

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2019 CHRT 42

**Date:** October 9, 2019

**File No.:** T2101/1715

**Between:**

**Tracy Polhill**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Keeseekoowenin First Nation**

**Respondent**

**Decision**

**Member:** Gabriel Gaudreault

## TABLE OF CONTENTS

I.	BACKGROUND .....	1
II.	ISSUES.....	2
III.	PRELIMINARY REMARKS.....	3
	A. Wes’s communications with Robyn and Myrna, witnesses for the Nation .....	3
	(i) Reasons for my order .....	3
	(ii) The impact of Wes’s communications on his credibility and the reliability of his testimony .....	6
	B. Credibility of witnesses.....	8
	C. Tracy’s addition of certain elements in her final arguments.....	8
IV.	ANALYSIS .....	9
	A. Does Tracy have one or more prohibited grounds of discrimination under the <i>CHRA</i> ?.....	12
	B. Did Tracy suffer one or more adverse impacts? Were any of the prohibited grounds a factor in the adverse impacts? .....	13
	(i) Denial of services and adverse differential treatment (section 5 <i>CHRA</i> ) .....	13
	(a) Income assistance: service customarily available to the public .....	21
	(b) The creation of the band council resolution .....	22
	(c) Karen’s interventions with the Nation regarding the provision of services and filing of the complaint.....	28
	(d) Filing of the complaint and reinstatement of benefits .....	35

(e)	Differences in amounts provided in July and August 2013 versus May 2014 .....	36
(ii)	Adverse differential treatment in the provision of residential accommodation (paragraph 6(b) of the <i>CHRA</i> ) .....	37
(iii)	Harassment (section 14 of the <i>CHRA</i> ) .....	38
(a)	Creation of a hate group .....	38
(b)	Comments by Karen on Facebook .....	39
(iv)	Retaliation .....	41
(a)	Comments by Jen Bone .....	41
(b)	Fake Facebook account created in Wesley Bone's name.....	42
(c)	The incident involving errant horses .....	44
(d)	Anonymous call to the BC Employment and Assistance Office in British Columbia.....	45
(e)	Fake emails from Brian Sharpe .....	46
(f)	Incidents involving Wes Bone's home .....	47
(g)	Incidents concerning the hay cutting contract.....	51
(v)	Other allegation: funeral expenses .....	55
C.	Justifications provided by the Nation or limitation of its liability .....	57
V.	DECISION.....	57

## I. BACKGROUND

[1] Before summarizing the complaint, I am taking the time to clarify that several individuals named in the Tribunal record have the same family names. In the interest of making it easy for the parties and other readers to understand clearly, I will respectfully use the first names of these individuals in order to facilitate the reading of this decision.

[2] The complainant, Tracy Polhill (Tracy), filed a complaint with the Canadian Human Rights Commission (the Commission) in April 2014, alleging that she had been discriminated against and harassed by the Keeseekoowenin First Nation (the Nation), because of her race or her national or ethnic origin.

[3] Tracy identifies as Indigenous: she traces these Indigenous origins back to her mother's ancestral heritage. Despite this fact, she is not eligible to be registered under the *Indian Act*, R.S.C. 1985, c. I-5 [the *Indian Act*]. Tracy is in a relationship with Wes Bone (Wes), who is also of Indigenous descent. Wes is a member of the Keeseekoowenin First Nation and is registered under the *Indian Act*.

[4] In her complaint, Tracy alleges that she was denied income assistance benefits by the Nation. She also claims that she was treated differently in the provision of this service (paragraphs 5(a) and (b) of the *Canadian Human Rights Act (CHRA)*). She further alleges that she was retaliated against after she filed her complaint in April 2014. She alleges different acts of retaliation, including comments made by Jen Bone (Jen), a fake Facebook account created in Wes's name, an incident involving errant horses, an anonymous call to the BC Employment and Assistance Office in British Columbia, fake emails from Brian Sharpe, incidents concerning Wes's home and incidents concerning hay cutting.

[5] Tracy also claims that she was subjected to adverse differential treatment in the provision of residential accommodation (paragraph 6(b) of the *CHRA*) by being forced to leave the community and consequently, the home of her partner, Wes. Lastly, she alleges that she was harassed by the Nation after crude comments were posted by Karen Bone (Karen) on Facebook and following the creation of a hate group, both of which, according to her, were attributable to the Nation's action or inaction.

[6] Tracy also added certain discriminatory practices that were not included in the initial complaint or the amended complaint. I will address some of these practices in my preliminary remarks (Part III) as well as in the section entitled “Other Allegations: funeral expenses” (Part IV, title B, sub-title [v]).

[7] Tracy claims that, in her opinion, all these discriminatory acts were based on her race (the perception that she is *white*, to use her own words) and her national or ethnic origin (the fact that she is not a member of the Nation).

[8] The Nation, for its part, is a band within the meaning of the *Indian Act*. It is located in the province of Manitoba and is made up of three parcels of land, i.e., Keeseekoowenin 61, Clear Lake 61A and Bottle Lake 61B. The Nation does not assume control of its band list. Consequently, it is Indigenous Services Canada that ensures the administration thereof, and the eligibility rules are set out in the *Indian Act*.

[9] The Nation is administered by a band council, elected by the members of the Nation under the *Indian Act*. The council is made up of a chief and four or five councillors. Elections are held every two years, and the terms of office held by the chief and the councillors expire at the end of April of odd-numbered years.

[10] Between April 2013 and April 2015, James Plewak (Chief James) was the band chief. At all other times relevant to the complaint, excluding the period from April 2013 to April 2015, the band chief was Norman Bone (Chief Norman), the band chief at that time.

[11] For the following reasons, and based on a balance of probabilities that was presented to me at the hearing, I find that Tracy’s complaint, in its entirety, is unfounded.

## II. ISSUES

[12] The issues are as follows:

- (1) Did Tracy meet the burden of proof for her case, meaning, was she able to demonstrate the following three elements based on a balance of probabilities?

