmarais* and the *Starblanket* cases have elements in common, which would further suggest that Mr. Desmarais' case is not unique.

[77] The Respondent has also alleged that the likelihood that the Complainant will return to a federal institution is low, as he has been declared unfit to stand trial. As such, the Respondent submits that Mr. Desmarais is not affected by the practices and policies put in place by CSC after the termination of his incarceration period. The Complainant disagrees; in fact, Mr. Desmarais is not presently being held at Pinel but is being detained at Rivière-des-Prairies, a provincial detention center, while he waits to return to court. While Mr. Desmarais does have an intellectual disability, which is permanent, the Respondent is wrong to equate a disability and a finding of unfitness with the conclusion that unfitness is a permanent state. A person with a disability, who is unfit, can evolve with special training to the point where they understand the judicial system sufficiently to meet the low bar that divides fitness and unfitness. In fact, on September 10, 2013, the TAQ ruled that Mr. Desmarais was fit to stand trial and returned his case to the criminal court. As such, it must be assumed that the possibility exists that Mr. Desmarais may again, at some point, be sentenced to a federal sentence. Therefore, an improvement in the practices and policies of CSC could be of great benefit to the Complainant.

[78] In addition, the complaint filed on behalf of Mr. Desmarais alleges that the root of the discrimination against him was systemically motivated, based on his disability and his family status. Human rights tribunals, in ruling on the scope of a complaint, have previously ruled that systemic evidence is admissible in the context of proving an individual complaint. In paragraph 64 of the *Moore* decision, Justice Abella stated:

> [...] the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, [...].

[79] The Complainant submits that the *Moore* decision, even though systemic discrimination was not in evidence in that case, recognized that individual complaints may introduce systemic

evidence, and that systematic remedies may naturally flow from a claim. This is in line with previous human rights jurisprudence. For example, in *Radek v. Henderson Development (Canada) Ltd. and others*, 2003 BCHRT 6750, the Tribunal stated “Despite the fact that I have found this complaint to be systemic in nature, it is still the complaint of an individual Complainant.”

(iii) The Respondent’s motion further delays the present proceedings

[80] The Complainant disagrees with the Respondent’s assertion that the motion could not have been brought at an earlier date. The *Moore* decision, which was a highly publicized decision, came out at the beginning of November 2012. The Respondent signed its Statement of Particulars on October 17, 2012 and committed itself to providing a full disclosure with a short delay. It postponed its filing many times through the subsequent months, and, at the end of May 2013, disclosure had not yet been filed. It was only during a case management call organized by the Tribunal in June 2013 that the Respondent announced its intention to make a motion to limit the time periods for disclosure.

[81] Although the systemic discrimination allegations and the intention to address them had been transparent throughout the process, CSC’s resistance to provide a full disclosure in a timely manner has resulted in a delay of close to a year.

VI. Analysis

[82] The Respondent asks the Tribunal to quash the systemic discrimination aspects of this inquiry or, in the alternative, to limit their scope to the relevant periods of time, for the above-stated reasons. In so doing, the Respondent is asking the Tribunal to considerably restrict the debate surrounding the complaint. The Commission and the Complainant both object to this motion.

[83] In light of the fact that the present Motion was brought by the Respondent, the burden lies on the Respondent to convince the Tribunal to exercise its discretion to dismiss the systemic

aspects of the present complaint. The Tribunal is master of its own proceedings (s. 50. (3) (e) of the *CHRA*) and has the ability to reject portions of a complaint. However, as stated in the Commission's Reply, when asked to do so on a preliminary basis, in the absence of a hearing, the Tribunal must exercise this power cautiously and even then, the case law is clear that this should only occur 'in the clearest of cases': *Buffet* at para. 39. The *CHRA* already includes a screening function, which is performed by the Commission.

[84] In considering such a motion, the Tribunal must have regard for the requirements of section 50(1) of the *CHRA*. This section provides that the Tribunal "shall" provide parties with a "full and ample opportunity" to present evidence and make arguments on the matters raised in the complaint. The Tribunal must also render its decision in compliance with the rules of natural justice: See *Buffet* at paras. 38-40; *FNCFCS* at paras. 125, 131-132, 140.

