

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 15
Date: April 3, 2023
File No.: HR-DP-2856-22

Between:

E.F.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Athanasios Hadjis

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I. OVERVIEW

[1] The Complainant seeks an order anonymizing these proceedings. In her human rights complaint, she states that she is an Indigenous transgender woman in the custody of the Correctional Service of Canada (the Respondent). She alleges that the Respondent's practice for determining access to gender-affirming care for gender diverse prisoners is discriminatory and in particular that a forensic psychiatrist contracted by the Respondent outed her to her family and home community without her consent.

[2] She submits that there is a real and substantial risk that the disclosure of her identity through the Tribunal proceedings would cause her severe and undue hardship, which would engage her personal dignity interests that the broader public has an interest in safeguarding.

[3] The Canadian Human Rights Commission consents to the request. The Respondent takes no position on it.

II. DECISION

[4] For the following reasons, I grant the order.

III. ISSUES

[5] I must decide the following issues:

1. Is there a real and substantial risk that exposing the Complainant's identity will cause her undue hardship, which poses a serious risk to an important public interest?
2. Are there no alternative measures that would prevent the serious risk of hardship to the Complainant while preserving the values underlying the open court principle?
3. Do the substantial risks of hardship outweigh the public's interest in knowing the Complainant's identity?

[6] The Tribunal's authority to issue confidentiality orders is set out at s. 52 of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (*CHRA*). It states that Tribunal inquiries are conducted in public, which reflects the principle that hearing processes should be held in

the open. As the Supreme Court of Canada stated in *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII) at para. 1, the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, represents a central feature of a liberal democracy.

[7] However, the Supreme Court also recognized that exceptional circumstances do arise where competing interests justify a restriction to the open court principle (*Sherman Estate* at para. 3). In the present context, this is reflected in s. 52(1)(c) of the *CHRA*, which provides that Tribunal members may take any measures and make any order to ensure the confidentiality of an inquiry if they are satisfied there is a real and substantial risk that the disclosure of personal and 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 public.

[8] The statutory analysis for this type of confidentiality order request is informed by the three-part test set out in *Sherman Estate*, which is generally consistent with the test set out in s. 52(1)(c) of the *CHRA* (*A.B. v. Correctional Service of Canada*, 2022 CHRT 15 at paras. 14-15). The Supreme Court stated at para. 38 that the person asking a court or tribunal to exercise its discretion in a way that limits the presumption that hearings are held in open court must establish that:

- Court openness poses a serious risk to an important public interest;
- The order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- As a matter of proportionality, the benefits of the order outweigh its negative effects.

[9] The Supreme Court noted that a privacy interest may reflect a public interest in confidentiality (para. 48). However, caution is required in deploying this concept. Open court proceedings by their nature can be a source of discomfort and embarrassment, and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness (para. 56). It must be demonstrated that the dissemination of highly sensitive information would result in an affront to the affected person's dignity (paras. 33-35).

[10] Accordingly, s. 52(1)(c) of the *CHRA*, informed by the Supreme Court's analysis in *Sherman Estate*, set out the issues that I must address in this ruling.

IV. ANALYSIS

A. **Issue 1. There is a real and substantial risk that exposing the Complainant's identity will cause her undue hardship, which poses a serious risk to an important public interest**

[11] I find that there is a real and substantial risk that exposing the Complainant's identity will cause her undue hardship, which poses a serious risk to an important public interest.

[12] The Complainant states in her motion that as an Indigenous transgender woman, she is subject to exceptional and extreme forms of public stigma. She has been referred for gender-affirming surgery and hopes to have the option to live as her chosen gender upon release without being immediately identifiable online as transgender. She adds that if her identity is not anonymized in this proceeding, it will publicly out her in perpetuity, rendering her transgender identity as well as intimate details about her personal history and mental health accessible to anyone at any time. The Complainant attached a copy of the psychiatrist's report that is the basis of her complaint. It details her mental health history among other personal matters. The Complainant also notes that her anonymity has been maintained throughout her criminal proceedings, which were subject to a publication ban.