- a. Tracy had one or more prohibited grounds of discrimination under the *CHRA* (race, national or ethnic origin);
  - b. Tracy suffered one or more adverse impacts (denied in the provision of services or subjected to adverse differential treatment in the provision of services and residential accommodation; harassed and retaliated against (section 5, paragraph 6(b), section 14 and subsection 14.1 of the *CHRA*);
  - c. One or more prohibited grounds of discrimination were a factor (or factors) in the manifestation of the adverse impact;
- (2) If Tracy met the burden of proof for her case, was the Nation able to present a defence or justification (section 15 of the *CHRA*) or was it able to limit its liability? (section 65 of the *CHRA*);
- (3) If not, what remedies should the Tribunal order (subsection 53(2) of the *CHRA*)?

### **III. PRELIMINARY REMARKS**

#### **A. Wes's communications with Robyn and Myrna, witnesses for the Nation**

##### **(i) Reasons for my order**

[13] Mr. Boudreau, counsel for the Nation, was supposed to start Wes's cross examination on the second day of the hearing. When Mr. Boudreau appeared before the Tribunal to start the cross-examination, he addressed the Tribunal in order to share what he described as "troubling facts". He explained that he had just learned that Wes had asked his sister, Myrna Seaton (Myrna), to reach out to a witness for the Nation in order to dissuade her from testifying.

[14] According to Mr. Boudreau, Wes had allegedly called Myrna the evening before and had asked her to contact Robyn Nabess (Robyn), a band councillor, to tell her that if she testified, Wes would make sure that her husband, the principal of Sioux Valley High School, would lose his job.

[15] Myrna allegedly refused to comply with her brother's request and, frightened, had decided to call Chief Norman and Mr. Boudreau in order to inform them of the conversation that she had had with her brother.

[16] Mr. Boudreau therefore suggested that I hear from Myrna immediately, who could be reached via telephone. According to him, Wes's actions were not only punishable under the regime set out in sections 59 and 60 of the *CHRA*, but could also lead to a charge of contempt of court. Mr. Boudreau further added that this incident should also have major consequences for Wes's testimony and that Wes should be **excluded altogether** by the presiding member.

[17] In light of these new facts, I asked the parties to offer suggestions in order to resolve the situation.

[18] Mr. Smith, counsel for the Commission, agreed that this was a very serious matter. However, in his view, the Tribunal did not have the jurisdiction to use sections 59 and 60 of the *CHRA* because these sections create a criminal offence and only the Attorney General of Canada is able to bring such charges. He also invited the Tribunal to consult the decision rendered in *Temple v. Horizon International Distributors*, 2017 CHRT 30, where the Tribunal completely rejected the testimony of a witness who had allegedly been paid by the complainant.

[19] Tracy and her representative, Wappo Piesew, were opposed to Myrna being called to testify as a witness. They suggested that the hearing should simply continue with Wes's cross-examination, and that he should be asked questions regarding the new allegations of intimidation.

[20] In order to obtain more detailed answers, I ordered a break of about ten minutes to allow the parties to consider their position regarding these admittedly extraordinary facts.

[21] After the break, I recognized that the Tribunal did not have the jurisdiction to use the mechanisms provided in sections 59 and 60 of the *CHRA* for the purpose of ending or sanctioning intimidation. I also took the time to read the decision rendered in *Temple* and once again, I asked the parties to give me their opinion on how to proceed.

[22] The parties both took a position regarding the issue of contempt of court. According to Mr. Boudreau, the Tribunal had the jurisdiction to issue such an order, while Mr. Smith believed that the authority to do so fell within the scope of influence of the Federal Court. Despite this disagreement, the parties agreed on how to proceed and allowed Mr. Boudreau to question Wes about the allegations of intimidation.

[23] The cross-examination therefore resumed briefly and during this cross-examination, Wes admitted he had called his sister the evening before but denied asking her to intimidate Robyn. The cross-examination was then suspended again.

[24] According to Mr. Boudreau, it was imperative that Myrna be questioned by telephone as soon as possible, and for this to be done before Wes's cross-examination continued. Mr. Smith and Tracy were opposed to this suggestion. Instead, they suggested that Wes's cross-examination be completed the next day and that Myrna be summoned to appear at a later time, like any other witness. In light of this deadlock, I decided to take another break.

[25] After the break, I rendered a decision and I read the following order:

I decide that we will continue with the Respondent's cross-examination of Mr. Bone tomorrow morning, 9h00;

If the Respondent wants to challenge the credibility of the witness, he has the opportunity to do so;

The Complainant will have a chance to address that new issue in her redirect, should she chose to do so;

I will authorized the Commission to address that new issues as well in their redirect, should they chose to conduct one;

I authorize the Respondent to call Ms. Myrna as a witness as part of the Respondent's case;

In the circumstances, I exempt the Respondent from filing a summary of the anticipated testimony of Ms. Myrna;

Any concerns of the Respondent about the preservation of the evidence could be address by an affidavit of Ms. Myrna to be sworn such time and place as convenient for her and counsel;



The reasons for these directions and orders will be included in my final decision in this case;

[26] The reading of this order put an end to the second day of the hearing. The next morning, I addressed the parties in order to clarify the next steps. I concluded that it was not necessary, given the context, and at this stage, to determine whether the Tribunal had jurisdiction to issue an order for contempt.

[27] However, I made it clear that this would not in any way prevent me from assessing Wes's credibility, in light of what I would hear about the allegations of intimidation.

[28] Nevertheless, I authorized the parties to file a motion concerning the issue of contempt if they wished to do so. I informed them that they would need to address the following questions. (1) What jurisdiction does the Tribunal have to issue a contempt of court order; (2) what arguments support their position; and (3) what remedies are being sought? I also suggested that they address the decision rendered in *Tipple v. Canada (AG)*, 2012 FCA 158 in their written submissions, if applicable.

[29] Ultimately, the Tribunal did not receive a motion concerning the issue of contempt. Consequently, it was not necessary to dispose of this issue.

**(ii) The impact of Wes's communications on his credibility and the reliability of his testimony**

[30] Lastly, I must determine whether Wes's communications with Myrna and Robyn affect his credibility and the reliability of his testimony overall. The Nation requested that his entire testimony be excluded as a result of his communications.

[31] I believe that Wes did in fact interfere with Myrna and Robyn, witnesses for the Nation. I find, based on a balance of probabilities, there was consistency in Wes's actions, seeking to discourage Robyn from testifying.

