

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 34

Date: August 22, 2023

File Nos.: T2747/12321; HR-DP-2868-22

Between:

Nicholas Dinardo

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Services Canada

Respondent

Ruling

Member: Catherine Fagan

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I. OVERVIEW

[1] The Complainant, Nicholas Dinardo, has brought a motion requesting the following:

a) An order requiring the Respondent, Correctional Services Canada (CSC), to produce the documents set out in Schedule A of this Ruling by September 30, 2023;

b) An order compelling CSC to produce the documents that it has agreed to produce, as set out in Schedule B of this Ruling, by August 31, 2023; and

c) An order requiring CSC to perform a further search for relevant videos of use of force incidents and to produce the videos it locates by August 31, 2023.

[2] The motion was heard on August 16, 2023.

[3] The Complainant in this case is Nicholas Dinardo. Mx. Dinardo self-identifies as an Indigenous, Jewish, Two-Spirit transfeminine woman with diagnosed mental health disabilities, who uses gender-neutral pronouns.

[4] Mx. Dinardo has filed two human rights complaints against CSC before this Tribunal (Tribunal file numbers T2747/12321 and HR-DP-2868-22). The Tribunal has consolidated the two complaints to be heard in a single inquiry. In these complaints, Mx. Dinardo is alleging past and ongoing harassment and discrimination in the provision of correctional services.

[5] The hearing for this matter is set to begin on November 6, 2023.

[6] The Tribunal and the parties have been diligent in their efforts to begin the hearing in November to limit the psychological impacts of Mx. Dinardo's testimony, given the nature of much of their testimony and their vulnerabilities as well as their imminent release from federal custody. To preserve the November hearing dates and to allow the parties sufficient time to prepare for the hearing, there is a need for a ruling on this motion as soon as possible. Therefore, the reasons for this ruling are succinct.

II. REASONS

[7] *CONSIDERING* the motion filed on July 7, 2023;

[8] *CONSIDERING* the written submissions filed by the parties as well as their oral submissions heard on August 16, 2023;

[9] *CONSIDERING* that disclosure by CSC has advanced significantly but is not yet complete and that there is disagreement between the parties on several disclosure requests;

[10] *CONSIDERING* that CSC did not contest the relevancy, or arguable relevancy, of the Complainant's disclosure requests in its submissions on this motion;

[11] *CONSIDERING* that any confidentiality concerns caused by the disclosure and eventual production of certain documents can be addressed through confidentiality orders of this Tribunal;

A. Re: Schedule B

[12] *CONSIDERING* that CSC agrees that the requested documents listed in Schedule B are at least arguably relevant to the complaints, that they have already begun disclosure on these categories of documents and that they agree to continue disclosure until complete (subject to ongoing disclosure requirements);

B. Re: Schedule A – A(1)

[13] *CONSIDERING* that, for the years 2018–2021, CSC produced a document to show the information requested in Schedule A-A(1) and that, on consent between the parties, CSC has agreed to disclose statistics in regard to the sought-after information by September 30 for the years 2021–2022 and 2022–2023;

[14] *CONSIDERING* that, during the hearing, the parties agreed that to ensure that CSC has sufficient time to collect the required statistics, it would be appropriate to provide CSC four more weeks and that this extra delay would not affect the November hearing dates.

C. Re: Schedule A – C(2) and D(1)

[15] *CONSIDERING* that, on consent of all parties, CSC has agreed to compile and disclose statistics that provide the information requested in Schedule A-C(2) and D(1), without the need to provide the source documents from which the information was obtained;

D. Re: Schedule A – E(1) and E(2)

[16] *CONSIDERING* that CSC agrees to disclose the documents requested under Schedule A-E(1) and E(2);

E. Re: Schedule A – B(1)

[17] *CONSIDERING* that the information sought in the documents requested at Schedule A – B(1), described as:

1. Documents sufficient to show for each of the last five fiscal years: the number of assaults against gender diverse people in CSC custody, broken down by year and type of institution (men's or women's).

is relevant to the issues raised and the remedies requested in the complaints;

[18] *CONSIDERING* that CSC does not track such statistics and that over 20,000 documents would need to be produced to compile such information over the past five fiscal years;

[19] *CONSIDERING* the need for the Tribunal to consider the principle of proportionality when ordering disclosure (*Temate v Public Health Agency of Canada*, 2022 CHRT 31 at para 9; 8-16);

