File No: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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

RESPONDENT

-and-

CHIEFS OF ONTARIO AND
AMNESTY INTERNATIONAL CANADA

INTERESTED PARTIES

RESPONDENT'S WRITTEN ARGUMENT – RETALIATION COMPLAINT

PART I

Overview

1. The Respondent, Aboriginal Affairs and Northern Development Canada (AANDC), is responsible for First Nations child welfare funding on Indian Reserves in Canada. The Respondent engages many organizations and experts for their expertise in this field, as well as engaging with all provincial governments and numerous international organizations on similar issues.

2. One of these many organizations included The First Nations Child and Family Caring Society and its Executive Director, Dr. Cindy Blackstock (the "Complainant") for assistance in First Nations child and family services, including funding for the Wen:de report. Following the completion and presentation of the Wen:de report in 2006 the Complainant was steadfast in the results of that report, and would not settle for AANDC using any other formula for First Nations child welfare funding. The Complainant filed the substantive human rights complaint in February 2007.

3. The Respondent is involved in voluminous litigation at any given time. The Respondent responded to the Complainant's numerous ATIP requests as quickly as possible, engaged in litigation preparation as any party would to best defend its case, and engaged in provincial, national and international conventions and conferences on topics that are pertinent to its jurisdiction and authority. The Respondent did not intend, nor did it actually violate the Complainant's privacy, or engage in any form of retaliation as alleged.

PART II

Facts

1. 2008 B.C. Working Group

4. The Complainant alleges, in her statement of particulars on the retaliation allegations, dated January 29, 2013, that First Nations child welfare agencies in British Columbia wanted to have her participate in a 2008 Working Group that was comprised of B.C. child welfare agencies, provincial government, and federal government representatives. She alleges that Ms. Linda Stiller, an AANDC official, advised the group that the Respondent would not permit the Complainant to be involved with the working group.

5. The Complainant testified about this issue on February 28, 2013. She stated that Mary Teegee, Executive Director of the Carrier Sekani Family Services Organization in Prince George, B.C., wanted her to participate in the working group as an expert advisor. The Complainant testified that Ms. Teegee told her that AANDC officials would not hold the discussions if the Complainant participated. Complainant's counsel acknowledged on the record that this was hearsay. He stated that he was "not in any way seeking to have it introduced as true to its contents" and undertook to call Ms. Teegee as a witness to adduce this

evidence. However, Ms. Teegee was not called to testify and thus the only evidence adduced by the Complainant on this issue is hearsay.

6. The Respondent called Ms. Stiller to testify. In 2008, she was a Manager in Child and Family Services in the B.C. Region for AANDC. She retired in September 2010. Ms. Stiller testified about the events leading up to the creation of the 2008 Working Group, its work, and the suggestion that the Complainant be hired to assist.

7. Ms. Stiller testified about the Partnership Table, which met approximately four times each year, and was comprised of representatives from B.C. First Nations agencies, B.C. Ministry for Children representatives, and federal representatives from the AANDC B.C. Region. Canada and B.C. funded the B.C. Caring Society to coordinate the meetings. At one of these meetings, an AANDC official from the Alberta Region spoke to the group about the Alberta Model, which was a "renovation" of Directive 20-1 and instituted a prevention enhancement model. Ms. Stiller testified that Alberta and the Chiefs of Alberta were very supportive of this new model and signed on to it. Press releases indicated the parties were happy with the process and were working together to implement the new model.

8. Ms. Stiller testified that the Working Group grew out of the Partnership Table in late 2007. It planned to use the Alberta 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. AANDC headquarters provided funding for B.C. agencies to participate by sending one representative each, chosen by each agency. The B.C. Caring Society was contracted to coordinate the meetings, which involved booking venues, inviting participants, taking minutes, and other administrative duties.

9. Ms. Stiller testified that her office had funding available to hire a casual employee, who would help develop the document that the Working Group would produce. This employee would attend the meetings, prepare drafts, manage the input of the Working Group members, write briefing notes internal to AANDC senior management, and develop communication pieces for the use of the agencies to explain the model to their various Chiefs, councils, and communities.

10. Ms. Stiller testified that during one of the Working Group's preliminary meetings, they discussed the process they would be embarking on. Part of that discussion involved who would "hold the pen" on the Group's development of the model. Ms. Stiller recalled that Ms. Teegee suggested the Complainant be hired. Ms. Stiller

recalled that she replied that she considered this a potential "conflict of interest" in that she was aware that the Complainant was "extremely negative and had been very vocal about the fact that she did not support the Alberta Model." This was problematic as the Working Group was using the Alberta experience as the basis for a "made-in-B.C." model.

11. Ms. Stiller was also asked whether Ms. Teegee was ever told that the Complainant could not participate in the Working Group or attend its meetings. She testified that she never recalled saying such a thing. She explained that funding was provided for First Nation agencies to send one representative each to the meetings. On some occasions, representatives brought their Chiefs. She testified that if an agency wanted to invite the Complainant to attend, "that was their prerogative." Ms. Stiller was also asked whether she ever told Ms. Teegee that she would not hold discussions if the Complainant participated. Ms. Stiller had no recollection of ever making such a statement.

12. Ms. Stiller testified that the casual employee hired by AANDC to manage drafting the Working Group's document was Jerry Lyons. She testified that Mr. Lyons had previously worked for many years 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. Mr. Lyons retired by 2008, but had done some contract work with the B.C. provincial government and with B.C. First Nations organizations, including the Caring Society in Victoria. Ms. Stiller testified that no one in the Working Group opposed her suggestion that Mr. Lyons be hired and that no other names were put forth. She further testified that the Working Group participants supported the final work product put together by Mr. Lyons.

13. Ms. Stiller testified that the Complainant's human rights complaint was irrelevant to her decision not to consider hiring the Complainant as an AANDC casual employee. The important factor for Ms. Stiller was the Complainant's negative comments about the Alberta Model. In response to a question from the Tribunal, Ms. Stiller acknowledged that she was probably aware of the human rights complaint at that time, but that as a regional manager, she was not involved in dealing with it. She testified that she participated in regular national teleconferences and that the complaint was probably mentioned as part of reporting on what was happening at the national level. Ms. Stiller also reiterated that the casual position involved more than just attending the Working Group meetings; it also included internal support and briefings.