[32] First, on the first day of the hearing, the Nation announced that it would like to call on a new witness to testify, that is, Robyn, Wes's niece. After hearing the parties on this point, I agreed to add her to the list of witnesses for the respondent.

[33] In her testimony, Robyn explained that Wes had tried to contact her on that very same day, through Jeremy Bone (Jeremy), Wes's son. Jeremy had come to her with a piece of paper with a telephone number on it that she could use to contact Wes and Tracy. Robyn had refused to call them.

[34] Since this attempt to make contact was unsuccessful, it seems consistent in my view that Wes subsequently decided to find an indirect way of contacting Robyn. During his cross examination, Wes in fact admitted that he had contacted Myrna in order to discuss the fact that Robyn was going to be called as a witness for the Nation.

[35] However, Wes denied trying to intimidate the two women. As I indicated earlier, I cannot address the issue of intimidation under sections 59 and 60 of the *CHRA*. This prerogative clearly falls within the scope of influence of the Attorney General of Canada (see subsection 60(4) of the *CHRA*). Nevertheless, it seems clear to me that Wes seriously interfered with these witnesses, thereby disrupting the conduct of the hearing. I also recognize that Wes's actions made both Myrna and Robyn apprehensive about testifying at the hearing.

[36] The Honourable Sébastien Grammond of the Federal Court recently noted that the credibility of a witness is comprised of two principal components, (1) veracity; and (2) reliability. Veracity refers to the witness's ability to be honest while reliability refers to the witness's ability to provide an accurate account of facts material to the litigation (see *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para. 17).

[37] In our case, despite Wes's deplorable communications with Myrna and Robyn, should I conclude that this affected all of his testimony? No, I do not believe so.

[38] I do not believe that Wes thought that his communications would result in him being questioned thereon before the Tribunal. Given that, based on the balance of probabilities, I believe Myrna's and Robin's testimony that they were pressured in this way, I cannot accept the full version of the facts given by Wes. He appears to have lacked judgment in contacting Myrna and trying to influence Robyn's testimony. Nevertheless, this was an isolated incident.

[39] Even though it disrupted the Tribunal's process, nothing else in the evidence suggests that Wes was not honest in the other portions of his testimony.

## **B. Credibility of witnesses**

[40] I must address the issue of the credibility of the witnesses, because I must admit to having heard direct and indirect attacks on the character of practically every individual named in these proceedings, in both the Nation's and Tracy's evidence.

[41] Both Tracy and the Nation tried to discredit the other party's witnesses by making references to their character or their actions outside the Tribunal's proceedings. With regard to this conduct, I cannot list in this decision all the outrageous remarks that I heard. These remarks include allegations about mental health issues and accusations of corruption.

[42] I believe that the witnesses who testified before me were credible. However, I also believe that certain testimony was not always reliable, as we will see later.

[43] That said, I will address the issue of witness reliability in my decision when necessary.

## **C. Tracy's addition of certain elements in her final arguments**

[44] I do not intend to dwell on this aspect at any length. The Nation rightly pointed out that in her final arguments, Tracy added evidence and arguments that had not been raised in the initial complaint, in the amended complaint nor in the statement of particulars. The Nation further added that I had also not heard evidence concerning these elements.

[45] I hear the Nation and, when I read Tracy's final arguments, I in fact agree that additions were made.

[46] In my opening remarks at the beginning of the hearing, I set out the various aspects that are at stake in Tracy's original complaint, as well as in her amended complaint. I state

that I have already allowed the complaint to be expanded in my decision in *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34.

[47] I again informed the parties of the discriminatory practices alleged by Tracy and the Commission. The parties were therefore able to focus their evidence on these very specific aspects, thereby making it possible to facilitate and accelerate the hearing.

[48] I gave the parties an opportunity to make submissions on the alleged practices I had mentioned. No one made submissions or requested the addition or removal of certain alleged practices. The parties were also invited, once again, to make submissions in their final arguments. In my opinion, the parties addressed each of the aspects I had listed at the beginning of the hearing.

[49] However, the objective of final arguments is not to add new evidence that was not presented during the hearing. Instead, it provides the parties with a last opportunity to explain the facts which, in their view, were proven during the hearing and the reasons why they had been proven. The facts presented must support each party's theory of the case. More specifically, they must demonstrate whether or not discrimination occurred and address the remedies being sought or challenged. The parties may also cite various pieces of legislation or case law in support of their submissions.

[50] In my view, the parties had an opportunity to present all their evidence at the hearing. For these reasons, I shall disregard the arguments and additional elements submitted by Tracy, which were not included in the original complaint, the amended complaint or the statements of particulars, and for which no evidence was submitted at the hearing.

#### **IV. ANALYSIS**

[51] The purpose of the *CHRA* is to guarantee that all individuals have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so on the basis of any of the prohibited grounds of discrimination (section 2 *CHRA*).

[52] It is well established that in discrimination matters, the burden is on the complainant to present evidence that is sufficiently complete to meet the burden of proof for their case (traditionally referred to as establishing a *prima facie* case of discrimination; see my comments in *Brunskill v. Canada Post Corporation*, 2019 CHRT 22, at paras. 56 to 58 [*Brunskill*]).

[53] Tracy must therefore present evidence that is sufficiently complete to establish a *prima facie* case of discrimination, based on a balance of probabilities.

... A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

(*Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 SCR 536, at para. 28 [*Simpson-Sears*])

[54] Three elements must be proven:

(1) Tracy has one or more prohibited grounds of discrimination under the *CHRA*;

(2) Tracy was adversely affected;

(3) The prohibited ground or grounds of discrimination was or were a factor in the adverse effect.

(*Moore v. British Columbia (Education)*, [2012] SCR 61, at para. 33; *Quebec (Commission des droits de la personne et de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, [2015] SCR 789 [*Bombardier*]; see *Simpsons-Sears*, above, at para. 28).

[55] The evidence presented must be analyzed based on a balance of probabilities. The prohibited ground of discrimination does not need to be the sole factor in the adverse impacts suffered by the complainant. Direct proof of discrimination is not necessary, nor is it necessary to demonstrate an intention to discriminate (*Bombardier*, at paras. 40 and 41).

