

**YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS**

Between:

**Raymond Nukon-Blake**

“Complainant”

And:

**The Yukon Human Rights Commission**

“Commission”

And:

**Government of Yukon, Department of Justice,  
Whitehorse Correctional Centre (“WCC”)**

“Respondent”

**BOARD DECISION**

Attendees Before the Board:

Raymond Nukon-Blake	Complainant
Marianne Joe	Complainant’s partner
Jennifer Cunningham	Counsel for the Commission
Rebecca Jones	Student at the Commission
Karen Wenckebach	Counsel for Respondent
Kevin Gillespie	Articling student for the Respondent
Marlaine Anderson-Lindsay	Observer
Colleen Henry	Registrar

Board of Adjudication Members:

Penelope Gawn	Chair
Carmen Gustafson	Adjudicator
Michael Dougherty	Adjudicator

Heard: Whitehorse, Yukon May 15, 2017

1. At a case management conference on April 10, 2017, the hearing of Mr. Nukon-Blake's complaint (the "Complaint") was adjourned on consent of all three parties and submissions were directed to be filed on contested issues regarding the scope of the Complaint and proposed expert evidence as well as on what terms, if any, should be placed on the adjournment of the hearing.

2. Written submissions were filed accordingly and a hearing on these issues took place before the Board on May 15, 2017.

## **BACKGROUND**

3. Although the original complaint made by the Complainant was accepted by the Commission in May of 2014, it was not until April of 2015 that it was received by the Panel, by way of a direct referral from the Commission without investigation pursuant to section 20(1)(d) of the *Human Rights Act* RSY 2002, c.116, as amended (the "Act").

4. A Summary of Complaint provided by the Commission on July 27, 2015 set out details of the factual allegations and included the following passage:

- The Complainant says that, when he was incarcerated in October 2013, he was taking medication for his PTSD and for his anxiety, which had been prescribed by his doctor and which he had been taking for the past 19 years. He says his medication regimen was discontinued by WCC, which resulted in horrible withdrawal symptoms and left him agitated, unable to sleep and in a persistent foul mood. He says he was then punished by WCC for his behaviour which was tied to his withdrawal symptoms and the lack of treatment for his PTSD and anxiety, including by placing him in solitary confinement.

- The Complainant says that segregation is a form of psychological torture because of his mental disabilities and his experiences as a residential school survivor. He says that segregation also limits the already extremely limited programs or courses available to inmates.

5. The text of the Complaint referred to the Panel was subsequently amended, following an application made by the Commission and the Complainant, and following the Reasons for Decision on that application, released February 4, 2016. The amendment added religious grounds to the Complaint, so that the amended text now reads:

Contravention: The Complainant alleges that the Respondent contravened the *Act* by discriminating against him on the prohibited ground of ancestry, including colour and race; physical or mental disability; criminal charges or criminal record; religion or creed, or religious belief, religious association, or religious activity; duty to accommodate; systemic discrimination and harassment in connection to offering or providing services to the public.

Sections of the Act Contravened: 7(a), (h), (i), 8, 9(a), 12 and 14

Date of Contravention: October 2013 and ongoing

6. In a Notice to the Board, some of the legal issues set out by the Respondent in March 2016, under the heading Separate Confinement, were:

B. If he has a mental disability, did he experience adverse treatment with respect to separate confinement?

(a) Did placing Mr. Nukon-Blake in separate confinement amount to adverse treatment?

(b) If so, did Mr. Nukon-Blake suffer psychological effects as a result of being placed in separate confinement?

C. If there was adverse treatment and if Mr. Nukon-Blake has mental

disabilities, was there a link between Mr. Nukon-Blake's mental disabilities and being placed in separate confinement?

D. If the Complainant establishes a *prima facie* case of discrimination, did the Respondent accommodate Mr. Nukon-Blake's disability to the point of undue hardship?

7. Case management conferences were held on November 4, 2015, April 4 and June 20, 2016, and April 10, 2017, in a continuing process of trying to bring this matter to a full hearing before a Board of Adjudication.

8. Hearing dates were scheduled for January 23 to 27, 2017, subject to Board availability, but on October 19, 2016 the Commission advised that new legal counsel was taking carriage of this file immediately and seeking new dates for the hearing of the Complaint.

9. After contacting counsel, the Registrar set new mutually agreed-upon dates of May 15 to 19, 2017. Arrangements were then made by the Registrar for the Board of Adjudication to be available and for rental of a suitable room for a hearing on those dates.

10. On March 20, 2017, Respondent Counsel requested a pre-hearing conference to address issues of concern regarding the scope of the Complaint, disclosure timelines and witnesses. On March 24, 2017, counsel for the Commission filed an application to adjourn the May 15 to 19 hearing dates. As set out above, that adjournment on consent was granted on April 10, 2017, at a pre-hearing conference.

## ANALYSIS AND DECISION

### *A. Scope of the Complaint*

11. The Respondent is concerned that the Commission is now expanding the scope of the Complaint to include allegations regarding the disciplinary process administered by WCC. The Respondent says that these are new allegations and would require an amendment to the text of the Complaint in order to be heard. The Respondent says that allowing such an amendment would however be prejudicial to the Respondent and will cause delay and submits that the Board should not grant such a further amendment. The Respondent is also concerned that the issue of how or whether the WCC disciplinary process contravenes the *Act* has not been adequately defined.

