Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Clayton Starblanket

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

File No.: T1754/10911
Member: Sophie Marchildon
Date: October 2, 2014
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I. Complaint & Motion

[1] The Complainant, Mr. Clayton Starblanket, is a federal prisoner in the custody of Correctional Services Canada ("CSC"), the Respondent in this complaint. The Complainant alleges he suffers from multiple mental disabilities. He claims the Respondent has pursued policies or practices that are discriminatory to prisoners with mental disabilities and that it does not adequately accommodate their needs. On this basis, the Complainant filed a human rights complaint on March 19, 2010, alleging the Respondent has engaged in a discriminatory practice, within the meaning of section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *CHRA*], on the basis of his disability.

[2] On December 1, 2011, pursuant to section 49 of the *CHRA*, the Commission referred the complaint to the Tribunal for an inquiry. The Commission is participating at the hearing representing the public interest and alleges the Respondent has engaged in systemic discrimination towards prisoners with mental disabilities.

[3] On May 30, 2014, the Commission filed a motion to determine the scope of the complaint before the Tribunal as it is a contentious issue between the parties. It also requests further disclosure from the Respondent.

[4] In support of its motion, on September 12, 2014, the Commission also sought leave to file a public fatality inquiry report related to the death of an inmate, as an additional exhibit to its motion.

[5] The Commission's motion, and its corresponding request for leave to file an additional exhibit to this motion, is the subject of the present ruling.

II. Analysis

[6] The Commission's motion asks the Respondent to disclose certain documents from 1998 to 2007 and from 2013 to present. In the same vein, it requests that the Tribunal affirm that the

period at issue in the complaint is from November 1998 to present: the entire period of the Complainant's federal incarcerations.

[7] In addition, the Commission requests the disclosure of:

- additional materials mentioned in documents already disclosed, but which have not been disclosed;
- unredacted versions of certain documents already disclosed;
- complete and legible versions of certain documents already disclosed; and,
- statistical information on segregated inmates throughout the period at issue.

[8] Finally, the Commission requests an order requiring the Respondent to provide electronic versions of all disclosure materials.

[9] The Complainant supports the Commission's motion for disclosure and adopts all the arguments it has put forth.

A. Scope of the complaint & documents from 1998 to 2007 and from 2013 to present

[10] According to the Commission, the Complainant is presently serving his second federal sentence. The first occurred from November 1998 to June 2002. His current federal incarceration began in July 2003 and is ongoing. The Commission submits that, while the complaint focuses on allegations related to the Complainant's incarceration during early 2010, an examination of the materials disclosed so far indicates that the issues complained of also occurred during his first federal incarceration and continue to this day. According to the Commission, the Complainant's first incarceration also included incidents of self-harm and attempted suicide by the Complainant; the use of segregation by the Respondent towards the Complainant; and, the transfer of the Complainant between penitentiaries and treatment centres.

[11] The Commission also takes the position that the facts related to this complaint raise ongoing issues of systemic discrimination regarding inmates who suffer from mental disabilities. The systemic allegations the Commission will focus on relate to: (1) the appropriate placement of inmates with mental disabilities (i.e. treatment/psychiatric centres versus penitentiaries; (2) the placement of inmates with mental disabilities in segregation; (3) the treatment and accommodation of chronic self harming inmates; and (4) access to programming for inmates with mental disabilities.

[12] According to the Commission, limiting the examination of the present complaint to a three month period in 2010 would artificially sever the examination of allegations that occurred before and after this period. Therefore, in order to fully hear and assess the evidence related to the allegations raised in the complaint, both individual and systemic, the Commission requests that the Tribunal affirm that the period at issue is from November 1998 to present. Given the Respondent has already disclosed materials regarding the Complainant's incarceration from 2007 to the end of 2012, the Commission also requests the following information for the periods of 1998 to 2007 and from 2013 to present:

(1) Records indentifying institutions the Complainant has been housed in throughout the periods of incarceration with CSC, and transfers within and between institutions.

(2) Records identifying the types and conditions of confinement throughout the periods of incarceration with CSC (including access to and completion of programming as part of the Complainant's correctional plan, as well as every instance he was placed in formal segregation and placed on segregation or isolation status, including the exact periods of such placements).