[20] *CONSIDERING* that three years of disclosure would be sufficient to allow the Complainant to fully and amply present their case before the Tribunal while respecting the proportionality principle (see *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, section 50(1) and *Brickner v Royal Canadian Mounted Police*, 2017 CHRT 28 at para 7) and that by choosing the years 2018, 2019 and 2022, the information should avoid major anomalies that could be caused by the COVID-19 pandemic and its impacts on correctional services;

[21] *CONSIDERING* that it is also possible to restrict the geographical breadth of the disclosure, while still allowing the Complainant to mount a full case and respect the principle of proportionality by choosing certain regions across the country;

[22] *CONSIDERING* that the production of documents from the Pacific, Prairie and Ontario regions of CSC would provide for a significant enough sample from across the country to allow the Complainant to make a full case while respecting the principle of proportionality;

[23] *CONSIDERING* that in cases where the disclosure would result in a high volume of documents, particularly documents that contain sensitive information such as in the present complaints, it may be appropriate to provide an option to the Respondent to either produce the relevant documents to allow the Complainant to compile the needed information or compile the statistics to demonstrate the information requested by the Complainant (*Brickner v Royal Canadian Mounted Police*, 2018 CHRT 2);

[24] *CONSIDERING* that the Complainant and the Canadian Human Rights Commission (the “Commission”) agree to the production of statistics instead of the underlying source documents for this request;

Re: Schedule A – B(2)

[25] *CONSIDERING* that the information sought in the documents requested at Schedule A – B(2), described as:

2. Documents sufficient to show for each of the last five fiscal years: the number of grievances filed by people in institutions designated for men regarding transphobia and/or harassment or discrimination on the basis of their gender identity.

is relevant to the issues raised and the remedies requested in the complaints;

[26] *CONSIDERING* that CSC does not track such statistics and that over 6,500 documents would need to be produced to compile such information over the past five fiscal years;

[27] *CONSIDERING* paragraphs 19-24 of this Ruling;

F. Re: Schedule A – B(3)

[28] *CONSIDERING* that the information sought in the documents requested at Schedule A – B(3), described as:

3. Documents sufficient to show for each of the last five fiscal years: the number of violations of individualized protocols in CSC institutions designated for men.

is relevant to the issues raised and the remedies requested in the complaints;

[29] *CONSIDERING* that, despite the relevancy of the information, CSC has provided evidence that it does not track the requested information and that there are no documents available that would allow such statistics to be compiled;

G. Re: Schedule A – B(4)

[30] *CONSIDERING* that the information sought in the documents requested at Schedule A – B(4), described as:

34. Documents sufficient to show for each of the last five fiscal years: the number of gender diverse people in prison who received correctional programming aligned with their gender identity and the number who did not, broken down by the nature of the institution (designated for men vs. designated for women) where those individuals were in custody.

is relevant to the issues raised and the remedies requested in the complaints;

[31] *CONSIDERING* that CSC produced a report which outlines the requested information up to March 13, 2020;

[32] *CONSIDERING* that, after March 13, 2020, there are no reports or studies providing the requested information and that thousands of documents would have to be produced to compile the requested information for March 31, 2020, onwards;

[33] *CONSIDERING* that, in the interest of proportionality, the information provided in the report up to March 31, 2020, is sufficient to allow the Complainant to present a full case, while respecting the principle of proportionality as well as the resources of the Tribunal and the parties;

H. Re: Schedule A – C(1)

[34] *CONSIDERING* that the information sought in the documents requested at Schedule A – C(1), described as:

1. Documents sufficient to show for each of the last five fiscal years: the number of people in prison placed in observation cells or quiet room cells, for how long, and the conditions of confinement during those placements including daily time out of cell and daily meaningful human contact.

is relevant to the issues raised and the remedies requested in the complaints;

[35] *CONSIDERING* that CSC provided evidence that it does not track the requested statistics and that there are no documents in CSC's possession that would allow the compilation of the requested information in regard to quiet room information, length out of observation cells and quiet rooms, daily time out of cells, or meaningful contact;

[36] *CONSIDERING* that CSC provided evidence that it tracks the number of inmates in observation cells and for how long;

[37] *CONSIDERING* that CSC stated during its submissions that, if the Tribunal requires disclosure in regard to C(1), it would prefer to create and provide the relevant statistics instead of the individual documents, which contain voluminous sensitive and private information, and that the Complainant and Commission agree to this approach;

I. Re: Schedule A – C(3)

[38] *CONSIDERING* that the information sought in the documents requested at Schedule A – C(3), described as:

3. Documents sufficient to show for each of the last five fiscal years: the number of times officers have conducted a noncompliant strip search and/or cut someone's clothes off pursuant to placement in an observation cell or Pinel restraints.

is relevant to the issues raised and the remedies requested in the complaints;

[39] *CONSIDERING* that CSC provided evidence that it only tracks searches that lead to contraband and that, to produce sufficient documents to obtain the requested information

over five years, CSC would need to provide approximately 9,000 multi-page incident packages.

