Tribunal File No.: T 1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and the ASSEMBLY OF FIRST NATIONS

Complainants

– and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

– and –

ATTORNEY GENERAL OF CANADA (representing the Minister of Indian and Northern Affairs)

Respondent

– and –

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

FINAL WRITTEN SUBMISSIONS of the CANADIAN HUMAN RIGHTS COMMISSION on RETALIATION

Dated August 1, 2013

, PART ONE ~ OVERVIEW

1. In 2007, the Complainant, Dr. Cindy Blackstock, along with the Assembly of First Nations filed a complaint with the Canadian Human Rights Commission (the Commission) alleging that the inequitable funding of child welfare services on First Nations reserves by the Respondent amounts to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*[1] (the "*CHRA*"). The complaint was referred to the Canadian Human Rights Tribunal on

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[1] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ["*CHRA*"].

October 14, 2008 and the Commission is fully participating in the hearing of the complaint.

2. On October 16, 2012, the Complaint before the Tribunal was amended to include allegations of retaliation, contrary to section 14.1 of the *CHRA*. The Commission supported the amendment.

3. Specifically, Dr. Blackstock alleges the following retaliatory conduct:

   (i) The Respondent improperly accessed her Indian Status records;

   (ii) The Respondent prohibited her from participating in their meeting with the Chiefs of Ontario, who had invited her to participate as a technical advisor;

   (iii) The Respondent refused to consider her for a casual contract or allow her to participate in a Working Group on the development of a new child welfare funding formula in British Columbia; and

   (iv) The Respondent and Justice have systematically and surreptitiously monitored her activities by surveilling her personal Facebook page.

4. In light of the Commission's participation in these proceedings dealing with the allegations of retaliation, its final written and oral arguments will be limited to: (i) the proper interpretation of section 14.1 and the test for retaliation; and (ii) the Complainant's allegation that the Respondent and Justice systematically monitored her personal Facebook page.

5. The Commission will not address the other allegations of retaliation, leaving them to the Complainant. However, it is open to the Tribunal to find that those other allegations, if proven, either on their own or taken together, could constitute a *prima facie* case of retaliation

PART TWO ~ MATERIAL FACTS

6. The Commission provides this brief summary of the material facts as they relate to the discrete issue of the Respondent and Justice's accessing of Dr. Blackstock's personal Facebook page. For all remaining issues, the Commission relies on the facts as set out by Dr. Blackstock in her Statement of Particulars, dated January 29, 2013.

7. Dr. Blackstock alleges that the Respondent and Justice (on behalf of the Respondent) have systematically and surreptitiously monitored her activities by surveilling her personal Facebook page.

8. The documentary evidence at Tabs 12, 15 and 18 of the Complainant's Book of Documents ("C-1"), and Tabs 57, 58 and 59, 69 of the Respondent's Book of Documents ("R-12") support Dr. Blackstock's allegation that the Respondent and Justice routinely monitored her personal Facebook page.

9. The evidence shows that the Respondent requested access to Facebook, a restricted website on the Respondent's network, on or around February 18, 2010. The justification for said access was directly related to the human rights complaint, the proceedings before the Tribunal in this case, and Dr. Blackstock's role as a Complainant, stating that her personal Facebook page "should be monitored".[2] The Respondent did not call any witnesses from the Respondent Department to respond to the allegation that they had been surveilling Dr. Blackstock's personal Facebook page for a purpose directly related to the exercise of rights under the *CHRA* and the litigation that subsequently ensued.

10. The evidence also shows that Justice requested access to Facebook, a restricted website on the Justice network, for the purpose of monitoring Dr. Blackstock's personal Facebook page. In response to this allegation, the Respondent called Ms. Natalia Strelkova, a Paralegal who was employed by Justice at the time and was working on this case, to testify. The evidence shows that Ms. Strelkova requested access to Facebook on or around February 2010.[3] The justification for access was again directly related to the

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[2] C-1, Tab 12.
[3] R-12, Tabs 57, 57.

human rights complaint at issue in these proceedings, and states that the "Claimant [i.e. Dr. Blackstock] is posting information on her facebook account that we need to monitor."[4]

11. In her *viva voce* evidence before the Tribunal on July 16, 2013, Ms. Strelkova stated that she requested access to Facebook at the behest of Justice Counsel (and Lead Counsel in this case) for the purposes of monitoring what was being said on Dr. Blackstock's Facebook page in terms of what could be relevant for the purposes of cross-examination.