[56] The Tribunal has repeatedly stated that discrimination is not usually open or intentional. It is therefore necessary for the Tribunal to analyze all of the circumstances of

the complaint to determine whether there is a subtle scent of discrimination (see *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) [*Basi*]).

[57] Circumstantial evidence may help the Tribunal draw inferences; it is the case when the evidence presented in support of the allegations of discrimination makes such inferences more probable than other possible inferences or hypotheses (see *Basi, above*). However, the circumstantial evidence presented must nevertheless be tangibly linked to the respondent's impugned decision or conduct (see *Bombardier, above*, at para. 88).

[58] In the past, I have repeatedly expressed the opinion that when the Tribunal analyzes evidence to determine whether a complainant has met the burden of proof, it must consider the evidence in its entirety, which may include evidence filed by the respondent (*Brunskill, above*, at para. 64).

[59] In other words, to meet its burden of proof, the Complainant must prove, on a balance of probabilities, that (1) they have a prohibited ground of discrimination, (2) they suffered an adverse differential treatment and (3) there exists a link between the prohibited ground of discrimination and the adverse differential treatment. The Respondent, in turn, may present its evidence to refute those 3 criteria.

[60] The Tribunal may therefore conclude, on a balance of probabilities, that the evidence presented by the complainant was, or was not, complete and sufficient in regards to those 3 criteria. The complaint is dismissed if the evidence is not complete and sufficient.

[61] On the other hand, if the Tribunal concludes that the evidence presented is complete and sufficient, the burden is now upon the Respondent. The Respondent has an opportunity to avail itself of a defence provided under section 15 of the *CHRA* to justify its impugned decision or conduct. The Complainant, in turn, may try to demonstrate that the Respondent's justification is nothing more than a pretext. Again, these elements will be analysed by the Tribunal on a balance of probabilities. **After analysing the elements all together**, the Tribunal can then determine if discrimination did or did not occur.

[62] Finally, the respondent could limit its liability under section 65 of the *CHRA*, if applicable.

[63] It is in the context of this analysis that I will address the evidence presented at the hearing.

**A. Does Tracy have one or more prohibited grounds of discrimination under the *CHRA*?**

[64] I do not intend to dwell at length on the prohibited grounds, which, in my opinion are particularly clear. The prohibited grounds of discrimination raised by Tracy are national or ethnic origin (non-member of the Nation) and race (perception of being *white*) (section 3 of the *CHRA*).

[65] Without restating all of the Nation's submissions, the Nation asserted, in its final arguments, that whether or not an individual is a member of an Indigenous community and whether or not an individual is a Status Indian within the meaning of the *Indian Act* is unrelated to the prohibited ground of discrimination of national origin. That said, this argument addresses the issue of national origin only; it does not address the issue of **ethnic origin** in any way whatsoever.

[66] Even though the Nation's arguments are interesting, I nevertheless believe that it is not necessary to further complicate the case. Tracy identifies herself as Indigenous, because she has Anishnaabe ancestors. Despite this fact, she is not a Status Indian under the *Indian Act*. Furthermore, she is not a native of the Keeseekoowenin community. This means that Tracy cannot be and is not a member of the Nation. That is why I believe that ethnic origin is at issue in the case at bar.

[67] With respect to the ground of race, Tracy explained that it is the perception that other individuals within the community have of her that is relevant in this case. They are not aware of her Anishnaabe ancestry and view her as being *white*, to use her own words.

[68] It is recognized that the *CHRA* prohibits discrimination based on **perceived** belongingness in a protected group (see *Warman v. Kyburz*, 2003 CHRT 18, at para. 52.

See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665; *Via Rail Canada Inc. v. Canada (Human Rights Commission) (No. 2)* (1999), 33 C.H.R.R. D/127 (CHRT).

[69] Therefore, not only does Tracy believe that she is perceived as being white, but she is also not a member of the Nation: These two elements mean that she is perceived as being an outsider within the Nation. She therefore successfully demonstrated having these two prohibited grounds of discrimination, protected under the *CHRA*.

**B. Did Tracy suffer one or more adverse impacts? Were any of the prohibited grounds a factor in the adverse impacts?**

[70] Tracy alleges that she suffered numerous adverse effects at the hands of the Nation, because she was perceived as being white or as being a non-member of the Nation within that community. I will analyze her five allegations in order to determine whether she met the burden of proof for her case.

**(i) Denial of services and adverse differential treatment (section 5 *CHRA*)**

[71] Tracy's first allegation concerns the problems that she faced when she tried to obtain income assistance benefits from the community. Like the Commission maintained throughout its involvement in Tracy's complaint, I also believe that this aspect lies at the heart of the case before the Tribunal. This is a complex allegation, which brings numerous facts into play. Tracy believes that the denial of services resulted from different incidents of adverse differential treatment by the Nation. Before analyzing each of these incidents, I believe that it is important to provide context and that is why I will provide a brief summary of the facts before me at this particular point in time.

[72] Tracy decided to settle in Manitoba in 2004. She already had a relationship with the community and its members before her relationship with Wes started in 2012. She had established ties with various people living within the community, including Linda, Wes's sister, and their mother, Rachel.



[73] Around 2009, Tracy's daughter and her brother-in-law decided to buy a farm adjacent to the Keeseekoowenin community. This is where Tracy lives when she is not in the Keeseekoowenin community.

[74] The evidence also reveals that in 2010, Tracy offered assistance and care services to certain members of the community, including Rachel, Wes's mother, whom she cared for. She also cared for Marvin Blackbird, another member of the community with serious health problems. In order to offer him more intensive care, she lived with this individual for a certain period of time. The evidence reveals, however, that even though Tracy was interested in providing personal care, she had not yet obtained her diploma in this field; she received this diploma in March 2011.

[75] Tracy's involvement with Rachel and the care that she provided to the latter caused her to have certain problems with the Nation. Indeed, in July 2010, there was an altercation between Tracy and Ms. Jung, a nurse at the Keeseekoowenin health centre. The disagreement had to do with Ms. Jung's proposed treatment plan for Rachel and Tracy's concerns about this plan. Tracy reported the situation to the Nation and filed a complaint against Ms. Jung with the College of Nurses; this complaint was dismissed.

