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 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

REPLY SUBMISSIONS
(On the Complainant's Motion to Amend the Complaint)

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1. In addition to the motion record dated July 13, 2012, the Complainant, First Nations Child and Family Caring Society ("FNCFCS" or "Caring Society"), makes the following submissions in reply to the Respondent's motion record and written representations dated August 7, 2012.

2. The Caring Society maintains that the present complaint ought to be amended to include allegations of retaliation by the Respondent, in breach of section 14.1 of

the *Canadian Human Rights Act* ("*CHRA*" or "the *Act*"). Contrary to the Respondent's assertions, the retaliatory acts by representatives and agents of the Minister of Indian and Northern Affairs against Dr Blackstock, Executive Director of the FNCFCS, are directly and plainly connected to the present complaint.

3. Any prejudice to the Respondent as a result of amending the complaint to include these allegations of retaliation would be more than offset by prejudice to the Complainant arising from the artificial separation of these related allegations into multiple proceedings. In this regard, the Complainant notes that a separate complaint in relation to these allegations (CHRC File No. 2011 0053) was initiated only because the Tribunal had previously declined to deal with the within motion in a timely manner. Should this motion to amend be granted, the Complainant would agree to place CHRC file 2011 0053 in abeyance.

Retaliation is Directly Connected to the Complaint

4. The Respondent argues that the proposed amendment should not be granted because it will expand the scope of the complaint and supplant the Commission's investigative role. However, the Respondent's position fails to take into account the unique circumstances of retaliation, which is separately and specifically dealt with both in caselaw concerning the amendment of complaints and under the *Act* itself.

5. In *Gaucher v. Canadian Armed Forces*, the Tribunal acknowledged that because the Tribunal's jurisdiction over a complaint originates from a referral by the Commission, there must be certain limits on the scope of amendments. However, Member Groark went on to note that this constraint is "only one aspect of the matter," observing that "human rights tribunals have adopted a liberal approach to amendments" that is in keeping with the remedial nature of the *CHRA*. As noted by Member Mactavish (as she then was) in *Warman v. Kyburz*:

> A human rights complaint is not like a criminal indictment. There is discretion in the Tribunal to amend a complaint to deal with additional allegations,

provided that sufficient notice is given to the respondent so as to enable him to properly defend himself.

Gaucher v. Canadian Armed Forces, 2005 CHRT 1 at paras. 9-13

Warman v. Kyburz, 2003 CHRT 6 at para. 5

Also see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 5

6. As noted in *Tran*, a complaint will be considered "new" and a proposed amendment denied where it bears "no factual, logical, or other connection with the original complaint." However, this is not the case in circumstances of retaliation, which by definition relates to actions taken as a result of and in response to the filing of a complaint.

Tran, Cam-Linh (Holly) v. Canada Revenue Agency, 2010 CHRT 31 at para. 18

7. As a general rule, the Tribunal will permit amendments to include allegations of retaliation under section 14.1 of the *Act* in circumstances where respondents have taken action against complainants because they have filed complaints. For example, in *Virk v. Bell Canada*, the complainant sought to amend his original complaint to include an allegation of retaliation after the Commission had already referred the matter to the Tribunal. In granting the motion to amend the original complaint to add allegations of retaliation, Member Deschamps noted:

> It is now undisputed that this Tribunal has the authority to amend a complaint to add an allegation of retaliation. As a rule, an amendment should be granted unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed. In any case, the Tribunal should not embark on a substantive review of the merits of an amendment. That should be done only in the fullness of the evidence after a full hearing. Thus the test to be applied is whether the allegations of retaliation are by their nature linked, at least by the complainant, to the allegations giving rise to the original complaint and disclose a tenable claim for retaliation.
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> *Virk v. Bell Canada*, 2004 CHRT 10 at para. 7 [emphasis added]

8. In *Bressette*, Member Sinclair granted a motion to amend the original complaint to add an allegation of retaliation under section 14.1, noting that "it should not be necessary for individuals to make allegations of reprisal or retaliation arising after a complaint, by way of separate proceedings."

> *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 6

9. The Tribunal's approach to amending complaints to add allegations of retaliation, and the distinct nature of this approach from the more restrictive approach taken for other types of amendments, is set out in *Cook v. Onion Lake*:

> The issue of amendments has become prominent in the context of allegations that a respondent has retaliated against a complainant for filing a complaint. In *Kavanagh v. Correctional Services of Canada* (May 31, 1999), T505/2298 (C.H.R.T.), the Chairperson of this tribunal adopted the reasoning of the Ontario Board of Inquiry in *Entrop v. Imperial Oil Limited* (1994) 23 C.H.R.R. D/186, at paragraph 9:
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> > It would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings. This would necessitate their going to the end of the queue to obtain investigation, conciliation and adjudication on matters which are fundamentally related to proceedings already underway. Insofar as reprisals are intended to intimidate or coerce complainants from seeking to enforce their rights under the *Code*, this would thwart the integrity of the initial proceedings and make a mockery of the *Code's* obvious intent to safeguard complainants from adverse consequences for claiming protection under the *Code*. The allegations of reprisal should be dealt with in the context of the original complaint.
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> The same approach was followed in *Fowler v. Flicka Gymnastics Club*, 31 C.H.R.R. D/397 (B.C.H.R.C.), where the complainant argued that the amendment arose "out of the facts which form the basis of the original complaint."
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> The rule regarding allegations of retaliation can probably be seen as an exception to the general practice regarding amendments. That practice appears to be that amendments will normally be allowed if they do not alter the substance of the complaint, as reflected in the material facts of the case. If the amendment prejudices the case for the respondent, on the other hand, it should not be allowed. The case law does not discuss how much prejudice is

