Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 30
Date: July 17, 2019
File Nos.: T1848/7812, T1849/7912 and T1850/8012

Between:

Canadian Association of Elizabeth Fry Societies and Renee Acoby

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Jennifer Khurana

Overview

[1] The Complainant, the Canadian Association of Elizabeth Fry Societies (CAEFS), filed two complaints alleging that the Respondent, the Correctional Service of Canada (CSC), discriminates against women in the federal prison system on the basis of sex, race, national or ethnic origin, religion and/or disability. These are broad, systemic complaints brought on behalf of federally sentenced women across Canada. They are not complaints brought on behalf of specific women, nor do they seek remedies for individual women.

[2] In the first complaint, CAEFS alleges that CSC discriminates against federally sentenced women, in particular Indigenous women and women with mental health issues, by doing the following:

1. Overclassifying federally sentenced women within the security classification system;
2. Holding women in the federal prison system in segregated, restrictive conditions of confinement;
3. Failing to provide women in the federal prison system with necessary accommodation or services, particularly in the area of mental health; and
4. Denying federally sentenced women access to programming.

[3] In the second complaint, CAEFS alleges that CSC discriminates against federally sentenced Indigenous women throughout Canada by denying them access to Indigenous spiritual practices and culture.

Issues

[4] I need to determine two motions in this ruling.

[5] First, CSC filed a motion asking the Tribunal to adjourn the two systemic complaints pending both the outcome of constitutional challenges addressing the administrative

segregation regime within the *Corrections and Conditional Release Act* (CCRA), and the completion of Parliament's legislative process in relation to Bill C-83, *An Act to Amend the Corrections and Conditional Release Act and another Act*. CSC asks the Tribunal to adjourn the systemic complaints because the outcome of these processes will have a significant impact on the issues that are before the Tribunal to be decided.

[6] Second, the Native Women's Association of Canada (NWAC) filed a motion seeking full interested party status in these proceedings.

[7] In addition, the Canadian Human Rights Commission (Commission) filed a motion asking the Tribunal to order CSC to disclose a number of documents. I make no decision on this motion as the Commission has asked the Tribunal to put its request on hold.

Decision

[8] CSC's motion to adjourn these complaints is denied because I am not persuaded that it is in the interest of justice to suspend the proceedings at this time. NWAC's motion is allowed in part, with conditions and a requirement to revisit the scope of NWAC's participation as these complaints progress to a hearing.

Ms. Acoby's Complaint

[9] When the Commission referred the two systemic complaints to the Tribunal for an inquiry, it included a third complaint filed by an individual, Ms. Renee Acoby.

[10] Ms. Acoby wants her complaint to proceed on its own. She has requested that the Tribunal sever her complaint from the systemic complaints filed by CAEFS. She is no longer seeking systemic remedies and limits her complaint to allegations of historical treatment while she was incarcerated. CSC is not asking the Tribunal to adjourn Ms. Acoby's complaint and does not take issue with her request to proceed on her own. However, her complaint was referred as a single inquiry together with the systemic complaints.

[11] As I am denying CSC's motion to adjourn, I need not deal with Ms. Acoby's request to sever at this time. The parties agreed to try to resolve Ms. Acoby's complaint through mediation and Ms. Acoby does not take a position on CSC`s motion to adjourn. If the parties do not resolve Ms. Acoby's complaint in mediation, I will decide whether her complaint should be severed from the systemic complaints.

[12] NWAC is aware that Ms. Acoby wants her matter to proceed separately from the systemic complaints if it is not resolved in mediation. NWAC does not seek to intervene or interfere with Ms. Acoby's complaint.

[13] Ms. Acoby is directed to advise the Tribunal at the latest by August 19, 2019 whether her complaint has been resolved. If there is no resolution of her complaint, I will determine Ms. Acoby's request to sever, and if severed, her complaint will proceed to a hearing.

