Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 14
Date: June 5, 2015
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada
- and-
Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario
- and -
Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon, Réjean Bélanger, Edward P. Lustig

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I. Context

[1] The Complainants, the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN), have filed a human rights Complaint (the Complaint) against the Respondent, Aboriginal Affairs and Northern Development Canada (AANDC), formerly known as Indian and Northern Affairs Canada (INAC), alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c. H-6 (the *CHRA* or the *Act*). The Complaint was referred to the Canadian Human Rights Tribunal (the Tribunal) by the Canadian Human Rights Commission (the Commission) on October 14, 2008 and, on November 3, 2008, the Commission requested that the Tribunal institute an inquiry into the Complaint.

[2] On December 22, 2009, Dr. Cindy Blackstock, on behalf of the Caring Society, served a notice of motion to amend the Complaint to include allegations of retaliation, contrary to section 14.1 of the *Act* (the motion to amend the Complaint). The Tribunal granted the motion in a ruling dated October 16, 2012 (2012 CHRT 24), finding that the allegations of retaliation emanated from the same factual matrix as the initial Complaint and that the fair administration of justice supported granting the amendment rather than creating an artificial separation of the allegations in multiple proceedings. The Tribunal held a hearing on the allegations of retaliation on February 28, 2013, March 1, 2013, July 15, 16, 17, 19, 22 and 24, 2013 and August 7, 2013, in Ottawa. For the purposes of the present decision, Dr. Blackstock's name will be used when reffering to events involving herself and the Caring Society will be referenced as the Complainant. The evidence heard during this hearing, along with the parties' subsequent written submissions, inform the present decision.

II. The Law on Retaliation

A. Overview of the Relevant Case Law

[3] Section 14.1 of the *CHRA* provides that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[4] As is the case with other discrimination complaints, the onus of establishing retaliation first rests on the complainant who must demonstrate a *prima facie* case. That is, the complainant must provide evidence which, if believed, is complete and sufficient to justify a verdict that the respondent retaliated against him or her (see *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, at para. 28 [*O'Malley*]). Where a complaint is based on a prohibited ground of discrimination, complainants are required to show that they have a charateristic protected from discrimination under the *CHRA*, that they experienced an adverse impact and that the protected characteristic was a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33).

[5] Retaliation complaints, however, are not founded on a prohibited ground of dicrimination. Rather, it is a complainant's previous human rights complaint that is substituted for the prohibited ground of discrimination. Therefore, to establish a *prima facie* case of retaliation, complainants are required to show that they previously filed a human rights complaint under the *CHRA*, that they experienced an adverse impact following the filing of their complaint and that the human rights complaint was a factor in the adverse impact. That said, there is some debate in the Tribunal's jurisprudence as to how a complainant can establish that their human rights complaint was a factor in the adverse impact suffered.

[6] In *Virk v. Bell Canada* (2005 CHRT 2 [*Virk*]), the Tribunal stated: "[r]etaliation implies some form of willful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint" (*Virk*, at para. 156). According to this view, a complainant must show that the alleged retaliator knew of the existence of the complaint,

acted in an inopportune way and that its actions were motivated by the filing of the complaint (see *Virk*, at para. 158). In some Tribunal cases, *Virk* has been interpreted as requiring the complainant to prove an intention to retaliate (see for example *Malec, Malec, Kaltush, Ishpatao, Tettaut, Malec, Mestépapéo, Kaltush v. Conseil des Montagnais de Natashquan*, 2010 CHRT 2; and *Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29).

[7] Another approach was outlined in *Entrop v. Imperial Oil Ltd.* (No. 7), (1995), 23 C.H.R.R. D/213; aff'd (1998) O.A.C. 188 (Div. Ct.); varied on other grounds (2000), 50 O.R. 3(d) 18 (C.A.); and adopted by the Tribunal in *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT) [*Wong*]. Under this approach, to prove retaliation there only need be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the *CHRA*. While intent to retaliate would obviously establish this link, the complainant's "reasonable perception" that the act is retaliatory could also establish this link.

[8] In applying the *Wong* approach, the reasonableness of the complainant's perception is measured so as not to hold the respondent accountable for unreasonable anxiety or undue reaction by the complainant (see *Wong*, at para. 219). In this regard, where there is a history of conflict between the complainant and the respondent, it can be difficult to discern the reasonableness of the complainant's perception of retliation. To assist in this analysis, in *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40, at paras. 48-61 [*Bressette*], the Tribunal adopted an approach whereby it first determined whether it could accept, on a *prima facie* basis, that the human rights complaint was at least one of the factors influencing the alleged differential treatment. If a *prima facie* case is established, then the respondent is asked to provide a reasonable explanation for the treatment.

[9] Similar to *Virk*, some provincial human rights Tribunals and Commissions require proof of intent, whether by direct evidence or by inference, to substantiate a retaliation complaint (see *Walsh v. Mobil Oil Canada*, 2008 ABCA 268; and *Noble v. York University*,

2010 HRTO 878). Others follow the *Entrop*, *Wong* and *Bressette* approach, relying on a complainant's reasonable perception of retaliation (see *Bissonnette v. School District No. 62 and Frizzell*, 2006 BCHRT 447),or simply a connection between the human rights complaint and a subsequent adverse treatment (see *Commission des droits de la personne et des droits de la jeunesse c. Ville de Nicolet*, 2001 CanLII 88 (QC TDP)).

[10] The parties in this case have each argued that the Tribunal ought to prefer one of these two approaches. The Complainant suggests that the *Wong* approach currently prevails and that it is unnecessary for the Complainant to prove specific intent on the part of the Respondent; rather, the Complainant must show that Dr. Blackstock reasonably perceived the Respondent's conduct to be in retaliation to the human rights Complaint. The Respondent, on the other hand, submits that, as stated by the Tribunal in *Virk* and *Cassidy*, there must be a conscious aspect to retaliation and that the Complainant must demonstrate that the Respondent knew of the Complaint and responded to it negatively by way of reprisal or other punitive conduct. However, both the Complainant and the Respondent argue that regardless of the approach the Tribunal adopts, the evidence of the present case supports their respective positions.

[11] In our view, the *Wong* and *Bressette* approach is the correct approach to analyzing complaints of retaliation. To require intent in order to establish retaliation places a higher burden to substantiate this discriminatory practice than any of the other ones outlined in the *CHRA*. This is not consistent with an interpretation of the *CHRA* or human rights legislation in general.

[12] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, at para. 21).

[13] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.
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> (*CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114, at p. 1134)

Similarly, in *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44, the Supreme Court reiterated:

> More generally, this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: see, for example, Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571, at para. 120; University of British Columbia v. Berg, [1993] 2 S.C.R. 353, at p. 370; Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, at pp. 89-90; Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, at pp. 157-58.
>
> (*B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44)

[14] To retaliate is to “respond to an injury, insult, assault, etc. in likemanner” (*Canadian Oxford Dictionnary*, 2d ed., *s.v.* “retaliate”). In French, the word “représailles” means “[r]endre le mal pour le mal” (*Le Petit Robert 2013*, *s.v.* “représailles”). While the grammatical or ordinary sense of the words “retaliate” or “représailles” assist in

understanding the basic action at issue, these defintions are not totally transferrable to the scheme, object and intention of the *CHRA*.

[15] First, applying the above definitions literally in the context of the *CHRA* would amount to characterizing a human rights complaint as something that is wrong (injury, insult, assault, mal). This obviously does not fit with the purpose of the *CHRA*:

> 2. The purpose of this Act is to extend the laws in Canada to give effect…to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

In filing complaints of discriminatory practices to protect this purpose, the public is exercising its "fundamental" or "quasi-constitutional" rights (see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566, at p. 577). These rights, "…and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all other" (*Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145, at p.158). Therefore, the filing of complaints to protect human rights should not be viewed as a wrong, but as something noble, safe and fair.

[16] Second, while the definitions of the words retaliate and représailles imply some sort of conscious, intentional action on the part of the person retaliating, the same can also be said about the action of discriminating. In English, to discriminate means to "make a distinction, esp. unjustly and on the basis of race, age, sex, etc." (*Canadian Oxford Dictionnary*, 2d ed., *s.v.* "discriminate"). In French, "discrimination" means "[t]raitement inégal et défavorable appliqué à certaines personnes (notamment en raison de leur origine, leur sexe, leur age, leurs croyances religieuses…) (*Le Petit Robert 2013*, *s.v.* "discrimination"). Despite these definitions of the action of discriminating, when the nature and purpose of human rights legislation is taken into account, the Supreme Court of Canada has found that proof of intent is not needed in order to substantiate a discrimination claim.

[17] In *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), at para. 9 [*Robichaud*], the Supreme Court noted that the *CHRA* "…seeks "to give effect" to the principle of equal opportunity for individuals by eradicating discrimination." That is, the *CHRA* is primarily aimed at eliminating discrimination, not punishing those who discrirmnate. In this regard, the Supreme Court went on to state:

> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.
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> (*Robichaud*, at para. 10)

[18] Similarly, in *O'Malley*, at paragraph 14, the Supreme Court stated:

> To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in Griggs v. Duke Power Co., 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal (Dennis v. United States, 339 U.S. 162 (1950), at p. 184). Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.