> sufficient, but it must be real and significant. There must be "actual prejudice." There may also be factors such as delay, which are implicitly prejudicial. This might include the loss of the investigation and conciliation processes.
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> *Cook v. Onion Lake First Nation*, 2002 CanLII 45929 at paras. 19-20 [emphasis added]

10. In light of the foregoing, it is the Complainants' submission that the Tribunal's authority to amend a complaint to include allegations of retaliation is clear, and that the applicable test is simply whether the allegations of retaliation are by their nature linked, at least by the complainant, to the allegations giving rise to the original complaint and disclose a tenable claim for retaliation.

11. In the present case, there is a plain and obvious connection to the original complaint. The allegation raised in the proposed amendment concerns retaliation against Dr Blackstock in her capacity as Executive Director of FNCFCS, the organization that filed the complaint, contrary to section 14.1 of the *CHRA*. The very purpose and objectives of the FNCFCS is to improve child welfare services on reserves, particularly by addressing funding inequities and flawed funding formulas by the federal government. As set out in the Complainant's written submissions and in the affidavit of Dr Blackstock, she – and by extension the FNCFCS – was barred from participating in meetings with INAC officials concerning funding for child and family services for the stated reason that FNCFCS had filed the present human rights complaint against INAC. In this way, INAC was preventing the Caring Society from doing its vital work, namely alleviating funding inequities in child welfare services on reserves. Underfunding of these services is at the core of the within complaint.

12. Although the Respondent takes the position that the retaliation allegations are "sufficiently and qualitatively separate" from the allegations in the original complaint, the link between the child welfare complaint, and the retaliation complaint which alleges the Respondent interfered with the Caring Society's efforts to work with its constituencies to remedy this same problem, is obvious on its face.

The well-established test employed by this Tribunal for the amendment of a complaint to include allegations of retaliation is clearly met.

Prejudice and Multiple Proceedings would be Minimized by Amending the Complaint

13. The Respondent contends that it would suffer undue prejudice if the present complaint were to be amended to include allegations of retaliation, and that it would be preferable if the retaliation allegations were dealt with by way of the separate complaint now before the Commission (2011 0053). The Complainant reject the Respondent's assertion that it will be prejudiced by having to respond to allegations of retaliation for which it has proper knowledge and notice as early as December 2009.

14. Moreover, it is submitted that any such prejudice would be more than offset by the prejudice and delay arising from the artificial separation of these related allegations into multiple proceedings. In that regard, the Caring Society submits that any prejudice which may be suffered by the Respondent should be weighed or balanced against the harm faced by the Complainant if the complaint is not amended to include the allegations of retaliation.

15. As this Tribunal has acknowledged, it would be impractical, inefficient, and unfair to require complainants to make allegations of reprisals through separate proceedings rather than as part of their existing complaints, as doing so would place them at the end of the queue for investigation and adjudication of matters which are fundamentally related to proceedings that are already underway. In short, there would be significant prejudice to the Complainant in requiring the retaliation allegations to proceed through the Commission and Tribunal processes as a separate complaints. It is the Complainant's submission that such prejudice would clearly outweigh any prejudice suffered by the Respondent in not having the benefit of a Commission investigation, particularly in circumstances where the Respondent has

had proper knowledge and notice of the allegations long before the Tribunal hearing commences.

> *Entrop v. Imperial Oil Limited* (1994) 23 C.H.R.R. D/186 at para. 9, as cited in *Cook v. Onion Lake First Nation*, 2002 CanLII 45929 at para. 19

16. Finally, the Complainant notes in this regard that the separate complaint in relation to the retaliation allegations (CHRC File No. 2011 0053) was initiated only because the Tribunal had previously declined to deal with the within motion in a timely manner. Should this motion to amend be granted, the Complainant would agree to jointly asking the Commission to place CHRC file 2011 0053 in abeyance pending a determination on the merits of the amended complaints. As such, creating a multiplicity of proceedings is not an issue in the present circumstances.

Conclusion

17. Given all the foregoing, the Complainant Caring Society submits that the motion should be granted and the present complaint ought to be amended to include allegations of retaliation by the Respondent, in breach of section 14.1 of the *Canadian Human Rights Act* ("*CHRA*" or "the *Act*").

All of which is respectfully submitted on this 14th day of August, 2012.

_____
Paul Champ

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LIST OF AUTHORITIES

Bressette v. Kettle and Stony Point First Nation Band Council, 2004 CHRT 2

Cook v. Onion Lake First Nation, 2002 CanLII 45929

Gaucher v. Canadian Armed Forces, 2005 CHRT 1

Tran, Cam-Linh (Holly) v. Canada Revenue Agency, 2010 CHRT 31

Virk v. Bell Canada, 2004 CHRT 10

Warman v. Kyburz, 2003 CHRT 6