

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 42
Date: September 15, 2023
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: Colleen Harrington

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I. Context

[1] The hearing into this complaint is well underway. The hearing started with the parties and Tribunal in-person in Burns Lake, British Columbia, where most of the Complainants' witnesses testified over the course of two weeks, from May 1-12, 2023. The hearing then continued using the Zoom videoconferencing platform for four additional weeks in May and June of 2023. The Tribunal has not yet heard all of the evidence that the parties intend to introduce. There are still several witnesses to be called, including evidence related to a particular remedy sought by the Complainants that required a Tribunal Ruling agreeing to allow them to reopen their case (2023 CHRT 21). As such, an additional nearly 5 weeks of hearing have been scheduled in the fall of 2023. The remainder of the hearing is scheduled to take place by videoconference.

[2] The RCMP have asked the Tribunal to hold another portion of the hearing in-person in Burns Lake in November of 2023, in order to hear from 3 of its witnesses. Although the RCMP made a prior request for the Tribunal to hear from some of its witnesses in-person in Vancouver or Burns Lake, that request was eventually abandoned.

[3] This Ruling deals with the RCMP's second request for an in-person hearing in Burns Lake, in November 2023. The Complainants and the Canadian Human Rights Commission ("Commission") oppose the request and ask that the hearing be completed by videoconference.

II. The RCMP's application for an in-person hearing

[4] The RCMP's present request was first raised with the Tribunal and parties during a Case Management Conference Call ("CMCC") on June 12, 2023. According to the CMCC summary, the RCMP stated its intention to call as witnesses some senior officers from the North District of British Columbia, as well as someone from its Indigenous policing unit in Burns Lake. The intention was to call these witnesses to respond to the Complainants' evidence regarding one of the remedies they are seeking, which will be heard near the end of the hearing. The RCMP indicated it may also want to call an expert in response to the Complainants' additional evidence.

[5] The RCMP stated during the June 12th CMCC that it wanted these witnesses to testify in-person in Burns Lake so the community could hear their evidence. The Complainants' counsel objected to this, noting that the cost to the Complainants to have their counsel travel to Burns Lake again would likely be prohibitive. The Tribunal inquired as to why it would be necessary to hear from these witnesses in-person, since community members could not be compelled to attend and hear the testimony in-person, and those who wish to watch the hearing could continue to do so by video, as they have been doing since late May. However, I indicated that this request could be discussed further at a later date.

[6] On July 20, 2023, the RCMP wrote to the Tribunal and parties asking that 3 of its witnesses who will be called to respond to the Complainants' additional remedy evidence be permitted to testify in-person in Burns Lake. These 3 witnesses were identified as Superintendent Dee Stewart of E Division; Chief Superintendent Warren Brown, the North District commanding officer; and one of the three Indigenous Policing Services officers in Burns Lake, who was not identified by name at that time. The RCMP stated its understanding that the Complainants' remedy evidence would start to be called on November 14, 2023 and so these 3 RCMP witnesses would likely testify sometime during the currently scheduled hearing dates of November 14-24, 2023.

[7] The RCMP states that having these 3 witnesses testify in person would have several benefits, including that: "People would hear and see the evidence in their community once again and, specifically, hear and see the officers directly. It would further show that the Tribunal and parties are committed to having a presence in the community during the hearing and that the officers, and the RCMP, are visible and accountable to the community and the Canadian public."

[8] The RCMP argues that Zoom is not an adequate substitute, as "appearing in person links the officers' testimony with the community and any concerns people there may have. It permits everyone to see and be seen. It allows for a natural dialogue after testimony."

III. Positions of the parties

[9] The Tribunal heard from the other parties with respect to the RCMP's request to reconvene in person in November. The Complainants and Commission both oppose the RCMP's request.

[10] The Complainants say the costs they would have to incur in order to have their legal counsel attend and conduct the hearing in-person in Burns Lake would be substantial and, in their view, unnecessary. They ask the Tribunal to recognize that the Complainants have extremely limited financial resources, particularly in comparison to the RCMP. They say the RCMP is aware of this, as the Complainants already raised this during the June 12, 2023 CMCC when the RCMP first made this request. I note that, during the June 12th CMCC I asked the RCMP's counsel if the RCMP would consider paying the travel and accommodation costs of the Complainants' counsel. He said he would look into this. No further information has been provided with regard to this request, nor was it addressed in the RCMP's written submissions.

[11] The Complainants also state that the issues the RCMP relies upon as forming the basis for its request to reconvene the hearing in-person can be addressed in other ways. They state that, if the RCMP wants the officers to be visible in Burns Lake, they need not wait for the Tribunal hearing to do so: "They can make themselves visible and accountable to the Burns Lake Community and the Canadian public in many other ways without burdening the Indigenous Complainants with the cost of having an in-person hearing."