[40] *CONSIDERING* paragraphs 19-24 of this Ruling;

Re: Schedule A – C(4)

[41] *CONSIDERING* that the information sought in the documents requested at Schedule A – C(4), described as:

4. Documents sufficient to show for each of the last five fiscal years: the number of self-harm incidents, including whether these incidents occurred in SIUs and/or in maximum security institutions.

is relevant to the issues raised and the remedies requested in the complaints;

[42] *CONSIDERING* that CSC provided evidence that it does not track such information and that it would need to produce around 7000 multi-page incident reports of self-harm to allow the requested information over five years to be compiled;

[43] *CONSIDERING* paragraphs 19–24 of this Ruling;

J. Re: Schedule A – D(2), (3) and (4)

[44] *CONSIDERING* the Complainant makes the following requests at Schedule A – D(2), (3) and (4):

2. Documents sufficient to show the average cost of a cell extraction by the Emergency Response Team.
3. Documents sufficient to show for the last five years the number of strip searches performed each year.
4. CSC research and analysis related to the effectiveness of strip searches for finding contraband.

[45] *CONSIDERING* that CSC provided evidence that it does not track this information and that there are no documents in existence that would allow such information to be compiled;

[46] *CONSIDERING* that parties cannot be ordered to produce documents that do not exist or to make documents for the sole purpose of disclosure (*Canadian Human Rights*

Tribunal Rules of Procedure, 2021, SOR/2021-137, Rule 6 and *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para. 17);

K. Re: Schedule A – D(5)

[47] *CONSIDERING* that the information sought in the documents requested at Schedule A – D(5), described as:

5. Documents sufficient to show for each of the last five fiscal years: the average number of days a person in prison was required to wait to receive a response to a Privacy Act request for records documenting forced used against them.

is arguably relevant to the issues raised and the remedies requested in the complaints, albeit with limited probative value;

[48] *CONSIDERING* that CSC provided evidence that it does not track this information and that it would have to produce approximately 144 documents and/or video packages (each package approximately 20–150 pages) to allow such information to be compiled for the past five years; and

[49] *CONSIDERING* the need to respect the principle of proportionality and the need to consider the probative value of burdensome and voluminous disclosure requests (*Brickner v Royal Canadian Mounted Police*, 2017 CHRT 28 at paras 5-6 and 8);

L. Re: Further Search for Videos

[50] *CONSIDERING* that the Respondent does not contest the request of the Complainant to carry out a further search for relevant videos of use of force incidents regarding the Complainant and to produce any videos it locates by August 31, 2023;

III. ORDER

[51] The Tribunal therefore allows the Complainant's motion in part and orders that:

a) on consent, the Respondent produce the following documents in Schedule B by September 30, 2023:

B1. Documents with respect to the development, implementation and evaluation of CD 100 and Interim Policy Bulletin 584. Including, but not be limited to, any internal research and memos about the experiences or management of gender diverse people in prison and all documents reflecting CSC's consultative process for developing CD 100 and its implementation of recommendations received during that process.
B2. All Internal CSC policy or guidance related to "overriding health or safety concerns" as referred to in CD 100 and Interim Policy Bulletin 584 and/or mitigation of those concerns, and as referenced in CSC's SOP at para. 404.
B3. CSC documents relating to the relationship between gender diverse people in prison and "the philosophy behind women's incarceration" as alleged in CSC's SOP at para. 438;
B4. Documents sufficient to show for each of the last five fiscal years: the number of gender diverse people in prison who received correctional programming aligned with their gender identity and the number who did not, broken down by the nature of the institution (designated for men vs. designated for women) where those individuals were in custody.
B5. All program materials for (1) the Integrated Correctional Program Model ("ICPM") Multi Target High Intensity Program for men; (2) the Motivational Module – SIU – Indigenous for men; (3) the equivalent programs for women, as well as the Women's Modular Intervention Program.
C1. Documents with respect to the development, implementation and evaluation of CD 843. Including any operational guidance or protocols regarding the application of CD 843.
C2. CSC research, analysis, and training materials on the relationship between self-harm and isolation.
C3. CSC staff training and guidance documents related to responding to mental health crises.
C4. CSC staff training and guidance documents related to the use of Pinel restraints and observation cells.
D1. CSC documents with respect to the development, implementation and evaluation of Commissioner's Directive 567-1: Use of Force and Commissioner's Directive 567: Management of Incidents.
D2. CSC research and analysis related to the mental health impacts of use of force.
D3. CSC training and guidance for healthcare staff regarding the assessment and/or treatment of people subjected to use of force.