(3) Records identifying every incident of self harm or suicide attempt on record in addition to related psychological reports.

[13] The Commission claims it may be possible for the Respondent to provide this information in a simplified format through its Offender Management System ("OMS"). In this regard, the Commission has sought leave to file an additional exhibit to its motion: a public fatality inquiry report related to the death of an inmate. According to the Commission, the report

provides a useful definition to assist the Tribunal and the parties to better understand what the OMS is and its relevance to disclosure matters.

[14] For its part, the Respondent submits it has already provided the Complainant's OMS information for the relevant period of the complaint. The Respondent contends that the Tribunal's role is to adjudicate the facts in dispute between the parties, and the facts in dispute between the parties must be set out in the pleadings. In this case, the Respondent contends the Statement of Particulars ("SOP") of both the Commission and the Complainant contain no facts whatsoever dealing with any specific incident prior to 2009. If the scope of the complaint now includes incidents prior to 2009, the Respondent claims it would be prejudiced because it does not know the case it must meet. The Respondent argues it would also be prejudiced by the passage of time (faded memories, forgotten details and the unavailability of witnesses).

[15] The Respondent also argues that, prior to 2007, the Complainant was at other institutions in other provinces. Therefore, the Respondent would have to locate witnesses in those other provinces, which it claims will unduly and unnecessarily complicate the process. The Respondent adds that potentially the Tribunal and witnesses might want to view the facilities and finally, that there would be tens of thousands of additional documents to disclose. In the Respondent's view, these factors will add considerable practical difficulties to this case.

[16] In addition, the Respondent claims that expanding the complaint at this stage to include years that were not in the original complaint, not part of the Commission's investigation and not part of the referral to the Tribunal, runs contrary to the complaint resolution process set out in the *CHRA*, including the expeditious processing of complaints. The Respondent adds that human rights complaints should not be conducted like a commission of inquiry.

[17] Finally, with regard to the Commission's request to file the public fatality inquiry report, the Respondent objects to this document's admissibility for the purposes of this motion. In its view, there is no issue as to what the OMS is. Even if there was an issue, there is an explanation of the OMS on the Respondent's website. Rather, in the Respondent's view, the Commission is

attempting to file evidence of an inmate who committed suicide while in the Respondent's custody in order to cast the Respondent in a negative light. As a result, the Respondent views the report, without any facts or context, as highly prejudicial and as raising privacy concerns as it deals with another inmate – not the Complainant.

(i) Request to file the public fatality inquiry report

[18] In its September 12, 2014 request for leave to file the public fatality inquiry report, the Commission actually forwarded the document to the Tribunal. In a subsequent email dated September 25, 2014, the Commission explained that the report was intended for the parties only and apologized for the error in sending it to the Tribunal as well. However, at that point, the Tribunal had already seen the report. Apart from the aspect of the report that discusses the OMS, the contents of the report are irrelevant for the purposes of this motion. In this regard, I agree with the Respondent that the manner in which the report came before the Tribunal was prejudicial to it. Therefore, the Commission's request to file the public fatality inquiry report as part of the current motion is denied.

[19] The public fatality inquiry report was not considered in deciding this motion.

(ii) Scope of the complaint

[20] The Commission relies on the Tribunal's ruling in *Desmarais v. Correctional Service of Canada*, 2014 CHRT 5 [*Desmarais*], as an authority for its proposition that the scope of this complaint should be from 1998 to present. In that case, allegations of discrimination are again made against the Respondent with regard to its treatment of inmates with mental disabilities. Mr. Desmarais alleges that this discrimination occurred, on a continuing basis, during two different federal sentences served from 2001 to 2003 and from 2005 to 2007. In addition, Mr. Desmarais alleges the discrimination he endured is a reflection of systemic issues. The Respondent brought a motion to strike the systemic discrimination aspects of the inquiry or, in the alternative, limit their scope to Mr. Desmarais' periods of incarceration, i.e. from 2001 to 2003 and from 2004 to 2006.