2. 2009 Chiefs of Ontario Meeting at the Minister's Office

14. The Complainant alleges, in her statement of particulars dated January 29, 2013, that she was prohibited by the Respondent from participating in a meeting held between the Chiefs of Ontario and the Respondent. She further alleges that, although the Chiefs of Ontario were prepared to abandon the meeting, she decided to remain in the waiting room, where she was watched over by a security guard.

15. The Complainant testified about this issue on February 28, 2013. She testified that she was invited to the meeting by Grand Chief Randall Phillips to act as his technical advisor at a meeting regarding child welfare funding issues in Ontario with David McArthur, Senior Special Assistant to the Minister, who at that time was the Honourable Chuck Strahl.

16. The Complainant testified that she followed the proper security procedures required to access the Minister's office. The Complainant alleges that Mr. McArthur told her that she could not attend the meeting as she had a "number of issues" and that he could meet with her at another time. She testified that she stayed in the reception area and that a security guard also remained to watch her for approximately 10 to 15 minutes. She left before the meeting concluded.

17. The Complainant called Randall Phillips to testify about this issue. Mr. Phillips testified about his role within the Chiefs of Ontario, where he was responsible for overseeing the Ontario Social Services Coordination Unit. He testified that before the December 2009 meeting, he had never worked directly with the Complainant or engaged her to work on his behalf in meetings with the federal government, but rather met her periodically at various events, conferences, and lectures.

18. Mr. Phillips testified that he was in Ottawa in December 2009 for an Assembly of First Nations ("AFN") conference. On the afternoon of the first day of the conference, his group utilized the AFN office to facilitate a meeting with AANDC officials, sparked by a recent government of Ontario announcement of impending budget cuts that would have an impact on northern Ontario First Nations agencies. He recalled speaking with Jonathan Thompson of the AFN with respect to organizing this meeting. Mr. Thompson appeared as a witness in these proceedings, but did not testify about the circumstances surrounding the December 2009 meeting. Mr. Phillips testified that he was made aware of the logistics of the meeting approximately a few hours in advance. He testified that

he ran into the Complainant the morning of the meeting at the AFN conference and invited her along. Her role was to give him advice in case the "INAC representative started to give me a line, started to tell me mistruths, started to mislead me...".

19. Mr. Phillips testified that, after reaching the reception area of the Minister's office and waiting for a period of time, he engaged in a conversation with Mr. McArthur regarding the large number of people in attendance. He testified that the delegation was comprised of Chiefs and "technicians", whom he explained on cross-examination were staff members of the various organizations headed by the Chiefs. Mr. Phillips further testified that Mr. McArthur indicated that the Complainant could not participate in the meeting, even in her purported role as technical advisor to Mr. Phillips. In the end, Mr. Phillips elected to proceed with the meeting and without the Complainant. Mr. Phillips testified that, in his experience, he had never seen delegates excluded from meetings with government officials. He also testified, however, that he has excluded government officials from meetings "several times".

20. Mr. Phillips testified that his delegation was able to raise all of their issues in the meeting and that it resulted in a positive outcome.

21. The Respondent called Mr. McArthur to testify about this meeting. He testified that Mr. Thompson, Director of Health and Social Development for the AFN, contacted him on or about December 8, 2009 and requested a meeting between Mr. McArthur and representatives of the Chiefs of Ontario. Mr. McArthur was aware that the AFN was holding its semi-annual meeting in Ottawa at that time and was happy to meet with the Chiefs of Ontario on short notice as AANDC was interested in strengthening their relationship with the AFN. After exchanging several emails on the logistics, they agreed to meet in the Minister's office on December 9, 2009 at 11:00 a.m.

Emails between David McArthur and Jonathan Thompson, dated December 8-9, 2009, Exhibit R-12, tabs 49-56

22. Mr. McArthur testified that in preparation for meetings with First Nation groups, AANDC puts together comprehensive briefing packages. Such a briefing package identifies all of the potential issues that might be discussed; if necessary, pre-meeting briefings with other departmental officials also occur.

23. Mr. McArthur received by email a list of attendees from Mr. Thompson on December 8, 2009. Mr. McArthur emailed Mr. Thompson about the security procedure for the meeting, indicating that the attendees were to register with security and proceed to the 21st floor. On the morning of December 9, 2009, Mr. Thompson emailed Mr. McArthur to advise him that the Chiefs of Ontario were bringing the Complainant with them to the meeting. Mr. McArthur replied and asked Mr. Thompson to call him right away. Mr. McArthur testified that in this phone conversation, he outlined for Mr. Thompson the protocols necessary for meeting with someone of the Complainant's stature, given that she was a prominent member of the First Nations community and advocated on a number of issues. Mr. Thompson followed up with an apology by email where he stated, "Again my apologies for the confusion this morning. It was not my intention to blindside you. Had I been aware that they asked Cindy I would have advised against it obviously."

Email between David McArthur and Jonathan Thompson, dated December 9, 2009, Exhibit R-12, tab 56

24. Sometime after this last email, Mr. McArthur received a call that a group of people had entered the Minister's reception area, that they had bypassed security, and were there for the meeting. He went out to the reception area and met with the party, including Mr. Phillips. Mr. McArthur stated that he was willing to proceed with the meeting as originally planned, but that he could not meet with the Complainant at that time because he needed more time to properly prepare. He apologized to the Complainant, repeating his need to be better prepared, and said that he would be willing to meet with her in the future. This invitation was again extended to the Complainant in a letter, dated January 29, 2010, from the Minister's Chief of Staff, Laurie Throness. The Complainant never acted on the invitation.

Letter from Laurie Throness, Chief of Staff to Dr. Blackstock, dated January 29, 2010, Exhibit C-1, tab 11

25. Mr. McArthur testified that the Chiefs and their administrative assistants were allowed into the meeting room, even though some or most of the assistants were not on the list of attendees.