[85] It is with these guiding principles in mind that I must determine the present motion.

A. The Tribunal's jurisdiction to examine the systemic allegations

[86] The Tribunal's derives its authority from the *CHRA*:

> 49.(1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.
>
> (2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint […].

[87] The Commission's letter of Nov. 22, 2010, which was signed by David Langtry and mandated the Tribunal to conduct an inquiry into the complaint, clearly asked that the systemic discrimination aspect of the complaint be specifically examined:

> "[…] the issues raised by this complaint are indicative of possible systemic barriers to the treatment and rehabilitation of inmates with mental disabilities [...]"

[88] This letter also mentioned:

> "For your information, either party to a complaint can ask the Federal Court to review a Commission's decision under subsection 18(1) of the *Federal Courts Act*. That application to the Court must normally be filed within 30 days of receipt of the Commission's decision."

[89] In the following two decisions, the Tribunal explained the purpose of the Commission's letter of request:

(a) *Kanagasabapathy v. Air Canada*, 2013 CHRT 7, in which the Tribunal stated that "it is this letter of request [from the CHRC] addressed to the Chairperson that breathes life into the Tribunal's jurisdiction in regard to a complaint." *Kanagasabapathy* at para. 37;

and

(b) in *Emmett* the Tribunal held as follows: "Had the Commission decided to dismiss her allegations on the basis of age, it would have made a specific decision about it, would have provided reasons for dismissal and, therefore, would have indicated the dismissal of this portion of the complaint in its referral letter to the Tribunal.": *Emmett* at para. 40.

[90] In the case at hand, as well as in the *Emmett* case, not only did the Commission not restrict any part of the complaint, but it specifically asked the Tribunal to verify if the issues raised by the complaint "are indicative of possible systemic barriers to the treatment and rehabilitation of inmates with mental disabilities". Consequently, I conclude that the Commission intended for the Tribunal to investigate the entirety of the complaint by Mr. Desmarais, having special consideration for its systemic component. The Tribunal is not at liberty to contest or review the Commission's decision in this regard; this purview belongs to the Federal Court. However, in this instance, neither party filed a judicial review of this decision.

[91] The *CHRA* also explicitly provides the Tribunal, upon proper referral of a complaint, with the necessary authority to correct and prevent discriminatory practices such as the ones alleged by Mr. Desmarais. This section reads as follows:

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, **to redress the practice or to prevent the same or a similar practice from occurring** in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17.
>
> [Emphasis added]

[92] These powers have been granted to the Tribunal ensure the application of the *CHRA*; their purpose is not to punish but to *prevent* discrimination. As stated in *Action Travail* at p. 1134:

> In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", **the Act seeks to prevent all "discriminatory practices"** based, *inter alia,* on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to **prevent discrimination**.
>
> [Emphasis added]

(i) The *Moore* decision

[93] The Respondent's argues that while the Tribunal possesses the jurisdiction to examine allegations of systemic discrimination, the *Moore* decision precludes this examination in the present case as there is an absence of *nexus* between these allegations and the complaint.

[94] In the *Moore* decision, while the Court upheld the Tribunal's finding of discrimination against Jeffrey Moore and the finding of the school District's liability in this regard, it found that the evidence which formed the basis of the liability of the Province was too remote to demonstrate discrimination against the Complainant. In so doing, the Court clarified that systemic discrimination must relate to the complaint as framed by the Complainant which, in that case, was made on behalf of Jeffrey Moore. The Court rejected the Tribunal's binary approach to the discrimination (individual and systemic), stating that remedies ordered by a Tribunal 'must flow from the claim': See *Moore* at paras. 58 – 71.