[21] The Tribunal found the allegations of systemic discrimination could only be determined following the presentation of evidence at the hearing. There was no reason to dismiss these allegations on a preliminary basis. Furthermore, the Tribunal found no reason to limit the scope of the systemic allegations to the periods of incarceration. Relying on the Supreme Court of Canada decision in *Moore v. British Columbia (Education)*, 2012 SCC 61 [*Moore*], the Tribunal reasoned that "evidence of systemic discrimination against intellectually disabled inmates by the Respondent both during and outside of Mr. Desmarais' period of incarceration may support the Complainant's individual complaint of discrimination" (*Desmarais*, at para. 102).

[22] The question the Tribunal had to answer in *Desmarais* is similar to the current one and, likewise, I see no reason to limit the scope of this inquiry to the Complainant's second period of incarceration. While the material facts alleged in the complaint form and in the SOPs of both the Complainant and the Commission focus on events that occurred during the second period of incarceration in 2009-2010, the Complainant's prior incarceration experience is raised as relevant context to his treatment during his second period of incarceration. In fact, the Complainant and the Commission suggest that the Complainant's treatment during his first incarceration mirrors his treatment during the second period.

[23] The current motion does not seek to amend the complaint or have new consequences or liability attached to events occurring during the Complainant's first incarceration period. Rather, my understanding of the Commission's motion is that it is asking the Tribunal to confirm that events prior to and following the period of 2009-2010 be considered in the determination of what consequences, if any, should be attached to the events forming the subject matter of the complaint (2009-2010).

[24] In my view, to consider events prior to and following the period of 2009-2010 in the determination of this complaint is supported by the Tribunal's need to fully understand the context in which the Complainant entered the correctional system and how he navigated through it. In its SOP, the Respondent refers to the Complainant as a dangerous offender with a history of violent behaviours (see *Statement of Particulars of the Respondent*, September 19, 2012, at

paras. 3 and 23). Focusing on the period of 2009-2010 and basing a hearing only on that time frame would leave out potentially relevant context for all parties. In the end, this could also lead to an unjust outcome, whether the complaint is substantiated or not. The Complainant came into the correctional system in 1998 and came back again in 2003, and is currently still in that system; surely, his criminal and medical history as a whole is paramount to these proceedings and must be viewed as such. Focusing simply on one portion of the Complainant's incarceration would lack context and could lead to inaccurate findings. I note that the Respondent made a similar argument regarding context and facts with regard to the Commission's request to introduce the public fatality inquiry report.

[25] I also distinguish these proceedings from a complainant filing a complaint and constantly adding new allegations to the complaint, making it a moving target and therefore impossible for the Respondent to know the case it has to meet. In these proceedings, this is not the case; the allegations, including the sections of the *CHRA* and the prohibited grounds of discrimination alleged, remain the same. The Commission's scope request does not create a "substantially new complaint" (see *Canada (Attorney General) v. Parent*, 2006 FC 1313; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1; and, *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT)).

[26] In its submissions on this motion, the Commission argues that it was during the Complainant's first incarceration (1998-2002) that he was identified as having a history of self harm and of being suicidal (see *Written Submissions of the Canadian Human Rights Commission (motion on the scope of disclosure and of the complaint)*, May 29, 2014, at para. 8). During this period, the Commission alleges the Complainant self harmed on 25 occasions and attempted suicide 4 times.

[27] In its SOP, the Respondent also refers to the Complainant's psychological, medical and criminal history, especially during his first incarceration period, to give context and background to its actions during the second period of incarceration. The Respondent also reproduced extracts

of criminal profile reports as early as 1993 in its SOP to provide context. Furthermore, the following extracts from the Respondent's SOP are particularly relevant:

> 3. This is a complaint by an inmate with a lengthy history of violence, numerous criminal convictions and a history of engaging in serious self-harm. The Complainant's volatile behavior presents a difficult challenge for CSC to reasonably accommodate without undue hardship.
>
> 4. CSC denies any discrimination and says that Mr. Starblanket's constant threats and acts of violence pose a serious risk to safety of staff, other inmates and Mr. Starblanket himself. Violence and serious harm cannot be tolerated under any circumstances.
>
> 15. [...] In other words, while the Complaint deals with 2009-2010, the very same behavior can be observed in the years before this period.
>
> 23. Mr. Starblanket's criminal history is very lengthy and is relevant to this Complaint.
>
> 30. In 2007 however, after seven years in the Prairies, his behavior escalated to the point that he was involuntarily transferred to the Special Handling Unit ("SHU") in Quebec, which is classified as a super-maximum institution.
>
> (*Statement of Particulars of the Respondent*, September 19, 2012, at paras. 3-4, 15, 23 and 30)

[28] The original complaint and the Complainant's and the Commission's SOPs also allege an ongoing systemic failure to accommodate prisoners with disabilities, including the Complainant. The Complainant and the Commission request remedies to address this alleged systemic discrimination. In order to properly remedy any alleged systemic discrimination, it is necessary for the Tribunal to understand not only what has caused the alleged systemic discrimination, but whether that cause still exists. In this regard, I would also note the Respondent's statement in *Desmarais* 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" (*Desmarais*, at para. 110).

[29] While it may not be necessary to prove that any alleged systemic discrimination existed over a long period of time, or is rooted in history, for the Complainant or the Commission to make their case, this information may give context and provide for a better understanding of the Complainant's current situation. In any event, it is up to the Complainant and the Commission to decide how they want to present their case and I see no reason at this stage to restrict the scope of the complaint to the second incarceration period.

[30] Therefore, considering the parties' submissions to date and the nature of the complaint, I am of the view that the scope of this complaint can include argument and evidence related to the entire period of the Complainant's incarceration with the Respondent: from 1998 to present. This does not amend or enlarge the scope of the complaint, nor does it put the Tribunal in the position of a commission of inquiry. Rather, it confirms each party's ability to fully and amply present their case. Excluding the first incarceration period from the scope of the complaint or ignoring the Complainant's current circumstances could lead to an artificial fact-finding process. Seemingly important elements of the case, as argued by the Commission above, could be left out. As also mentioned above, it would seem that aspects of the Complainant's first incarceration period are of importance to the Respondent's case as well. Consequently, in the search for truth in this matter, I believe it is important for the Tribunal to properly understand the circumstances of the Complainant's incarceration as a whole.

(iii) Disclosure of documents from 1998 to 2007 and from 2013 to present

[31] In the same vein, I find the information requested by Commission for the periods of 1998 to 2007 and from 2013 to present to be arguably relevant to the scope of the complaint. The Commission's request for records indentifying institutions the Complainant has been housed in throughout his periods of incarceration and transfers within and between those institutions and records identifying the types and conditions of confinement throughout the Complainant's periods of incarceration with the Respondent relate directly to the allegations of systemic discrimination, including the appropriate placement of inmates with mental disabilities and the use of segregation on inmates with mental disabilities. Moreover, as mentioned above, both the Complainant and the Commission seek systemic remedies in this case. Therefore, the records

requested by the Commission amount to a reasonable and legitimate request for information related to the issues and remedies in this case. As a result, the Complainant's institutional and confinement records, as requested by the Commission, must be disclosed by the Respondent.

[32] The records identifying every incident of self harm or suicide attempt on record, in addition to related psychological reports, from 1998 to 2007 and from 2013 to present, are also potentially relevant in this case. As stated above, the Commission's submissions on this motion refer to the alleged fact that it was during the Complainant's first incarceration that he was identified as having a history of self harm and of being suicidal. In this regard, the Respondent also refers to the Complainant's psychological and medical history in its SOP, especially during his first incarceration period, to give context and background to its actions during the second period of incarceration. Therefore, in my view, records identifying every incident of self harm or suicide attempt on record, in addition to related psychological reports, from 1998 to 2007 and from 2013 to present, are potentially relevant in this case.

[33] If possible, the disclosure of documents from 1998 to 2007 and from 2013 to present should be provided through the Respondent's OMS. The Respondent is directed to provide this disclosure by December 2, 2014.