26. The Complainant remained in the reception area with a Commissionaire. Mr. McArthur testified that the reception area of the Minister's office allows for direct access to the offices of the Deputy Minister and the Associate Deputy Minister.

The only office area with secure access is that of the Minister. The Commissionaire was present in the reception area because the delegation had bypassed security protocols in the main floor lobby area. The Commissionaire remained in the reception area because of the direct access to the other offices.

27. AANDC conducted an internal investigation into the security breach. It was determined that an AANDC employee had inappropriately swiped her access card and allowed the members of the delegation through the main floor security gates.

Investigation Report, dated January 25, 2010, Exhibit R-1

28. Mr. McArthur testified that he was aware of the Complainant's human rights complaint at the time of the meeting. However, his reason for not meeting with her at that time was that it was imperative that he be better briefed in order to meet with someone of her prominence. He acknowledged that he was concerned they could have ended up discussing the complaint, as well as any number of other issues. He did not engage in any other briefings before the meeting due to the constricted timeline in which it was requested and set up. Mr. McArthur considered this meeting to be an aberration in that he normally would not agree to such a meeting on such extremely short notice and without a proper briefing. Mr. McArthur agreed to meet with the Chiefs because they were the representatives and had responsibilities to the affected northern Ontario agencies and the meeting was on a very specific issue.

3. AANDC Reporting on Complainant's Speaking Engagements

29. The Complainant testified about various documents and emails she received pursuant to her *Privacy Act* requests that give summaries or make mention of some of her public speaking engagements. Although this was not included in her statement of particulars, it appears to form part of her retaliation complaint. It also formed part of a complaint made by her to the Complainant to the Privacy Commissioner in March 2012. The Office of the Privacy Commissioner ("OPC") released its report of findings on May 28, 2013.

30. The Respondent called Keith Smith, Director of Intergovernmental and International Relations Directorate, AANDC to testify on this issue. His group at AANDC works with multilateral forums at the United Nations, the Organization of American States, and various other international bodies. Part of his work involves

preparing AANDC officials for engagement on behalf of Canada in appearances and attendance at these forums.

31. Mr. Smith testified about the March 2010 Expert Group Meeting ("EGM"), an annual meeting in preparation for the United Nations Permanent Forum on Indigenous Issues. This particular EGM was held at the Tsleil-Waututh First Nation, which is located on the north shore of the Burrard Inlet next to North Vancouver. Mr. Smith's General Director, Line Paré attended this meeting on behalf of AANDC. As part of the preparation for Ms. Paré's attendance, Mr. Smith's staff reviewed the presenters' materials and papers, and prepared a brief précis of each paper.

32. Mr. Smith testified that the Director General wrote a brief reporting email on the daily events at the EGM. The email was a short report, noting the number of participants, giving general background information, and noting the issues addressed.

Email from Line Paré, dated March 4, 2010, Exhibit C-1, tab 14, pages 81-83

33. The Complainant presented a paper about the human rights complaint at the EGM. Her paper was reviewed as a matter of course by Mr. Smith's group, not because of the fact of the human rights complaint. A brief summary of the Complainant's presentation was included as part of the Director General's daily reporting emails.

34. Mr. Smith testified that he was aware of the human rights complaint at that time, but that it did not have any bearing on how his group prepared for the EGM, except insofar as he noted that they had to be fairly judicious in how they may address the issues that arose at the event.

4. Monitoring the Complainant's Facebook Page

35. The Complainant alleges, in her statement of particulars, that AANDC and Department of Justice ("DOJ") officials monitored her Facebook page and reviewed and shared her personal information. The Complainant testified about this issue on February 28, 2013. She said that she was unaware that Facebook had reset the privacy setting at some point, which allowed the public to view her page. She testified that she checked her privacy settings regularly, but was unaware of this reset, which allowed people with their own Facebook accounts to

access and view her page for several months. During this period, AANDC and DOJ checked the Complainant's Facebook page.

36. Natalia Strelkova testified for the Respondent. Ms. Strelkova was a paralegal with DOJ Resolution Branch in Ottawa at that time. She was a member of the DOJ litigation team assigned to this file; indeed, it was her only file because of the workload involved. Ms. Strelkova testified that she was instructed by DOJ Senior Counsel to view the Complainant's Facebook page, as well as the Caring Society's Facebook page and the "I am a Witness" Facebook page, to see if there was anything noteworthy to bring to his attention. He had been told that the Complainant had announced on her Facebook page that he would be conducting a cross-examination of her with regard to the human rights complaint and, via her Facebook page, she had invited the general public to attend.

Email from Mitch Taylor to Natalia Strelkova and others, dated February 20, 2010, Exhibit R-12, tab 69

37. In February 2010, social media websites, including Facebook, were not accessible from DOJ or AANDC computers. Although Ms. Strelkova was a DOJ employee, her network access was on an AANDC server. Consequently, she submitted an access request to the AANDC IT Service Desk. The request was for access to Facebook.com and was strictly for litigation purposes. Ms. Strelkova's request was approved by her Director on the justification that she had to conduct such research for litigation purposes.

Website Access Request Form, Exhibit R-12, tab 57

38. Ms. Strelkova testified that she periodically logged in as herself to her Facebook account, where she would enter the Complainant's name in the search function. Ms. Strelkova initially recognized the Complainant's profile picture and clicked the accompanying link which led to the Complainant's Facebook page. Ms. Strelkova also checked "I am a Witness" and the Caring Society's Facebook pages. Ms. Strelkova never sought to "friend" the Complainant.

39. Ms. Strelkova testified that she would send screen shots or copy and paste from these pages to send to a select group of people: the DOJ litigation team and the AANDC client contacts. She testified that she only sent out shots of material she considered relevant to the litigation. She did not receive replies to these emails and counsel did not instruct her to discontinue. Ms. Strelkova testified that she did not recall seeing much personal information on the Complainant's page and

that, in any event, she was only looking for information that related to the human rights complaint and the litigation.

40. Ms. Strelkova had access to Facebook.com from approximately March 2010 to August 2011, when she ceased to work on this litigation and took on a new assignment in Vancouver. She has not checked the Complainant's Facebook page since she stopped working on this litigation.