[95] Despite the Respondent's submissions to the contrary, I do not interpret this decision as precluding the examination of systemic discrimination in the present case. Contrary to the complaint in *Moore*, which was focused on Jeffrey, the complaint of Mr. Desmarais clearly alleges discrimination of a systemic nature and was referred to the Tribunal in this manner. Paragraph 7 of the complaint reads:

> **The systemic nature of this discrimination** was demonstrated by Mr. Bigras, a CSC classification officer testifying in 2001 regarding admission into IPPM. Mr. Bigras *who never met Roger or read any reports on him*, accurately predicted, solely on the basis of Roger's intellectual disability, Roger's fate inside CSC should he not be sent to IPPM as the judge wished, namely: segregation [solitary conferment]; detention order denying statutory release; maximum security classification…
>
> [Emphasis in original]

[96] Combined with the Commission's referral letter to the Tribunal which, as previously stated, clearly raises allegations of systemic discrimination, I am of the view that these

allegations are properly before the Tribunal in this case. This is contrasted with the situation in *Moore* where the Court found that the scope of the inquiry and the resulting remedial orders had been expanded beyond Jeffrey's actual complaints during the judicial review stage: *Moore* at paras 68 -69.

[97] It follows that, in the case at hand, were the Tribunal to consider evidence of systemic discrimination and order systemic remedies in the event that it finds the complaint substantiated, this would be in keeping with the Court's decision.

[98] The Respondent relies on the *Mzite* decision in support of its interpretation of the *Moore* decision. The *Mzite* decision dealt with a British Columbia Human Rights Tribunal decision to accept the Mr. Mzite's complaint despite the fact that it was outside of the six-month limitation period provided at s. 8(1)(b) of the *Human Rights Code*. The Tribunal found that, in light of the novelty of the complaint and its systemic component, it was in the public interest, pursuant to s. 22(3)(a) of the *Code*, to accept the complaint despite the delay. On judicial review, the Supreme Court of British Columbia determined that the Tribunal had erred in this regard. In the Court's view, a decision on Mr. Mzite's complaint would have been limited to his incarceration period which had ended twenty two months earlier and, as such, would not benefit the 'public interest' as per s. 22(3)(a) in a manner which supported accepting the complaint.

[99] With respect, I do not find this decision helpful with regard to the present motion. The Court does appear to limit the inquiry into the complaint to Mr. Mzite's incarceration period and notes that any resulting remedy would have limited value to others in light of the delay. However, this statement is made in view of determining whether the complaint should be accepted well past the expiry of the limitation period due to the public interest as per the *Code*. I do not agree that this constitutes an interpretation of the *Moore* decision which ought to be transposed to the present context. I note, in addition, that this decision is in no way binding on this Tribunal.

(ii) Limiting the scope of the hearing and the disclosure to the Complainant's periods of incarceration

[100] The Respondent further requests that the hearing and the disclosure be restricted mainly to the first period of incarceration, as the allegations of discrimination during the second period of incarceration only pertain to a limited period of time. The Respondent contends that since Mr. Desmarais is no longer incarcerated, and is unlikely to be under the care of CSC in the future, to extend the hearing and the disclosure to dates beyond this period of time would go beyond the scope of the complaint and run contrary to the *Moore* decision.

[101] It is worth noting that the Court in *Moore* overturned the Tribunal's decision to award a number of systemic *remedies*, however it did not preclude the Tribunal from considering systemic *evidence* in its decision to substantiate the complaint. In fact the Court explicitly recognized the Tribunal's ability to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination: *Moore* at para. 63.

[102] The Respondent seeks to strike the allegations of systemic discrimination outside of the Complainant's periods of incarceration with CSC on a *preliminary* basis, a discretion which, as stated above, the Tribunal must exercise only in the 'clearest of cases'. Were the Tribunal to grant the motion as requested, this would prevent the Complainant from relying on any evidence of systemic discrimination at CSC outside of the periods of his incarceration to support his own claim of discrimination. The Court in *Moore* explicitly recognizes that systemic evidence 'can be instrumental in establishing a human rights complaint': *Moore* at para. 65. There is no question that evidence of systemic discrimination against intellectually disabled inmates by the Respondent both during and outside of Mr. Desmarais' periods of incarceration may support the Complainant's individual complaint of discrimination.

[103] The Respondent also argues that, like Jeffrey Moore, who had finished high school and would not re-enter the public school education system, Mr. Desmarais is no longer under the supervision of CSC and, having been declared unfit to stand trial, will not be in the future.