(iv) Addressing the potential prejudice to the Respondent

[34] If the scope of the complaint is now to include incidents prior to 2009, the Respondent claims it would be prejudiced because it does not know the case it must meet. The Respondent submits it would also be prejudiced by the passage of time (faded memories, forgotten details and the unavailability of witnesses).

[35] As stated above, the focus of the complaint thus far has been on the 2009-2010 period of the Complainant's second incarceration. Thus, I understand the Respondent raising a prejudice argument with regard to the scope of the complaint. However, as also mentioned above, the current motion does not seek to amend the complaint or have new consequences or liability attached to events occurring during the Complainant's first incarceration period. Rather, my

understanding of the Commission's motion is that it is asking the Tribunal to confirm that events prior to and following the period of 2009-2010 be considered in the determination of what consequences, if any, should be attached to the events forming the subject matter of the complaint (2009-2010). Therefore, I believe the potential prejudice claimed by the Respondent can be addressed by the filing of amended Statements of Particulars. Therein, the Complainant and the Commission should detail the case they intend to present before the Tribunal, including what aspects of the Complainant's first incarceration period will be presented at the hearing of this matter. This will allow the Respondent to know the case it has to meet and to respond accordingly.

[36] Furthermore, the Respondent's argument regarding the unavailability of witnesses and their recollection of events, and the other potential practical difficulties it raises with regard to scope, are best assessed after amended particulars have been submitted and, even more so, when the case is presented at the hearing. At that point, the Tribunal and the Respondent will be in a better position to assess whether witnesses are in fact available and, if so, their recollection of events. This approach is similar to the one taken by the Tribunal in *Uzoaba v. Canada (Correctional Service)*, 1994 CanLII 1636 (CHRT), at pp. 4-7, where the Tribunal was dealing with a situation analogous to the present one.

[37] The other potential practical difficulties, such as the potential for viewing facilities and the amount of documents to be disclosed, are speculative at this time. In this regard, I note that the Commission's disclosure request was limited to specific categories of documents (see for example paragraph 12) and was not in the nature of a fishing expedition. However, if such practical difficulties do arise, I encourage the Respondent to raise them as soon as possible.

[38] I would also note that despite the Tribunal's determination that the scope of the complaint can include argument and evidence related to the entire period of the Complainant's incarceration, and the related disclosure of information in this regard, that does not necessarily mean that this information is admissible at the hearing or what weight, if any, this information

will have on a final determination in this matter. Those questions are best addressed during and/or after the hearing.

[39] Therefore, I believe any potential prejudice to the Respondent can be addressed through the filing of amended Statements of Particulars and properly assessing the availability, admissibility and weight of the evidence presented at the hearing. A schedule for amended Statements of Particulars will be set following the disclosure of the additional documentation directed in this ruling.

B. Additional materials mentioned in documents already disclosed

[40] The Commission requests the disclosure of 75 additional items, the existence of which was revealed through a review of certain items already disclosed. Of the documents requested, 33 of the items relate to specific documents, while the other items ask for details related to an incident or period of time by way of documentation.

[41] For many of the documents, the Respondent states the requests fall outside of the relevant date range pursuant to its submissions on the scope of the complaint above. For the other items asking for details related to an incident or period of time, the Respondent submits its obligation is to disclose documents, not details. In addition, it states that questions concerning additional details are better addressed through questions of witnesses at the hearing. For the remaining documents requested by the Commission, the Respondent agrees to either search for additional documentation or point to documents already disclosed.

[42] As I have decided above that documents from 1998 to 2007 and from 2013 to present should be disclosed, any additional materials that relate to this request should now be disclosed. For the remaining documents, the Respondent has agreed to search for additional documentation or point to documents already disclosed. The Respondent is directed to respond to this request for additional documentation by November 2, 2014.

C. Unredacted versions of certain documents already disclosed

[43] The Commission has concerns with redactions in certain documents related to locations (within institutions, specific institutions generally, and even court houses), staff names and incidents involving staff, psychological matters and other issues that go to the heart of the issues raised in this matter. The Commission adds that this is especially the case when duplicate versions of redacted documents are not redacted or contain different redactions, thus indicating inconsistencies in the use of redactions. However, the Commission does recognize that the names of other inmates, informers or otherwise, is not required for the purposes of this matter and could therefore remain redacted. As a result, the Commission requests the disclosure of the unredacted versions of certain documents, with the exception of the names of other inmates.