[19] Pursuant to *Robichaud* and *O'Malley*, intent is not a necessary element of proof to establish a discriminatory practice under the *CHRA*. In this regard, we note the *CHRA* does not differentiate between discriminatory practices, including retaliation at section 14.1:

> 4. A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in section 53.
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> 39. For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1.

[20] There is also no requirement of intent specifically mentioned in section 14.1:

> 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[21] The concept of intent only arises in the *CHRA* when a complaint has been substantiated, as something to consider in making an order under section 53:

> 53. (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

The analysis adopted by Tribunal members under 53(3) and the corresponding awards or lack thereof may be indicative of this higher threshold present in the requirement of intent.

The Federal Court has interpreted this section as being a "…punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone*, 2013 FC 113, at para. 155, aff'd 2014 FCA 110 [*Johnstone FC*]). A finding of wilfulness requires "…the discriminatory act and the infringement of the person's rights under the Act is intentional" (*Johnstone FC*, at para. 155). Recklessness involves "…acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone FC*, at

para. 155). The Tribunal has not often made awards in the higher range of this section, which may be indicative of the application of the requirement for intent. Interestingly, in *Bressette*, the Tribunal substantiated the retaliation complaint, but it did not award any amount under section 53(3) of the *CHRA*.

[22] Furthermore, the Federal Court of Appeal recently stated: "[t]here should be no hierarchies of human rights" (*Canada (Attorney General) v. Johnstone*, 2014 FCA 110, at para. 81 [*Johnstone FCA*]). In determing that the prohibited ground of family status should not entail a higher threshold for a finding of *prima facie* discrimination than for the other prohibited grounds set out in the *CHRA*, the Court stated:

> We agree that the test that should apply to a finding of prima facie discrimination on the prohibited ground of family status should be substantially the same as that which applies to the other enumerated grounds of discrimination.
>
> (*Johnstone FCA*, at para. 81)

[23] The same reasoning can be applied to section 14.1 of the *CHRA*. While retaliation does not entail the application of a prohibited ground of discrimination, it employs a complaint of discrimination in its place. Pursuant to *Johnstone FCA*, the *prima facie* test for section 14.1 should be substantially the same as those for the other discriminatory practices. As mentioned above, none of the other discriminatory practices require a complainant to establish intent.

[24] This interpretation is also consistent with the important policy considerations underlying section 14.1. A prohibition on retaliation for having filed a complaint safeguards the integrity of the *CHRA* complaint process by providing protection for complainants who may be hesitant to exercise their rights under the *CHRA* for fear of reprisal. It also provides an assurance that, if reprisal is taken against them as a result of the filing of a complaint, redress will be provided. This section may also serve to deter those who might retaliate.

[25] Requiring intent to establish retaliation may defeat the purposes of section 14.1, because, as the Tribunal has stated many times: “[d]iscrimination is not a practise which one would expect to see displayed overtly” (*Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)). Therefore, a requirement to establish intent would make it very hard to ever substantiate a retaliation complaint.

[26] In fact, prior to the inclusion of section 14.1, retaliation was only covered under sections 59 and 60 of *CHRA*. Those sections make it a summary conviction offence to threaten, intimidate or discriminate against an individual because they have made a complaint under the *CHRA*. Prior to the adoption of section 14.1 in 1998, there had been few retaliation prosecutions, and those launched had generally been unsucessful. That was because it was difficult to meet the criminal requirements needed to secure a conviction in those cases: proof beyond a reasonable doubt that action was taken against a complainant with the intent to force the abandonment of his or her human rights complaint. As a result, Parliament decided the anti-discrimination system created by the *CHRA* would be better suited than the criminal courts to deal with retaliation cases (see Parliament of Canada, Legislative Summary-298E, Bill S-5: *An Act to Amend the Canada Evidence Act*, the *Criminal Code*, and the *Canadian Human Rights Act* by Nancy Holmes (Law and Governance Division, 1998), at C3, online: Parliament of Canada http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=S5&Parl=36&Ses=1).

[27] For these reasons, we do not believe a complainant should be required to show proof of intent to substantiate a retaliation claim under the *CHRA*. In our view, the central purpose of the *CHRA* is “…to eradicate anti-social conditions without regard to the motives or intention of those who cause them” (*Robichaud*, at para. 11). To require a complainant to prove intent in order to substantiate a retaliation complaint minimizes the protection against retaliation under the *CHRA* and enfeebles the proper impact of having included section 14.1 in the *CHRA*.

[28] That said, while a complainant does not have to prove intent to substantiate a retaliation complaint, he or she must still present sufficient evidence to justify that his or her human rights complaint was a factor in any alleged adverse treatment he or she received from a respondent following the filing of his or her complaint, whether based on a reasonable perception thereof or otherwise. In this regard, we note that a *prima facie* case does not require a party to adduce any particular type of evidence. Rather, in each case, it is a question of mixed fact and law whether the evidence adduced is sufficient to establish a *prima facie* case of retaliation (see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154, at para. 27). If sufficient evidence is presented to establish a *prima facie* case of retaliation, it is then the Tribunal's role to consider the complainant's evidence, alongside any evidence presented by the respondent, to determine whether it is more probable than not that retaliation has occurred.

[29] It is with this in mind that we now turn to examine the facts specific to the present case.

III. The Retaliation Complaint

[30] The Complainant argues that prior to the filing of the 2007 human rights Complaint against the Respondent, Dr. Blackstock and the Caring Society had strong collaborative ties with the Respondent. Following the 2000 National Policy Review, which examined the funding formula used by the Government of Canada to fund First Nations child and family services on reserve (known as Directive 20-1), the Respondent commissioned the Caring Society to engage a team of experts to identify at least three funding formula alternatives for First Nations child and family service agencies. The Complainant argues that in the course of this research and the resulting three reports (known as the *Wen:De* Reports), the parties worked in a concerted manner. However, once the Complaint was filed, there was a noticeable shift in the Respondent's attitude towards the Complainant, which the Complainant argues was unquestionably motivated by the human rights Complaint.

[31] The Respondent, for its part, recognizes that AANDC engages many organizations, like the Caring Society, and experts for their expertise in the field of child welfare funding on Indian Reserves in Canada. In fact, AANDC also engages provincial governments and numerous international organizations on related issues. While the Respondent and the Caring Society admittedly possessed a working relationship for a number of years, this relationship changed in 2006, upon the completion of the *Wen:De* report and its presentation. However, this change in the relationship pre-dates the filing of the Complaint. The Respondent takes the position that Dr. Blackstock's perception that the Respondent retaliated against her as a result of her filing of her human rights Complaint is unfounded and unreasonable.

[32] The Retaliation Complaint is grounded in a series of specific incidents where it is alleged the Respondent took actions of a retaliatory nature. Dr. Blackstock, on behalf of the Caring Society (Complainant), alleges that the following incidents occurred due to her filing of the Complaint: (A.) she was not hired by the Respondent as a casual employee on a working group, despite her qualifications (The British Columbia Working Group); (B.) she was excluded from a meeting with the Minister and the Chiefs of Ontario (Chiefs of Ontario Meeting at the Minister's Office); (C.) the Respondent monitored her public appearances (Monitoring of Complainant's Public Appearances); (D.) the Respondent monitored the Caring Society's and "I am a Witness" campaign Facebook pages as well as her personal Facebook page (Monitoring of Facebook Pages); and (E.) the Respondent inappropriately accessed her Indian Registrar Record on two occasions (Access to the Complainant's Indian Registrar Record).

[33] The present decision will examine each of these alleged incidents in turn.

A. The British Columbia Working Group

[34] In 2008, the Respondent formed a Working Group in British Columbia with First Nations organizations to develop and implement a new Enhanced Funding Formula for the province for the funding of First Nations child welfare services. The Working Group grew

out of the Partnership Table, a group comprised of representatives from B.C. First Nations agencies, B.C. Ministry for Children representatives and Federal representatives from the AANDC B.C. Region, which met approximately four times a year.

[35] At one of the Partnership Table meetings, an AANDC official from the Alberta Child and Family Services office presented Alberta's funding model, which was described as a renovated Directive 20-1 formula. Following these discussions, the group decided that they would use the Alberta funding model as the basis for a "made-in-B.C." approach, which would be tailored to meet the needs of B.C. First Nations and reflect requirements of B.C. legislation.

[36] This led to the formation of the Working Group, a tripartite process which was composed of representatives from the B.C. First Nations agencies, the B.C. provincial government and from AANDC Headquarters. The AANDC Child and Family Services B.C. Regional office provided funding to hire a casual employee to manage the process and help develop the document that the Working Group would produce. This employee was to attend the meetings, prepare drafts, manage the input of the Working Group members, write briefing notes to AANDC senior management and develop communications pieces for the use of the agencies so as to enable them to explain the model to their various Chiefs, councils and communities.