[76] The Nation was informed of the incident and the disruption that it had caused at both the band council office and the health centre. The council had obtained this information from different sources. By all indications, the Nation decided to intervene and to send a letter to Tracy at the end of July 2010, in order to address the incident. The band council was concerned about the health and safety of its personnel and members. The band council informed Tracy that it would be holding a meeting to discuss the situation and that unless it obtained a proper explanation from her, the band would limit her involvement within the community or even remove her from the Nation entirely. The council invited Tracy to provide an explanation, which she did in writing. Following this incident and Tracy's explanations, the council did not find it necessary to intervene further.

[77] This incident is important because it resurfaced and influenced the passing of a band council resolution against Tracy in January 2013. I will return to this point shortly.

[78] That said, Tracy and Wes started their relationship as friends. Over time, they decided to become romantically involved, and they officially became a couple in spring 2012. Wes is a member of the Nation and owns a home in the Keeseekoowenin community. Tracy started to spend more time within the community, partly to be with Wes. Obviously she lived with him.

[79] In June 2013, Tracy moved into Wes's home on a permanent basis. She decided to file a claim with the Nation to benefit from the income assistance program. This is when her problems started.

[80] The Nation offers different services to its members. These services are administered by various officers and managers who each have their own portfolio, depending on the tasks assigned to them. Other employees work as senior staff and their functions therefore have more to do with the governance and administration of the Nation.

[81] In the same vein, it is relevant to mention that the province of Manitoba and the Government of Canada offer income assistance programs. I heard a great deal of evidence about these programs and I do not believe that it is relevant to repeat the details of everything presented at the hearing.

[82] It is enough to understand that eligibility for any of the programs depends on different criteria and factors. The Government of Manitoba is responsible for the administration and funding of its own income assistance program. Individuals who live outside an Indigenous community or those who live in an Indigenous community and apply for income assistance as a primary beneficiary, but do not have Indian status within the meaning of the *Indian Act*, may be eligible to receive income assistance benefits from the province.

[83] The Government of Canada also administers an income assistance program. If an individual is considered to be an Indian within the meaning of the *Indian Act* and normally lives in an Indigenous community, that individual may be eligible to receive such benefits from the federal government. Moreover, that individual's dependents, whether or not they have Indian status, are also eligible to receive these benefits.

[84] Of course, income assistance programs are resources that are used as a last resort. Other than the aforementioned criteria, eligibility for these programs is also based on the specific situation of each applicant, who must demonstrate that without these benefits, his or her basic needs would not be met at even a minimum level. When program officers receive an application, they verify the information provided by the applicant, in order to confirm their eligibility. The information may include the applicant's place of residence, assets and income. Officers may also request additional information when clarifications are required.

[85] That said, Tracy, through her partner Wes, was able to submit an application for the income assistance program administered by the Government of Canada. It is important to remember that this program is managed by the Nation. Since Tracy was the dependent of someone registered as an Indian within the meaning of the *Indian Act* and who normally resided in the Keeseekoowenin community, she was able to submit an application with the Nation. Indeed, the application was in fact accepted by the program officers and as Wes's dependent, Tracy was able to benefit from federal income assistance benefits for a certain period of time in 2013.

[86] In September 2013, Tracy's benefits were suddenly terminated. The program officers had been informed of the existence of the band council's resolution, which had been passed a few months earlier, on January 23, 2013. The adoption of the resolution by the band council is critical in this file. It is important to consider it.

[87] A band council resolution dated January 23, 2013, prohibited Tracy from entering the reserve or communicating with any member of the Nation. Tracy was not personally summoned by the band council before the creation of the resolution and she was not invited to make submissions. Furthermore, Tracy was not informed of the existence of the resolution after it was created. Between January 2013 and September 2013, this resolution therefore lay dormant within the band council.

[88] It was only in early September 2013, that Tracy got her hands on a copy of the band council resolution concerning her. Wes apparently heard about the resolution while he was in a bar in Sandy Lake. An acquaintance allegedly told him that members of the

community, Karen Bone (Karen) and Dianne Blackbird (Dianne), had been brandishing and boasting about the resolution, which banished Tracy from the community.

[89] Did Karen and Dianne actually have a copy of the resolution with them of which they were brandishing and talking about in public spaces? The evidence in this regard is flimsy and generally based on hearsay. In any case, I do not believe that this is determinative. By all indications, Wes was informed of its existence. He therefore went to the band council office with Tracy to obtain a copy. It was at that point that Tracy learned that she was no longer allowed to enter the community or communicate with its members.

[90] Tracy and Wes immediately went to the office of the Royal Canadian Mounted Police (RCMP) in Elphinstone. An officer confirmed that the resolution could not be enforced by the RCMP. He also confirmed that someone from the Nation had come to the RCMP offices a few months earlier to ask the RCMP to serve the resolution to Tracy in person. The RCMP had refused this request.

[91] Tracy described this resolution as the most severe punishment that the Nation could have imposed on her. She therefore decided to leave the community. She went back to living in her daughter's home, near to the Keeseekoowenin community. She submitted an application for income assistance with the province of Manitoba, and her application was approved. Her benefits were therefore reinstated between September 2013 and February 2014, but this time, through the province.

[92] In February 2014, Tracy wrote a letter to the band council, asking to have the resolution revoked. The evidence shows that Chief James remembers this letter and remembers discussing the situation with the other councillors. At the time, his attention had been drawn to the fact that the existence of the resolution was attributable, in part, to an incident in 2010, during which Tracy had suggested to seniors that they did not need to follow the medical advice of their doctor. He had also been informed that the resolution was not enforceable because it was invalid.

[93] Chief James continued his testimony by explaining that the executive secretary, a position held by Karen at that time, had been tasked with writing back to Tracy to inform her that the resolution was invalid. This letter was in fact written on February 19, 2014. It

informed Tracy that her letter had been discussed by the band council; it also indicated that Tracy had not complied with the resolution and that it had not prevented her from entering the community. Lastly, the letter mentioned that the resolution did not prevent her from seeking employment in the Nation if she so desired.

