

YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS

Between:

Alyx Stastny

The "Complainant"

And:

The Yukon Human Rights Commission

The "Commission"

And:

**Government of Yukon, Department of Justice,
Whitehorse Correctional Centre**

The "Respondent"

REASONS FOR DECISION

1. P. Gawn (Chief Adjudicator): The Commission applies to amend the text of the complaint filed on behalf of Alyx Stastny in this case, so as to add to the grounds of discrimination alleged, by including "religion or creed, or religious belief, religious association, or religious activity" [*Human Rights Act s.7(d), RSY 2002, c.116, as amended*].

2. I have reviewed and considered the written submissions provided in support of the application from the Commission and the Complainant, as well as the Respondent's submissions opposing the application, and the submissions by way of reply from both the Commission and Respondent. After its reply was submitted, the Commission also provided a copy of the Ontario Human Rights Commission's Summary of its new Policy

on preventing discrimination based on creed, and requested that this document be appended to its reply. While not inadmissible, I do agree with the Respondent that this Policy is of little assistance here and I have therefore not relied on it in reaching my decision.

3. For the reasons below, I have concluded that the application should be allowed.

BACKGROUND

4. The original complaint in this case was accepted by the Commission and disclosed to the Respondent in May of 2014. The text of that complaint included among its alleged grounds of discrimination "ancestry, including colour and race" [*Human Rights Act, s.7(a)*], and alleged that there was a lack of cultural programming and encouragement of First Nations cultural practices provided to the Complainant by the Whitehorse Correctional Centre, including with respect to smudging, smoking peace pipes and sweat ceremonies.

5. In this case, no investigation of the complaint was conducted by the Commission and it was directly referred to the Panel by the Commission on April 23rd, 2015, pursuant to subsection 20(1)(d) of the *Human Rights Act*. Forms filed by the Commission and Complainant on July 27th provided the Respondent and the Panel with disclosure as required by the Panel's *Notice of Disclosure*. Included in those forms were particulars of the remedy being sought by the Commission that staff at Whitehorse Correctional Centre should receive "training in First Nations culture and spirituality" and "ensuring that inmates' First Nations culture and spirituality are respected and accommodated at WCC, by ensuring access to spiritual practices, including use of

peace pipes and sweat lodges and allowing inmates to have their own smudge kits”.

6. It was not until October of 2015 that the Respondent filed forms with its Summary in response to the complaint, which includes statements that the Respondent "provides First Nations programming and provides opportunities to inmates to practice First Nations cultural practices" and, furthermore, that "it allows inmates to use their own smudge kit".

7. A case management conference was held in Whitehorse on November 4, 2015 with Commission counsel and counsel for the Respondent in attendance, although the Complainant was, as it turned out, unavailable to participate by telephone on that date. At that time, deadlines were set for submissions on the application by the Commission to amend the text of the complaint to include subsection 7(d) of the *Human Rights Act* as a ground of discrimination to be proven at the hearing. The Commission was also asked to contact the Complainant and ascertain her availability for a rescheduled case management conference to take place at a later date. That case management conference is now scheduled for January 27, 2016, and can be expected to address the need for further deadlines such as for witness (including expert witness) disclosure, as well as for suitable dates for the hearing of the complaint.

JURISDICTION

8. The Chief Adjudicator does have jurisdiction to amend the text of a complaint, in accordance with subsection 8(2) of the regulations to the *Human Rights Act* which reads as follows:

The text of the complaint to be decided may be changed at any stage

of the proceeding, but only with the permission of the Chief Adjudicator or, after the hearing begins, the board of adjudication, and only in circumstances or upon conditions which give reasonable assurance that no party will be prejudiced by the change.

ANALYSIS

9. In this case, because there is clear reference to cultural/spiritual practices in the original complaint and the Complainant's intake form, the Respondent has had notice from the beginning of the factual issues that now are being relied on in relation to this application to add to the legal grounds of complaint.

10. In these circumstances, it is my view that amending the text of the complaint to include the additional ground of discrimination under subsection 7(d) does not change the nature of the complaint but merely ensures that all aspects of the complaint may be heard together. The way that the allegation of discrimination on the ground of religion arises in this case is intertwined with "culture" and the distinctions between the grounds under subsections 7(a) and 7(d) are not intended as watertight compartments but rather to allow for overlap.

11. The grounds under subsection 7(d) are not limited by a narrow definition of religion but must be interpreted liberally and purposively in accordance with the inclusive meaning of "religion or creed, or religious belief, religious association, or religious activity". As the Supreme Court of Canada has said:

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the

practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

Syndicat Northcrest c. Amselem, 2004 SCC 47 at para.39.

12. The tribunal has a duty to ensure that the substance of the Complainant's allegations is fully canvassed. There does not appear to be any dispute among the parties that First Nations ancestry and spirituality are intertwined. The Respondent has had notice of the substance of the claim that the Complainant was treated adversely by being denied any or sufficient access to specific First Nations practices, including smudging, sweats and peace pipe ceremonies. Accordingly, amending the complaint to recognize that such practices could be characterized as cultural and/or spiritual will not cause any real prejudice to the Respondent with respect to dealing with the substance of the complaint.

13. Allowing the Commission and the Complainant to amend the text of the complaint does not amount to an acknowledgement that the complaint has been made out. The burden of proof will remain on the Commission and the Complainant to establish discrimination on the prohibited grounds alleged.

14. The Respondent submits that it may suffer prejudice by having to seek particulars about the religious beliefs of the Complainant, and having to canvass employees of the Whitehorse Correctional Centre about what they knew about those beliefs. However, keeping in mind that no investigation by the Commission has been completed in this case, there should be no real prejudice to the Respondent in having to interview witnesses and to canvass the relevant issues with them, as it would normally expect to do, prior to the hearing. . The Respondent has already identified the need for

an expert on the cultural practices that are in issue here and may reasonably be assumed to be able to structure the retainer of such an expert on these practices, so as to also address or encompass the spiritual aspects of such practices.

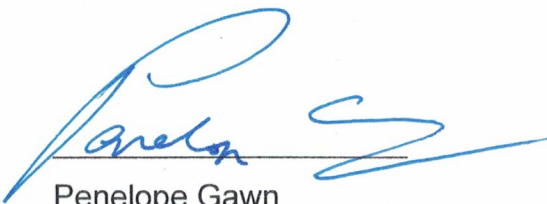
15. Therefore, I am not satisfied that there is any actual or real prejudice to the Respondent that cannot be addressed through the case management process, by allowing the Respondent such time as is reasonably necessary to respond to the change to the text of the complaint.

CONCLUSION

16. In fairness to the Complainant, and in order to ensure that all the issues raised by the substance of her complaint may be properly addressed by the tribunal, I conclude that the application to amend the complaint must be allowed. The Respondent however will be entitled to amend its response, with respect to its forms and disclosure previously filed or provided, and the time needed for this may be addressed at the upcoming case management conference, along with any other procedural issues arising from my decision.

17. I thank the parties for their very helpful submissions.

Dated at Whitehorse, Yukon, this 25th day of January, 2016.



Penelope Gawn
Chief Adjudicator
Yukon Human Rights Panel of Adjudicators