[37] During one of the Working Group's preliminary meetings, Mary Teegee, from the Carrier Sekani Family Services in Prince George, B.C., suggested to the Working Group that Dr. Blackstock should be retained for this position, in light of her background and expertise in the area of child welfare in B.C.. Linda Stiller, who at the time managed the AANDC Child and Family program in the B.C. region, rejected the idea, allegedly because Dr. Blackstock had been openly quite critical of the new Alberta funding model which B.C. was planning on following. The Working Group chose instead to hire someone named Jeffrey Lyons, who had previously worked in the AANDC Manitoba Region as a social worker and had been involved in the national review of Directive 20-1 as an AANDC Headquarters representative.

[38] The Working Group continued to meet over a period of nine to twelve months to establish the B.C. funding model and prepared a document entitled “Enhanced Prevention Services Model for B.C. Advisory and Steering Committee workshop.” According to Ms. Stiller, the BC funding model was approved by the members of the Partnership Table, as well as by the Board of Directors of all the B.C. child welfare agencies, but was never adopted by the Federal Government.

(i) Parties’ positions

[39] The Complainant argues that the Respondent’s opposition to the Working Group retaining Dr. Blackstock as a consultant was grounded in the filing of the Complaint. Dr. Blackstock testified that Mary Teegee informed her that, in addition to refusing to hire for the consultant position, the Working Group had taken the view that they would not have discussions if Dr. Blackstock participated.

[40] In the Complainant’s view, the explanation given by Linda Stiller, the Respondent’s witness, for the refusal to hire Dr. Blackstock, namely that she had been critical of the new Alberta funding model, is pretextual. Ms. Stiller admitted that she did not know Dr. Blackstock’s specific criticisms and did not contact her to discuss her views on the Alberta funding model; the views that the Complainant argues are also supported by the Auditor General of Canada’s 2008 report. Ms. Stiller also acknowledged that the Complaint was regularly discussed in her meetings with AANDC National Headquarters. Combined with the fact that the consultant hired by the Working Group was from out of province and lacked Dr. Blackstock’s credentials and specific knowledge of B.C., the Complainant argues that the decision not to hire Dr. Blackstock, whose expertise in child welfare in B.C. is well known and respected, was based on her filing of the Complaint.

[41] The Respondent argues that its witness, Ms. Stiller, provided a clear explanation as to why Dr. Blackstock was not considered an appropriate choice for the casual employee position with the Working Group. The employee hired was to “hold the pen” for the Working Group and undertake the drafting of the group’s work, as well as provide internal

support and develop communication documents explaining the chosen model to Chiefs, councils and communities. The B.C. Working Group had planned to use the Alberta model as a basis for its own B.C. approach and tailor it to meet the needs of the B.C. First Nations and reflect the requirements of the provincial legislation. Given the Complainant's vocal and public criticisms of the Alberta model and her view that the *Wen:De* approach would have been more appropriate, Ms. Stiller testified that she felt the Dr. Blackstock would have a conflict of interest as she did not support the model which was to constitute the foundation of the Working Group's approach. Ms. Stiller testified that contrary to the Dr. Blackstock contentions, Mr. Lyons possessed specific knowledge of B.C. and had worked on several contracts for the B.C. provincial ministry as well as for a number of B.C. First Nations agencies.

[42] The Respondent argues that the decision to hire Mr. Lyons instead of the Dr. Blackstock was not retaliatory and that Dr. Blackstock's perception in this regard is not reasonable. While Ms. Stiller acknowledged that she was aware of Dr. Blackstock's and the Complainant's human rights Complaint, she expressed that this was not a relevant factor in her decision.

(ii) Analysis

[43] Dr. Blackstock has an undeniable expertise in the area of focus of the Working Group. Combined with the fact that these events occurred soon after the filing of her human rights Complaint, the Tribunal finds that in the absence of an explanation by the Respondent, the Complainant has provided sufficient evidence to demonstrate that the Respondent's objection to hiring Dr. Blackstock for the position was retaliatory. As such, on a *prima facie* basis, the Complainant has demonstrated that Dr. Blackstock was adversely differentiated in this regard.

[44] However, the Respondent has provided an explanation for this differentiation. Respondent witness Linda Stiller was credible and the Tribunal accepts her evidence that she did not prevent the Dr. Blackstock from attending the Working Group meetings

generally, but objected to hiring her to help develop the document that the Working Group was to produce.

[45] The Tribunal also accepts the explanation provided for this objection, namely that Dr. Blackstock's publicly expressed negative views with regard to the Alberta child welfare funding model were in direct conflict with the objective that the Working Group was trying to achieve. Dr. Blackstock was supportive of the *Wen:De* report, which advocates for a large investment of funds across the country, whereas according to Ms. Stiller's evidence, the Alberta model worked with the provinces' current levels of spending and attempted to improve the delivery of services by the on-reserve agencies to the level of the province with these existing funds.

[46] It is reasonable, in a hiring decision such as this one, for the Respondent to refuse to hire an individual that has previously expressed views indicating the presence of a conflict of interest with the work that would be undertaken. We found nothing in this evidence which could indicate that the Respondent's explanation is pretextual. While it is true that Ms. Stiller mentioned that, at the time, she may have been aware of the existence of the Complaint, she also pointed out that, as a regional manager, she had no involvement in these types of matters. The Tribunal finds that, in light of the credibility of the explanation provided for the adverse differentiation, Ms. Stiller's awareness of the Complaint alone is insufficient to conclude that it was a factor in her decision.

[47] For these reasons, the Tribunal finds that this particular series of events does not demonstrate that the Respondent retaliated against the Complainant.

B. Chiefs of Ontario Meeting at the Minister's Office

[48] On December 9, 2009, Dr. Blackstock was invited by the Chiefs of Ontario to attend a meeting with David McArthur, a special assistant to the Honourable Chuck Strahl, Minister of AANDC (at the time known as INAC). The meeting was convened on short notice, as many of the Chiefs were in Ottawa to attend a meeting with the AFN. The goal

of the meeting was to discuss issues surrounding child welfare policy and funding in Ontario and was scheduled to take place in the offices of the Minister in Gatineau, Quebec. Dr. Blackstock testified that Grand Chief Randall Phillips, from the Allied Iroquois and Algonquin Nation, invited her to attend, in light of her expertise in this area. She was one of several individuals who had been invited by the Chiefs of Ontario to attend the meeting as a technical aid.

[49] Upon arrival at the Minister's office building, Dr. Blackstock, along with the 10 to 14 other individuals accompanying Grand Chief Phillips, proceeded through security and took the elevator to the floor of the Minister's office. There, they sat and waited in the reception area, outside of the meeting room. Mr. McArthur appeared and following a brief discussion with Grand Chief Phillips regarding the number of delegates, proceeded to allow the delegates to enter the meeting room one by one, greeting them individually as they went in.

[50] When it was Dr. Blackstock's turn to enter the room, Mr. McArthur asked her to identify herself. When she did, he blocked access to the room, stating "[w]ell, we'll meet with you at another time, …I understand that you have a number of issues, and we'll meet with you at another time" (see StenoTran Services Inc.'s transcript of February 28, 2013, vol. 4, at p. 16, lines 8-11). Dr. Blackstock clarified that she was not there to discuss the Complaint and that she was attending the meeting as a technical advisor for the Chiefs of Ontario.

[51] Grand Chief Phillips intervened in support of Dr. Blackstock confirming her role as a technical advisor. After some back and forth between them, Mr. McArthur said to Grand Chief Phillips: "'Chief', he said, '[i]f she comes in, there's no meeting. It's as simple as that'" (see StenoTran Services Inc.'s transcript of July 15, 2013, vol. 13, at page 80, lines 19-20). Grand Chief Phillips therefore yielded to Mr. McArthur's request and entered the meeting room, leaving Dr. Blackstock in the waiting area. As the meeting started, she remained there alone for 10 to 15 minutes, under the watch of a security guard. Dr.

Blackstock testified she left before the meeting concluded. Grand Chief Phillips and Mr. McArthur both testified that, in the end, the meeting had been fruitful for both parties.

[52] Following the meeting, in a letter dated December 15, 2009, Dr. Blackstock wrote to Minister Strahl requesting an explanation for her exclusion from the meeting. She added that "[t]he only reasonable explanation is that I am involved in the filing of a Human Rights complaint against INAC" (see StenoTran Services Inc.'s transcript of July 17, 2013, vol. 15, at page 66, lines 7-11). She received a letter in response on January 29, 2010, signed by Laurie Throness, Minister Strahl's Chief of Staff. The letter explained that Dr. Blackstock was excluded from the meeting as she was not originally listed as one of the participants and that the Minister's office had a practice of obtaining briefings prior to any meetings, something which had not been done for Dr. Blackstock. The letter stated that, as a result, Mr. McArthur felt that meeting with her at that time would not have been appropriate. Mr. Throness reminded Dr. Blackstock that Mr. McArthur had expressed that he was, however, willing to meet with her on a separate occasion and reiterated this offer in the letter. Dr. Blackstock never availed herself of this offer.

