

**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  
(representing the Minister of Indian and Northern Affairs)**

**Respondent**

**- and -**

**CHIEFS OF ONTARIO and  
AMNESTY INTERNATIONAL CANADA**

**Interested Parties**

---

**MOTION RECORD OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA  
(Response to the motion to amend the complaint)**

---

**Jonathan Tarlton and Melissa Chan**  
Department of Justice, Canada  
Suite 1400, 5251 Duke Street  
Halifax, NS B3J 1P3

Tel: (902) 426-7916  
Fax: (902) 426-8796

**Counsel for the Respondent**

## Overview

1. The Tribunal is being asked to amend an existing complaint to include allegations of retaliation. These allegations raise a distinct new complaint that should proceed through the Commission's investigation stage on its own. The respondent is entitled to the benefit of its statutory right to a Commission decision, and only after the Commission decides to refer it to the Tribunal for inquiry should the Tribunal consider allowing the proposed amendments to the existing matter.

## Facts

2. On February 26, 2007, the First Nations Child and Family Caring Society ("the Caring Society) and the Assembly of First Nations ("the AFN"), filed a complaint with the Canadian Human Rights Commissions ("the Commission").<sup>1</sup> This complaint alleged discriminatory treatment by the Respondent in funding child welfare services for on-reserve First Nations children. This complaint was assigned file number 2006 1060.
3. After the Commission referred Complaint 2006 1060 to inquiry before the Canadian Human Rights Tribunal (the Tribunal"), the Caring Society filed a motion requesting that the complaint be amended to include allegations of retaliation, contrary to section 14.1 of the *Canadian Human Rights Act*.<sup>2</sup>
4. A further human rights complaint was filed by Cindy Blackstock (Executive Director of the Caring Society) and the Caring Society, on February 7, 2011, alleging the Respondent engaged in retaliation.<sup>3</sup> The complaint was assigned file number 2011 0053 and contains the same allegations raised in the Notice of Motion, dated December 22, 2009.
5. On March 17, 2011, the Commission advised Aboriginal Affairs and Northern Development Canada, of the receipt of Complaint 2011 0053.<sup>4</sup>

---

<sup>1</sup> *Summary of Complaint (20061060) dated February 26, 2007*, Affidavit of Prudence Kennedy, para. 2, exhibit 1.

<sup>2</sup> *Notice of Motion, dated December 22, 2009*, Affidavit of Prudence Kennedy, para. 3, exhibit 2.

<sup>3</sup> *Summary of Complaint (2011 0053) dated February 7, 2011*, Affidavit of Prudence Kennedy, para. 4, exhibit 3.

<sup>4</sup> *Commission letter dated March 17, 2011*, Affidavit of Prudence Kennedy, para. 5, exhibit 4.

6. On April 24, 2012, the Commission issued the Section 40/41 Report, which listed issues that the Commission would be reviewing in Complaint 2011 0053.<sup>5</sup>
7. On July 11, 2012, the Commission issued the Record of Decision under Sections 40/41 in respect of Complaint 2011 0053.<sup>6</sup> The Record of Decision determined that the Commission would deal with Complaint 2011 0053.

### **Issue**

8. The only issue to be determined in this motion is whether Complaint 2006 1060 should be amended to include the allegations of retaliation.

### **Law and Argument**

*Amending the complaint now circumvents the legislative process and undermines the respondent's right to a Commission decision on this matter.*

9. Complaint 2006 1060 should not be amended to include the retaliation allegations. These allegations are distinct and have not been referred to the Tribunal for further inquiry. A separate complaint has been filed containing these allegations and the Commission should complete its investigation process and determine whether it warrants a further inquiry before amending the complaint to include the allegations of retaliation.
10. To amend the Complaint 2006 1060 now to include the retaliation allegations would disregard the complaint process established in the *Canadian Human Rights Act* and deprive the parties of this procedure.
11. The *Act* sets out a scheme for the filing, investigation and referral of a complaint to the Tribunal. The process is commenced with the filing of a complaint under section 40 of