41. Ms. Strelkova testified that at a particular point, she found she could no longer access the Complainant's Facebook page due to the increased privacy setting. This occurred shortly after the DOJ litigation team notified the Tribunal that the Complainant had inappropriately posted sealed transcripts from a cross-examination on her Facebook page. Ms. Strelkova testified that she would periodically check to see if she could access the Complainant's Facebook page, to no avail. She was able, however, to access the Caring Society page as well as the "I am a Witness" page. Ms. Strelkova testified that the Complainant generally posted the same information regarding the human rights complaint on all three pages.

42. Ms. Strelkova testified that she never asked the Complainant for access to her Facebook page because it was open to the public. Moreover, she was part of a litigation team and the Complainant, in Ms. Strelkova's words, was "on a different team."

43. Ms. Strelkova searched Facebook.com only for the Complainant and not the other parties in this litigation because the Complainant was the "most outspoken person about this claim" and was "very active" in the complaint. Ms. Strelkova testified that she looked for information on other possible witnesses on the internet but did not search specifically on Facebook.com. She testified, however, that she would not have needed to submit another website access request form as she had already been granted access to Facebook.com.

5. Accessing the Complainant's Registered Indian Record

44. The Complainant alleges that government officials have improperly accessed her Registered Indian Record ("RIR"). Although this was not included in her statement of particulars, it appears to form part of her retaliation complaint. As well, it also formed part of the complaint made by the Complainant to the Office of the Privacy Commissioner in March 2012.

45. The Respondent called three witnesses to speak to this issue: Linda McLenachan, Kent-Daniel Glowinski, and Monica Fuijkschot.

46. Ms. McLenachan is a Protest, Appeals and Litigation Officer in the Protest Unit at the Office of the Indian Registrar, AANDC. She testified about the origins of the Indian Registry System ("IRS"), the strict security protocols of the IRS, the process for gaining access, and the various levels of access that may be granted. She testified that there are approximately 40 levels of access, although they are generally variations of access whereby one can only read the data, read and write (that is, manipulate data by adding entries for events such as birth, death, marriage, or protests related to registration; however, one cannot delete data), and partial read and write access (this relates to the ability to add in data pertaining only to certain events). The access level granted is dictated by the requester's position and tasks. When applying for access, the requester acknowledges that they can only use the information for whatever purpose it is needed and that the information is protected under the *Access to Information and Privacy Act*.

47. Ms. McLenachan also testified about the process for applying to be registered. A record is not created until an application for registration is received. On the application, the individual would provide her full name, date of birth, address, parents' names, parents' dates of birth, parents' band numbers and band affiliation, grandparents' names, and any other information that she considered supports her application for registration. After a person is registered and notified of the details of this registration, including information on how to lodge a protest, she can apply for a Certificate of Indian Status card; the file is then closed and archived.

48. Ms. McLenachan testified that access to the IRS is limited to AANDC officers, specifically the Office of the Indian Registrar, regional staff, some departments that have a Memorandum of Understanding with AANDC, and Indian Registry Administrators ("IRA"). The latter are band or tribal council employees. Regional AANDC staff visit IRA offices to ensure that proper security measures are in place before granting access to the IRS.

49. Ms. McLenachan testified that approximately 600 people currently have access to the IRS; of that amount, 490 are IRAs and they generally have only paper access and not access to the electronic IRS.

50. Ms. McLenachan testified about the process by which her office responds to requests made under the *Access to Information and Privacy Act*. Ms. McLenachan has processed such requests. She testified that application and registration information is only released to the applicant; access is not given to third parties without the written consent of the applicant. Information that is released back to an applicant is the information that the applicant initially provided when applying for registration. This includes date of birth, parents' names, parents' dates of birth, siblings' names, etc.

51. Ms. McLenachan testified that if a request for access was made by another branch of AANDC, such as the Litigation Management and Resolution Branch, the requester would be referred to the Access to Information and Privacy ("ATIP") office within AANDC. The requester would have to fill out a form pursuant to section 8(2)(d), which is an exemption for third parties under the *Privacy Act* and the ATIP office would decide whether the information should be provided. Ms. McLenachan testified that she did not receive a section 8(2)(d) request on this file from any third party.

52. The Respondent called Kent-Daniel Glowinski, Director of Access to Information and Privacy, AANDC. Mr. Glowinski testified about the difference between requests made under the *Access to Information Act* and the *Privacy Act*. The *Privacy Act* applies to personal information; requests can only be made by Canadian citizens or residents. Requests can be made under section 12 for access to personal information held by a government institution, which is defined in Schedule I of the *Privacy Act*. When a request comes in, any document under the control of the federal institution must be provided to the requester, subject to various but limited exemptions and exclusions.

53. Mr. Glowinski testified about the scope of requests for information. In some cases, a request is too vague and so the requester is consulted by letter or by phone to see if the request parameters can be focussed, which he referred to as "scoping a request." Mr. Glowinski's ATIP group does not search out the records; rather, they send call outs to various program areas within the department, called Offices of Primary Interest ("OPI"), which have the greatest likelihood of having the records requested. Two of the most common OPIs for personal information requests are Human Resources and Resolution and Individual Affairs, which holds the IRS and related records, such as the Registered Indian Record. As the Director and the holder of a delegated authority under the governing legislation, Mr. Glowinski signs off on all release packages which are sent out to requesters. The release letter includes information on the right to complain to the Information

Commissioner or the Privacy Commissioner, as well as a contact name and number within the ATIP group should the requester have any questions or concerns.

54. Mr. Glowinski testified about the six *Privacy Act* requests made by the Complainant between July 2010 and March 2012. The Complainant's RIR was produced within the release packages for two of those requests: P-2010-02114 and P-2011-01591.