12. Ms. Strelkova also stated that she routinely and regularly monitored Dr. Blackstock's personal Facebook page between the months of February and May 2010. Her evidence was that she did so by logging into her own personal Facebook account, searching for Dr. Blackstock and then clicking on her name in order to access her personal Facebook page. She did not request that Dr. Blackstock "add" her as a friend on Facebook, but nonetheless had access to some or all of the information posted on Dr. Blackstock's personal Facebook page because of the configuration of the security settings at the time.

13. During her oral testimony, Ms. Strelkova stated that the purpose for the routine monitoring of Dr. Blackstock's personal Facebook page was to check for updates and comments being made with regards to the litigation in this case. She further stated that she had no intention of advising Dr. Blackstock of her surveillance.

14. In describing the method used to report on the information she gathered by monitoring Dr. Blackstock's personal Facebook page, Ms. Strelkova stated that she would sometimes "copy and paste" information from Dr. Blackstock's personal Facebook page into an email, which she would then send to Justice Counsel and the Respondent client. She also stated that she would sometimes take a "screen shot" of Dr. Blackstock's personal Facebook page.

15. The documents contained at R-12, Tab 15 demonstrate the nature of the information Ms. Strelkova gathered as a result of her routine monitoring of Dr. Blackstock's personal

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[4] R-12, Tab 57.

Facebook page, as well as the type of reporting to Counsel and client she was responsible for.

PART THREE ~ STATEMENT OF ISSUES

16. With respect to the allegations of retaliation, the present complaint gives rise to the following issues:

(1) Has Dr. Blackstock met her onus of proving, on a balance of probabilities, a *prima facie* case of retaliation, contrary to section 14.1 of the *CHRA*?

(2) If so, has the Respondent provided a reasonable explanation or justification for its actions that is not a pretext for discrimination?

(3) If the answer to (1) is in the affirmative, and (2) in the negative, what remedies is Dr. Blackstock entitled to?

17. In considering issue (1), the complaint raises the novel issue of whether routine online surveillling of the personal life of an individual who has filed a human rights complaint or the alleged victim by monitoring their Facebook or other social media activities, and the gathering of information for the purpose of litigation through that monitoring, could constitute retaliation under section 14. 1 of the *CHRA*. This is the only issue the Commission will fully address in these submissions other than the statement in paragraph 5 herein.

PART FOUR ~ SUBMISSIONS

I. Establishing a *Prima Facie* Case of Discrimination

18. The initial onus is on the complainant and/or the Commission to make out a *prima facie* case of discrimination, on a balance of probabilities. A *prima facie* case consists of

evidence that covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. If a *prima facie* case is established, the complainant is entitled to relief, in the absence of justification.[5]

19. In the context of the present complaints, the onus is on the Complainant to establish a *prima facie* case of discrimination, contrary to section 14.1 of the *CHRA*, which reads as follows:

> **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.
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> **14.1** Constitute un acted discriminatoire lefait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

20. The Federal Court of Appeal has emphasized the public policy importance of ensuring that the test for *prima facie* discrimination under the *CHRA* does not become unduly precise, detailed or "legalised", stating:

> "A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the Canadian Human Rights Act, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in Shakes.
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> To make the test of a *prima facie* case more precise and detailed in an attempt to cover different discriminatory practices would unduly "legalise" decision-making and delay the resolution of complaints by encouraging

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[5] *McAllister-Windsor*, *supra* at para. 27 (Commission's Authorities, Vol. 2, Tab 28) (citing *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 558).