Therefore, as found in the *Moore* case, any remedy going beyond the period of time relevant to the individual complaint reaches beyond its scope.

[104] As previously stated, the present motion pertains to the disclosure and scope of the hearing, not to any potential future systemic remedies. Furthermore, Mr. Desmarais has been reevaluated and was recently declared fit to stand trial. He may therefore, in the future, be once again placed under the supervision of CSC. Consequently, the current practices and policies of CSC with regard to intellectually disabled individuals like Mr. Desmarais are relevant to the Complainant. This supports their inclusion as part of the disclosure and the hearing.

[105] Moreover, in the event that the complaint is found substantiated, it will be incumbent upon the Tribunal, pursuant to section 53(2)(a), to fashion a remedy designed 'to prevent the same or a similar practice from occurring in the future'. With no knowledge of CSC's current practices and policies with regard to intellectually disabled inmates, the Tribunal will not be in a position to craft or implement any such remedy, thereby frustrating the very purpose of the *CHRA*.

[106] I consider it appropriate to make a reference to the pronouncement of the Tribunal on this same issue in *Emmett*, which is indicative of the proper course to take:

> At this stage of the proceedings, prior to having received any evidence on the merits of the Complainant's allegations, I see no basis upon which I can dismiss the Complainant's claims for relief postdating the time period of her complaint. I was also not provided with any authority, whether in the Act or otherwise, that restricts the period over which complainants can claim relief. (...) Ultimately, the Complainant still has to establish a link between the alleged discriminatory practices and the loss she is claiming. If there is no link, and the remedies requested are only related to the retaliation complaints, the remedy will not be awarded. The Respondent will have a full and ample opportunity to present its arguments in this regard at the hearing of this matter.

[107] As in *Emmett*, I have not been provided with any authority that supports restricting the period over which the Complainant can claim relief.

[108] For these reasons, I determined that the relevant period for the submission of the disclosure of documents and for the scope of the hearing will start in November 2001, on the day Mr. Bigras testified and forecasted the Complainant's future at CSC, and end on the day of the release of the present decision.

(iii) The proper administration of justice

[109] The Respondent argued that authorizing the Complainant to go ahead with its allegations of systemic discrimination would increase costs for all parties and the Tribunal due to the large amount of disclosure required. While these predictions are always difficult to make, I am of the view that to determine these issues in a manner that impacts the Complainant as well as future complainants like him would avoid a multiplicity of cases and result in savings in costs for all involved. In my view, this would better serve the interest of justice.

[110] The Respondent added that the Desmarais case was not as appropriate and as justified as the *Starblanket* case, also presently before the Tribunal, for a study of systemic discrimination regarding inmates with intellectual/mental disability. I cannot respond to such an assertion, since I have authority over the Desmarais case, but no authority over any other case managed by other members of the Tribunal.

(iv) Timing of this Motion

[111] Taking into account what has been said above, I do not consider it to be necessary to elaborate on this matter.

VII. Conclusion and Decision

[112] The present case involves a complex set of facts, as can be seen in paragraphs 8 to 32 above, and also of law, which raises issues directly related to the Respondent's policies and practices regarding the treatment of inmates with mental disabilities. Combined with the caution with which the Tribunal must proceed in dismissing aspects of a complaint on a preliminary

basis, and the clear wording of the Complaint Form and Referral Letter to the Tribunal, I am of the view that the allegations of systemic discrimination can only be determined once parties have had the opportunity to fully present the evidence on this matter at a hearing. This view is supported by a number of cases already mentioned: See for example *Buffet* and *FNCFCS*.

[113] The Tribunal still has the ability to dismiss the systemic portions of the complaint as part of its remedial discretion. This discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (*Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37) and reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[114] For these reasons, my decision is the following:

The Motion is quashed;

The disclosure period shall start on November 2001, the day Mr. Bigras testified, and shall end the day the present decision is rendered.

Signed by

Réjean Bélanger
Tribunal Member

Ottawa, Ontario
February 25, 2014