Reasons

A. Should the systemic complaints be adjourned until the legislative process and the constitutional challenges conclude?

[14] No. It is only in the most exceptional cases that the hearing of a complaint should be suspended (*Bailie et al. v Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 at para. 22). Tribunal proceedings should be conducted as expeditiously as the requirements of natural justice allow (s. 48.9(1) of the *Canadian Human Rights Act* ("*CHRA*") and Rule 1(1)(c) of the Tribunal *Rules of Procedure*). In the circumstances, the "interest of justice" includes the interest of all the parties, including the public interest (*Constantinescu v. Correctional Service Canada*, 2018 CHRT 10, at para. 10). In my view it is in the interests of all parties, and in the public interest, to move forward at this stage and to avoid further delay.

[15] The Commission referred these complaints to the Tribunal 7 years ago. I have only recently assumed carriage of this file, however it is apparent that the parties and the Tribunal have already expended considerable resources and time through this process. Since the complaints were referred to the Tribunal, the parties have filed, updated and

revised their Statement of Particulars and submitted new and revised summaries of anticipated testimony. They have exchanged well over 60,000 documents through the disclosure process. They have participated in multiple case management conference calls. The Tribunal has a duty to proceed in an expeditious manner and delaying these proceedings in these circumstances will not promote that objective.

[16] Much remains to be done before this hearing can start and there have been a number of developments that may impact the scope of these complaints. I am not persuaded that these developments warrant an adjournment at this time.

[17] In the fall of 2018 the government introduced Bill C-83 to amend parts of the federal correctional system, including replacing administrative segregation with a different model for inmates who cannot safely reside within a mainstream inmate population.

[18] In addition, two court applications were started in provincial courts in Ontario and British Columbia and have been proceeding in parallel to the systemic complaints (see *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 and C*anadian British Columbia Civil Liberties Association v. Canada (Attorney General),* 2018 BCSC 62)) (the "constitutional challenges"). These cases challenged the legislative framework for administrative segregation under the CCRA under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[19] CSC argues that it would be in the interest of justice to adjourn the systemic complaints as the legislative changes brought by Bill C-83 may render some of the allegations moot, narrow the issues to be determined by the Tribunal, and could impact the consideration of any available remedies. CSC submits that the constitutional challenges will provide clarity on the legal issues in dispute in the systemic complaints because the courts found that the existing legislative provisions authorising administrative segregation are invalid and infringe inmates' rights under the *Charter.*

[20] The lower court decisions have worked their way through the appellate courts. CSC recently advised the Tribunal of the latest developments in these cases, namely that the British Columbia Court of Appeal released its decision upholding most of the lower court's ruling striking down portions of the CCRA that pertain to administrative segregation. See

British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 202. There are also two outstanding applications for leave to appeal to the Supreme Court of Canada from decisions of the Ontario Court of Appeal (decision on the merits; 2019 ONCA 243 and decision on extension of suspension of declaration of invalidity; 2019 ONCA 342).

[21] CSC also recently advised that Bill C-83 received royal Assent on June 21, 2019.

[22] CAEFS and the Commission agree that a partial adjournment is warranted for the allegations in the systemic complaints that deal with administrative segregation. They submit that the segregation allegations can be easily separated from the remaining issues which can proceed.

[23] Both CAEFS and the Commission argue that the Tribunal should not wait for the constitutional challenges to conclude as these cases challenge the statutory regime authorising the use of administrative segregation under the CCRA, but do not focus on the disproportionate impact of administrative segregation on women in particular. The Commission agrees that the constitutional challenges may provide some clarity on the factual and legal issues related to the statutory administrative segregation regime, but disagrees that the challenges are "related" to the complaints.

[24] I do not find that there are exceptional circumstances warranting an adjournment at this time. I also do not accept that there is an easy or efficient way to separate out the administrative segregation allegations given the way the systemic complaints have been framed.

[25] I agree with CSC that the systemic complaints raise complex, intersecting issues. Neither the Commission nor CAEFS has convincingly articulated how these issues would be efficiently unpacked either before or during the hearing. The Commission's Updated Statement of Particulars refers to the complaints as raising "overlapping and inter-related" allegations of systemic discrimination. The Commission's witness statements and the remedies it is seeking similarly reflect the position that the issues raised in these complaints are by their nature systemic and often connected with administrative segregation.