applications for judicial review …"[6] (emphasis added)

21. Once a *prima facie* case of discrimination is established, the burden shifts to the respondent to justify the conduct or practice by demonstrating that it is a *bona fide* occupational requirement, or is otherwise justified under the exemptions provided for in the *CHRA*. Such a response or explanation must be believed and cannot be a pretext.[7] If the conduct or practice cannot be justified, discrimination will be found to occur and the complainant is entitled to relief.[8]

II. The Purpose of Section 14.1 and the Test for Retaliation

22. The purpose of section 14.1 is to prohibit reprisal against an individual for exercising his or her rights under the *CHRA*.

23. Retaliation is a form of discrimination prohibited under the *CHRA*. An action by the Respondent that has adverse or prejudicial outcome for the Complainant can be considered a form of retaliation and this could include intimidation or discrimination against her for filing a human rights complaint.

24. The Tribunal has taken a flexible approach to the legal framework under which a claim of retaliation should be examined – the central difference being that "intention" is not required.

25. In *Wong v. Royal Bank of Canada*,[9] the Tribunal described the test for retaliation as follows:

> "…to prove a violation under [s.14.1], there must be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the Act. Where there is evidence that the respondent intended the act

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[6] *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras. 27-29. See also: *Canada (Attorney General) v. Walden*, 2010 FC 490 at paras. 105-107 (quoted in *Hendershott, supra* at para. 67 – Commission's Book of Authorities, Vol. 1, Tab 22).

[7] *Basi v. Canadian National Railway Company*, [1988] C.H.R.D. No. 2 (paragraphs unnumbered) ["*Basi*"].

[8] *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. See also *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 at p. 208.

[9] (2001) T.D. 06/01 ["*Wong*"], cited with approbation by the Federal Court of Canada in *Leung v CRA*, 2008 FC 704 at *para*. 37

> to serve as retaliation for the human rights complaint, the link is established. But if the complainant reasonably perceived the act to be retaliation for the human rights complaint, this could also amount to retaliation, quite apart from any proven intention of the respondent. Of course, the"reasonableness" of the complainant's perception must be measured. Respondents should not be accountable for unreasonable anxiety or undue reaction of the complainant." (emphasis added)

26. The language of section 14.1 of the *CHRA*, while different from its equivalent provision under the *Ontario Human Rights Code*,[10] was found by the Tribunal in *Wong* to have the same purpose – namely, the prohibition of reprisal against individuals for exercising their rights under the *CHRA*.

27. Similarly, the Ontario Board of Inquiry in *Entrop v. Imperial Oil Ltd.*[11] stated the following with reference to the reprisal provision in the *Ontario Human Rights Code*:

> "The proper standard… is the "reasonable human rights complainant." In assessing the reasonableness of the complainant's fears and perceptions, boards of inquiry must be sensitive to the particular difficulties that confront complainants, many of whom experience great fear and anxiety surrounding the lodging and pursuit of a human rights complaint."

28. The reasoning in *Entrop* and *Wong* has been adopted by the Federal Court of Canada in *Boiko v. Canada (National Research Council)*,[12] where the Court held at paragraph 35:

> "Under section 14.1 of the Act, there are two ways to establish a retaliation complaint. The first is where there is evidence that the respondent intended the act to serve as retaliation; and the second is where the applicant reasonably perceives the act to be retaliation for the human rights complaint: *Wong v. Royal Bank of Canada,* [2001] C.H.R.D. No. 11 at paragraph 219." (emphasis added)

29. Conversely, in *Virk v. Bell Canada (Ontario)*,[13] the Tribunal concluded that retaliation "implies some form of wilful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint."[14]

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[10] *Ontario Human Rights Code*, R.S.O. 1990, c. H-19, s. 8.
[11] (No. 7) (1995), 23 C.H.R.R.D/213 ["*Entrop*"].
[12] 2010 FC 110 ["*Boiko*"].
[13] [2005] C.H.R.D. No. 2 ["*Virk*"].