b) on consent, the Respondent produce a document outlining statistics compiled by CSC in regard to the information requested at the following item of Schedule A for the years 2021–2022 and 2023–2023 by October 27, 2023:

A1. Documents sufficient to show for each of the last five fiscal years: the total number of Indigenous persons in prison, and the percentage of Indigenous people in prison classified as maximum security, medium security, and minimum security, broken down by year.

c) on consent, the Respondent produce a document outlining statistics compiled by CSC in regard to the information requested at the following items of Schedule A by October 27, 2023:

C2. Documents sufficient to show for each of the last five fiscal years: the number and percentage of observation cell, quiet room, and Pinel restraint placements that have involved use of force and/or the Emergency Response Team.

D1. Documents sufficient to show for each of the last five fiscal years: the number of use of force incidents that occurred in response to a person in prison engaging in self-harm.

d) on consent, the Respondent produce documents related to the information requested at the following items of Schedule A by October 27, 2023:

E1. Documents related to the use of force incident experienced by Mx Dinardo at Kent Institution on February 5, 2023

E2. Documents relating to investigations of staff misconduct and harassment against Mx. Dinardo

e) in regard to the information requested at the following items of Schedule A:

B1. Documents sufficient to show for each of the last five fiscal years: the number of assaults against gender diverse people in CSC custody, broken down by year and type of institution (men's or women's).

B2. Documents sufficient to show for each of the last five fiscal years: the number of grievances filed by people in institutions designated for men regarding transphobia and/or harassment or discrimination on the basis of their gender identity.

C3. Documents sufficient to show for each of the last five fiscal years: the number of times officers have conducted a noncompliant strip search and/or cut someone's clothes off pursuant to placement in an observation cell or Pinel restraints.

C4. Documents sufficient to show for each of the last five fiscal years: the number of self-harm incidents, including whether these incidents occurred in SIUs and/or in maximum security institutions.

the Respondent produce either documents allowing the Complainant to compile the requested information or a document outlining statistics compiled by CSC in regard to the information requested for years 2018–2019, 2019–2020 and 2022–2023 for CSC institutions located within its Pacific and Ontario regions by October 27, 2023;

f) the Respondent produce a document outlining statistics compiled by CSC in regard to the information requested at the following items of Schedule A:

C1. Documents sufficient to show for each of the last five fiscal years: the number of people in prison placed in observation cells or quiet room cells, for how long and the conditions of confinement during those placements including daily time out of cell and daily meaningful human contact.

for years 2018–2019, 2019–2020 and 2022–2023 or CSC institutions located within its Pacific, Prairie and Ontario institutions in regard to information regarding the number of inmates kept in observation cells and for how long by October 15, 2023;

[52] the Respondent perform a further search for relevant videos of use of force incidents regarding the Complainant and produce the videos it locates by August 31, 2023; and

[53] The Tribunal denies the requests of the Complainant in regard to the items at Schedule A – B(3), B(4), D(2), D(3), D(4) and D(5).

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
August 22, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2747/12321; HR-DP-2868-22

Style of Cause: Nicholas Dinardo v. Correctional Services Canada

Ruling of the Tribunal Dated: August 22, 2023

Date and Place of Hearing: November 8-15, 2023

Vancouver, British Columbia

Appearances:

Nicole Kief, Jessica Magonet, David Taylor, and Christopher Trivisonno, for the Complainant