[12] Similarly, the Complainants argue that, if the RCMP seeks to have a "natural dialogue" following the testimony of its witnesses, "they are more than welcome to have their officers present in the community while they testify by [Z]oom and invite the community to a meeting afterward."

[13] The Complainants argue that conducting the hearing over Zoom actually allows more people in more communities to have access to the hearing than if it is conducted in-person in Burns Lake. They state that the case is being observed over Zoom throughout BC and in multiple provinces. An in-person hearing in Burns Lake would exclude those who do not live there.

[14] The Complainants note that the reason they had requested an in-person hearing in Burns Lake for the first two weeks of the hearing, when most of their witnesses testified, was because many of the 14 witnesses who testified did not have access to the internet and/or they required in-person support from Indian Residential School Survivors Society (“IRSSS”) counselors, who were present during the hearing. The Complainants point out that the RCMP officers proposed to be called in November of 2023 have neither of these difficulties or requirements.

[15] The Commission agrees with the Complainants that the hearing dates in question should be held by videoconference, not in-person. It shares the Complainants’ concerns, especially with respect to barriers to participation that may arise if the hearing is in-person, given the Tribunal’s inability to broadcast the in-person proceedings by Zoom. The Commission is also concerned that the time set aside for that portion of the hearing would be shortened if the hearing takes place in-person, since the parties may need to travel to and from Burns Lake during the week.

IV. Decision

[16] For the reasons set out below, I deny the RCMP’s application to reconvene in-person in Burns Lake to hear the evidence of 3 of its witnesses who will be responding to the Complainants’ evidence about one of their requested remedies.

V. Reasons

[17] Prior to March of 2020, the Tribunal conducted most, if not all, of its hearings in-person in communities across Canada. Due to the global health crisis caused by Covid-19, the Tribunal, like many other tribunals and courts across the country, quickly transitioned to using videoconferencing platforms to conduct its hearings. The Tribunal has been conducting most of its hearings by videoconference since then, finding this technology to be cost effective and easy to use, and enabling the Tribunal to conduct its complaint inquiries fairly and efficiently.

[18] As public health restrictions have eased, the Tribunal has returned to offering in-person hearings upon request, as well as hybrid hearings, although the majority of hearings continue to proceed fully by videoconference.

[19] The Tribunal has previously determined that the *Canadian Human Rights Act*, RSC 1985, c.H-6 [CHRA] essentially requires the Tribunal to “ensure the venue for the hearing meets the standards of the CHRA that require a fair, informal, expeditious and open hearing process, where each party is given a full and ample opportunity to appear, present evidence and make representations (see ss. 48.9(1), 50(1) and 52(1) of the CHRA)” (*Temple v Horizon International Distributors*, 2016 CHRT 20 (CanLII) at para 11). The Tribunal has concluded that videoconference hearings meet these requirements (*Hugie v T-Lane Transportation and Logistics*, 2020 CHRT 25 (CanLII) [*Hugie*]).

[20] The Tribunal has determined that videoconferencing is an entirely appropriate alternative to an in-person hearing, one that is fair and equitable and that protects the principles of natural justice and procedural fairness (*Hugie* at para 21; *Duverger v 2553-4330 Québec Inc. (Aéropro)*, 2018 CHRT 12 (CanLII) [*Duverger*] at paras 27-36).

[21] This does not mean, however, that the Tribunal will not consider requests such as the RCMP’s. The Tribunal in *Duverger* stated that:

[I]n certain circumstances, the Tribunal may decide that the use of videoconferencing would not be appropriate, such as cases in which a person has certain disabilities, where the matter is highly complex, or where the available technologies cannot provide sufficient videoconferencing quality. These examples are not exhaustive and the Tribunal should assess the circumstances and make decisions on a case-by-case basis (at para 38).

[22] Indeed, requests for in-person hearings are assessed on a case-by-case basis, with the Tribunal considering the preferences and interests of the parties, the fairness and accessibility of the form of hearing, and health and safety requirements. Proportionality is also a factor, meaning the Tribunal will consider the cost, time and effort for the parties and for the Tribunal relative to the nature of the proceeding.

A. Having its witnesses appear by videoconference is not unfair to the RCMP

[23] In its reply submissions, the RCMP states that, “As the Tribunal granted the Complainants’ request for their lay witnesses to testify in person in Burns Lake and effectively denied our request for the same for Sgt. Mackie, it should grant the present request to ensure fairness and balance in the hearing.”

[24] The RCMP is suggesting that fairness requires the Tribunal to treat all parties the same. Such an approach is not consistent with the requirement to consider each motion or application on the basis of its own facts.

