Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 20
Date: June 16, 2021
File No.: T2459/1620

Between:

Cathy Woodgate, Richard Perry, Dorothy Williams, Ann Tom, Maurice Joseph and Emma Williams

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: David L. Thomas

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I. Background

[1] Cathy Woodgate, Richard Perry, Dorothy Williams, Ann Tom, Maurice Joseph and Emma Williams (collectively the "Complainants") are members of the Lake Babine First Nation in northern British Columbia. They allege adverse differential treatment and denial of access to police services against the Royal Canadian Mounted Police (the "Respondent") in a complaint filed with the Canadian Human Rights Commission (the "Commission") on January 12, 2017 and referred to this Tribunal on February 6, 2020.

[2] The Complainants filed a motion dated October 16, 2020 to request a confidentiality order for several appendices attached their Statement of Particulars (SOP) that was filed as part of the inquiry process. The motion was brought under Rule 3 of the Tribunal's *Rules of Procedures* (the "Rules") seeking an order under s.52 of the *Canadian Human Rights Act* (the "CHRA"). The Complainants request that the Tribunal keep the appendices confidential or, in the alternative, that it anonymize all names therein to protect personal privacy and dignity.

[3] The Respondent and the Commission both consent to the Complainant's request.

II. Decision

[4] The Complainants' request for confidentiality is granted in part.

III. Issue: Should Appendices B, D, and E of the Complainants' Statement of Particulars be exempted from public disclosure because there is a real and substantial risk that the disclosure of personal matters will cause undue hardship to the persons involved that outweighs the societal interest in this inquiry being conducted in public?

[5] Appendix B of the Complainants' SOP is a list of travel expenses that are claimed on behalf of two Complainants and two "non-legal representatives" as part of the remedies sought. The Complainants argue that the personal travel expenses claimed in Appendix B should be kept confidential because they have no relevance to the substance of the Complainants' claim.

[6] Appendix D is a list of arguably relevant documents in the possession of the Complainants over which solicitor-client or litigation privilege is claimed. Specifically, Appendix D mostly consists of a list of notes from phone conversations between counsel for the Complainants and various named complainants and witnesses. The Complainants argue for the confidentiality of Appendix D because many of the witnesses described therein (there are six non-complainant witnesses named) would like to keep their identity anonymous since their allegations are personal and private and involve details of childhood abuse.

[7] Appendix E is a list of 27 proposed witnesses for the Complainants accompanied by their brief will-say statements. The Complainants wish to have Appendix E kept confidential because some of the will-say statements contain private and personal details of the witness' life and the abuse they suffered as a child.

[8] The Complainants argue that keeping these materials out of public disclosure will not prejudice the Respondent or the Commission. They argue that the disclosure would create prejudice to the witnesses' privacy and dignity. They say the potential harm to their personal privacy and dignity should outweigh any public interest the disclosure of the information.

[9] In its submissions, the Commission does not oppose the Complainant's request, particularly in light of the Commission's understanding that the request would not prevent the Parties from using any of the materials in preparation for, or at, the hearing. The Commission submits that there is a public interest in ensuring the details of personal trauma such as childhood abuse are not accessible to the public in advance of a hearing.

[10] The Respondent also consents to the Complainants' motion. However, their consent does not extend to any future requests or to holding the hearing in camera. They also understand that the motion would not affect their use of the unredacted documents.

IV. The Law

[11] The Tribunal has issued confidentiality and /or anonymization orders in certain cases in in accordance with the provisions set out in s. 52 of the CHRA which reads as follows:

> s.52 (1) An inquiry shall be conducted in public, but a member or a panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
>
> (a) there is a real and substantial risk that matters involving public security will be disclosed;
>
> (b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
>
> (c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in pubic; or
>
> (d) there is a serious possibility that the life, liberty or security of a person will be endangered.
>
> (emphasis added)

[12] There is a public interest in open and transparent legal processes. Human rights hearings are intended to be public proceedings (Section 52(1) of the *CHRA*.) The Tribunal and its processes are accountable to the public. Anonymization requests or other confidentiality orders are not to be granted without balancing the societal interest in the proceeding occurring in public with the specific privacy interests of the party requesting a confidentiality order.