> **Excerpts from P-2010-02114 release package and P-2011-01591 release package, Exhibit C-1, tabs 14 and 19; see also the Complainant's RIR, Exhibit C-1, tab 1 (sealed)**

55. With regard to P-2010-02114, the Complainant's request letter, dated October 19, 2010, provides as follows:

> Please find enclosed a request for personal information regarding me (Cindy Blackstock or Cynthia Blackstock) held by the Department of Indian Affairs and Northern Development. My experience tells me that Indian and Northern Affairs rarely dates or authors documents it produces and thus it may be difficult to search by time period. Nonetheless, I have offered the guideline of likely to have been produced between 2005 to present.
>
> **Letter from Complainant to ATIP Coordinator, dated October 19, 2010, Exhibit R-12, tab 43**

56. Mr. Glowinski testified that the Complainant's RIR was accessed pursuant to this request because of the broad scope of her request. Her subsequent *Privacy Act* requests contained much more narrow date ranges. Mr. Glowinski testified that his office seeks to provide as much information as possible in response to requests, without engaging in duplication with subsequent requests. Mr. Glowinski testified that the Complainant's October 2010 request was so broad that it would necessarily entail producing her RIR.

57. Mr. Glowinski testified that the Complainant's RIR was produced on a second occasion, in response to a *Privacy Act* request made by the Complainant on December 12, 2011, which was assigned file number P-2011-01591. The Complainant's request letter provides as follows:

Any 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.

Letter from Complainant to Monica Fuijkschot, ATIP Coordinator, dated December 12, 2011, Exhibit R-12, tab 45

58. Mr. Glowinski testified that this date range is significant because within that time period, the Complainant had made public allegations in the media that AANDC had improperly accessed her RIR. The ATIP Directorate conducted an internal review to determine whether these allegations were well-founded. Part of that review, conducted by Monica Fuijkschot, entailed obtaining a copy of the Complainant's RIR. Because a copy was produced for the internal review, it had to be kept in the secure ATIP offices and thus fell within the parameters of the December 2011 request for information made by the Complainant. Mr. Glowinski testified that the ATIP Directorate is subject to ATIP requests and thus ATIP records were produced to the Complainant as part of the release package for P-2011-01591.

59. Mr. Glowinski testified that the Complainant's RIR was not produced as part of any of her four other *Privacy Act* requests because of the narrow date ranges in these requests and her RIR had not been reproduced by any OPI during those timeframes. As well, the ATIP office sought to avoid providing duplicates of already produced records for subsequent requests by the same requester.

60. The Respondent also called Monica Fuijkschot to testify on this issue. Ms. Fuijkschot was the former Director of AANDC's ATIP office, prior to Mr. Glowinski assuming that role. She testified that AANDC had received critical reviews of their performance under the legislation and were keen to achieve operational efficiencies and improve their compliance level. Ms. Fuijkschot started at the ATIP office in June 2011 and remained there until March 2013.

61. Ms. Fuijkschot testified that it is "highly unusual" for allegations about how an ATIP request was handled to be made outside of the formal complaints process. She noted that the release letter advises requesters that if they have any concerns, a formal complaint mechanism exists, and they are given contact information. Additionally, requesters are also advised of who they can contact within the institution for any concerns or clarification. When a complaint is aired outside of those two channels, there is no formal internal review process for the ATIP office to follow; rather, a common sense process takes over where the

ATIP Coordinator would go over the original request and how it was processed to try to resolve the allegation.

62. Ms. Fuijkschot became aware on November 17, 2011, that the Complainant had made allegations in the media that her personal information and the personal information of her parents had been improperly accessed by AANDC. The Complainant had not contacted the ATIP office with any concerns at that time, nor had she initiated a complaint with the Privacy Commissioner.

63. Ms. Fuijkschot took the allegations seriously; if there had been a breach, remedial action needed to be taken by way of a mitigation strategy. Ms. Fuijkschot had only a transcript of the media interview for information. She checked the database to see whether the Complainant had made any Access or Privacy requests and determined that three had been made. She pulled the requests and had one of her officials go through the release package records to see what was in them that may have led the Complainant to make the allegations. She also went through the files and saw nothing to indicate improper disclosure was made through those requests.

64. Ms. Fuijkschot testified that, given that the allegations were about the Complainant's personal information and her parents' personal information, and based on her own experience in the office, she concluded that the Complainant was probably referring to her RIR. Ms. Fuijkschot requested the Complainant's RIR as she did not have access to the IRS and was able to determine that the information complained about was contained within this record.

65. Ms. Fuijkschot testified about her efforts to see if an audit log or tracking system was in place in the IRS so that she could see whether anyone had logged into the IRS for an improper purpose. However, due to the age of the IRS operating platform, this was not possible. After going through the request files again, Ms. Fuijkschot could find no evidence of any privacy breach. She concluded that, having received the RIR, the Complainant had perhaps assumed that there was an actual record lying somewhere in a file, which was not the case. Ms. Fuijkschot testified that what happened was that the Complainant made a *Privacy Act* request for personal information. Her RIR constitutes personal information and so a copy was produced, printed out, and provided to her. The Complainant was given the record because she asked for it, and not because it was being kept somewhere in a file specific to the Complainant.

66. Ms. Fuijkschot testified that she did not write a report, but documented what she had done by emails and a page of notes. She briefed her superiors and recommended that the Deputy Minister send a letter to the Privacy Commissioner inviting her to investigate. This letter, which she drafted, went out under the Minister's signature. Ms. Fuijkschot kept a file containing the emails, notes, and the RIR, which had been produced that day. This file was locked in a secure cabinet within her locked office, located in the ATIP area, which is a restricted access area.

Letter from Minister Duncan to Privacy Commissioner Stoddart, dated November 22, 2011; emails from Monica Fuijkschot to Andy Doraty, John Byers, and Colleen Swords, dated November 17, 2011, Exhibit R-12, tabs 61 and 63-65

67. The copy of the Complainant's RIR, produced to Ms. Fuijkschot as part of her internal review and kept in her file on the matter, was subsequently produced to the Complainant pursuant to her *Privacy Act* request dated December 12, 2011 (file P-2011-01591).

68. Subsequently, the Complainant utilized the formal complaint process and lodged a complaint with the Office of the Privacy Commissioner on March 19, 2012. The OPC released its report of findings on May 28, 2013. The complaint alleged that AANDC and DOJ monitored her public speaking engagements; AANDC and DOJ accessed and monitored her social media feeds, in particular her Facebook page; and that AANDC officials repeatedly accessed her RIR.