[44] The Respondent categorizes its response to the documents requested by the Commission into four groups: (1) irrelevant documents dealing with other inmates that were misfiled in the Complainant's files; (2) duplicate documents that were redacted differently by the Respondent; (3) documents where it will agree to remove or reduce redactions; and (4) documents where it asserts public interest immunity.

[45] For the first category, the Respondent explains that it disclosed documents that were inadvertently misfiled in the Complainant's files, but which are irrelevant as they concern other inmates. According to the Respondent, the only reason they were listed is because it was not possible to have reviewed these documents before listing them given the volume of documents and the timeframe for disclosure. It claims it simply listed every document contained in the Complainant's files and then, before producing the documents, undertook the review and redacted that which needed to be redacted. So as to not disrupt the numbering of the documents by removing them from the list, the Respondent indicates that it decided to simply redact the entire document.

[46] According to the Respondent, the second category of redacted materials are documents which are duplicated, but with fewer or no redactions. The Respondent explains that these documents were reviewed by separate employees and despite efforts to be consistent, redactions

in some duplicate documents were inconsistent. The Respondent submits the Commission can simply rely on the version with less or no redactions.

[47] In the third category of redacted documents, the Respondent agrees to remove or substantially reduce the redactions. It trusts that these changes will be satisfactory to the Commission; if not, then the Respondent takes the positions that further submissions may be necessary.

[48] From the Respondent's perspective, it is the fourth category of redacted documents that is controversial with respect to redactions and for which it is unwilling to remove redactions. The Respondent submits that these seven documents generally deal with the identity and surrounding circumstances of informants and incompatibles. In its view, the law affords significant protection to informants in the criminal justice system, including an informer privilege. It has provided a written certification, pursuant to section 37 of the *Canada Evidence Act*, that the information should not be disclosed on the grounds of public interest immunity. Section 37 of the *Canada Evidence Act* provides as follows:

> 37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.
>
> (1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.
>
> (2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.
>
> (3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by
>
> > (a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if

> the person or body is not a court established under a law of a province; or
>
> (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

[49] In the same vein, the Respondent also relies on section 58 of the *CHRA*, which provides :

> 58. (1) Subject to subsection (2), if an investigator or a member or panel of the Tribunal requires the disclosure of any information and a minister of the Crown or any other interested person objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter and the Court may take any action that it considers appropriate.
>
> (2) An objection to disclosure shall be determined in accordance with the *Canada Evidence Act* if
>
> > (a) under subsection (1), a minister of the Crown or other official objects to the disclosure in accordance with sections 37 to 37.3 or section 39 of that Act;
> >
> > (b) within 90 days after the day on which the Commission applies to the Federal Court, a minister of the Crown or other official objects to the disclosure in accordance with sections 37 to 37.3 or section 39 of that Act; or
> >
> > (c) at any time, an objection to the disclosure is made, or a certificate is issued, in accordance with sections 38 to 38.13 of that Act.

As the redacted documents engage section 37 of the *Canada Evidence Act* and section 58 of the *CHRA*, the Respondent argues it is beyond the jurisdiction of the Tribunal to order the redactions be removed. Given these provisions, the Respondent submits it is the Federal Court, and not the Tribunal, that has jurisdiction with respect to the disclosure of information over which a section 37 *Canada Evidence Act* privilege is claimed.

[50] Despite the Respondent's written certifications, the Commission challenges the privilege claimed. It argues the Tribunal has the authority to decide whether and to what extent specific

privileges apply under the common law. As a result, it contends that it would be preferable to deal with the claimed privilege first under the common law, rather than further delay proceedings by invoking the process set out in the *Canada Evidence Act*. For this proposition, the Commission relies on the Tribunal's ruling in *Public Service Alliance of Canada v. Canada (Minister of Personnel for the Government of the Northwest Territories)*, 2000 CanLII 28887 (CHRT) [*PSAC*].