---

<sup>5</sup> *Commission Section 40/41 Report, dated April 24, 2012, Affidavit of Prudence Kennedy, paras. 6-7, exhibit 5.*

<sup>6</sup> *Record of Decision under Sections 40/41, dated July 11, 2012, Affidavit of Prudence Kennedy, paras. 8-9, exhibit 8.*

the *Act*.<sup>7</sup> Once it is filed, the Commission is to deal with the complaint unless it falls under one of the exceptions listed in sections 40 and 41.<sup>8</sup>

12. The complaint is then usually investigated by an investigator assigned by the Commission.<sup>9</sup> At its conclusion, the investigator prepares a report for the Commission's consideration outlining the findings and recommendations from the investigation.<sup>10</sup>
13. Under section 44(3)(a), the Commission can then decide to refer a complaint for further hearing by the Tribunal.<sup>11</sup> Or the Commission can dismiss the complaint under section 44(3)(b) if it determines a further hearing is not warranted or that the complaint falls under one of the exceptions listed in section 41(c) to (e).<sup>12</sup>
14. The decisions of the Commission under sections 41(1) and 44(3) are subject to judicial review by the Federal Court.<sup>13</sup>
15. In the case at bar, the Respondent raised objections under section 41 to Complaint 2011 0053 being dealt with by the Commission. The Commission considered these objections and decided, pursuant to section 41(1), to deal with the complaint.
16. Complaint 2011 0053 is presently slated to be investigated by the Commission. During this investigation, the Respondent will have its first opportunity to respond to the merits of the complaint and to provide its version of events. The investigator will consider the evidence submitted and make a recommendation on whether further investigation by the Tribunal is warranted in this case. The Commission will then make a decision to dismiss the complaint or refer it to the Tribunal.
17. If this motion to amend Complaint 2006 1060 is granted at this time, all of these steps will be bypassed. The Respondent will not have an opportunity to respond to the merits

---

<sup>7</sup> *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 40.

<sup>8</sup> *Canadian Human Rights Act*, *supra*, ss. 41(1).

<sup>9</sup> *Canadian Human Rights Act*, *supra*, ss. 43(1) and (2).

<sup>10</sup> *Canadian Human Rights Act*, *supra*, ss. 44(1).

<sup>11</sup> *Canadian Human Rights Act*, *supra*, ss. 44(3)(a).

<sup>12</sup> *Canadian Human Rights Act*, *supra*, ss. 44(3)(b).

<sup>13</sup> *Federal Courts Act*, section 18.

of the complaint, which compromises its right to procedural fairness during the investigation stage.

*Allowing proposed amendment at this time will prejudice the respondent.*

18. A key consideration for the Tribunal in deciding whether to grant an amendment is the effect the amendment will have on the proceeding. Here the proposed amendment will expand the scope of the complaint and supplant the role of the Commission, thereby prejudicing the respondent.
19. Where the amendment will correct obvious errors or bring the proceedings in line with the evidence and matters already in issue, the amendment will be granted. For example, in *Office and Professional Employees International Union, Local 404 v Atomic Energy of Canada Limited*, the Tribunal stated that it “has granted amendments to complaints in order to clarify the legalities of the situation and where no prejudice will result to the respondent.”<sup>14</sup>
20. This approach is confirmed by the Supreme Court of Canada in *Central Okanagan School District No. 23 v Renaud* when it granted the amendment because it “simply brought the complaint into conformity with the proceedings.”<sup>15</sup>
21. The situation was similar in *Canada (Human Rights Commission) v Canada Telephone Employees Assn.*, where the amendments were granted in order to “correct an obvious error, and bring the Tribunal proceedings in line with the relevant evidence.”<sup>16</sup> Further, the proposed amendments occurred before the complaints were referred to the Tribunal and were the versions available to the Commission when it made its determination on referral. Although the Court found that the amended complaints were broader in scope than the original complaints, their purpose was found to be the same.<sup>17</sup>

---

<sup>14</sup> *Office and Professional Employees International Union, Local 404 v Atomic Energy of Canada Limited*, 2007 CHRT 35, at para. 10.