[26] Bill C-83 has advanced further since CSC filed its motion to adjourn, however, as the Commission has previously noted, little information is available regarding the implementation of any new system or approach, or on corresponding regulations and policies that will all require development. It is also not known how any additional funds may be allocated. At this point, the Tribunal has not been presented with information regarding the timing of these eventual measures or their coming into force.

[27] Further, although CAEFS submits that an adjournment of the allegations relating to administrative segregation is warranted, it also argues that it is dubious that the legislation will change much in practice for the women at the heart of these complaints.

[28] I do not agree with CSC that this is a situation where “short term delay can achieve long term gain and a better final result” (see *Bailie*, *supra*, at paragraph 22). In some circumstances, an adjournment can avoid unnecessary hearings and judicial review applications and appeals where the same or substantially similar issues are working their way through the administrative justice or judicial system. No hearing dates have been set for the systemic complaints. While Bill C-83 has received royal assent, there are many questions that remain, both in that process and with respect to the constitutional challenges.

[29] I acknowledge CSC’s concern about the challenge of preparing for a hearing without first understanding the full impact of these processes. I also acknowledge that since these complaints were filed, the factual and legal landscape has continued to shift. However, it is unclear when and how the legislative changes will take effect together with any other policy or regulatory changes to CSC’s correctional services. I am not prepared to adjourn proceedings that have been ongoing for 7 years in such a vacuum of information.

[30] For the public interest and the interests of justice to be served, this case also needs to have a beginning and an end. As both the Commission and CAEFS have submitted, the alleged victims in these complaints are federally sentenced women with particular vulnerabilities and challenges and further delay would be troubling. The Commission and CAEFS may need to refine the scope of the systemic complaints in light of the evolution of the legislative process and the constitutional challenges, and the parties may have to

amend their submissions yet again so that this matter can finally proceed. The parties need to continue pre-hearing preparations, resolve any remaining disclosure issues and finalise and exchange expert reports.

[31] I also encourage the parties to work together to determine what, if anything, they can agree on regarding the impact of the processes on the systemic complaints and to propose an approach forward. Their collective work or an agreement about the issues in dispute in these complaints could shorten the length of the proceedings. The Tribunal will convene a case management conference call to move this process forward and to hear from the parties on their efforts in this regard.

B. Should NWAC be granted interested party status?

[32] Yes, but with conditions. I am satisfied that NWAC meets the test to intervene as it has specialised expertise that will be of assistance to the Tribunal in the systemic complaints and that will add to the legal positions of the parties. NWAC will also work together with the Commission and CAEFS to avoid duplication so that its participation will not unduly lengthen the proceedings. Irrespective of what may happen with the scope of the complaints dealing with administrative segregation, I am persuaded that there are several allegations that relate to the impact of CSC's policies and practices for Indigenous women prisoners that will remain and for which NWAC's participation will be useful and relevant.

[33] At this stage it is not possible to determine the full extent of NWAC's useful participation. As has already been addressed above, the scope of the systemic allegations and the issues in dispute may need to be revisited. I am therefore granting NWAC's request in part to allow it to start preparing and to review the voluminous materials in this file to avoid further delay. For the moment, NWAC will only be permitted to receive all disclosure and documents exchanged in the systemic complaints, and to call the two expert witnesses it has identified in its motion materials. The extent of any further participation will be reassessed as the systemic complaints proceed.

[34] The Tribunal has the jurisdiction to allow any interested party to intervene before this Tribunal in regard to a complaint (section 50(1) of the *Act* and Rule 8(1) of the Tribunal's Rules). The onus is on the applicant to demonstrate how its expertise will be of assistance in the determination of the issues. Interested party status will not be granted if it does not add significantly to the legal positions of the parties representing a similar viewpoint. See, for example, *Attaran v. Citizenship and Immigration Canada*, 2018 CHRT 6 at para. 10 ("*Attaran*").

[35] This Tribunal has outlined a test for parties seeking interested party status. The applicant for interested party status must show that:

a) its expertise will be of assistance to the Tribunal;

b) its involvement will add to the legal positions of the other parties; and

c) the proceeding will have an impact on the moving party's interests.