(i) Parties' Positions

[53] The Complainant argues that Dr. Blackstock's exclusion from the meeting was based on her filing of the Complaint and constitutes retaliation. As Grand Chief Phillips testified, Dr. Blackstock was present as a technical aid to him, in light of her knowledge on statistics and funding levels and both he and Dr. Blackstock clearly indicated to Mr. McArthur that she was not there to discuss the Complaint.

[54] The Complainant rejects the Respondent's explanation for excluding Dr. Blackstock, which is that she was not on the list of invitees and because Mr. McArthur had not received a prior briefing on her. Dr. Blackstock was the only person excluded from the meeting, even though many others who were present were not on the invitee list. In fact, the evidence revealed that although five people were expected at the meeting, approximately 10 to 14 people were present. Mr. McArthur also admitted that he had not

received briefings on the invitees whom he knew were scheduled to attend. Mr. McArthur's unfriendly tone and demeanour, along with the order for a security guard to stand and watch over Dr. Blackstock as she sat in the waiting area, compounded her feelings of shame and humiliation, all of which constituted retaliatory action, according to the Complainant.

[55] The Respondent is of the view that it has provided a reasonable explanation for the decision to exclude Dr. Blackstock from the meeting and that this event does not support the retaliation Complaint. Mr. McArthur testified that meetings of this kind were usually planned a long time in advance and accompanied by comprehensive briefing packages by AANDC. This meeting, scheduled just a day before, was an aberration in this respect and was only agreed upon as a courtesy to the Chiefs of Ontario, who were already in Ottawa, in the interest of strengthening the relationship with the AFN. Mr. McArthur testified that he only learned of Dr. Blackstock's planned attendance shortly before the meeting and that, while he was aware of the Complaint, his reason for excluding her was because he needed to be properly briefed before meeting with someone of Dr. Blackstock's stature. Mr. McArthur expressed that he was concerned that a wide range of other issues, including the Complaint, could arise during the meeting and that he was not in a position to address them at this time.

[56] The Respondent submits that the evidence fails to demonstrate that the Respondent intended to retaliate against Dr. Blackstock and that her perception of retaliation is unreasonable. Mr. McArthur was firm towards Dr. Blackstock, but also apologetic, and offered to meet with her at another time, an invitation which Dr. Blackstock never acted upon. As for the Commissionaire who remained in the reception area with Dr. Blackstock while the meeting was taking place, the Respondent maintains that the Commissionaire was present because a security breach had occurred when the Chiefs and the other participants had entered the office building. The Commissionaire was also present because the offices of the Deputy Minister and Associate Deputy Minister were adjacent to the reception area where Dr. Blackstock was sitting.

(ii) Analysis

[57] On a *prima facie* basis, the Tribunal finds that Dr. Blackstock has demonstrated that she was adversely differentiated when she was excluded from the meeting with the Chiefs of Ontario and Mr. McArthur. Of the 10 to 14 individuals present, Dr. Blackstock was the only person who was excluded from the meeting. Moreover, Mr. McArthur's statement that he would not meet with her because "she had a number of issues" which needed to be discussed at another time, is a clear indication that the Complaint was at least a factor forming the basis for her exclusion. Combined with the fact that a Commissionaire appeared to stand guard over her while she sat alone in the waiting room as the meeting took place, compounding her feelings of shame, Dr. Blackstock's perception that these actions were in retaliation to the filing of her human rights complaint is reasonable.

[58] The Respondent's explanation for Dr. Blackstock's exclusion is grounded in the fact that it is general practice for the Respondent to put together comprehensive briefing packages in preparation for meetings with First Nation groups, particularly when meeting with an individual of Dr. Blackstock's prominence. With respect, the Tribunal does not find this explanation plausible. While obtaining prior briefings may have been the Respondent's general practice in organizing meetings of this kind, this practice was not applied to the other individuals present. The list of attendees was initially composed of 5 individuals and yet 10 to 14 were able to enter the meeting room. Most of these individuals had not been identified ahead of time. Mr. McArthur also acknowledged that he did not personally know any of the Chiefs or other individuals present at this meeting and, despite this, all of them with the exception of Dr. Blackstock's were allowed to attend.

[59] Dr. Blackstock's expertise in the field of child welfare is well established and the Tribunal accepts the explanation that the basis for her attendance at the meeting was to provide technical advice to the Chiefs. Both Dr. Blackstock's and Grand Chief Phillips communicated this purpose clearly to Mr. McArthur, to no avail. Mr. McArthur also acknowledged that he was aware of the Complaint and did not deny that in excluding her, he was concerned that he might end up in a discussion about the Complaint (see

StenoTran Services Inc.'s transcript of July 17, 2013, vol. 15, at p. 78, lines 9-13). This admission supports the conclusion that the Complaint formed the basis for her exclusion and in the Tribunal's view, constitutes a retaliatory act. Moreover, Mr. McArthur's offer to meet with Dr. Blackstock's at a later date was unhelpful and rendered moot by the fact that the parties to the meeting were able to resolve the issues at hand. Since Dr. Blackstock's aim in attending the meeting was to assist the Chiefs, there was no reason for her to request a subsequent meeting with Mr. McArthur.

[60] On the issue of the presence of the Commissionaire who was standing guard as Dr. Blackstock sat in the waiting area, the Tribunal finds that the Respondent did provide a reasonable explanation for this aspect of the incidents which took place that day. The Tribunal heard compelling evidence describing the origins of the security incident which resulted in the presence of the Commissionaire. While Dr. Blackstock's perception of intimidation and feelings of shame were understandable under these circumstances, it appears that this particular aspect of the incident was due to a misunderstanding. However, in light of the Tribunal's previous finding that the Respondent has not provided a reasonable explanation for her exclusion from the meeting, this finding has no bearing on the Tribunal's conclusion that the Respondent has retaliated against the Complainant.

C. Monitoring of Dr. Blackstock's Public Appearances

[61] Dr. Blackstock's obtained a number of documents, pursuant to her requests under the *Privacy Act*, which indicate that following the filing of the Complaint, the Respondent was monitoring her professional activities. According to the evidence, government officials reported back on the presentations that she delivered at the New Brunswick Child and Family Services Symposium in the Fall of 2009, at an international working group in March 2010 in North Vancouver whose aim was to prepare a report for the United Nations Permanent Forum on Indigenous Issues (UNPFII), as well as a presentation she delivered at the July 27-29, 2010 National Conference in Alice Springs, Australia. Dr. Blackstock's November 23, 2009 interview with the CBC was also transcribed and circulated within

AANDC. It is alleged that some documents even highlighted her absence at an event. Dr. Blackstock stated that she found this surveillance very disturbing.

[62] These allegations were part of the basis for Dr. Blackstock's Complaint to the Privacy Commissioner on March 6, 2012. The Office of the Privacy Commissioner (OPC) conducted an investigation into these events and released its report of findings on May 28, 2013. The report concluded that no breach of privacy had occurred.

(i) Parties' Positions

[63] The Complainant argues that the close and proactive monitoring of Dr. Blackstock's appearances, speeches and interviews by the Respondent constitutes retaliation for filing the Complaint, particularly given that there is no evidence that such type of monitoring of Dr. Blackstock occurred prior to the filing of the Complaint. The Complainant submits that the Respondent's only witness, called to explain the many reports of monitoring, was present at solely one of the events in question and that his testimony was unhelpful. In the absence of further evidence explaining the purpose of the monitoring, the Tribunal should draw an adverse inference from this behaviour. The Complainant notes that the Complaint was filed on behalf of First Nations children and not Dr. Blackstock personally. In light of this, it is difficult to understand the relevance of Dr. Blackstock's personal public appearances to the litigation and, as such, it was reasonable for Dr. Blackstock to perceive this scrutiny as retaliation for filing the Complaint.

[64] The Respondent submits that reporting on Dr. Blackstock's public speaking engagements, particularly when they pertain to issues relating to child welfare, the work undertaken by the Caring Society and the Complaint, does not constitute retaliatory conduct. It is to be expected that these activities of public advocacy would interest the Respondent, in light of its related operations and programs, as well as the ongoing litigation. The Respondent did not retaliate against Dr. Blackstock and is of the view that Dr. Blackstock's perception that this was unwelcomed scrutiny is unreasonable.

(ii) Analysis

[65] While the Complainant argues that Dr. Blackstock was inappropriately singled out by the Respondent in these monitoring activities, a review of the evidence suggests otherwise. Many of the documents entered into evidence consist of summaries prepared by AANDC officials who attended conferences where Dr. Blackstock was speaking. These summaries cover Dr. Blackstock's presentation but also cover the presentations of other panelists. For example, at a child welfare workshop during the AFN Special Chiefs Assembly in 2011, an AANDC official produced a summary of those who were presenting. The summary detailed the presentation of Dr. Blackstock, but also that of McGill professor Vandna Sinha as well as Jonathon Thompson of the AFN, also a co-complainant in the present matter. The evidence indicates that AANDC employees attended these conferences and prepared these summaries with the aim of formulating media lines and Questions and Answers to respond to questions from the press.