Julie Hudson and Genevieve Colverson, for the Canadian Human Rights Commission

Matthew Morawski, Ratib Islam, and Charmaine De Los Reyes, for the Respondent

SCHEDULE A

A. Documents Relevant to Discrimination on the basis of Indigenous Identity and Related Relief
1. Documents sufficient to show for each of the last five fiscal years: the total number of Indigenous persons in prison, and the percentage of Indigenous people in prison classified as maximum security, medium security, and minimum security, broken down by year.
B. Documents Relevant to Discrimination on the Basis of Gender Identity and Related Relief
1. Documents sufficient to show for each of the last five fiscal years: the number of assaults against gender diverse people in CSC custody, broken down by year and type of institution (men's or women's).
2. Documents sufficient to show for each of the last five fiscal years: the number of grievances filed by people in institutions designated for men regarding transphobia and/or harassment or discrimination on the basis of their gender identity.
3. Documents sufficient to show for each of the last five fiscal years: the number of violations of individualized protocols in CSC institutions designated for men.
4. Documents sufficient to show for each of the last five fiscal years: the number of gender diverse people in prison who received correctional programming aligned with their gender identity and the number who did not, broken down by the nature of the institution (designated for men vs. designated for women) where those individuals were in custody.
C. Documents Relevant to Isolation and Degrading Treatment in Observation Cells and Restraints
1. Documents sufficient to show for each of the last five fiscal years: the number of people in prison placed in observation cells or quiet room cells, for how long, and the conditions of confinement during those placements including daily time out of cell and daily meaningful human contact.
2. Documents sufficient to show for each of the last five fiscal years: the number and percentage of observation cell, quiet room, and Pinel restraint placements that have involved use of force and/or the Emergency Response Team.
3. Documents sufficient to show for each of the last five fiscal years: the number of times officers have conducted a noncompliant strip search and/or cut someone's clothes off pursuant to placement in an observation cell or Pinel restraints.
4. Documents sufficient to show for each of the last five fiscal years: the number of self-harm incidents, including whether these incidents occurred in SIUs and/or in maximum security institutions.
D. Documents Relevant to Use of Force

1. Documents sufficient to show for each of the last five fiscal years: the number of use of force incidents that occurred in response to a person in prison engaging in self-harm.
2. Documents sufficient to show the average cost of a cell extraction by the Emergency Response Team.
3. Documents sufficient to show for the last five years the number of strip searches performed each year.
4. CSC research and analysis related to the effectiveness of strip searches for finding contraband.
5. Documents sufficient to show for each of the last five fiscal years: the average number of days a person in prison was required to wait to receive a response to a Privacy Act request for records documenting forced used against them.
E. Other Documents
1. Documents related to the use of force incident experienced by Mx Dinardo at Kent Institution on February 5, 2023
2. Documents relating to investigations of staff misconduct and harassment against Mx. Dinardo

SCHEDULE B

B. Documents Relevant to Discrimination on the Basis of Gender Identity and Related Relief
1. Documents with respect to the development, implementation, and evaluation of CD 100 and Interim Policy Bulletin 584. Including, but not be limited to, any internal research and memos about the experiences or management of gender diverse people in prison and all documents reflecting CSC’s consultative process for developing CD 100 and its implementation of recommendations received during that process.
2. All Internal CSC policy or guidance related to “overriding health or safety concerns” as referred to in CD 100 and Interim Policy Bulletin 584 and/or mitigation of those concerns, and as referenced in CSC’s SOP at para. 404.
3. CSC documents relating to the relationship between gender diverse people in prison and “the philosophy behind women’s incarceration” as alleged in CSC’s SOP at para. 438;
4. Documents sufficient to show for each of the last five fiscal years: the number of gender diverse people in prison who received correctional programming aligned with their gender identity and the number who did not, broken down by the nature of the institution (designated for men vs. designated for women) where those individuals were in custody.
5. All program materials for (1) the Integrated Correctional Program Model (“ICPM”) Multi Target High Intensity Program for men; (2) the Motivational Module – SIU – Indigenous for men; (3) the equivalent programs for women, as well as the Women’s Modular Intervention Program.
C. Documents Relevant to Isolation and Degrading Treatment in Observation Cells and Restraints
1. Documents with respect to the development, implementation, and evaluation of CD 843. Including any operational guidance or protocols regarding the application of CD 843.
2. CSC research, analysis, and training materials on the relationship between self-harm and isolation.
3. CSC staff training and guidance documents related to responding to mental health crises.
4. CSC staff training and guidance documents related to the use of Pinel restraints and observation cells.
D. Documents Relevant to Use of Force
1. CSC documents with respect to the development, implementation, and evaluation of Commissioner’s Directive 567-1: Use of Force and Commissioner’s Directive 567: Management of Incidents.

2. CSC research and analysis related to the mental health impacts of use of force.

3. CSC training and guidance for healthcare staff regarding the assessment and/or treatment of people subjected to use of force.