<sup>15</sup> *Central Okanagan School District No. 23 v Renaud* [2002] 2 SCR 970, pgs. 33-34.

<sup>16</sup> *Canada (Human Rights Commission) v Canada Telephone Employees Assn.*, 2002 FCT 776, at para. 37.

<sup>17</sup> *Canada (Human Rights Commission)*, *supra*, at para. 36; also see *Canadian Museum of Civilization Corporation v Public Service Alliance of Canada (Local 70396)*, 2006 FC 704 at para. 9.

22. In contrast, the Tribunal has exercised caution when the amendment will expand the scope of the complaint, particularly when the original complaint has already been referred to the Tribunal. One of the reasons for this concern is that it is the Commission's role to refer a complaint, not the Tribunal's.<sup>18</sup>
23. The *Act* is a complete code for the administration and enforcement of anti-discrimination matters arising in the federal jurisdiction.<sup>19</sup> The Tribunal obtains its jurisdiction to inquire into a complaint only once the Commission has referred the matter to Tribunal (s. 49(2)). Further, case law recognizes that Tribunals are generally not permitted to review the exercise of Commission discretion. A Tribunal decision to amend the complaint will effectively supersede the scheme of the Act, undermine the respondent's statutory right to a decision by the Commission on whether an inquiry is warranted and substitute the discretion of the Tribunal for that of the Commission.
24. In *Gaucher v Canadian Armed Forces*, the Tribunal stated:
- The jurisdiction of the Tribunal under the *Canadian Human Rights Act* comes from the fact that the complaint has been referred by the Commission. This provides the general context in which any request for an amendment must be considered. The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.<sup>20</sup>
25. In this case, the proposed amendment will expand the parameters of the complaint. As there are new allegations, with new evidence, it goes beyond simply bringing the matters in line with what is already before the Tribunal. The underlying nature of the complaints are also different – the original complaint concerns allegations of funding for child welfare services for First Nations children on reserve and the proposed amendment involves allegations arising from personal interaction between the executive director of the Caring Society and the federal government. This is clearly a distinct and different

---

<sup>18</sup> *Tran, Cam-Linh (Holly) v Canada Revenue Agency*, 2010 CHRT 31, at paras. 18-19.

<sup>19</sup> *Seneca College v Bhadauria*, [1981] 2 S.C.R. 181.

<sup>20</sup> *Gaucher v Canadian Armed Forces*, 2005 CHRT 1, at para. 9.

claim and allowing this amendment will expand the complaint that is currently before the Tribunal.

26. Because the retaliation allegations are sufficiently and qualitatively separate from the allegations underlying the original complaint, there is an insufficient nexus between the two complaints to warrant allowing an amendment of the complaint before the Tribunal at this stage of the proceedings. This is not a situation where either a victim, or a complainant, has filed a complaint of underfunding and then alleged retaliation by having received even less funding after bringing the initial complaint.

*Denial of the respondent's right to the statutory benefit of a Commission decision is prejudicial even where the proposed amendment concerns retaliation.*

27. The Tribunal has indicated in *Cook v Onion Lake* that the rule regarding allegations of retaliation can probably be seen as an exception to the general practice of allowing amendments if they do not alter the substance of the complaint and do not cause prejudice to the respondent.<sup>21</sup> However, the above statement was *obiter dicta* and the Tribunal did not say that such amendments will always be granted.<sup>22</sup>
28. As previously stated, the proposed amendments both alter the substance of the complaint and cause prejudice. Furthermore, disallowing the proposed amendment at this juncture does not mean that the Caring Society's allegations of retaliation will never be considered by the Tribunal.
29. Presently the retaliation allegations are the subject of their own, distinct complaint and are currently before the Commission at the investigation stage. The respondent should be entitled to the benefit of its statutory right to a Commission decision on this matter. This is the scheme set out in the *Canadian Human Rights Act*, and to deviate from it would compromise the procedural rights the respondent has under the legislation. As noted by the Tribunal in *Cook v Onion Lake*:

Under section 49(1) of the *Canadian Human Rights Act*, the Canadian Human Rights Commission has the authority to request that the Human

---

<sup>21</sup> *Cook v Onion Lake First Nation*, [2002] C.H.R.D. No. 12, at para. 2.

<sup>22</sup> *Cook v Onion Lake First Nation*, *supra*, at para. 20.

Rights Tribunal inquire into a complaint. Section 49(2) states that the Chairperson of the Tribunal "shall" institute an inquiry on receiving a request by assigning a member or a panel to inquire into the complaint. It follows that the decision to take a complaint to an inquiry lies with the Commission rather than the Tribunal. Section 50 of the *Act* sets out the powers of the Tribunal and gives the member or panel the authority to "inquire into the complaint"....

...These cases deal with amendments during the course of an investigation, however. The situation changes once a complaint has been referred to the Tribunal. In *I.M.P. Group Limited v. Dillman* (1995), 24 C.H.R.R. D/529, for example, the Nova Scotia Court of Appeal criticized a Board of Inquiry for allowing an amendment that went beyond the facts of the original complaint. In paragraph 35, at page 332, the court stated as follows:

As counsel for the company says, it was not merely an extension, elaboration or clarification of the sexual harassment complaint already before the Board. To raise a new complaint at the hearing stage would circumvent the whole legislative process that is designed to provide for attempts at conciliation and settlement. This matter did not go through the preliminary stages of investigation, conciliation and referral by the Commission to an inquiry pursuant to s. 32(a) of the *Act*. The Board dealt with a matter which had never been referred to it.

The Commission would be the last to suggest that the Tribunal is entitled to enter into an inquiry without a referral from the Commission.<sup>23</sup>

30. Conversely, if the proposed amendments are allowed at this time, the respondent will experience prejudice and its right to procedural fairness will be compromised. Given the proposed amendment prejudices the case for the respondent, it should not be allowed.
31. The case law does not discuss how much prejudice is sufficient, but it must be real and significant. There must be "actual prejudice". Such actual prejudice includes the loss of the investigation and conciliation processes.<sup>24</sup> There may also be factors such as delay, which are implicitly prejudicial.

---

<sup>23</sup> *Cook supra*, at paras. 10, 13.

<sup>24</sup> *Cook supra*, at para. 20



32. Multiplicity of proceedings is another factor. Amending Complaint 2006 1060 to include the same allegations made in Complaint 2011 0053, while the latter proceeds to investigation would create multiple proceedings with the possibility of different outcomes arising from the same allegations.
33. The investigation of Complaint 2011 0053 by the Commission should continue in order to allow the Commission to make a full and informed decision on whether an inquiry by the Tribunal is warranted in these circumstances.
34. Only after the Commission investigates Complaint 2011 0053 and determines a Tribunal inquiry is warranted, should consideration be given to amending the complaint to include the proposed allegations of retaliation under section 14.1 of the *Act*.