See, for example *Walden et al. v Attorney General of Canada*, 2011 CHRT 19 at para. 23 ("*Walden*").

[36] The Tribunal should adopt a case-by-case holistic approach in considering requests for interested party status. It must also take into account its responsibility under s.48.9(1) of the CHRA to conduct proceedings expeditiously and informally in determining the extent of an interested party's participation (See *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada(for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 11 at para. 3 ("*First Nations Caring Society*").

[37] NWAC is asking the Tribunal to grant it full interested party status to permit it to file a Statement of Particulars, lead evidence and make oral and written submissions. Its proposed evidence would address the broader and systemic issues that contribute to federally incarcerated Indigenous women's over-classification and placement in isolating prison conditions. NWAC's proposed evidence would also provide assistance in analysing the impact that security classification tools and restrictive prison conditions have on Indigenous women's access to traditional approaches to healing.

[38] As the only national organization to collectively represent the interests of Indigenous women and girls, NWAC states that it has experience in legal advocacy and that its expertise has been recognised at various levels of government in policy, programming and consultations regarding Indigenous women. NWAC submits that the potential outcome of these complaints for Indigenous women in correctional facilities is substantial given the proportion of women in federal prisons who are Indigenous. It argues that decisions impacting incarcerated women should take into account the specific realities faced by Indigenous women.

[39] CSC consents to NWAC being granted limited interested party status. It acknowledges NWAC's expertise and unique perspective, but asks that the Tribunal restrict NWAC's participation to making written submissions at the end of the hearing that do not duplicate those of the other parties. CSC submits that a limited role is consistent with Tribunal decisions that try to strike a balance between reasonable participatory rights on the one hand, and impacting the hearing process to the least extent possible on the other. CSC relies on *First Nations Caring Society, supra,* at paras. 1, 14, 15, 18; *Attaran, supra,* at paras. 1, 3, 7, 24 ("*Attaran*") and *Walden, supra, at paras. 1-4, 28* in support of its arguments in favour of limited participation. Finally, CSC submits that the Commission and CAEFS are sophisticated public interest groups actively participating in the complaints who already intend to lead evidence and make argument on issues relating to Indigenous women in federal correctional facilities. According to CSC, NWAC`s request is arriving late in the day as these complaints have been ongoing since 2011.

[40] In the alternative, CSC asks that I delay any request for further participatory rights until the impact of the constitutional challenges and Bill C-83 on the scope of the complaints has been assessed and determined.

[41] CAEFS and the Commission consent to NWAC's motion. The Commission asks that the Tribunal determine the motion now to permit NWAC as much time as possible to prepare and to allow the Commission to work with NWAC to minimise overlap.

[42] I accept that NWAC will bring its expertise with respect to Indigenous women to these proceedings, and that its input will be of particular value in systemic complaints that

involve the interests of federally incarcerated Indigenous women in particular. NWAC's expertise is directly relevant to several of the allegations in the complaints. I am persuaded that NWAC`s experience can assist the Tribunal in its task by providing information and a perspective that would otherwise not be available to the Tribunal.

[43] I also agree with NWAC that the Commission and CAEFS do not bring this expertise. They may be sophisticated public interest litigants as CSC submits, and some of the witnesses identified by the Commission may address allegations particular to Indigenous women. However I have not been presented with any persuasive argument that the Commission or CAEFS have particular expertise with respect to Indigenous issues that would detract from what NWAC can bring to these complaints. In addition, the second systemic complaint focuses on Indigenous women prisoners and allegations that CSC denied them access to Indigenous spiritual practices.

[44] Further, I accept NWAC's submission that prior to the summer of 2017 it did not have the resources required to bring this motion and to participate in these proceedings. I accept that it should not be faulted for its past scarce resources as a non-profit organization. It has advanced its motion before hearing dates have been set, as opposed to parties requesting intervenor status at the remedies stage, as in the *Walden* and *First Caring Society* cases relied on by CSC.