[51] With regard to the first three categories of documents identified by the Respondent, the Respondent's explanations seem reasonable and acceptable. Should there still be any outstanding issues with these documents, the Complainant or the Commission can raise the matter at the next conference call.

[52] For the fourth category of documents, the Respondent has certified in writing, under section 37 of the *Canada Evidence Act*, that 7 documents should not be disclosed on the grounds of a specified public interest. Having done so, in my view, section 37 of the *Canada Evidence Act* and section 58 of the *CHRA* are clear: the Tribunal does not have the jurisdiction to deal with the Commission's objections to the privilege claimed by the Respondent over these 7 documents. The proper recourse for the Commission, if it wishes to pursue the matter, is to make an application to the Federal Court.

[53] While the Commission relies on the *PSAC* ruling for the proposition that the Tribunal should determine the privilege issue first, before recourse to the Federal Court, it should be noted that the *PSAC* ruling was set aside on judicial review (*Canada (Human Rights Commission) v. Northwest Territories*, 2000 CanLII 16337 (FC) [*PSAC (FC)*]; aff'd on other grounds 2001 FCA 259). The Federal Court found the Tribunal had erred in law in its determination that it had authority to determine objections to production of government information on grounds of public interest immunity when claimed by the federal government or one of its agencies. According to the Federal Court, "An objection of that sort is to be dealt with pursuant to ss. 37 to 39 of the [*Canada Evidence Act*]..." and, consequently, the Tribunal has no authority but to leave the determination to the Federal Court (*PSAC (FC)*, at paras. 35 and 40). The Tribunal has also taken

this approach in *Warman v. Lemire*, 2007 CHRT 21. Therefore, the Tribunal declines jurisdiction to deal with the Commission's objections regarding the section 37 *Canada Evidence Act* privilege the Respondent claims over 7 documents.

D. Complete and legible versions of certain documents already disclosed

[54] The Commission submits that Respondent counsel committed to resending these documents in March 2014; however, given the these materials have yet to be received and the longstanding and continued difficulties encountered on disclosure in this matter, the Commission requests that the Tribunal make an order that the items be disclosed.

[55] The Respondent states it is working on getting better copies of documents where available, some of which it claims to have already provided.

[56] Given the delay in providing legible copies of the documents requested by the Commission where available, the Tribunal directs the Respondent to provide the documents by, November 2, 2014.

E. Statistical information on segregated inmates throughout the period at issue

[57] According to the Commission, the placement of mentally disabled inmates is one of the central issues in this case, both in terms of individual and systemic allegations. Therefore, it submits that statistical information on segregated inmates throughout the period at issue relates directly to the dispute, and also goes towards demonstrating patterns of discrimination, both on an individual and a systemic basis.

[58] To the extent that statistics are relevant to the issues raised, counsel for the Respondent has requested these statistics from the CSC and states he will forward them to all parties.

[59] Given that this issue appears to be resolved, it will be discussed at the next conference call and, if statistics have not been provided by then, the Tribunal will set a deadline for their disclosure.

F. Electronic versions of disclosure materials

[60] According to the Commission, since the Tribunal's October 2013 ruling rejecting the Respondent's motion for electronic evidence at the hearing (*Starblanket v. Correctional Service of Canada*, 2013 CHRT 28 [*Starblanket (e-hearing)*], counsel for the Respondent has refused to provide any further disclosure in electronic format. The Commission adds that this is the case despite Respondent counsel already having electronic versions of the disclosure materials in his possession. In the Commission's view, procedural fairness dictates not only that disclosure be provided, but also that it be provided in a workable format that can be easily used for hearing preparations; That is, the format in which the evidence is presented at the actual hearing does not dictate the format in which materials are to be disclosed in the pre-hearing stage of the Tribunal's proceedings.

[61] The Commission claims the Respondent's refusal to provide electronic disclosure will unnecessarily waste the Commission's human and financial resources because support staff will need to scan all of the non-electronic documents for both the Commission's records and for sharing with the Commission's expert. The Commission submits that this is unacceptable given its public interest mandate and reliance on limited public financial resources for its operations.