[94] It is undeniable that this letter, written by Karen, is short and offers few details. It does not state that the resolution was unenforceable and even invalid. It does not address the issue of residency or the possibility of applying to the income assistance program. Chief James confirmed that the letter did not reflect his instructions and was poorly written. It is also clear that Tracy did not understand the content of the letter, because a few days later, she sent another letter to the band council to address the existence of the resolution.

[95] In March 2014, Tracy returned to live in the community. A call was apparently made to the province of Manitoba in connection with her income assistance benefits. The information allegedly provided indicated that Tracy was once again officially living in the community. It is impossible for me to identify the person who called the province of Manitoba, based on the evidence provided at the hearing. Ultimately, the evidence reveals that in any case, Tracy informed the province that she had moved, which resulted in her provincial benefits being terminated at the end of February 2014.

[96] After her return, in March and April 2014, she therefore approached Dolores Blackbird (Dolores), the officer responsible for the income assistance program, to re-apply for the federal income assistance program. She also raised the issue of the existence of the band council resolution. Tracy and Dolores tried to resolve the situation. Dolores was direct in telling Tracy that she could not reinstate Tracy's benefits without obtaining instructions from the band council. Tracy, for her part, wanted to obtain a letter from the Nation stating that she would not be entitled to benefits. With this letter, she would be able to reapply for the provincial program. In short, the evidence demonstrates that efforts were made to resolve the impasse.

[97] On April 14, 2014, Tracy went to the office of the Nation. It was at this time that an altercation between Tracy and Karen, the Nation's executive secretary, occurred. The evidence about this incident is contradictory. I heard four witnesses who gave me

accounts of the incident, Tracy, Karen, Dolores and Wes, and the four versions were not similar in every respect. Based on the balance of probabilities, I accept the following version of the facts.

[98] Tracy had wanted Dolores to give her an update on the situation, including regarding the letter that she had requested. She had gone to Dolores's office to talk to her. Apparently, Karen's office was right next to Dolores's office. Dolores allegedly told Tracy to talk to Karen. Tracy reportedly responded that she was not very open to talking to Karen since the latter did not like her. Karen allegedly overheard this comment and asked Tracy why she would say something like that since they did not even know each other. Tracy had then entered Karen's office and this is when the altercation occurred.

[99] According to Tracy, Karen allegedly hurled racist insults at her, in relation with the perception that she was white. She allegedly used vulgar language to ask her to leave her office. Wes reportedly heard Karen tell Tracy that she was not a member of the community and that she was not entitled to receive services. Karen, for her part, denies hurling racist insults at Tracy. She acknowledged asking Tracy, quite curtly, to leave her office and indicated that the situation had particularly shaken her.

[100] Ultimately, Dolores confirmed that both Tracy and Karen had raised their voices. She did not hear Karen hurl racist insults, but confirmed that both women were frustrated and upset. She confirmed that this was not the first time that she had witnessed such a reaction and that it was not uncommon for clients to vent their frustrations. She explained that she understood Tracy's anger at that point in time, given the difficulties she had in obtaining benefits. Finally, she indicated that Karen had also been very shaken by the incident.

[101] I find that the testimony given by Dolores, who was not personally or emotionally involved in the situation, was particularly credible. Her testimony was calm and restrained. Dolores was not targeted or involved in this altercation between Karen and Tracy. It is important to add that she was also present during the incident and was able to hear what was being said. Considering her distance and detachment and the fact that she has no vested interest in the matter, I believe that hers is the most probable version of events.

[102] That said, the incident did not end there. After the altercation, Karen went home, still angry and shaken by the situation. In a moment of impulsiveness, she posted an offensive message on Facebook stating the following:

“OMG!!!! Some f\*#& white trash are restarted[sic], especially ones that think they can live on reserve and get what ever they fucken want... ooh I’m so fucken pissed off ... some bitch has a fucken nerve plus demand for services on reserve”.

[103] Karen confirmed that there was an error in her message: the term “restarted” should have read “retarded”.

[104] That said, this message prompted other messages from different people including members of the Nation. Someone asked Karen who she was talking about and she responded by saying “The same ol retarded one lol”. One person then responded that she knew exactly who Karen was talking about when she talked about the “retarded” person.

[105] It did not end there. Karen continued and added the following comment: “Lol stupid fucken stalking bitch and it’s too bad some people are so gullible to believe the bull shit that comes out of her mouth”. There was one last message from someone responding to this comment; this person said that she also knew who Karen was talking about because there was only one crazy woman like that. These messages and comments were quickly brought to Tracy’s attention, and she was particularly affected by them.

[106] After this incident and always mindful of the existence of the council resolution and the difficulties experienced in receiving benefits, Tracy and Wes tried to contact Chief James in April 2014 to discuss and resolve the situation. They travelled to Winnipeg, knowing that Chief James could generally be found in this city. They also tried to call him and send him text messages, to no avail. Tracy then decided to file a complaint with the Commission.

[107] It is not clear whether a copy of the complaint was provided to the band council. Tracy claims that she gave a copy to Dolores, who made a copy. Dolores does not remember seeing the complaint and believes that she learned about the complaint when

the Commission investigator contacted her to discuss the situation. Ultimately, in my opinion, this is not determinative in this case.

[108] In the end, Tracy's benefits were reinstated on May 1, 2014.

**(a) Income assistance: service customarily available to the public**

[109] The parties do not contest the fact that the income assistance program managed by the Nation is a service customarily available to the general public within the meaning of section 5 of the *CHRA*.

[110] In a recent decision, the Tribunal summarized guidelines for services customarily available to the general public as follows:

[30] Pursuant to the wording of this section, the complainants must establish that the actions complained of are "...in the provision of...services...customarily available to the general public". The first part of this analysis involves determining what constitutes the "service" based on the facts before the Tribunal (see *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) per La Forest J. at para. 68 [*Gould*]). In other words, what is the "benefit" or "assistance" being held out (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 31 [*Watkin*]; and, *Gould* per La Forest J. at para. 55). In making this determination, "[r]egard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (see *Watkin* at para. 33). In this respect, it may be useful to inquire whether the benefit or assistance is the essential nature of the activity (see *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 42).

