

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 37

Date: August 31, 2023

File No.: T2715/9121

Between:

A.B.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Security Intelligence Service

Respondent

Ruling

Member: Athanasios Hadjis

Table of Contents

I.	OVERVIEW.....	1
II.	DECISION.....	1
III.	ISSUE	1
IV.	ANALYSIS	1
V.	ORDER.....	6

I. OVERVIEW

[1] The hearing in this matter is scheduled to begin on September 5, 2023, by videoconference using the Zoom platform. The Respondent, the Canadian Security Intelligence Service (“CSIS”), has requested an order that current or former CSIS employees be permitted to give evidence with their cameras turned off or by dialing in using the audio-only feature of Zoom.

II. DECISION

[2] For the following reasons, I deny CSIS’s motion and order instead that the witnesses in question may testify *in camera* in the presence only of the Complainant (“AB”), CSIS instructing authorities, parties’ counsel, the Tribunal registry officer, and me.

III. ISSUE

[3] Should the Tribunal issue an order under s. 52 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“*CHRA*”) permitting certain witnesses to testify by video with their cameras turned off?

IV. ANALYSIS

[4] On February 8, 2023, I issued a ruling (*AB v. Canadian Security Intelligence Service*, 2023 CHRT 5) on a motion from CSIS, anonymizing most aspects of this case, pursuant to s. 52 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“*CHRA*”). Section 52 states that Tribunal inquiries are conducted in public, but the Tribunal may take measures and issue orders to ensure the confidentiality of an inquiry if there is a real and substantial risk that matters involving public security are disclosed.

[5] I noted in my ruling that s. 18(1) of the *Canadian Security Intelligence Act*, R.S.C., 1985, c. C-23 (“*CSIS Act*”) states that no person shall knowingly disclose any information from which it could be inferred the identity of a CSIS employee or former employee who was, is, or is likely to become engaged in covert operational CSIS activities (“Confidential

CSIS Employee”). I considered this provision in my analysis, together with the Supreme Court of Canada’s reasons in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (“*Sierra Club*”) and *Sherman Estate v. Donovan*, 2021 SCC 25, and I concluded:

- 1) That revealing the identities of these individuals would pose a serious risk to an important public interest;
- 2) That an order anonymizing their identities is necessary, and reasonable alternative measures would not prevent the serious risk to this important public interest;
- 3) That the benefit of issuing the order outweighed its negative effects.

[6] Specifically, I ordered that the Complainant, who is a former Confidential CSIS Employee, would only be identified by the pseudonym “AB.” I also directed that CSIS could identify any Confidential CSIS Employee by random initials or other pseudonym, provided their position title was made clear. I also ordered all parties to respect the confidentiality of the information in question by referring to all Confidential CSIS Employees by the random initials or pseudonyms assigned to them.

[7] CSIS did not make any special request about how these employees would testify. At two Case Management Conference Calls (“CMCC”) that were held in the months following the ruling, it was understood that the hearing would be held in person in Ottawa, though it was possible some witnesses would appear by video. All CSIS witnesses were to testify in person, under the understanding that they would be addressed by their pseudonyms, and no one would disclose their real names.

[8] On July 19, 2023, CSIS’s counsel sent a letter to the Tribunal stating that CSIS had “advised” them that its witnesses, and the Complainant, should all appear virtually by video with their cameras turned off at all times. At a CMCC held a few days later, I stated that any request for additional confidentiality orders regarding the Tribunal’s public hearing would need to be made formally by application, pursuant to s. 52 of the *CHRA*.

[9] On August 23, 2023, CSIS filed its Notice of Motion making the request. It was accompanied by an affidavit from someone identified under the alias “James,” who is a Deputy Chief within CSIS’s Litigation and Disclosure Branch. James offered to disclose under seal their real name to the Tribunal, but I do not think that is necessary.