[13] As the Tribunal pointed out in *A.B.*, at paras. 41-42, transgender identity still carries a "high level of stigma in our society." The continuing disadvantage, discrimination, extreme stigma, and prejudice experienced by transgender individuals are well known. The Complainant points out that she is in an even more vulnerable situation due to her intersectional status as an Indigenous transgender person detained in a correctional facility.

[14] I find that, just as in the case of the transgendered complainant in *A.B.*, the Complainant's transgendered identity falls within the protected privacy interests identified in *Sherman Estate*. It is information so sensitive that its dissemination could be an affront to the Complainant's dignity. She would face a real and substantial risk of undue hardship that is far more than a mere embarrassment or discomfort. It would be an affront to her dignity.

B. Issue 2. An anonymization order is necessary; no alternative measures would prevent the serious risk of hardship to the Complainant while preserving the values underlying the open court principle

[15] The Complainant has established that there are no measures short of an anonymization order which would be sufficient to protect her personal dignity and privacy interests with respect to her gender identity.

[16] The complaint is centred on the psychiatrist's report. The substantive content of this report cannot be redacted without undermining the transparency and intelligibility of the Tribunal's ultimate ruling. A blanket publication ban, or even the limited redaction of the more intimate substantive details concerning the Complainant's gender, mental health, or personal history, would significantly undermine the public's ability to understand the case and the Tribunal's decision. The only reasonable option is to redact the Complainant's name and identifying information from the report and other documents to protect her anonymity in these proceedings.

[17] As the Complainant correctly submits, the requested order's terms will not undermine the public's ability to understand the issues at stake in this matter or the basis for the Tribunal's decision. All the underlying facts will remain part of the record and can be included in the Tribunal's decision, save those limited details specifically identifying the Complainant. The values underlying the open court principle would thus be preserved.

C. Issue 3. The substantial risks of hardship outweigh the societal interest in knowing the Complainant's identity; the benefits of the order outweigh any harms

[18] The risks of hardship to the Complainant outweigh the societal interest in her identity. In fact, there is an important public interest in safeguarding her dignity and that of other potential transgender complainants who may be in similar circumstances as her. The public interest in her identity is limited, especially given that her criminal proceedings to date have also been anonymized.

[19] As the Complainant correctly points out, the order being sought strikes the perfect balance by removing only her identifying information (i.e., the Complainant's gender identity,

her personal, medical, and mental health histories, and the tone and findings of the psychiatrist's report) from public view, while leaving intact all evidence and information that may actually be relevant to the Tribunal's decision. This approach respects the core values underlying the open court principle while also preserving the public's interest in protecting the privacy, safety, and human dignity of transgender human rights complainants. The benefits of such an order outweigh its negative effects.

[20] I therefore find that the three parts of the test have been met and that, in accordance with the Tribunal's authority under s. 52(1) of the *CHRA*, a confidentiality order should be granted with the conditions set out below.

V. ORDER

[21] The Tribunal orders the following:

1. The Complainant must be referred to as E.F. throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions, and any other documents filed in the Tribunal's official record of these proceedings;
2. The Complainants' identifying information, including her preferred name, her "dead name" (i.e., the name given at birth), the names of her family members, and her date of birth (collectively referred to as "Identifying Information"), will be kept confidential throughout these proceedings, including in motions, submissions (both written and oral), hearings, rulings and decisions, and any other documents filed in the Tribunal's official record of these proceedings;
3. The Complainant's Identifying Information will not be disclosed to anyone except the Tribunal, Tribunal Secretariat personnel, members of the parties' litigation teams, their clients in this matter, and prospective or actual witnesses;
4. The Registry is instructed to identify any Identifying Information filed in the official records of this proceeding. Such information is to be redacted from any public access request for the documents that contain it; and

5. The parties will apply appropriate redactions before filing any documents with the Tribunal.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
April 3, 2023

Canadian Human Rights Tribunal

Parties of Record

File No.: HR-DP-2856-22

Style of Cause: E.F. v. Correctional Service of Canada

Ruling of the Tribunal Dated: April 3, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Paul Quick, for the Complainant

Brittany Tovee, for the Canadian Human Rights Commission

David Aaron and Aman Owais, for the Respondent