69. With regard to the Complainant's RIR, the OPC concluded in its investigation that this allegation was not well-founded. The OPC concluded that there was no evidence to suggest that AANDC had periodically accessed the Complainant's RIR for purposes other than those for which the information had originally been compiled. The OPC also concluded that there was no evidence to support the allegation that the Complainant's records were being used to "uncover ulterior motives" that the Complainant had when the human rights complaint was filed. The OPC recommended that AANDC implement an audit trail for the IRS and AANDC accepted that recommendation.

Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, paras 106-108, Exhibit R-12, tab 48

70. The OPC report concluded that the Complainant's allegations regarding monitoring her public speaking engagements from January 2007 to December 2012 did not engage the *Privacy Act* as the information disclosed by the Complainant at these public events was not personal information within the meaning of the Act.

> **Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, paras 37-40, Exhibit R-12, tab 48**

71. Finally, the OPC report concluded that the allegation regarding Facebook was well-founded only insofar as certain pieces of personal information unrelated to the human rights complaint litigation were incidentally collected. The OPC noted,

> courts have held that a party initiating litigation provides implied consent to a certain amount of probing of their personal affairs for the proper determination of the litigation. Generally speaking, courts will allow entities, including the government, some leeway to probe into the private affairs of an individual who has brought litigation against them in order for the truth to be ascertained.
>
> **Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, para 76, Exhibit R-12, tab 48**

72. The OPC noted that there was insufficient evidence to support the allegation that information gleaned from the Complainant's Facebook page was widely distributed to a vast number of personnel within AANDC and DOJ. The OPC noted that AANDC and DOJ accepted its recommendations to develop and implement internal policies, access the Complainant's Facebook page only where necessary in direct relation to an operating program or the ongoing litigation, and destroy any personal information unrelated to programs or the litigation, subject to rules of evidence and other court requirements.

> **Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, para 83, Exhibit R-12, tab 48**

PART III

Legal Test for Retaliation

73. Section 14.1 of the *Canadian Human Rights Act* makes it a discriminatory practice to retaliate or threaten retaliation against a person who has filed a human rights complaint under the Act.

***Canadian Human Rights Act*, RSC 1985, c H-6 ["*CHRA*"]**

74. Section 14.1 provides 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.

75. The purpose of this provision is to ensure that complainants are able to file a discrimination complaint without fear of reprisal. The provision provides complainants with the assurance that, if action is taken or threats are made against them as a result of the filing of a complaint, redress will be available. It also acts as a deterrent to those who would take action or threaten action against a person who filed a complaint.

> ***Warman v. Winnicki* 2006 CHRT 20 at para 112**

76. The jurisprudence on retaliation reveals two approaches to interpreting section 14.1. One line of cases does not require a complainant to prove intent to retaliate; all that need be proven by the complainant is that she reasonably perceived the impugned conduct to be in retaliation for the filing of the human rights case. This is the approach favoured by the Complainant in this case.

77. The second approach requires proof of intent and is set out in *Virk v. Bell Canada (Ontario)*:

> Retaliation implies some sort of wilful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (*Wong v. Royal Bank of Canada*, [2001] CHRT 11; *Bressette* v. *Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40).
>
> The burden of proving retaliation rests with the complainant, who must prove, on a balance of probabilities, that the person against whom he or she alleges retaliation knew of the existence of the complaint, that the person acted in an inopportune way and that the person's misbehaviour was motivated by the filing of a human rights complaint by the complainant. Retaliation being a form or discrimination under the Act, the same evidentiary burden should apply to allegations of discrimination and retaliation.

> Thus, proof on the part of the complainant that the person who is alleged to have retaliated knew of the existence of the complaint and that he or she acted in an inopportune way may give rise to a prima facie case of retaliation requiring the alleged retaliator to come forth with a reasonable explanation as to the reasons for his actions. If the explanation given is not credible, the Tribunal should find the allegation of retaliation substantiated.
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> ***Virk v. Bell Canada (Ontario)* 2005 CHRT 2 at paras 156 and 158-159 ["*Virk*"]**

78. More recently, in *Cassidy v. Canada Post Corp. and Raj Thambirajah*, the Tribunal noted the two competing schools of thought on the issue of intention and held:

> I agree with the reasoning in *Virk*, *supra* and other judicial and tribunal decisions requiring an element of intention. "Intention" includes wilful and reckless thought and action to retaliate against or punish a complainant for having filed a human rights complaint. While the *CHRA* does deem "retaliation" to be a discriminatory practice, it is different from the prohibition against discrimination and harassment in that "retaliation" need not be linked to a prohibited ground under the *CHRA*.
>
> ***Cassidy v. Canada Post Corp. and Raj Thambirajah* 2012 CHRT 29 at para 163**

79. The Respondent submits that the approach this Tribunal should apply is that which requires intent to be proven. There must be a conscious aspect to the notion of retaliation, in the sense of knowing about the complaint and responding to that event negatively by way of reprisals and other punitive conduct. The Respondent submits that if Parliament meant for retaliation to be treated as another form of discrimination, then it could have made "having filed a complaint" a ground of discrimination.

80. In the alternative, if the Tribunal prefers to apply the less stringent approach, the analysis must focus on the reasonableness of the complainant's perception. The Respondent ought not to be held accountable for "unreasonable anxiety or undue reaction on the part of the complainant", nor should it be held responsible for the individual sensitivities, fears and unreasonable perceptions of a complainant.

> ***Leung v. Canada*, 2008 FC 704 at para 32; see also paras 33-34**

81. The Complainant's perception of the alleged retaliatory conduct must be viewed objectively with regard to the evidence as a whole and found to be reasonable.

82. The Respondent submits that under both tests – the intent approach and the reasonable perception approach – the evidence does not support any of the Complainant's allegations of retaliation.

