

**YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS**

Between:

**Raymond Nukon-Blake**

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 Raymond Nukon-Blake 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. The Complainant in his submissions says that smudging and beadwork are both sacred to him and that they, along with sweat lodges, are “First Nations spiritual preferences” that are “about being connected to the Creator”. He also submits that he should not be “punished because the Commission made a mistake or because the investigator did not interview me for the direct referral report” and that his complaint was about “my religious or spiritual beliefs that were affected by being at WCC”.

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

## **BACKGROUND**

5. The original complaint in this case was accepted by the Commission and disclosed to the Respondent in May of 2014. That complaint included references to visits by elders, and to smudging and beading and requested that the “Respondent treat the Complainant with the human dignity he deserves and provide him with access to cultural programming”. Beading is described as a “form of meditation” for the Complainant and there is reference to “the hassle” of having to ask a corrections officer for permission to smudge, as well as the Complainant's requests for beading which he says were denied. In his Special Request forms at the Whitehorse Correctional Centre (WCC), the Complainant mentioned “native history”, “native culture”, and also “spirituality” among his reasons for requesting to be allowed to do beading.

6. 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*. The text of the complaint referred for adjudication includes allegations by the Complainant 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; duty to accommodate; systemic discrimination and harassment in connection to offering or providing services to the public.”**

The “Remedy Sought” described in Form 1 includes that the Respondent provide the First Nation Complainant with “access to cultural programming and to spiritual practices” as well as “adequate and appropriate First Nations cultural and spiritual programming to First Nation inmates”. The Commission and Complainant also allege that the Complainant was treated unfavourably by being denied “the opportunity to engage in cultural and spiritual practices” and refers specifically to beading, dreamcatchers and smudging in this regard.

7. In August 2015 the Respondent filed forms with its Summary of Response which includes a “STATEMENT OF STANDING ORDER” saying that the

**“Whitehorse Correctional Centre endeavours to the extent possible to respect cultural and religious practices. This standing order describes the duty to provide opportunities for smudging on all units by aboriginal inmates and the processes necessary to optimize inmate spiritual opportunities while ensuring there are sufficient safeguards to minimize correctional concerns related to contraband or abuse”.**



8. A case management conference was held at the Kwanlin Dun Cultural Centre in Whitehorse on November 4, 2015, with Commission counsel and counsel for the Respondent in attendance. The Complainant attended the location but then asked for, and was given, permission to wait outside the room and to have Commission counsel advise him of relevant information and dates. 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. A further pre-hearing conference was scheduled for February 16, 2016 at which time a hearing date is to be determined. Deadlines were also provided for the filing of Forms 4 by the parties and for expert witness disclosure to take place prior to the hearing.

## **JURISDICTION**

9. 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**

10. In this case, because there is specific reference to cultural and spiritual practices in the original complaint, 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.

11. 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.

12. 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.

13. 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 longstanding 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 and beading. 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.

14. 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.

15. 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 and that the Respondent has already been seeking particulars about the Complaint, including about spiritual practices, there should be no real prejudice to the Respondent in possibly having to obtain further particulars, and to interview witnesses and canvass the relevant issues with them, prior to the hearing.

16. I am not satisfied therefore that there is any 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 and by scheduling the hearing dates accordingly.

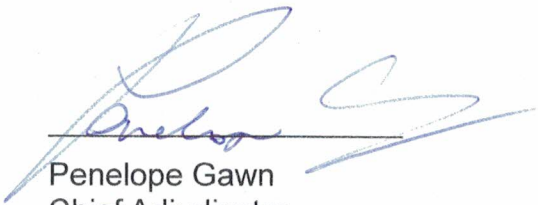


## CONCLUSION

17. In fairness to the Complainant, and in order to ensure that all the issues raised by the substance of his complaint may be properly addressed by the tribunal, I conclude that the application to amend the text of 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.

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

**Dated** at Whitehorse, Yukon, this 4th day of February, 2016.



Penelope Gawn  
Chief Adjudicator  
Yukon Human Rights Panel of Adjudicators