30. A recent analysis by the Tribunal of the two competing schools of thought about whether "intention" is required to establish a section 14.1 complaint is *Cassidy v. Thambirajah*.[15] In that case, the Tribunal agreed with the reasoning in *Virk* that retaliation requires "an element of intention", which "includes wilful and reckless thought and action to retaliation against or punish a complainant for having filed a human rights complaint."[16]

31. The Alberta Court of Appeal has also considered this issue, and concluded that "[m]ixed intents will meet the test for retaliation so long as the payback intended forms a part of the substantial reasons for the action."[17] It should be noted however that the wording of the Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14 is quite different (see *Walsh*, *supra*, at *para.* 65).

32. The Commission submits that there is no need to establish intent to demonstrate a *prima facie* case in the context of retaliation; s.14.1 of the *CHRA* is not a penal or quasi-penal provision (unlike s.59 of the *CHRA*). The provision establishes a discriminatory practice and is located within the part of the legislation titled Discriminatory Practice; consequently, intent on the part of the Respondent is irrelevant.

33. Therefore, it is submitted there is no "hard" test to establish a *prima facie* case in the context of retaliation. In order to establish a *prima facie* case in the context of retaliation, a complainant can adduce evidence of an actual or threatened prejudicial act by the respondent against him or her. Furthermore, the complainant can establish a link between the aforementioned prejudicial act and the enforcement of the complainant's human rights via the filing of a complaint: in other words, that "but for" the filing of a complaint, the prejudicial act would not have taken place.

34. In seeking to establish a link between the respondent's allegedly retaliatory acts and the complainant's filing of a human rights complaint, particular attention should be paid to the context within which the prejudicial acts occur. It is important for the Tribunal to

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[14] *Virk*, *supra*, at para. 156.
[15] 2012 CHRT 29 ["*Cassidy*"].
[16] *Cassidy*, *supra*, at para. 163.
[17] *Walsh v. Mobil Oil Canada*, 2008 ABCA 286 (CanLII) at para. 88 ["*Walsh*"].

"consider the entire context of the relationships between the parties to determine whether it can infer that conduct by the respondent, directed at the complainant, constitutes retaliation", as the respondent will rarely admit an intention to retaliate.[18]

35. Finally, for a human rights complaint to succeed, it is not necessary that discriminatory considerations be the sole reason for the decision or action in issue. It is sufficient that the discrimination be merely *one* basis for the respondent's actions or decision.[19] The courts have found that as in other cases of discrimination, it is sufficient to make out a case of retaliation if one of the reasons for the respondent's actions was retaliation.[20].

III. Does Routine Online Monitoring Constitute Retaliation?

36. As described in Part Two above, the *viva voce* and documentary evidence in this case establishes that Dr. Blackstock's personal Facebook page was intentionally accessed by the Respondent and Justice, and then routinely and systematically monitored in order to gather information about or posted by Dr. Blackstock for the purposes of "litigation". Based on the language of the Respondent and Justice's requests to access Facebook, it is clear that both Departments were aware of the complaint when the requests were made.

37. Thus, the evidence shows that the purpose of accessing and surveilling Dr. Blackstock's personal Facebook page was directly related to Dr. Blacktock's filing of a human rights complaint, her role as a witness in the proceedings before Tribunal, and her "active role" in the litigation process. In other words, the conduct of the Respondent and Justice was directly related to Dr. Blackstock's exercise of her rights under the *CHRA*.

38. In addition, the documentary evidence at C-1, Tab 15, and the *viva voce* evidence of Ms. Strelkova, demonstrate that at least some of the information collected from Dr. Blackstock's personal Facebook page was "incidental" information, personal information,