Analysis

1. 2008 B.C. Working Group

83. The B.C. Working Group position was for an AANDC casual employee to "hold the pen" and take charge of drafting the group's work product, as well as provide internal support. Ms. Stiller provided a clear and reasonable explanation for why she did not consider the Complainant to be an appropriate choice. The B.C. Working Group planned to use the Alberta Model as a basis for a "made-in-B.C." approach and, given the Complainant's vocal and public criticisms of the Alberta approach, Ms. Stiller was of the view that the Complainant was simply not the best choice for the position. Ms. Stiller explained in her testimony that, as a manager, she had the responsibility to produce a document setting out a model. She had funds available for the position and timelines to meet.

84. Contrary to the Complainant's assertion, the evidence does not support the conclusion that the person hired for this position lacked specific knowledge of B.C. Ms. Stiller testified that Mr. Lyons had worked on several contracts for the B.C. provincial ministry, as well as B.C. First Nations agencies, including the Caring Society in Victoria and the Cowichan Tribes.

85. Contrary to the Complainant's assertion, Ms. Stiller's explanation and actions do not constitute retaliation against the Complainant for filing the human rights complaint. Ms. Stiller acknowledged that she was aware of the complaint at that time, but that it was not a relevant factor in her decision. She did not testify that she received monthly updates on the complaint; rather, she engaged in monthly teleconferences with AANDC Headquarters and was informed of the complaint as part of Headquarters reporting on activities.

86. Although it is clear that the evidence on this issue does not establish any intent on the part of the Respondent to retaliate, it also fails to show the reasonableness of the Complainant's perception. The evidence of the Complainant on this issue is hearsay. Despite Complainant counsel's undertaking to call Ms. Teegee as a witness to speak to the hearsay evidence, this was not done. Although the Tribunal may consider hearsay evidence, the

Respondent submits that the hearsay evidence in this instance is weak and should be given no weight. Moreover, the Complainant's hearsay evidence establishes that she did not appear to possess the full facts regarding the B.C. Working Group. The available position was not that of consultant, but rather an AANDC casual employee. The job entailed writing the model, but also preparing briefing notes internal to AANDC and devising communications pieces for First Nations agencies to utilize when bringing the "made-in-B.C." model to their Chiefs, councils, and communities.

87. In this instance, the Complainant's perception of the events is simply not reasonable. Viewed objectively, the evidence supports Ms. Stiller's actions as reasonable and they cannot be construed as retaliation for filing the Complainant's human rights complaint.

2. 2009 Chiefs of Ontario Meeting at the Minister's Office

88. The Respondent submits that the explanation for excluding the Complainant from the December 2009 meeting is reasonable and does not support retaliation against the Complainant.

89. Mr. McArthur testified about the very short notice on which he agreed to meet with a select group from the Chiefs of Ontario. He testified that this was an aberration and was done as a courtesy and in the interests of strengthening the relationship with the AFN. He learned shortly before the meeting was to occur that the Complainant would be attending. Mr. McArthur was aware of the human rights complaint, however it was not the reason for his refusal to include the Complainant in the meeting. He testified that he needed to be properly briefed before meeting with someone of the Complainant's stature, even if she was attending as an advisor. He was concerned that a wide range of other issues, including the human rights complaint, could arise and that he would not be in a position to address them.

90. Mr. McArthur's demeanour towards the Complainant was not unfriendly, nor was it adversarial. He testified that he was firm, but also apologetic towards the Complainant and offered to meet with her at another time. He testified that there was some initial blowing off of steam in the meeting room, which lasted for approximately one or two minutes and included delegation members, but that the meeting then proceeded as planned. The outcome, as both Mr. Phillips and Mr. McArthur testified, was positive in that the impending budget cuts were averted.

91. The evidence fails to demonstrate an intention on the part of the Respondent to retaliate against the Complainant. The explanation given is reasonable and is one that is open to the Respondent to make. As well, the Complainant's perception is not reasonable. She failed to understand that a Commissionaire remained in the Minister's reception area with her not because of *who* she was, but rather because of the security breach and the open access to the offices of the Deputy Minister and Associate Deputy Minister. AANDC took the security breach seriously, and conducted an investigation into how it occurred.

3. AANDC Reporting on Complainant's Speaking Engagements

92. The Respondent's evidence shows that the Complainant's public speaking engagements were noted by the Respondent, largely in relation to its operating programs and activities or in relation to the human rights complaint. The Respondent's witness, Mr. Smith, testified about a specific meeting, the Expert Group Meeting of the United Nations Permanent Forum on Indigenous Issues. The Complainant presented a paper on the human rights complaint at that meeting. Mr. Smith's group reviewed this paper, as well as the papers of the other presenters, as part of their preparations for their Director General's participation and attendance at the EWG.

93. The Respondent submits that the evidence fails to support the allegation of retaliation. It is unclear how reporting on the Complainant's public speaking engagements amounts to retaliatory conduct. The evidence, including that of the Complainant, demonstrates that the Complainant speaks publicly on issues relating to child welfare, the work being done by the Caring Society, and the human rights complaint. It is to be expected that these activities would draw the interest of the Respondent, with regard to its related operations and programs, as well as the ongoing litigation.

94. The Complainant asserts that the human rights complaint is about discrimination against children and not against the Complainant or the Caring Society. As such, the Complainant fails to understand why the Respondent would be interested in her speaking engagements. However, the evidence demonstrates that the Complainant spoke about the litigation, as well as about child welfare issues that go to the core of the human rights complaint. As such, it is reasonable that the Respondent would wish to inform itself of the content of her public speeches and presentations. The Complainant's perception that this was unwelcome scrutiny is unreasonable and fails to take into account the very nature of her public advocacy.

4. Monitoring the Complainant's Facebook Page

95. The Respondent acknowledged that it periodically monitored the Complainant's publicly accessible Facebook page during the period of February 2010 to approximately August 2011, bearing in mind that the Complainant increased her privacy setting during that period so that her page was no longer available to be viewed by the public at large. The Complainant did not, however, change the privacy settings on the Caring Society or "I am a Witness" pages. The monitoring was not done in a surreptitious manner. Ms. Strelkova testified that she logged on to her own Facebook account and then searched for the Complainant's page, which was open to her to view. Ms. Strelkova testified that this was done at the instruction of senior counsel and for the purposes of the litigation. Ms. Strelkova testified that she was not interested in the Complainant's personal information, but rather looked only for information relating to the human rights complaint.