[10] CSIS submits that the Complainant and her witnesses, as well as all but two of CSIS’s witnesses are current or former Confidential CSIS Employees. In its submissions, CSIS reiterates many of the factors that I considered when I issued the earlier order that those employees’ names be anonymized. The affidavit states that the personal safety of these employees and their families is endangered if their identities were disclosed.

[11] But CSIS now suggests that more than just anonymization with pseudonyms is needed. It submits it is trite that a person’s face and image are essential components of their identity. The disclosure of the face, name, or any identifying feature should not be permitted to anyone participating in the hearing.

[12] CSIS submits that my original order is not enough to protect the public interest in not disclosing the employees’ identity. Revealing their face would reveal their identity, as surely as disclosing their name. Facial recognition technology could potentially readily match a witness’s face with databases that would allow identification. Furthermore, there is likely to be media coverage of this case.

[13] CSIS points out that testifying by voice alone is permitted under Rule 33(2) of the *Canadian Human Rights Tribunal Rules of Procedure 2021*, SOR/2021-137, which provides that a hearing could be conducted in whole or in part by telephone conference call, akin to an audio-only Zoom call. The rules of procedure for Federal and Ontario Courts have similar provisions.

[14] CSIS also referred to several decisions that support the proposition that measures should be taken to prevent the disclosure of CSIS officers’ identity. However, none of those decisions seem to address the specific question of witnesses testifying without showing their faces to the decision-maker or other parties.

[15] As I already said in my first ruling, there is a public interest in protecting Confidential CSIS Employees' identity, which addresses the first component of the *Sierra Club* test that I applied. But I find that the order CSIS now seeks does not satisfy the second component of the test. In this instance, there exists a reasonable alternative measure to the one that CSIS proposes that would prevent the serious risk to this important public interest, namely, holding an *in camera* hearing with an audio recording that remains in the public record.

[16] This approach was suggested at a CMCC that I conducted on August 24, 2023, after CSIS's motion was filed but before the other parties had prepared their written submissions, I proposed an option that focussed on AB's testimony only. CSIS later confirmed that it found the proposal acceptable. The Complainant and the Commission also agreed with it in their later submissions on the motion.

[17] The proposal was that AB's testimony be given *in camera*. That is, the only people who would have access to the hearing proceedings during her testimony would be the parties' lawyers, the Complainant, CSIS's instructing representatives, the registry officer, and me. The audio portion of the *in camera* proceedings would be digitally recorded as part of the official record. Everyone would refer to any CSIS employees subject to my prior order by their pseudonyms. No one's identity would be revealed in the recording. Thus, the public interest in protecting their identity would be preserved while at the same respecting the open court principle, since the hearing's recording would remain part of the Tribunal's official record, which can be accessed in accordance with the Tribunal's *Policy on Access to Canadian Human Rights Tribunal (CHRT) Official Records*, available on the Tribunal's website.

[18] Although CSIS does not object to adopting this approach for AB's evidence, it disagrees with the Complainant's and Commission's suggestion that it be extended to the other Confidential CSIS Employees. CSIS points out that the reason this approach would work for AB's testimony is because she already revealed her name to the Commission and the Tribunal in her complaint, before it was anonymized. This does not apply for the identities of the other employees, which have not been revealed to the Tribunal or the other lawyers.

[19] I am not persuaded by this argument. Even if this approach is extended to the testimonies of the other employees, they would still not be revealing their names to me, the registry officer, or the lawyers who as members of a law society, are subject to rules of professional conduct. I note that in my first order, I contemplated the possibility that position descriptions provided by CSIS may be insufficient to identify who an employee is and their involvement in an issue. I therefore ordered that in such instances, a full name must be disclosed to the Complainant or the Commission, on the condition that the information would be kept in confidence and not be publicized. In adopting the present proposed approach, even less information would be revealed to them than under my prior order – not even the names would be shared, just the image of the person testifying. On this last point, it should also be noted that the Tribunal directs in all hearings held by videoconference that no one is permitted to record any of the proceedings.