[13] The Tribunal may take any measures and make any orders necessary to ensure the confidentiality of the inquiry if it is satisfied that there is a real and substantial risk that the disclosure will cause undue hardship to the persons involved. It must also be satisfied that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public (Section 52(1)(c) of the *CHRA*.)

[14] It is important for parties to make submissions as to why s. 52 should apply to their application. The presumption under the *CHRA* is that all inquiries before the Tribunal are open and conducted in public. There is a strong, over-arching need for matters to be open and transparent, not least of which is to ensure continued support from a broad cross-section

of Canadians for the anti-discrimination goals of the Tribunal. That need should not be overshadowed lightly and without good reason.

[15] In the past, the Tribunal has made rulings in favour of confidentiality with all-party consent and, on occasion, without compelling submissions presented. However, more recent jurisprudence from the Tribunal suggests a stronger preference for conducting inquiries in public and requiring compelling reasons for an exception to that rule:

> I acknowledge that the parties consent to the anonymization request. But this consent cannot be determinative. In other words, the parties' consent is not sufficient for me to disregard the wording of s.52(1)(c) of the *Act* or the principles set out in the jurisprudence that require decision-makers to engage in a balancing exercise. It is not because a party asks for a confidentiality order and no one objects, that I can dispense with the binding analytical framework to be applied in deciding whether to make a confidentiality order. I am required to consider the openness of legal proceedings and determine whether the party seeking the order has established that there is a serious risk, well-grounded in the evidence, which poses a threat to an important interest in the context of the litigation because reasonably alternative measures will not prevent the risk (See *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 S.C.R.522 at paras 48 and 53, and *Dagenais v. Canadian Broadcasting Corp.,* 1994 3 S.C.R. 835, [1994] S.C.J. No.104 and *R. v. Mentuck,* 2001 SCC 76, [2001] 3 S.C.R.442).
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> (*White v. Canadian Nuclear Laboratories* 2020 CHRT 5 at para 50.)

[16] The Tribunal has granted confidentiality when it found that disclosure could cause undue hardship and risk of harm to the complainant or their children or might result in the disclosure of highly personal or sensitive information, for example in sexual harassment complaints (see, for example, *Mr. X v. Canadian Pacific Railway*, 2018 CHRT 11 and *N.A. v. 1416992 Ontario Ltd. and L.C.* 2018 CHRT 33 at paras 15-30) ("*N.A.*"). In other cases, the party seeking the confidentiality order satisfied the Tribunal that there was a very real possibility they would experience harm as a result of stigma that could impact future job prospects. (see, for example, *T.P. v. Canadian Armed Forces*, 2019 CHRT 10 at paras. 24-30) ("*T.P.*").

[17] While there are cases such as *N.A.,* relied on by the Commission, where the Tribunal has found that anonymization is warranted, the Complainants have only given general statements about their privacy interests. Given the broad nature of their request, and the

different types of information over which confidentiality is requested, a more measured and nuanced approach is preferred.

[18] Appendix B is a list of travel expenses that are claimed by two of the Complainants and two non-lawyer representatives. The Complainants have only made submissions that these travel details are not relevant to the substance of the complaint. While they may not go to the core of the issues before the Tribunal, they are nevertheless part of the remedies being sought by the Complainants. There are no submissions as to why disclosure of this part of the remedies sought creates any real and substantial risk of causing undue hardship. Whether or not the Tribunal decides the remedy is appropriate, it is proper that the details of this remedy sought remain public.

[19] The Complainants make a blanket request for the confidentiality of all of Schedule D. A measured request would have been for the redaction of the names of certain witnesses who would like to keep their identity anonymous because their allegations are personal and private and involve details of childhood abuse.

[20] In a recent Federal Court of Appeal decision, the relevant test to apply when considering whether a confidentiality order is necessary to preserve or promote an interest engaged by legal proceedings was reviewed (*Canada (Attorney General) v. Philps*, 2019 FCA 240 at paras 22-35 ("*Philps*")). Mr. Philps grieved his suspension for inappropriate acts involving female subordinate employees. Employee witnesses testifying on behalf of the employer had been given assurances that their full names would not be published, and asked for their names to be redacted from any rulings or decisions. The adjudicator declined to grant the confidentiality requested.