[66] Dr. Blackstock recognized that, prior to filing the Complaint, she had a close relationship with the Respondent. In addition to working together on the *Wen:De* reports, Dr. Blackstock and the Respondent appeared at conferences of this kind together. In the Tribunal's view, it is not surprising that the Respondent would continue to attend these conferences following the filing of the Complaint and nothing indicates that it did so with the sole purpose of monitoring her in retaliation for her filing of the Complaint.

[67] During many of her public appearances at conferences, on the radio and on television, Dr. Blackstock discussed the Complaint and Tribunal proceedings as well as her views on issues relating to the alleged inequality of services for First Nations and their underfunding. The evidence supports that this aspect was of particular interest for the Respondent. For example, in internally distributing a transcript of Dr. Blackstock's November 23, 2009 CBC interview, AANDC officials highlight that the radio segment begins with a discussion of the Tribunal and the recent adjournment of the hearing (see Exhibit C-1, Tab 14).

[68] In March 2010, Dr. Blackstock presented at an international working group which was to prepare a report for the UN Permanent Forum on Indigenous Issues. An AANDC official attended the conferences and communicated a summary of her presentation and paper to other AANDC officials. The summary highlights Dr. Blackstock's statements on the Complaint and her call on the UN to appoint a Special Observer to follow the Tribunal proceedings. In the email chain discussing Dr. Blackstock's presentation, one AANDC official asks: "[s]eparate from what we might say later at the UN permanent Forum, do we have coms lines addressing her presentation if it gets some coverage ?" (see Exhibit C-1, Tab 14, email chain entitled "(11/4/2010) Keith Smith-Rep. : Re: Cindy Blackstock Presentation", at p. 1).

[69] In exercizing this right to freedom of speech, Dr. Blackstock invited a significant amount of media and public attention. The "I am a Witness" campaign, for example, has thousands of subscribers. Throughout these frequent public appearances and statements, Dr. Blackstock openly criticised the Respondent for its actions and position with regard to the Complaint, placing the Respondent in a position where it was asked to explain and defend some of its actions and decisions. On one occasion, for example, a radio station called the Respondent in preparation for an interview with Dr. Blackstock scheduled for the following day, in order to obtain comments from the Minister on the Complaint. The evidence indicates that the Respondent's interest in Dr. Blackstock's public appearances is often related to its desire to be aware of these statements and allegations so as to be in a position to respond where necessary.

[70] The Tribunal notes that some of the emails between government officials did refer to Dr. Blackstock in an unprofessional manner. There is, however, no indication that in having its representatives attend these events, the Respondent was attempting to intimidate the Complainant. All of the events that were monitored were public appearances. While Dr. Blackstock states that she found the surveillance disturbing, she testified that she only became aware of it as a result of her requests under the *Privacy Act*. This fact pattern differs from the one in the *Cassidy* case, for example, where Ms. Cassidy saw the Respondent staring at her and perceived this behaviour as intimidation, in

retaliation for the filing of her human rights complaint against him (see *Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29).

[71] Having said this, the filing of the Complaint appears to have been a factor behind the Respondent's actions in this regard. In fact, the Respondent does not dispute that the Complaint was one of the reasons behind its monitoring of Dr. Blackstock's public appearances. However, the Respondent has stated that it took these actions in preparation for the present litigation. In publicly discussing the Complaint and these proceedings, Dr. Blackstock opened the door for the Respondent to keep track of her allegations so as to be in a position to defend itself before the Tribunal. The right to a defence is a fundamental common law principle, pursuant to which a party has the ability to gather information that may be helpful to its case. While this right is limited by procedural fairness and by the other parties' competing right to privacy, neither has been infringed in the present case. In light of the aforementioned, the Tribunal finds that in taking these actions, the Respondent was not retaliating against Dr. Blackstock or the Complainant.

D. Monitoring of Facebook Pages

[72] Dr. Blackstock's requests under the *Privacy Act* also revealed that subsequent to the filing of the Complaint, the Respondent had monitored three Facebook pages: Dr. Blackstock's personal Facebook page, the Caring Society's Facebook page and the "I am a Witness" Campaign Facebook page, which were all administered by Dr. Blackstock. The monitoring was done by Ms. Natalia Strelkova, a paralegal with the Department of Justice litigation team assigned to this file, at the instruction of senior counsel. According to Ms. Strelkova's testimony, she received instructions to monitor the pages and report if Dr. Blackstock posted anything pertaining to the ongoing litigation. As access to the Facebook website was restricted by the governmental Internet filtering system, Ms. Strelkova made a Website Access Request, with the approval of her immediate supervisor, to the IT department to obtain access to the website. She obtained the necessary authorization on

or around February 20, 2010 for the remainder of the calendar year, ending on December 31, 2010. She did not ask for an extension.

[73] Both the Caring Society's and the "I am a Witness" Campaign's Facebook pages are public pages and were readily accessible during this time by Ms. Strelkova. The evidence revealed that from May 2010 until July 2011, Dr. Blackstock's personal Facebook page was also publicly available due to the fact that Facebook had reset its privacy settings. Ms. Strelkova monitored all three sites, through her own personal Facebook account, checking them a few times a week to see if there were any new posts. She reported her findings by periodically sending screenshots of the pages to her client, AANDC, and to the client's legal team. She never received feedback from these reports. Ms. Strelkova's focus in reviewing these Facebook pages was on any posts relating to the litigation and she testified that she tried to skim over any information of a personal nature. However, despite her efforts in this regard, the evidence revealed that a few of the screen shots she captured did contain information of a personal nature. She monitored the websites until she left her position in August 2011.

[74] These allegations were also the subject of Dr. Blackstock's March 6, 2012 complaint to the Privacy Commissioner, who concluded that the allegations were well-founded, insofar as the respondents, AANDC and the Department of Justice Canada, did "collect select sets of personal information, unrelated to their ordinary operating activities, in the course of monitoring social media related to the complainant." The report also noted that the Office of the Privacy Commissioner "did not however find sufficient evidence to support the allegation that those records were widely distributed to a vast number of personnel within both departments" (see Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, at para. 82). The report concluded with a series of recommendations and states that the respondents accepted them in full.

(i) Parties' Positions

[75] Along the same lines as the surreptitious monitoring of Dr. Blackstock's public appearances, the Complainant argues that the Respondent's access to Dr. Blackstock's personal Facebook page, as conceded by the Respondent during the hearing, was not relevant to the Complaint and constitutes retaliation. The evidence suggests that the Respondent was accessing the Facebook page to try to find adverse personal information about Dr. Blackstock to discredit her, an approach which is further confirmed by the Respondent counsel deeply troubling line of questioning to Dr. Blackstock in the jurisdiction motion when she was asked about her religion and whether she had been in care as a minor. The Complainant argues that the Respondent's attitude and approach in this regard is retaliatory and that Dr. Blackstock rightfully felt targeted by these actions.

[76] The Respondent acknowledged that it monitored Dr. Blackstock's personal Facebook page during the period of February 2010 until approximately August 2011, when it was accessible to the public, as well as the Caring Society's and the "I am a Witness" Facebook pages. The Respondent argues that the monitoring was not done in a surreptitious manner and was done as part of its preparation for the litigation before the Tribunal. While the Respondent was only interested in information relating to the human rights Complaint, unrelated pieces of personal information were incidentally collected. The Office of the Privacy Commissioner's report took note of this and issued recommendations to the Respondent, which the Respondent accepted. The Respondent submits that it is entirely appropriate for parties that are engaged in litigation to seek information about each other, including motivation for pursuing the litigation. The Office of the Privacy Commissioner's report (OPC report) acknowledged this and noted that "courts have held that a party initiating litigation provides implied consent to a certain amount of probing of their private affairs for the proper determination of the litigation" (see Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, at para. 76). The Respondent submits that the evidence fails to show any intent to retaliate on the part of the Respondent and that the Complainant's perception in this regard is not reasonable in light of the circumstances of the litigation.

[77] With regard to Dr. Blackstock's assertion that the Respondent asked "deeply troubling" questions during cross-examination on a jurisdiction motion, the Respondent submits that Dr. Blackstock chose to be affirmed for her cross-examination on an affidavit and that the line of questioning sought to ascertain that she was committed to telling the truth. The Respondent also notes that counsel for the Complainant raised no objection at that time.

[78] The Commission is of the view that these allegations raise a novel question, namely whether the routine online surveillance of the personal life of an individual who has filed a human rights complaint, or is the alleged victim for the purposes of litigation, could constitute retaliation pursuant to section 14.1 of the *Act*. It has therefore chosen to limit its final written and oral arguments to this issue, examining whether the Complainant has established discrimination on a *prima facie* case in this regard and, if so, if the Respondent has provided a reasonable explanation or justification for its actions.

[79] The Commission notes that the evidence revealed that the Respondent sought to monitor Dr. Blackstock's Facebook page for reasons directly linked to the Complaint. Ms. Strelkova stated that her mandate was to monitor what was being communicated on the Facebook page so as to identify information relevant for the purposes of cross-examination. The evidence also revealed that some of the information collected was incidental personal information, unrelated to the issues of the case and the Respondent's stated purpose for accessing the Facebook page.