[31] The next step requires a determination of whether the service creates a public relationship between the service provider and the service user. The fact that actions are undertaken by a public body for the public good is not determinative. In fact, no one factor is determinative. Rather, in ascertaining whether a service creates a public relationship, the Tribunal must examine all relevant factors in a contextual manner (see *Gould* per La Forest J. at para. 68; and, *Watkin* at paras. 32-33). As part of this determination, the Tribunal must decide what constitutes the "public" to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the "public" (see *University of British Columbia v. Berg*, [1993] 2 SCR 353 at pp. 374-388; and, *Gould* per La



Forest J. at para. 68). A public relationship is created where this “public” is extended a “service” by the service provider (see *Gould* per La Forest J. at para. 55).

(see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 2, at paras 30 and 31).

[111] The Tribunal has also previously recognized that a First Nation was providing a service customarily available to the public when it administers and manages an income assistance program otherwise offered by the federal government (see *MacNutt v. Shubenacadie Indian Band Council*, D.T. 14/95, October 11, 1995).

[112] It is therefore my opinion that the Nation does in fact offer a service within the meaning of section 5 of the *CHRA* in administering the income assistance program.

**(b) The creation of the band council resolution**

[113] As mentioned earlier, the events surrounding the creation of the band council resolution are important, because it is the resolution that was used to stop Tracy’s income assistance benefits. If the resolution is in itself discriminatory, using it to stop paying benefits would, by extension, be discriminatory.

[114] The evidence reveals that Dianne provoked the band council resolution. Before starting a relationship with Tracy, Wes was in a relationship with Dianne, who was also a member of the Nation. The relationship between Tracy, Wes and Dianne is particularly tense, even highly toxic. At the hearing, I heard a myriad of allegations, accusations and interpretations of words and actions reportedly committed by these three individuals. Several elements of their testimony were based on perceptions, theories and assumptions.

[115] Frankly, my decision cannot include everything that they may have said about each other. I heard evidence about love triangles, extramarital relationships, gambling, alcohol and drugs addiction, alleged criminal acts, theft, harassment, violence, abuse, vandalism, stalking, and so on.

[116] I would add that even though hearsay is admissible before the Tribunal (paragraph 50(3)(c) *CHRA*), it was particularly omnipresent in the information given to me by the witnesses, which seriously complicates my task.

[117] I do not believe that it is determinative for me to distinguish everything that is true from everything that is false, because a vast amount of the information presented at the hearing **is not relevant to or determinative for the case.**

[118] By all indications, the relationship between Tracy, Wes and Dianne is particularly tense, toxic and clearly bitter. This caused all three to interpret the words, gestures and actions of the others with an inevitably heightened degree of sensitivity. This also necessarily led them to exaggerate what may have been said or done. All three had their own interpretation of the situation. All three sincerely believed that the other person was doing the harassing.

[119] In connection with the creation of the resolution, it is Dianne who contacted Barry Bone (Barry), a councillor sitting on the band council. She informed him, in part, that Tracy was harassing her, stalking her and calling her at home and at the office. She also mentioned that Tracy had been asking other members of the community whether Wes was still with her and that she allegedly threw nails on her driveway. Dianne even contacted the RCMP to report the situation, but she was reportedly told that she herself could be accused of harassing Tracy. In short, Dianne was fed up with the situation, wanted to protect her grandchildren and wanted the council to get involved. Barry therefore decided to discuss the matter with the band council and the Chief.

[120] For his part, Barry explained to me that he could not actually remember all the details of his conversation with Dianne. However, he recalled that Dianne had approached to talk about the fact that Tracy was harassing her and watching her. He also remembered that Dianne had told him that Tracy had accused her of having an affair with Wes, that Tracy would come to her home at night and that she did not feel safe. Dianne had therefore sought his help.

[121] Needless to say, a resolution was adopted on January 23, 2013, which prevented Tracy from entering the community and communicating with its members. Admittedly, the

explanations for such a decision are not actually provided in the resolution. I was able to benefit from the fact that this resolution was filed. It effectively states that the band council and the Chief have a moral and legal obligation to protect the citizens living within the boundaries of the community. The resolution also provides that if individuals come into the community and are a danger to themselves or to others, the band council and Chief must act in compliance with the principle of protecting citizens from these individuals and protecting these individuals from all citizens. This resolution was signed by four councillors, Marjorie Blackbird, Barry Bone, Yolanda Williams and Arnold Bone, as well as by the Chief, Norman Bone.

[122] The evidence reveals that minutes are generally prepared for the band council's meetings, discussions and decisions and then subsequently kept on record. In contrast, no minutes of the January 23, 2013 meeting that led to the adoption of the resolution were filed at the hearing.

[123] The Commission finds that this opened the door for me to infer that the Nation had failed to disclose these documents or had destroyed them because they were unfavourable to its position. Various witnesses, such as Chief Norman Bone (Chief Norman) and Karen, claimed that council meetings were typically recorded in minutes. That said, the Nation admitted that there were serious flaws within its own administration. The Tribunal's proceedings highlighted some flaws in its record-keeping practices. Nevertheless, the Nation believes that it disclosed all the information in its possession and contests the Commission's inference.

[124] I recall that inference is an inextricable part of the fact-assessment process undertaken by the finder of facts. The decision to judge and to draw inferences falls within the finder of fact's discretion. That said, inferences are drawn in light of the evidence, assessed as a whole. In this case, I do not have any evidence that the Nation deliberately destroyed or failed to disclose records. Consequently, I cannot draw such an inference, as the Commission is asking me to do.

[125] Tracy also highlighted problems with the form of the resolution, including its numbering, its reference and its registration with Indigenous Services Canada. According

to her, the resolution was not valid because of procedural breaches. I do not believe that this is determinative under the circumstances, since the resolution, whether it was valid or not, and whether it was in the right format or not, was passed and used to stop the benefits being paid to Tracy. It is through this lens that this portion of the complaint should be considered.

[126] That said, I must determine whether the creation of the band council resolution was based on discriminatory considerations. The resolution, used for the purpose of stopping benefit payments, would prove, by extension, to be based on discriminatory considerations.