[62] In the Respondent's view, the Tribunal's *Rules of Procedure* (03-05-04) [the *Rules*] do not require that disclosure be filed and served in any particular format; typically, disclosure is done in paper format absent some alternative agreement between the parties. According to the Respondent, the Tribunal determined that paper would be used at the hearing and it makes no sense to thereafter compel a party to disclose documents in a format other than paper. In the Respondent's view, doing so adds unnecessary costs and frustrates the expeditious and informal mandate of the Tribunal.

[63] The *Starblanket (e-hearing)* ruling on the Respondent's motion to have an electronic hearing dealt with the presentation of evidence at the hearing, not with the format of documents at the disclosure stage. The distinction is important and therefore I cannot accept the Respondent's views on this issue. In examining the Tribunal's *Rules*, there is a clear distinction between the disclosure stage and the hearing stage of the Tribunal's proceedings. Rule 6 deals with SOPs and the disclosure and production of documents. Rule 9 deals with the hearing process and the presentation of evidence. In particular, I note Rules 9(3)(c) and 9(4), which clarify and confirm the distinction between the disclosure and hearing stage:

> 9(3) Except with leave of the Panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in 1(1), and subject to a party's right to lead evidence in reply,
>
> > [...]
> >
> > c. a party who does not disclose and produce a document under Rule 6 shall not introduce that document into evidence at the hearing;
>
> 9(4) Except with the consent of the parties, a document in a book of documents does not become evidence until it is introduced at the hearing and accepted by the Panel.

[64] While the Respondent is correct in mentioning the *Rules* do not specify the manner or form by which production is to take place, the Tribunal has found that "the purpose of the *Rules* and the principles of fairness in general dictate that the disclosure and production of documents be sufficient to allow each party the full and ample opportunity to be heard" (*Grand Chief Stan Louttit in a representative capacity on behalf of the First Nations of Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada*, 2013 CHRT 3, at para. 14). Electronic production would assist the Commission in this regard and the documents seem to be readily available to the Respondent in electronic format. While the Respondent claims that producing electronic documents will add unnecessary costs and frustrates the expeditious and informal mandate of the Tribunal, it does not explain why this is the case. Based

on the Commission's arguments, it appears that it is the Commission who is suffering more prejudice on this issue.

[65] Therefore, where documents are provided to the Respondent in electronic format or where the Respondent has converted documents into electronic format, the Respondent will produce those documents to the Complainant and the Commission in electronic format. This also applies to documents that have already been produced by the Respondent. The Respondent will have until November 2, 2014 to reproduce and provide those documents in electronic format.

III. Ruling

[66] Pursuant to the reasons above, the Tribunal directs as follows:

(1) The Respondent is to disclose the following information for the periods of 1998 to 2007 and from 2013 to present:

a. Records indentifying institutions the Complainant has been housed in throughout the periods of incarceration with the Respondent and transfers within and between institutions.

b. Records identifying the types and conditions of confinement throughout the periods of incarceration with the Respondent (including access to and completion of programming as part of the Complainant's correctional plan, as well as every instance he was placed in formal segregation and placed on segregation or isolation status, including the exact periods of such placements).

c. Records identifying every incident of self harm or suicide attempt on record in addition to related psychological reports.

(2) If possible, the disclosure of documents in direction (1) above should be provided through the Respondent's OMS by December 2, 2014.

(3) Where available, the Respondent is to disclose documents that respond to the Commission's request for 75 additional items, the existence of which was revealed through a review of certain items already disclosed. The Tribunal directs the Respondent to complete this disclosure by November 2, 2014.

(4) Where available, the Respondent is to disclose legible copies of documents that have already disclosed (as requested by the Commission). The Tribunal directs the Respondent to provide the documents by November 2, 2014.

(5) Where documents are provided to the Respondent in electronic format or where the Respondent has converted documents into electronic format, the Respondent is to produce those documents to the Complainant and the Commission in electronic format. This also applies to documents that have already been produced by the Respondent. The Respondent will have until, November 2, 2014 to reproduce those documents in electronic format.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
October 2, 2014