[80] The Commission submits that there is no question that in monitoring Dr. Blackstock's personal Facebook page and subjecting no other witness or complainant to such surveillance, the Respondent singled her out, due to her active role in the Complaint. Having said this, the monitoring began after the Complaint was referred to the Tribunal and the litigation had begun. The litigation and Dr. Blackstock's role had been highly publicised and the information collected was gathered during a time when it was publicly accessible, due to Dr. Blackstock security settings. In the Commission's view, litigants must unfortunately frequently face a reduced expectation of privacy in litigation that is so

public in nature. While the systematic collection of information from Dr. Blackstock page is problematic due to the personal information that was also incidentally gathered, the Commission argues that it does not, in the context of this case, constitute a *prima facie* case of retaliation pursuant to section 14.1 of the *Act*.

[81] However, the Commission notes that while the Respondent's actions may not have constituted retaliation or harassment, their intrusive nature was unnecessary and can reasonably be seen to have a potentially chilling effect on this litigation.

(ii) Analysis

[82] During the hearing, Dr. Blackstock and her counsel drew the Tribunal's attention to a number of examples in the documentary evidence, where the Respondent captured information of a personal nature on Dr. Blackstock's Facebook page as part of its screen shots. These examples included the comments and compliments of a teacher, who expressed to Dr. Blackstock her interest and desire to support her in her initiatives. They also included the statements of a 12-year-old child, expressing his support, as well as the comments of friends of Dr. Blackstock complimenting her on her baking abilities, in response to a post by Dr. Blackstock announcing that cookies would be distributed at the hearing.

[83] At that time that these screen shots were captured, Dr. Blackstock's Facebook privacy settings were low, rendering them visible to the public. She later increased her settings to prevent the public from accessing her personal Facebook page. While, at first glance, the capturing of these personal comments appears problematic, a closer review of this evidence reveals that in all of the 44 screen shots of Dr. Blackstock's personal Facebook page, only the one which captured the teacher's comments on Dr. Blackstock's work is devoid of any other post or comment relating to the Complaint before the Tribunal. All 43 other screen shots capture posts containing some sort of reference or discussion of the Tribunal proceedings.

[84] The post relating to the cookies, for example, was part of a broader discussion where Dr. Blackstock advertised her “haveaheartcampaign”, which coincided with Valentine’s Day and the Federal Court hearing of the Complainant’s judicial review of the Tribunal’s March 14, 2011 decision to dismiss the Complaint. In this post, Dr. Blackstock urged her supporters to send Valentine letters to their MPs, as well as to the Minister. The post ends with her mention, once again, of the Valentine’s Day cookies.

[85] In another Facebook post, Dr. Blackstock posted hearing transcripts from the cross-examination of Odette Johnston, one of the Respondent’s witnesses, who was cross-examined on her affidavit which supported the Respondent’s motion to dismiss the Complaint. The transcripts were not sealed, but had not yet been made accessible to the public. Dr. Blackstock’s decision to post them led the Respondent to write to the Tribunal to bring this to the Tribunal’s attention. The Tribunal ultimately sent a letter to Dr. Blackstock’s counsel, indicating that the posting of the transcript was inappropriate.

[86] On a separate occasion, Dr. Blackstock also posted a CBC radio transcript where she discussed the Complaint, the government’s actions in this regard, as well as the recent determinations of the Tribunal’s former Chairs Sinclair and Chotalia in this matter. Dr. Blackstock mentioned that while Chair Sinclair had announced an imminent start to the hearing, the newly appointed Chair Chotalia had cancelled the hearing dates. Dr. Blackstock expressed her concern with the canceling of the hearing dates. Further evidence demonstrates that the Respondent chose to respond to these statements and clarify that it had not requested that the Tribunal cancel the hearing dates.

[87] In summary, the evidence as a whole demonstrates that the vast majority of the Facebook pages captured by Ms. Strelkova contained information about the Tribunal, the Federal Court proceedings and/or allegations made against the Respondent with regard to the Complaint. This information was publicly available on social media and, on at least one occasion, gave the public access to information that was not yet publicly available.

[88] The evidence supports the Respondent's position that its interest in Dr. Blackstock's Facebook posts is related to these comments in particular. As was the case in the monitoring of Dr. Blackstock's public appearances, the Tribunal is of the view that the Respondent has the right, in preparing for litigation, to be aware of a Complainant's public statements so as to prepare its defence.

[89] Ms. Strelkova explained she is not a lawyer and that she took screenshots of information that she believed was relevant. There is no question that the capturing of Dr. Blackstock's personal information was inappropriate. The Privacy Commissioner concluded as much and the Respondent accepted responsibility in this regard. The Tribunal is not, however, examining these allegations in light of the *Privacy Act* but rather in light of the *CHRA*. The question before us is whether the Respondent's actions in this regard amount to retaliation contrary to section 14.1 of the *CHRA*. In view of the context of the Facebook monitoring discussed above, it is the Tribunal's view that they do not.

E. Access to Dr. Blackstock's Indian Registration Record

[90] In the period from 2010 to 2011, Dr. Blackstock filed three separate *Privacy Act* requests with the Access to Information and Privacy (ATIP) Directorate of AANDC. The first was filed on October 19, 2010 and requested "[a]ny document or communication with personal information regarding Cindy Blackstock a.k.a. Cynthia Blackstock)… produced between 2005 to present" (the first request). The second was filed on June 22, 2011 and requested "[a]ny information relating to Cindy Blackstock also known as Cynthia Blackstock or Dr. Blackstock dated, or likely to be dated, from June 9, 2010 to June 22, 2011" (the second request). The third request was filed on December 12, 2011 and requested "[a]ny information on {Cindy Blackstock} also known as (aka) {Cynthia Blackstock} aka {Dr. Blackstock} dated, or likely to be dated, from July 9, 2011 to December 12, 2011" (the third request).

[91] Upon receipt of these requests, the ATIP Directorate of AANDC has a 30-day statutory period within which it must process the request. With the exception of the first

request where the Department availed itself of the time extension permitted pursuant to subsection 15(a) of the *Privacy Act*, it appears that Dr. Blackstock received a response to her requests, with enclosures, within this 30-day timeframe.

[92] As part of the package of records contained in these enclosures, Dr. Blackstock received two copies of her Registered Indian Record (the Record) in the Indian Registry System (IRS). The IRS is the official system of record for the identification of all Status Indians in Canada. The Record contained Dr. Blackstock's personal information, as well as the personal information of some of her family members. The copies indicated that the Record had been accessed on November 4, 2010, as well as on November 17, 2011.

[93] In light of the fact that Dr. Blackstock had not made any personal inquiries regarding her Indian Status or her Record in the IRS since 2008, she could not understand why, or by whom, the Record had been accessed on those dates. She testified that there were no active *Privacy Act* requests when her Record was pulled on November 17, 2011. She also found that, although she had made a number of other requests under the *Privacy Act*, the fact that the Record did not appear in every request was unusual.

[94] In an interview on the CBC program "The Current", on the morning of November 17, 2011, Dr. Blackstock publicly expressed her concern regarding what appeared to her to be the inappropriate access of her Indian Status information:

> One of the things that concerned me is, in the documents they have pulled my status application. And for your listeners, they may not know that on the application it not only has your name, your date of birth, it also has your parents and your sisters and brothers. And they had pulled that information on two occasions and I have absolutely no idea why they would have pulled that. Because I certainly had not asked them to do it, nor had I ever made any inquiries about my status during that timeframe.

[95] Dr. Blackstock's interview and the allegations therein contained came to the attention of Ms. Monica Fuijkschot, who at the time was the Director of the ATIP Directorate at AANDC. Ms. Fuijkschot testified that what she understood from these

allegations was that Dr. Blackstock was questioning the operational process of the Office of the Indian Registrar and its supply of information under the *Privacy Act*. Ms. Fuijkschot recognized that Dr. Blackstock had not filed a formal complaint into this matter, despite the fact that this recourse was made available to her in the letters which responded to her *Privacy Act* requests and enclosed the copies of her Record. Nevertheless, Ms. Fuijkschot felt that it was her responsibility to ensure that the personal information that was collected and under the control of the Directorate under the *Privacy Act* was properly protected by the institution. In light of the seriousness of these allegations, Ms. Fuijkschot decided to conduct an internal review of the matter so as to determine if improper disclosure had occurred and, if so, to put into place a mitigation strategy to ensure that it does not happen again.

[96] On November 17, 2011, following the CBC interview, Ms. Fuijkschot accessed Dr. Blackstock's Record as part of this investigation. While there was no way for her to track who had accessed the record in the system, the investigation indicated that Dr. Blackstock's Record had been accessed for the purposes of responding to her first request under the *Privacy Act* in which she sought "[a]ny document or communication with personal information regarding Cindy Blackstock a.k.a. Cynthia Blackstock)… produced between 2005 to present." Ms. Fuijkschot concluded, as a result, that there had been no breach of the *Privacy Act*. Ms. Fuijkschot kept the file containing the results of her internal review locked in her office.