[20] As both the Complainant and the Commission indicate, there are compelling procedural fairness reasons for ensuring that decision-makers and parties be able to see witnesses as they testify. In particular, the Commission cited the Supreme Court of Canada's majority reasons in *R v N.S.*, 2012 SCC 72 ("*N.S.*"), which held that there is a strong connection between the ability to see the face of a witness and a fair trial. The Court added that allowing a witness to testify without their face visible may impede credibility assessment by triers of fact. While visual assessments of demeanour are not the only or even the most important factor in deciding credibility, changes in demeanour can be highly instructive. One must assess whether the proposed departure from the practice of seeing the witness would create a real and substantial risk to trial fairness.

[21] I am mindful that *N.S.* was a criminal case dealing with sexual assault allegations. However, I think the Court's observations are helpful in the current human rights context as well, where serious discriminatory practices have been alleged.

[22] The Complainant and the Commission also pointed out that when the Tribunal addressed the fairness of holding hearings by videoconference after the start of the Covid pandemic, it underscored the fact that the witness appears "live" before Tribunal member, who can "observe the witness's non-verbal behaviour," (*Hugie v. T-Lane Transportation and Logistics*, 2020 CHRT 12 at para. 28).

[23] I agree that these are important considerations. The proposed approach takes them into account while at the same time ensuring that the open court principle is adhered to, balanced against the public interest in not revealing any Confidential CSIS Employee's identity.

[24] This brings up a second issue arising from CSIS's motion. It seeks to extend the confidential treatment of testimonies to two CSIS employee witnesses who do not fall squarely within the definition set out in s. 18 of the *CSIS Act*. These are persons who are not or were not engaged in covert operational activities. I had spelled out, at paragraph 17 of my earlier order, that it did not extend beyond the specific group of employees who require protection under s. 18. Consequently, the Commission and the Complainant argue that these witnesses should testify in public, with their cameras on.

[25] I observe, however, that to date, CSIS has seemingly been referring to these witnesses with pseudonyms in its list of witnesses. In fact, I do not know which of CSIS's anonymous witnesses are the two. The Commission and the Complainant to date have not objected to their inclusion in the anonymous list, despite the statement in my earlier order. If it has been acceptable to keep all CSIS's proposed witnesses anonymous until now, I see no reason to treat them any differently at this late stage.

[26] Subject to the presentation of any new compelling information on this question, these two witnesses, whoever they may be, may testify *in camera* like the Complainant and the other Confidential CSIS Employees.

V. ORDER

[27] The Commission provided in its submissions a proposed order, which I adopt with some modifications. I order that:

- 1) CSIS's motion is denied.
- 2) Confidential CSIS Employees will not be identified by name during the hearing.

3) Opening statements will be open to the public, in the normal course – although AB and any CSIS instructing authorities who are Confidential CSIS Employees will turn their cameras off.

4) Current and former Confidential CSIS Employees (which includes AB and any CSIS Employee on CSIS's witness list whose name has been anonymized) will be sworn or affirmed and testify with their cameras on, during in camera proceedings attended only by the member, the registry officer, AB, CSIS instructing authorities, and counsel for all parties. Audio-only recordings of any such testimony will form part of the official record and will be accessible in accordance with the Tribunal's *Policy on Access to Canadian Human Rights Tribunal (CHRT) Official Records*.

5) The Commission's expert witness will testify with her camera on, during open public proceedings.

6) Closing arguments will be open to the public, in the normal course – although AB and any CSIS instructing authorities who are Confidential CSIS Employees will turn their cameras off.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
August 31, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2715/9121

Style of Cause: AB v. Canadian Security Intelligence Service

Ruling of the Tribunal Dated: August 31, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Morgan Rowe/Claire Michela, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Sean Gaudet/Adam Gilani, for the Respondent