[21] The Court found that the adjudicator failed to reasonably balance the relevant interests and did not apply the well-established test in denying the witnesses' redaction request. The Court recognised the legitimate privacy interests to be protected in a situation involving a grievor who had been accused by younger female subordinates of inappropriate behaviour. The Court also found the Board's decision unreasonable as the adjudicator did not consider whether publishing the witnesses' names could have a chilling effect on the reporting of inappropriate workplace conduct on the part of superiors.

[22] In a similar way, I have concerns that witnesses who have personal, sensitive information may be less forthcoming if full public disclosure of the identity of every witness is required. *Philps* involved requests made by witnesses who also expressed concerns related to their status as current employees and the possible negative impact that disclosure could have for their careers. I am willing to accept that the disclosure might have a chilling effect for reporting inappropriate conduct like childhood abuse, and therefore, I am willing to redact the names of the non-complainant witnesses from Schedule D who will be giving testimony of that nature. The names in Appendix D in documents listed as numbers 6, 7, 9, 10, 11, 12 and 13 will be redacted from any public distribution. The name of a witness that will be testifying about matters other than their personal childhood experience will not be redacted.

[23] The other names in documents listed in Appendix D are the names of the Complainants in this inquiry. Their names are already part of the public and official record of this case and therefore it is unnecessary to redact their names from this list.

[24] For the same reasons I am prepared to redact certain names from Appendix D, I will also order the redaction of certain names from Appendix E, which is the list of anticipated witnesses for the Complainants and summaries of their anticipated testimony. These witnesses are anticipated to give evidence of childhood abuse, and in two cases, childhood sexual abuse. The names in the list in Appendix E numbered 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 24 will be redacted as well as the summaries of their anticipated testimony.

[25] The other names in Appendix E will not be redacted. There are no submissions as to why the disclosure of their names poses any undue hardship. Some of the listed witnesses are the Complainants themselves and others are witnesses who are not testifying about any personal experience of childhood abuse. The Complainants have not provided anything other than general statements about why the disclosure of these names could be potentially harmful. The onus is on the party seeking the confidentiality order to establish that this limit is necessary because of the particular circumstances of the case. The test referenced in *Philps* and reflected in the wording of s.52(1)(c) of the CHRA requires the Tribunal to weigh important personal and public interests and privacy considerations. On

the very limited submissions provided with this application, I am not persuaded that the Complainants have met the required threshold or established a “real and substantial” risk for these witnesses based on any evidence.

[26] This complaint is against the RCMP and alleges discrimination related to an investigation. The person who was the subject of that investigation is not a party to this complaint. The Tribunal has received several media inquiries about it, usually referencing his name. As a final matter, I would ask the Commission, in their role as representatives of the public interest, to advise the Tribunal if this person has been made aware of this complaint before the Tribunal.

V. Order

[27] In Appendix D to the Complainants’ SOP, the names in documents listed as numbers 6, 7, 9, 10, 11, 12 and 13 will be redacted in any version made available for public distribution. The other names therein will not be redacted or anonymized.

[28] In Appendix E to the Complainants’ SOP, the names on the list numbered 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 24 will be redacted as well as the summaries of their anticipated testimony in any version made available for public distribution. Their names will also be redacted where they appear in the summaries of other witnesses whose names are not redacted. For clarity, the names of the other witnesses in Appendix E will not be redacted or anonymized and the associated summaries of their anticipated testimony will not be redacted or anonymized, except for the redaction of the aforementioned listed names.

[29] This order does not affect the right of the parties to use the unredacted versions of Appendix D and E in preparation for or at the hearing.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
June 16, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2459/1620

Style of Cause: Cathy Woodgate et al. v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: June 16, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Karen Bellehumeur and Mary Eberts, for the Complainants

Daphne Fedoruk, for the Canadian Human Rights Commission

Whitney Dunn, for the Respondent