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[18] *Walsh, supra*, at para. 71.
[19] *Holden v. Canadian National Railways* (1990), 112 N.R. 395 (F.C.A.) (paragraphs unnumbered) ["*Holden*"].
[20] *Currie* v. *China Town Restaurant*, 3 C.H.R.R. D/1085; *Hill v. Wilson's Industries Ltd.* [1997] N.S.H.R.B.I.D. No. 3 October 29, 1997; *Bailey* v. *Anmore (Village)* (1992), 19 C.H.R.R. D/369; *Naomal Fernando v. Alberta Union of Provincial Employees* (1984), 6 C.H.R.R. D/2566; *Lagacé v. Canada (Canadian Armed Forces)*, [1996] C.H.R.D. No. 11 October 17, 1996.

and information unrelated to the issues in this case and the Respondent's stated purpose for accessing the page (i.e., for the purpose of "litigation"). For example, at Tab 15, page A0072492_1-001023, Ms. Strelkova appears to have copied and pasted a posting from Dr. Blackstock's personal Facebook page (note the web link to her "profile" page) regarding the Attawapiskat crisis, which is not and has never been part of the complaint before the Tribunal.

39. Although Dr. Blackstock's personal Facebook page was for her personal use, her security settings allowed public access to her personal page for a period of time. Upon discovering that the Respondent and Justice had been monitoring her personal Facebook page, Dr. Blackstock took measures to modify the level of privacy and increase the security of her page.

40. In her testimony before the Tribunal in Feburary 2013, Dr. Blackstock indicated that she perceived the conduct of the Respondent and Justice to be in retaliation for her having filed a human rights complaint. According to the Respondent's own documents, the purpose of the routine monitoring of Dr. Blackstock's personal Facebook page was because of or in reaction to her filing the initial human rights complaint.

41. The purpose of section 14.1 of the *CHRA* is to protect individuals from actions by the Respondent which have an adverse or prejudicial outcome for the Complainant and which are either intentionally retaliatory or reasonably perceived as retaliatory. It is necessary to consider whether, in the entire context, it was reasonable to perceive the monitoring of the Facebook page as retaliation.

42. It cannot reasonably be disputed that Dr. Blackstock was singled out for monitoring by the Respondent and Justice because of her "active role" in the complaint. "But for" the filing of the complaint, the monitoring would not have taken place. Moreover, the *viva voce* evidence of Ms. Strelkova established that she did not collect information from any other peron's personal Facebook page who is involved in this complaint. No other witness or complainant was subject to such intrusive monitoring and surveillance.

43. At the same time, the monitoring began after the complaint was referred to the Tribunal and the litigation had begun. The litigation and Dr. Blackstock's role in it were highly public. In fact, an application was made to have the litigation televised. Information was collected from the Facebook page only during the time when the security settings established by Dr. Blackstock provided public access. Given this context, it does not seem reasonable to perceive surveillance of publically available information as retaliation. In fact, litigants must unfortunately frequently face a reduced expectation of privacy due to the public nature of pleadings and hearings.

44. In the Commission's view, while the systematic collection of information from Dr. Blacklock's page is problematic due primarily to its lack of relevance and its consequent unwarranted intrusion into her personal life, it does not in the context of this case and in and of itself, constitute a *prima facie* case of retaliation under section 14.1 of the *CHRA*.

45. Although the Respondent explains its actions as being necessary for the purposes of litigation and preparing a full defence, it is difficult to agree particularly given the irrelevant nature of the information gathered. Notwithstanding any diminished expectation of privacy that may result from active involvement in litigation, the Commission views such intrusive actions as unfortunate and unnecessary in this case. Even though, in this instance, the surveilling of Dr. Blackstock's Facebook page at a time when it was public may not constitute retaliation or harassment, the activities of the Respondent and Department of Justice can reasonably be seen to have a potentially chilling effect on this litigation.

PART FIVE ~ REMEDY SOUGHT

46. The Commission leaves it to the Complainant to articulate the personal remedies that it may seek in connection with the Respondent's alleged retaliatory conduct. The kinds of personal remedies that might be ordered by the Tribunal after a hearing are described in sections 53(2) and 53(3) of the *CHRA*.

ALL RESPECTFULLY SUBMITTED this 1st day of August, 2013.

Daniel Poulin/Sarah Pentney

Counsel for the
Canadian Human Rights Commission