[25] The Complainants’ request for their witnesses to be heard in-person, made in November of 2022, was based in part on their Indigenous traditions to “transmit knowledge orally and in person.” Their request stated that:

Traditions for Indigenous people mean that when we talk, we meet in circles, and we do certain ceremonies that honour why telling the truth is so important, and why listening to others is also so important. The “justice system” and Canada have not listened. We have tried for many decades to tell these stories.

We don’t want the person making decisions about whether what we are saying is true or not be outside of our circle. Most people do not have a computer – we cannot “zoom” in. We will tell our stories and we expect the person listening to them to also be there in person.

Cathy Woodgate is no longer alive. She was deprived of telling her story to the human-rights tribunal. She, Emma Williams and Ann Tom—who were some of the brave people who made the complaint against the RCMP—are no longer alive. Other witnesses, siblings and friends are no longer alive. In their honour, in the honour of dozens of other people who died before they could tell their stories about the diocese schools, and in our honour, we ask that Member Harrington respect our traditional culture and see and talk to us in person.

[26] The Tribunal accepted the Complainants’ request to attend in-person, with the consent of all parties. Ceremonies were held throughout this in-person portion of the hearing that all parties benefited from.

[27] In addition to its argument that the Tribunal should hear some of its witnesses in-person because it heard from most of the Complainants' witnesses this way, the RCMP's argument relates mainly to its desire for the Complainants and the community of Burns Lake to hear their evidence in the community. The RCMP wants to show it is committed to having a presence there and to show that it is visible and accountable to the community and the Canadian public.

[28] In its reply submissions, the RCMP argues that its request aligns with the Tribunal's ruling on the Complainants' request to be heard in-person. It says the evidence relating to the community is best heard in the community, concluding that Superintendent Dee Stewart, Chief Superintendent Warren Brown, and Sergeant Joe Garcia "will testify about community outreach and work by the RCMP in Burns Lake and the First Nation communities."

[29] The RCMP does not need to have 3 of its witnesses testify in Burns Lake in order for people in Burns Lake or across Canada to witness their testimony. In fact, the videoconference portion of the hearing has been much more accessible to the public than the in-person portion was. The Tribunal was not able to broadcast the hearing when it was in-person in Burns Lake so the oral evidence given there was heard only by those present. Since then, anyone who has wanted to watch the Zoom hearing has been able to do so, so long as they are not subject to a witness exclusion order and they agree to comply with the terms of the Confidentiality Order that is in place.

[30] Community members in and around Burns Lake, and others from across Canada, have been watching the videoconference portion of the hearing, including the evidence of all of the RCMP's witnesses so far. People in Burns Lake who either do not have a device or internet to watch the hearing at home or wish to do so with others and with the IRSSS counselors present for support, may attend the room at the Ts'il Kaz Koh Band Office that the Tribunal has reserved for this purpose.

[31] With regard to any "dialogue" the RCMP wishes to have with the community, that is not the underlying purpose of an adversarial hearing before the Tribunal. However, both the RCMP and the community are of course free to initiate such a dialogue on their own. Presumably there is no reason why their witnesses could not be present in Burns Lake to

testify by Zoom if they so desire. I would note, however, that even if the Tribunal were to go back to Burns Lake for the hearing, there is no guarantee that members of the community would come to see the RCMP's evidence in person.

[32] I also disagree with the RCMP's position that Zoom is not an adequate substitute for appearing in person. As the Tribunal stated in *Hugie, supra*:

[28] In a virtual hearing held by videoconference, the witness is live before the member, and the member, live before the witness. As when a witness appears in person before a member, the member can observe the witness's non-verbal behaviour, but also ensure and control that the correct procedures with respect to testimony are being followed.

[33] Indeed, the parties have had no difficulty in communicating their objections during the questioning of most of the witnesses during the videoconference portion of the hearing.

[34] Finally, the RCMP's argument that the evidence of Superintendent Stewart, Chief Superintendent Brown and Sergeant Garcia will "relate to the community" more than any of the other evidence given by RCMP witnesses, including the evidence of the investigating officers and their supervisors, is difficult to understand. None of these 3 witnesses was present on the RCMP's witness list until well after the hearing commenced, despite the requirement to provide a witness list prior to the hearing, and the RCMP's knowledge of all of the remedies sought by the Complainants well in advance of the hearing. While the Tribunal looks forward to hearing their evidence, I see no compelling reason for the Tribunal and parties to be physically present in Burns Lake in order to do so.

[35] I note that the RCMP has not argued that it would be prejudiced if these 3 witnesses must testify by video as opposed to in-person. All of its witnesses have so far testified by videoconference without issue. I do not see any prejudice to any party in requiring the hearing to continue to be conducted via videoconference as we have successfully done for 4 weeks already.