[97] On November 22, 2011, the Honourable John Duncan, PC, MP, upon having been briefed by the Deputy Minister of AANDC, sent a letter to the Privacy Commissioner of Canada, bringing to her attention the fact that Dr. Blackstock had publicly claimed that her Indian Registration file was improperly accessed on two occasions. The letter noted that AANDC did not believe that a breach had occurred, but nonetheless wished to bring the matter to the Commissioner's attention, inviting her to conduct her own investigation. The letter enclosed a package of documents, relating to the releases under the *Privacy Act*, as well as recent media reports.

[98] The Assistant Privacy Commissioner of Canada replied, in a letter dated December 5, 2011, returning the package of documents, stating that they could not receive them without the consent of the individual involved. The letter highlighted the Privacy Commissioner's ability to initiate a complaint, should she determine that there are reasonable grounds to investigate whether a government institution has contravened a provision of the *Privacy Act*, and expressed that they "[w]ere in the process of examining the possibility of initiating an investigation on the basis of publicly available information and in accordance with established procedures and our authorities under the *Act*."

[99] Dr. Blackstock filed a complaint with the Office of the Privacy Commissioner on March 6, 2012. In addition to alleging that the Respondent had contravened to sections 7 and 8 of the *Privacy Act* in its monitoring of her public speaking engagements, as well as by accessing and monitoring her social media feeds, in particular her personal Facebook page, Dr. Blackstock alleged that "[o]fficials from AANDC 'repeatedly accessed her Indian status records from the Government of Canada's Indian status registration database, which contained not only her personal information but also that of a number of family members, where no issues relating to her Indian status existed'" (see summary of complaint in OPC report found at Exhibit R-12, Tab 48, para. 85).

[100] The Office of the Privacy Commissioner conducted an investigation into these events and, in its report, concluded that the allegations relating to the inappropriate access of Dr. Blackstock's Registered Indian Record were not well-founded (see OPC report at para. 106).

(i) Parties' Positions

[101] The Complainant concedes that, ultimately, there was insufficient evidence to support its fear that Dr. Blackstock's Indian Registration Records were being accessed in an attempt to find out about her personal life for information to use against her. However, the Complainant argues that the evidence of Ms. Fuijkschot demonstrates that she treated Dr. Blackstock differently because she had filed a human rights complaint. Ms. Fuijkschot

failed to document her review, did not contact Dr. Blackstock and, unsolicited, sent her personal information to the Privacy Commissioner without authority or Dr. Blackstock's lawful consent. The Complainant recognizes that while this allegation may not meet the test for retaliation under *Virk*, it does meet the test for retaliation set out in the *Wong* and *Bressette* cases.

[102] The Respondent submits that the evidence fails to support Dr. Blackstock's allegation that her Record was inappropriately accessed by AANDC officials. As demonstrated by the evidence, there are rigorous security protocols which govern access to the IRS. Dr. Blackstock's Record was provided to her on two occasions, pursuant to her own *Privacy Act* requests. There was no evidence which would support the contention that AANDC officials otherwise accessed the Record for any other reason. The investigation initiated by Ms. Fuijkschot following Dr. Blackstock's public allegations of misconduct in this regard was appropriate, valid and revealed no inappropriate accessing of Dr. Blackstock's Record. The Respondent submits that there is nothing that demonstrates an intention on the part of the Respondent to retaliate against the Complainant and that, when viewed objectively, the evidence as a whole does not support a finding of retaliation.

(ii) Analysis

[103] The administrative process which follows the filing of a request under the *Privacy Act* or *Access to Information Act* is a technical and methodical procedure. However, to better understand the events that transpired following the filing of Dr. Blackstock's requests, its examination is important. Mr. Kent-Daniel Glowinski, the current Director of the ATIP Directorate at AANDC, went over this process in his testimony before the Tribunal.

[104] According to this evidence, once a request under the *Privacy Act* or the *Access to Information Act* is received by the Department, it goes through the following steps:

(a) The request is received by the Triage and Intake Group, the administrative arm of the operations unit of the ATIP Directorate, in charge of the reception

of documents. There it is date-stamped, marking the start of the statutory 30-day period which the Department possesses to provide a response to the request;

(b) The intake team places a sheet on top of the request, called an intake tasking sheet. The sheet lists a number of acronyms, referring to various Offices of Primary Interest (OPI). An OPI refers to an area within the Department that has the greatest interest and likelihood to have the requested records within the scope of the request;

(c) In light of the fact that the public sometimes misuses the form, all requests are sent to the Director for review, so that he or she may determine if the request is appropriately categorized as a privacy request or an access to information request. In conducting this review, based on the wording of the request, the Director determines to which OPI or OPIs the request should be tasked with fulfilling the request;

(d) Once the Director has made this determination, triage team sends the request with the completed tasking sheet to the ATIP representatives in the different OPIs. These representatives will then consult with the specific Program Areas within those OPIs to obtain the requested records. It is up to the Program Areas themselves to conduct due diligence to find the records.

(e) Sometimes a request can be sent back to the ATIP Directorate for clarification. In these cases, the request may sometimes go back to the requestor to seek a specific date range or to clarify their search.

(f) Once the Program Area has obtained the records and sent them to the OPI, the OPI assesses the content of the records and determines if they contain, for example, third-party information or information that may be subject to solicitor-client or litigation privilege. The OPI then fills out an impact statement, containing its recommendations regarding the records and the information they contain, and sends it back to the ATIP Directorate.

(g) All the records found come together from the different Program Areas and OPIs to the ATIP Directorate, where they are scanned into an ATIP software called Redaction. The software assembles the different files into one cohesive chunk of records and they are given a naming convention. Requests under the *Privacy Act* start with a “P”, whereas requests under the *Access to Information Act* start with a “A”. This is followed by the year and a consecutive number. This can look something like “A-2013-0001”.

(h) Once the records have been entered into the software, the ATIP analyst who is assigned with responding to the request goes through the records and determines if any consultations should occur with third parties. If the analyst determines that this is the case, the Directorate will avail itself of a time extension. If no consultations are necessary, the analyst reviews the file to determine whether there are any applicable exemptions or exclusions.

(i) Once this process is completed, the records are assembled and sent to the requester.

[105] Mr. Glowinski explained that, since one of the Department's main business lines is to deal with Registered Indian Records (the Records) and registration, where an individual makes a *Privacy Act* request to the AANDC ATIP Directorate seeking information about himself or herself, as was the case with Dr. Blackstock's requests, one of the logical OPIs is the Resolutions and Individual Affairs (RIA) sector. The RIA is the sector which, under the purview of the Office of the Indian Registrar, holds the IRS and the Records. According to Mr. Glowinski, Dr. Blackstock's first request would have been referred there.

[106] Ms. McLenachan, a Protest, Appeals and Litigation Officer in the Office of the Indian Registrar, provided testimony which helped to elucidate the manner in which the IRS and the Records are accessed. According to her evidence, the IRS access is limited to officers of AANDC, specifically to those working in the Office of the Indian Registrar, the AANDC regional staff working in the Indian Registration and Band Lists areas, the Indian Registry Administrators (IRAs) which are employees of the Band and Tribunal Councils, as well as to some departments with which AANDC has a Memorandum of Understanding.

[107] In order to access the IRS, an individual must complete a form entitled "Access to the Indian Registry System and its information." In filling out this form, the individual accepts that he or she can only use the information for the purpose for which it is needed and recognizes that it is protected under the *Access to Information Act* and the *Privacy Act*. The individual's immediate supervisor will then sign the form, confirming the request for access.

[108] In the case of the IRAs, the access form is sent to the staff of the AANDC regional office, who will ensure that the Band office has proper security measures in place before forwarding the request to the information specialist at AANDC headquarters who possesses the delegated authority, on behalf of the Indian Registrar, to authorize the access.

[109] In all cases, the level of access provided is dependant upon the role that the individual occupies. There are 40 levels of access, ranging from simple paper access to various levels of access to the electronic IRS. Certain levels allow a read-only ability, while others allow a partial read and write access allowing for the adding of amendments, or a full read and write access. Access can also be restricted to certain Records. The IRA of a Tribal Council, for example, will only be granted access to the IRS records relating to the Bands that he or she administers.

[110] Ms. McLenachan testified that approximately 600 people currently have access to the IRS.

[111] Ms. McLenachan also described the access to the IRS in response to an individual's *Privacy Act* request, such as the requests made by Dr. Blackstock. Once a request is transmitted to the Office of the Indian Registrar by the ATIP Directorate, it is assigned to an officer with the appropriate level and type of access who will conduct a search to locate the records which correspond to the request. The officer then makes copies of the documentation, including, if applicable, the IRS Record of the requestor. A risk-analysis of the documents is completed and, if the officer determines that the file should be released, it is transmitted back to the ATIP Directorate or to the individual or party who made the request. In the case of a request emanating from the ATIP Directorate, its office will then make the final determination as to what should or should not be released to the requestor.