96. The Respondent submits that it is entirely appropriate for parties engaged in litigation to find out information about each other, including motivation and reasons for pursuing the litigation. The Office of the Privacy Commissioner's report readily acknowledged this and never stated that such activity is illegal or inappropriate. Indeed, the OPC noted, "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." The problem, however, arose where unrelated pieces of personal information were incidentally collected. As noted in the OPC report, the Respondent accepted the recommendations regarding the incidental collection of personal information.

> **Office of the Privacy Commissioner, Report of Findings, dated May 28, 2013, para 76, Exhibit R-12, tab 48**

97. The Complainant asserts that the Respondent was attempting to discredit her and notes, in this regard, that counsel asked her "deeply troubling" questions during cross-examination on a jurisdiction motion. The Complainant swore an affidavit on February 11, 2010 and chose to be affirmed for her cross-examination on that affidavit. Counsel asked three questions of the witness as to whether there was any reason for the different approach. Counsel did not engage in questioning the Complainant about her religion and was simply ascertaining that she was committed to telling the truth as best she knew how. Counsel for the complainant raised no objection at that time.

Cross-examination transcript, pages 2-3, Exhibit C-1, tab 21

98. The evidence fails to demonstrate any intent on the part of the Respondent to retaliate against the Complainant. The Respondent was interested in the Complainant's Facebook page solely due to the ongoing litigation and her actions in posting information about it on her page. The Complainant's perception that she was unfairly targeted is not reasonable in the circumstances of the litigation.

5. Accessing the Complainant's Registered Indian Record

99. The Respondent submits that the evidence fails to support the Complainant's allegation that her RIR was inappropriately accessed by AANDC officials in an attempt to gain information to use against her. The evidence clearly supported the rigorous security protocols governing access to the IRS. The evidence also clearly demonstrates that the Complainant's RIR was provided to her on two occasions, pursuant to *Privacy Act* requests she made.

Excerpts from P-2010-02114 release package and P-2011-01591 release package, Exhibit C-1, tabs 14 and 19; see also the Complainant's RIR, Exhibit C-1, tab 1 (sealed)

100. The Complainant's RIR was first produced to her in response to a request with a fairly broad scope. The RIR was produced a second time as a copy had been produced during the course of an internal review, which was conducted after the Complainant made allegations in the media about government officials inappropriately accessing her personal information. The Complainant's RIR was not produced in any subsequent or other *Privacy Act* requests because it had already been given to her in the release package for P-2010-02114 (and P-2011-01591) and the information contained in it had not changed. In the event that information is added to her RIR at some point, it could conceivably form part of a release package for a future *Privacy Act* request, should the Complainant choose to do make such a request.

101. Additionally, the evidence demonstrates that information on the Complainant's RIR was not redacted because it was information that was known to her and would have been provided by her in her application for registration.

102. The Complainant's assertion that Ms. Fuijkschot failed to document her internal review is not supported by the evidence. Ms. Fuijkschot acknowledged

that she did not write a report as one was not necessary in her view; however, she kept the emails generated by her review and a page of notes. It is important to bear in mind that this internal review was conducted over the course of the better part of one day following the Complainant's public allegations in November 2011.

103. The Complainant never contacted the AANDC ATIP office with her concerns, nor did she initiate a complaint to the Privacy Commissioner at the time she made the allegations in the media. Ms. Fuijkschot testified that she did not contact the Complainant because it was clear that the Complainant did not wish to speak with officials at AANDC ATIP as she had not availed herself of the contact person as indicated on the release letter or contacted the OPC. Ms. Fuijkschot testified that her request for a copy of the Complainant's RIR was appropriate and valid, pursuant to her legal obligations and duties under section 8(2)(a) of the *Privacy Act*. Moreover, Ms. Fuijkschot considered that by virtue of the Complainant's public allegations in the media, there was an implied consent for the ATIP office to access the RIR as part of its internal review into the allegations.

104. The Complainant's assertion that she was treated differently because of her human rights complaint is not supported by either evidence or inference. Ms. Fuijkschot testified that this was a unique situation, whereby allegations of a privacy breach were levelled in the media instead of by one of the two channels available to requesters. Normally, people either contact the ATIP office for clarification or the OPC. Ms. Fuijkschot took the allegations very seriously and conducted an internal review based on a common sense approach that traced back over the Complainant's previous release packages. When she failed to find any evidence supporting the allegations, Ms. Fuijkschot recommended that the OPC be invited to conduct its own investigation. Although the OPC can, on its own volition, initiate an investigation, it declined to do so. Indeed, it did not do so until the Complainant launched an official complaint. In the result, the OPC found no evidence supporting any inappropriate accessing of the Complainant's RIR.

6. Conclusion

105. The evidence fails to demonstrate any intention on the part of the Respondent to retaliate. Furthermore, the evidence, viewed objectively, and as a whole, manifestly does not support a reasonable perception of retaliation.

Part IV

Remedies

106. The Tribunal does not have the statutory authority to make an order directing the Minister of AANDC to issue a written and public apology to the Complainant.

107. No compensation should be awarded under s.53(2)(e) or s.53(3) of the *Canadian Human Rights Act* as the retaliation complaint has not been substantiated.

108. In the alternative, the retaliation complaint is part of the main human rights complaint, and therefore, a separate sum of $20,000 in compensatory damages would be inappropriate and not within the Tribunal's statutory authority. Moreover, an award of damages on the retaliation complaint would preclude any potential finding of damages on the main human rights complaint.

109. In the further alternative, if the Tribunal finds the retaliation complaint substantiated the circumstances do not warrant the maximum award of damages.

110. No evidence supports the Complainant's assertion of wilful or reckless discriminatory conduct. Furthermore, despite the use of the term discriminatory practice in s.14.1 of the *CHRA*, retaliation is meant to protect the complaint process from actions that would interfere with it. Retaliation does not engage adverse effect or systemic discrimination.

All of which is respectfully submitted.

Dated: August 5, 2013 at Vancouver, BC

Ainslie Harvey
Counsel for the Respondent

Michelle Casavant
Counsel for the Respondent