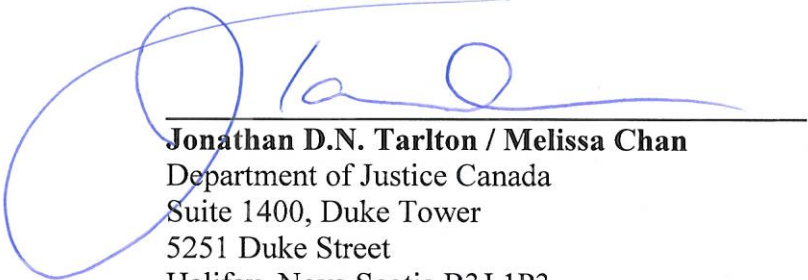
### **Conclusion**

35. The retaliation allegations are substantially different from the allegations in the original complaint that is currently before the Tribunal. Therefore, the issue of retaliation raises a distinct new complaint. These two complaints are at two different stages in the proceedings. Amending Complaint 2006 1060 should not result in bypassing the process set out in the legislation that governs the conduct of a complaint from filing to determination by the Tribunal. The result of that will be to prejudice the respondent.
36. The decision not to allow an amendment at this juncture does not prevent future consideration of the Caring Society's retaliation allegations. Rather, the retaliation complaint should continue as its own complaint through the Commission investigation. Only after Complaint 2011 0053 is referred to the Tribunal should the Tribunal consider amending the original complaint to include the allegations raised in it. If that were to happen, then Complaint 2011 0053 should be discontinued in order to avoid multiplicity of proceedings.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** this 7th day of August, 2012 in Halifax, Nova Scotia.

**Myles J. Kirvan**  
**Deputy Attorney General of Canada**



**Jonathan D.N. Tarlton / Melissa Chan**  
Department of Justice Canada  
Suite 1400, Duke Tower  
5251 Duke Street  
Halifax, Nova Scotia B3J 1P3

Tel: (902) 426-5959/7916  
Fax: (902) 426-8796

*Solicitors for the Respondent, The Attorney  
General of Canada*

**TO: Canadian Human Rights Tribunal**

**AND TO: Paul Champ / Anne Levesque**

Champ and Associates  
Barristers and Solicitors  
Equity Chambers  
43 Florence Street  
Ottawa, ON K2P 0W6

Tel: (613) 237-4740  
Fax: (613) 232-2680  
*Counsel for the Caring Society*

**AND TO: Daniel Poulin / Samar Musallam**

Canadian Human Rights Commission  
344 Slater Street, 8<sup>th</sup> Floor  
Ottawa, Ontario K1A 1E1

Tel: (613) 947-6399 / 943-9080  
Fax: (613) 993-3089

*Counsel for the Respondent, Canadian Human Rights Commission*

**David C. Nahwegahbow**  
Nahwegahbow, Corbiere  
7410 Benson Side Road  
PO Box 217  
Rama, Ontario L0K 1T0

Tel: (705) 325-0520  
Fax: (705) 325-7204

*Counsel for the Respondent, Assembly of First Nations*

**Michael W. Sherry**  
Barrister & Solicitor  
1203 Mississauga Road  
Mississauga, Ontario L5H 2J1

Tel: (905) 278-4658  
Fax: (905) 278-8522

*Counsel for the Respondent, Chiefs of Ontario*

**Justin Safayeni**  
Stockwoods LLP  
Royal Trust Tower  
Suite 4130, 77 King Street West  
PO Box 140  
Toronto, Ontario M5K 1H1

Tel: (416) 593-2494  
Fax: (416) 593-9345

*Counsel for the Respondent, Amnesty International*

### **List of Authorities**

1. *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, ss. 40, 41, 43 and 44.
2. *Federal Courts Act*, RSC 1985, c F-7, section 18
3. *Office and Professional Employees International Union, Local 404 v Atomic Energy of Canada Limited*, 2007 CHRT 35
4. *Central Okanagan School District No. 23 v Renaud*, [2002] 2 SCR 970
5. *Canada (Human Rights Commission) v Canada Telephone Employees Assn.*, 2002 FCT 776
6. *Canadian Museum of Civilization Corporation v Public Service Alliance of Canada (Local 70396)*, 2006 FC 704
7. *Tran, Cam-Linh (Holly) v Canada Revenue Agency*, 2010 CHRT 31
8. *Seneca College v Bhadauria*, [1981] 2 SCR 181
9. *Gaucher v Canadian Armed Forces*, 2005 CHRT 1
10. *Cook v Onion Lake First Nation*, [2002] C.H.R.D. No. 12