12. The Commission submits that an amendment to the Complaint is not required and says that the allegation that the *Act* was violated by the way WCC handles charging and administration of disciplinary hearing is “explicitly set out in paragraphs 31 to 33 of the Complaint” but, in any event, the scope of the Complaint “necessarily includes best practices leading to the disciplinary process and segregation” as part of the duty to accommodate. The document being referred to by the Commission is not the Complaint before the Board but is rather a document, entitled *Direct Referral Report*, dated March 18, 2013, which presumably was prepared by the Commission following the Complainant’s original Complaint dated May 9, 2014 and prior to the Commission’s referral to the Panel on April 23, 2015 of the Complaint (as described above). It is not therefore useful in determining the scope of the Complaint now before the Board, although it may have given the Respondent some prior notice of matters that were then

of concern to the Complainant.

13. In any event, at the oral hearing before the Board, it was clarified by counsel for the Commission that the issue that has now become a concern is with respect to the exercise of discretion by WCC in its handling of disciplinary decisions regarding segregation or solitary confinement. Although this issue was not previously explicitly identified in the Complaint or in the forms filed to provide details of the Complaint, it cannot be said to be a completely new issue, outside the bounds of the substance of the Complaint. If the exercise of that discretion were shown to be discriminatory, on one of the prohibited grounds alleged in the Complaint, it would properly form part of the Complaint.

14. Solitary confinement as a form of punishment was identified as part of the Complainant's allegations before the Panel in the July 2015 Summary of Complaint (quoted above).

15. The Commission however has only recently sought to expressly include the administration and handling of disciplinary processes by WCC. Although this new focus may be challenging for the Respondent to now address, any prejudice should be remediable through ensuring that the Respondent has sufficient particulars and adequate time to address this area of concern and that full disclosure of relevant documents in that regard take place well before the hearing. Counsel for the Commission said at the hearing that she would be happy to provide particulars of the issue and this should be done as soon as possible. The Commission has also advised that nothing from the disciplinary proceedings that is within the purview of the independent processes regarding disciplinary

hearings will be an issue in this matter, as those are things not within the responsibility of WCC.

16. Given these facts and the findings by the Board, no amendment to the text of the Complaint is required at this time.

*B. Scope of the Expert Evidence*

17. The Respondent submits that areas of proposed expert testimony now identified by Commission counsel are outside of the scope of the Complaint and prejudicial to the Respondent. The Commission is proposing to call two expert witnesses: one as to the impact of residential school and the other as to the effects of segregation on inmates with disabilities as well as on best practices in corrections.

18. Commission counsel in March 2017 expanded on its proposed expert evidence to include, under “best practices in corrections”, some topics that are objected to by the Respondent as being outside the complaint:

The application of Gladue principles to the use of segregation for First Nation inmates;

Disciplinary hearings and best practices for accommodating those with mental disabilities, and Gladue principles for First Nation prisoners within that process;

The effects of segregation on First Nation prisoners with mental disabilities; and

The mental health needs of residential school survivors in prisons.

19. Respondent counsel submits that only proposed testimony that is inside the scope of the Complaint should be allowed and that allowing the Commission and Complainant

to call expert testimony on issues not previously identified would be prejudicial to the Respondent.

20. Provided that the expert evidence to be called does come within the scope of the Complaint as described above, the Board agrees that such expert evidence may be relevant and admissible at the hearing of this complaint. As with the scope of the Complaint however, the Respondent is entitled to request and receive further particulars from the Commission as to the nature and content of the expert evidence to be called. The Board also notes that the question of the application of Gladue principles appears to raise a legal issue which may have to be separately argued before the Board at the hearing, as distinct from any proposed expert evidence as to how those principles could or should be applied at WCC.

21. The *Rules of Procedure* and the previous Case Management Orders made also continue to apply, as to their requirements and directions for the notice and disclosure of expert evidence that is to take place prior to the hearing.

*C. Should Adjournment be on Peremptory Terms?*

22. In its written submissions, the Commission argued that the adjournment of the hearing should not be made peremptory on the Commission and the Complainant. However, at the oral hearing, Commission counsel advised that they were no longer objecting to the adjournment being made on peremptory terms but did submit that it should be peremptory for all parties, not just the Commission and Complainant.

23. The Respondent sought to have the proceedings made peremptory on the



Complainant and the Commission.

24. There has been a history of delays in the process of getting this Complaint to a hearing and the Board is naturally concerned about the prejudice that may be caused to all parties by this delay, but especially to the interests of the Complainant. In the hope therefore of preventing further delay by making the ongoing proceedings and timelines peremptory, the Board has decided that they should be made peremptory on all parties. What this means is that all timelines: including filing and disclosure deadlines as well as case management conference and hearing dates, are to be strictly complied with, in the absence of compelling reasons why they cannot be.

## **CONCLUSION**

In summary, the decision of the Board is as follows:

1. The scope of the Complaint can include issues regarding WCC's use of segregation or solitary confinement as a form of discipline, with respect to the discretion exercised by WCC in that regard, but not with respect to processes independent of WCC in the conduct of disciplinary hearings;
2. The Respondent is entitled to receive full particulars identifying the precise nature of those issues of concern, by no later than 60 days from the date of this decision;
3. The scope of expert evidence can include areas now identified by the Commission, so long as the evidence given comes within the scope of the Complaint;

4. The Respondent is entitled to receive disclosure of all such proposed expert evidence in accordance with the Rules of Procedure and is at liberty to seek an extension of time if necessary in order to respond or to find its own experts in the areas specified;
5. Further proceedings and timelines will be peremptory for all parties, including the hearing dates now tentatively reserved of December 4 to 8, 2017;
6. A further pre-hearing conference will be scheduled by the Registrar to take place in September 2017 and to address and confirm the readiness of all parties to proceed to the hearing of the Complaint.

**Signed** at Whitehorse, Yukon on June 7, 2017.



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**Penelope Gawn, Chief Adjudicator  
For the Yukon Human Rights Board of Adjudication**