[36] There would be real prejudice to the Complainants, however, to have to incur the significant cost of reconvening in-person. Section 50(1) of the *CHRA* requires the Tribunal to ensure all parties have a full and ample opportunity, on their own behalf or through counsel, to present evidence and make representations. Testifying in-person is not a

prerequisite to this requirement being met. Indeed, in this particular situation, agreeing to the RCMP's request may result in a disadvantage to the Complainants in this regard. The Complainants' position is that the cost of having their counsel appear in-person in Burns Lake again would be very substantial and they are of modest means. It is entirely possible that, if the RCMP's application is granted, the Complainants' opportunity to present evidence and make representations through counsel may be adversely affected.

[37] The Tribunal is also mindful of incurring further costs to the Canadian taxpayer, if all of the Tribunal, RCMP and Commission were to have to travel back to Burns Lake again to hear from 3 witnesses.

B. The RCMP's previous request was not "effectively denied" by the Tribunal

[38] I disagree with the RCMP's assertion that the Tribunal effectively denied its request for Sergeant Mackie to testify in-person in Burns Lake. The RCMP initially requested, during a CMCC on January 17, 2023, that its witnesses testify in Vancouver, since the Complainants' witnesses would be testifying in Burns Lake. This was the RCMP's first request for an in-person hearing. In my written directions of February 8, 2023, I declined this request, stating that at that time it was still the exception, rather than the rule, to hold hearings in-person. However, I stated that, if there was a reason beyond the preference of counsel or their client or witnesses to hold part of the hearing in-person in Vancouver, as there was in the case of the Complainants' request, the RCMP could make this request in writing.

[39] On February 23, 2023, the RCMP requested in writing that 2 or 3 of its witnesses, including Sergeant Mackie and Constable Cox, testify in Burns Lake in either May or June. This request was made for 3 reasons.

[40] The first reason, described as the most important, was "reconciliation." The RCMP said that the investigation that is the subject of this human rights complaint was carried out in a "thorough and careful" manner, and it wanted the community to hear the investigating officers testify about this in person and "see the spirit in which they undertook the investigation."

[41] The second reason was that a videoconference is no substitute for observing a witness in person. Because officers Cox and Mackie would have substantial evidence to give, as they conducted the investigation that is the subject of this complaint, the RCMP asked the Tribunal to hear from them personally, not via a screen.

[42] The third reason was fairness. The RCMP suggested that, in order for justice to be seen to be done, the Tribunal should hear from its witnesses in person. Its argument was the same as in the present request, that proceeding with the RCMP's evidence by videoconference while the Tribunal heard from the Complainants' witnesses in-person could give the perception of an unbalanced field.

[43] The RCMP's request was discussed during a CMCC on February 27, 2023. The summary from that CMCC notes that the RCMP would likely want to call its witnesses in-person sometime during the scheduled hearing dates in June. The Complainants' counsel noted that it would be cost prohibitive for her clients to have her to attend in-person a second time in Burns Lake, since she would already be attending in-person for 2 weeks in May, but that she would ask them if they were opposed to the RCMP testifying in-person in Burns Lake. I indicated the issue could be discussed further to decide how and where these officers would testify.

[44] At the next CMCC on April 14, 2023, the Complainants' counsel indicated that it was the Complainants' preference that no RCMP personnel attend the hearing, although they understood that the RCMP was a party and had a right to do so.

[45] As per the summary of the February 27, 2023 CMCC, there was further discussion about how and where the officers would testify. Well after the hearing started, the RCMP advised that two of the three investigating officers, Constables Cox and Hanley, would be unable to testify at the hearing at all due to health issues. The RCMP advised that Sergeant Mackie would testify by videoconference, which he did for several days in June of 2023. As it took somewhat longer than expected for the Complainants to finish calling their evidence, all parties and the Respondent's witnesses, including Sergeant Mackie, were cooperative and showed flexibility to ensure all witnesses could be heard. I note that there was also a

request for the Tribunal and parties to accommodate Sergeant Mackie's schedule as he had appointments to attend, and this was done.

[46] We were able to deal with these scheduling issues easily enough because the hearing was proceeding by videoconference. I also note that, when asked by the Tribunal directly, counsel for the RCMP confirmed that the RCMP's first request for in-person testimony by its witnesses had been abandoned.

VI. Conclusion

[47] I am of the view that finishing the hearing by videoconference upholds the Tribunal's obligation to proceed both fairly and expeditiously, in accordance with section 48.9(1) of the *CHRA*.

[48] The RCMP's application is denied.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
September 15, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2459/1620

Style of Cause: Woodgate et al v. RCMP

Ruling of the Tribunal Dated: September 15, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

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