[112] Combined with the testimony of Ms. Fuijkschot, this evidence helps to clarify the process which followed Dr. Blackstock's requests under the *Privacy Act*. Ms. McLenachan stated that the IRS did not maintain a log of the individuals who have accessed the Records. This evidence is consistent with Ms. Fuijkschot's conclusions following her internal review. Despite this, the evidence provided by these witnesses, as well as by Mr. Glowinski, was that Dr. Blackstock's Record was accessed on November 4, 2010 in response to her first *Privacy Act* request, as well as on November 17, 2011, by Ms. Fuijkschot as part of her internal review. Ms. Fuijkschot's internal review file, containing the

Indian Registration Record, was subject to requests under the *Privacy Act* and was also provided to Dr. Blackstock following her December 12, 2011 *Privacy Act* request. The Tribunal found the evidence of all three of these witnesses to be credible.

[113] While Dr. Blackstock indicated that she suspected that her records were inappropriately accessed, suggesting that the Respondent could have attempted to try and discredit her in this manner, none of the evidence presented supports this claim. Access to the IRS is restricted and only those with the requisite level of authorization are able to access the Records. Ms. McLenachan was asked if the Litigation Management Resolution Branch of AANDC had made a request under the *Privacy Act* to access IRS information relating to the present Complaint. She replied that it had not.

[114] The Respondent also addressed Dr. Blackstock's confusion surrounding her receipt of copies of her Record in response to only some, but not all of her requests under the *Privacy Act*. Ms. Fuijkschot explained that when the Registry receives more than one application from an individual, in processing the second application, they review the documents provided in the course of the first application and avoid duplications.

[115] The Complainant has argued that Ms. Fuijkschot's internal review and her decision not to communicate with Dr. Blackstock and to forward Dr. Blackstock's personal information to the Privacy Commissioner unlawfully, demonstrates that she treated Dr. Blackstock differently because she had filed a human rights complaint.

[116] When asked why she had not communicated these findings directly to Dr. Blackstock, Ms. Fuijkschot explained that in going directly to the media without indicating her concerns to their office via the formal complaints process, Dr. Blackstock gave them a clear indication that she did not want to work with them. Combined with the ongoing litigation before the Tribunal, Ms. Fuijkschot felt that she had to approach the matter carefully so as to not cause or provoke any situation that could be misconstrued. Moreover, once the matter of the alleged privacy breach was referred to the Privacy

Commissioner, the case was no longer in her control and the institution may no longer contact the requester.

[117] The Tribunal need not determine the legitimacy of this internal review or the lawfulness of her decision to forward the information she obtained as a result to the Privacy Commissioner. The Tribunal must simply determine whether or not Ms. Fuijkschot's actions in this regard amount to retaliation. In the Tribunal's view, Ms. Fuijkschot's desire to determine whether or not her office was responsible for the alleged inappropriate access of Dr. Blackstock's Record is not grounded in the Complaint, but rather in Dr. Blackstock's public allegations. Moreover, the Tribunal does not view these actions as constituting a form of adverse differentiation. The internal review was documented and revealed that there had been a misunderstanding on the part of Dr. Blackstock as no breach of security had occurred. The Complainant's allegation that this amounts to retaliatory conduct is, in the Tribunal's view, unsupported by the evidence.

[118] In conclusion, given the general operational process and the manner in which Dr. Blackstock's file was accessed, the Tribunal concludes that the explanation provided by the Respondent is reasonable. The Tribunal therefore finds that there was no retaliation with regard to the access of Dr. Blackstock's Record.

[119] The Tribunal notes that it appears from the evidence that Dr. Blackstock, on November 17, 2011, was not in a position to allege that "they had pulled that information on two occasions." At the time of her interview with CBC, it appears that her Record had only been accessed once on November 4, 2011 and that this was done pursuant to her request under the *Privacy Act* so as to send her a copy. Only later could she have learned that her Record was accessed a second time on November 11, 2011, the same day as her interview, but only once the interview (which was in the morning) was over. The Tribunal has not been able to reconcile this evidentiary discrepency. However, since none of the above conclusions hinge on this allegation, the Tribunal has simply not awarded any weight to this evidence.

IV. Decision and Remedy

[120] For the foregoing reasons, the Tribunal finds that the Complaint is substantiated on the basis of the Respondent's retaliatory actions relating to the exclusion of Dr. Blackstock from the Chiefs of Ontario Meeting at the Minister's Office.

[121] Complainant counsel argues that the facts of the present case support that the Tribunal award, pursuant to section 53(2) and 53(3) of the *Act*, the statutory maximum of $20 000 for pain and suffering, as well as for wilful and reckless conduct. The Tribunal's case law when it comes to awarding amounts of monetary damages is not consistent, but the cases where a Tribunal member has chosen to award the statutory maximum of $20 000 reveal a trend which suggests that such awards are reserved for the very worst cases (see *Premakumar v. Air Canada,* (2002) 42 C.H.R.R. D/63; and *Canada (Attorney General) v. Morgan,* [1992] 2 F.C. 401. (F.C.A.)). For example, the Tribunal has awarded maximum compensation under section 53(3) in the following cases: *Johnstone v. Canada Border Services*, 2010 CHRT 20, aff'd 2013 FC 113, aff'd 2014 FCA 110; *Seeley v. Canadian National Railway*, 2010 CHRT 23, aff'd 2013 FC 117, aff'd 2014 FCA 111; and *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20, aff'd 2015 FC 599. Respondent counsel argues that the retaliation Complaint is part of the main human rights Complaint and, therefore, that awarding a separate sum in compensatory damages would be inappropriate and not within the Tribunal's statutory authority. Morevover, the Respondent contends that an award of damages on the retaliation Complaint would preclude any potential finding of damages on the main human rights Complaint.

[122] As stated above, section 14.1 of the *CHRA* is a separate, specialized "discriminatory practice" and it calls for the consideration of a separate head of damages. (see *Cassidy*, at para. 196). See also, *Chopra v. Canada (Department of National Health and Welfare),* 2001 CanLII 8492 (CHRT) at para. 292; and, *Gainer v. Export Development Canada,* 2006 FC 814 (CanLII) at para. 36).

[123] In the present case, Dr. Blackstock's feelings of shame and humiliation resulting from this public professional rejection, in front of the Chiefs of Ontario whom she was seeking to advise, are understandable and warrants some form of compensation. Moral pain and suffering is difficult to quantify. This being said, when evidence establishes pain and suffering, an attempt to compensate for it must be made (see *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, at para. 115). The Tribunal finds that $10 000 constitutes a reasonable award for the prejudice Dr. Blackstock experienced.

[124] As for the section 53(3) of the *Act*, there is no doubt that the Respondent's actions had a wilful and reckless nature. Dr. Blackstock was the only individual excluded from the meeting, which supports her contention that she was singled out. Not only did Mr. McArthur admit that he was aware of the Complaint, but he expressed that he was afraid that it would be discussed during the meeting if Dr. Blackstock was allowed to attend. His testimony revealed a desire to exclude her because she had filed a human rights complaint and a disregard for the rights protected in the *Act*. These are precisely the kinds of circumstances which section 14.1 of the *Act* seeks to deter. In the Panel's view, this conduct also warrants a $10 000 award.

[125] For these reasons, the Tribunal orders the following:

(a) Pursuant to s. 53(2)(*e*) of the *Act*, the Tribunal orders that the Respondent compensate the Complainant for $10 000 for pain and suffering.

(b) Pursuant to s. 53(3) of the *Act*, the Tribunal orders that the Respondent compensate the Complainant for $10 000 for its wilful and reckless conduct.

[126] In the event of a finding of liability, the Tribunal has been requested by the Complainant to order the Respondent to participate, in consultation with the Commission, in a training program for its employees pursuant to section 53(2)(a) of the *Act*. The Tribunal is obviously supportive of improving, on a continuous basis, the degree of human rights knowledge and sensitivity of individuals, be they employees or, management and supervisory personnel. In this case, the event that gave rise to the finding of retaliation was the exclusion by Mr. McArthur of Dr. Blackstock from a meeting that she was entitled to

attend, on account of her filing of the Complaint. His actions, though clearly wrong, were not necessarily representative of what any other managers employed by the Respondent would have done under the circumstances. As such, the Tribunal does not feel that granting the request of the Commission is necessary.

[127] The Complainant requested that the Tribunal issue an order directing the Minister of AANDC to issue a written and public apology to Dr. Blackstock and the Caring Society. However, in *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, at paras. 27-35, the Federal Court found that the *Act* does not empower the Tribunal to make such an order. The Complainant's request for a public apology is therefore denied.

Signed by

Sophie Marchildon
Panel Chairperson

Réjean Bélanger
Tribunal Member

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
June 5, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)

Decision of the Tribunal Dated: June 5, 2015

Dates and Place of Hearing: February 28, 2013

March 1, 2013

July 15, 16, 17, 19, 22 and 24, 2013

August 7, 2013

Ottawa, Ontario

Appearances:

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David Nahwegahbow and Stuart Wuttke, for the Complainant (AFN)

Philippe Dufresne, Daniel Poulin, Samar Musallam and Sarah Pentney, for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Melanie Chartier, Ainslie Harvey and Michelle Casavant, for the Respondent

Michael Sherry, for the Interested Party (Chiefs of Ontario)

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