[45] I agree with the Commission about the timing of this motion. Permitting NWAC to work with the parties to reduce the time required for a hearing of the complaints and to minimise the resources required for all involved is a compelling reason to determine this motion now. The sooner NWAC starts working with the Commission and NWAC, the better. Collectively the Tribunal and the parties have an interest in preventing additional delay.

[46] I do, however, share CSC's concern about unduly lengthening the proceedings. I have already indicated that while I am allowing the motion in part at this stage, it is with the reserve that the full extent of NWAC's participation will be determined going forward.

[47] Finally, I agree with NWAC and with the Commission that the circumstances in these complaints are distinguishable from the cases relied on by CSC in support of its

submissions to limit NWAC's participation to written submissions. In *Attaran,* an individual complainant was acting on his own behalf. The complainant opposed the proposed interested party's full participation and argued that it would add greatly to the time and cost of his own participation in the inquiry. In contrast, these are systemic complaints. As already noted, several of the allegations and potential remedies could impact Indigenous women. Unlike in the *Walden* and *First Nations Caring Society* cases, the hearing in these complaints has not started.

[48] I will therefore grant NWAC's request, but with the condition that its intervention is subject to the following terms:

1. All parties shall provide to NWAC a copy of their respective Statement of Particulars and any disclosure already made in these complaints. NWAC must also be copied on all written communications among the parties on these complaints with the Tribunal until further order;

2. NWAC will be permitted to call the two witnesses that it has identified in its motion materials. The Tribunal will set timelines for the confirmation of NWAC's witnesses and for the filing of its witness statements and intended evidence;

3. NWAC will be permitted to participate in case management teleconferences until further order;

4. NWAC's ability to participate in any mediation or dispute resolution processes conducted by the Tribunal will be determined if and when these processes take place;

5. NWAC's ability to file its own Statement of Particulars, cross-examine witnesses, make full written and oral submissions, and respond in all motions will be revisited as these complaints progress.

Commission's Motion for Disclosure

[49] In addition, the Commission filed a motion asking the Tribunal to order CSC to disclose a number of documents related to the "rolling disclosure" process and to the implementation of Bill C-83, including interim measures taken by CSC. At the last case management call, the parties were encouraged to work together and CSC committed to reviewing the documents listed by the Commission as missing. The parties also agreed to work together on the C-83 materials and to report back to the Tribunal.

[50] Since that time, the Commission contacted the Tribunal and asked that its motion be put on hold as the parties are trying to resolve the requests. The Commission committed to keeping the Tribunal advised of the progress of the disclosure issues.

[51] At this time I make no order on the motion. If the parties are not able to resolve the production requests set out in the Commission's motion, the Commission is directed to advise the Tribunal. If the Commission's motion is now moot and there is no live issue for me to determine, it is directed to advise the Tribunal or withdraw its motion accordingly.

Order

1. The Respondent`s motion to adjourn is denied.

2. Renee Acoby is directed to advise the Tribunal at the latest by August 19, 2019 as to whether she has resolved her complaint with the parties. If Ms. Acoby's complaint has not settled by August 19, 2019, I will determine her request to sever her complaint.

3. NWAC's request for interested party status is granted, with conditions as set out in paragraph 48 of this ruling. The style of cause is amended accordingly. The extent and scope of NWAC's participation beyond adducing the two witnesses identified in its motion materials will be revisited as these complaints progress.

4. The parties are directed to participate in a case management conference call regarding the progress of these complaints. Within 7 days of receipt of this ruling,

the parties are directed to provide the Tribunal with their availability for a case management conference call in August. The Tribunal will send details of the conference call and an agenda when the date has been confirmed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
July 17, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1848/7812, T1849/7912 and T1850/8012

Style of Cause: Canadian Association of Elizabeth Fry Societies and Renee Acoby v. Correctional Service of Canada

Ruling of the Tribunal Dated: July 17, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Morgan Rowe, for the Complainant

Fiona Keith, Samar Musallam, for the Canadian Human Rights Commission

Elizabeth Richards, Vanessa Wynn-Williams and Tom Finlay, for the Respondent

Elana Finestone, for the Native Women's Association of Canada