[127] I must first point out that I must distinguish between the reasons which motivated or supposedly motivated Dianne to request the intervention of the band council and the actions of the band council itself in adopting the resolution.

[128] The respondent in this complaint is the Nation itself. The Nation acts through its band council and chief, who make decisions on behalf of the Nation. Dianne is not personally named in the complaint filed before the Tribunal.

[129] Consequently, I have to consider **whether the Nation committed a discriminatory act within the meaning of the CHRA**, and not whether Dianne committed such an act. The issue is therefore the following: Did the Nation deny Tracy services or subject her to adverse differential treatment in the provision of services, namely, the income assistance program, on the basis of one or more prohibited grounds of discrimination? No, I do not believe so.

[130] Dianne is not a councillor on the band council. She does not have any decision-making power over the Nation. She is simply a member, who contacted a councillor in order to communicate her concerns. Even if I gave credence to the theory that Dianne wanted Tracy to be banished from the Nation, because of her race or her national or ethnic origin, I do not believe those elements affected the decision made by the band council.

[131] Did the fact that Dianne gave information to Councillor Barry and thereby to the council really change anything about the situation? I do not believe so, whether this information was true or false. I do not believe that it really matters whether or not Dianne's considerations were discriminatory, intentional or malicious.

[132] Dianne reported information about Tracy and her supposedly dangerous actions to the band council. There is no evidence that would allow me to conclude that Councillor Barry and by extension, the council, were made aware of the fact that Dianne's intervention may have involved discriminatory considerations. There is no evidence to suggest that the councillors and the Chief adopted the resolution because of Tracy's race or national or ethnic origin.

[133] Admittedly, the council ultimately adopted the resolution without asking too many questions. It did not ask Tracy to present her version of the facts. Whether or not the council acted fairly and impartially, or made a decision that was contrary to its practices or policies is not determinative in the circumstances. If the band council had refused to hear Tracy, because of her race or her national or ethnic origin, the situation would be quite different. Based on the evidence before me, there is no information that would allow me to conclude that this was the case.

[134] Nevertheless, without interfering in the procedures of the band council, and while remaining mindful that the Tribunal is not a reviewing body for the decisions of a band council, I in fact agree that the situation raises important questions of procedural fairness. That said, whether or not the council made a wrong or a right decision, as fair or unfair as it may have been, this does not mean that the decision, in itself, was discriminatory.

[135] In this case, the council relied on information from a member of the community. When Councillor Barry and Chief Norman testified at the hearing, they explained why the resolution was adopted. They confirmed that it had nothing to do with Tracy's race or national or ethnic origin. The resolution was adopted because Dianne, a member of the community, had claimed that she was being harassed by Tracy. Moreover, the incident involving the altercation with Nurse Jung had also resurfaced, as the band council had

recalled Tracy's actions and the major warning that she had been given at the time. Ultimately, the objective had been to protect the citizens living within the community.

[136] I agree in fact that the decision to prevent Tracy from entering the community and from communicating with members of the community may have been excessive. Councillor Barry explained, in hindsight, that the decision was dubious and may not have been the best decision made by the council and its chief.

[137] The evidence also reveals that this type of action by the band council, that is, to banish an individual from the community or prevent the individual from entering it, is normally used only as a last resort and in the most serious of cases. That said, it is not my role to decide whether or not the resolution was a good one, as extreme as it may have been.

[138] I also heard evidence concerning the fact that the resolution was not valid because a regular format was not used. I was further informed that the resolution was not enforceable and that it therefore had no force or effect. I do not believe that these elements are determinative in this case.

[139] The key point is that the resolution, whether or not it was valid and whether or not it was enforceable, was used to stop Tracy's benefits.

[140] Tracy also maintained that Councillor Barry and Chief Norman were Dianne's friends. Barry explained that he was not a close friend of Dianne's and that Chief Norman knew her because she was married to Dwayne Blackbird. Did this, in itself, influence them to adopt the resolution? This question is not relevant. Instead, the question that I need to ask is whether the resolution was based on discriminatory considerations. Whether or not certain individuals were close friends or mere acquaintances bears little importance.

[141] I would add that the Keeseekoowenin community is not a large community (500 members in the community and between 600 and 700 members outside the community). It goes without saying that individuals close to the community may, sooner or later, become friends or acquaintances.

[142] In short, I believe the key facts in this case are clear: the resolution resulted in the interruption of the benefit payments in September 2013. Tracy left the community when she learned that a resolution had been passed against her and her federal benefits were stopped. Between September 1, 2013 and February 28, 2014, while living outside the community, she received provincial benefits.

[143] Lastly, in March and April 2014, it is also clear that Tracy did not receive income assistance benefits. The same resolution was used when Tracy returned to live in the community and when she again applied for benefits via the income assistance program. It is with good reason that she tried to have the band council revoke the resolution. Dolores, the program officer, also tried to obtain clarifications from the council regarding the existence of this resolution and the payment of benefits.

[144] The interruption of the benefits in September 2013, and again in March and April 2014, does in fact constitute an adverse effect within the meaning of section 5 of the *CHRA*. However, this adverse effect must be linked to a prohibited ground of discrimination.

[145] Based on a balance of probabilities, the evidence filed by Tracy and the Commission does not demonstrate that the band council resolution, the tool that resulted in the benefits being stopped, was based on discriminatory considerations.

**(c) Karen's interventions with the Nation regarding the provision of services and filing of the complaint**

[146] The other aspect of Tracy's complaint concerns the fact that she was allegedly subjected to adverse differential treatment in the provision of services. According to Tracy and the Commission, the intervention by Karen, who, it should be recalled, was the Nation's executive secretary, affected the provision of services by the Nation. This adverse differential treatment was allegedly based on Tracy's race or national or ethnic origin. Karen's interventions took place on two levels.

[147] First, the Commission assumes that it is Karen who gave the income assistance program officer a copy of the band council resolution in September 2013, which resulted in

the termination of the benefits. According to the Commission, Karen's actions in this regard were allegedly based on discriminatory grounds.

[148] The evidence shows that Dolores, the officer in charge of the income assistance program for over 35 years, was not in the office during that period. She was on vacation and on sick leave. She explained that Muriel Twigg (Muriel) had filled in for her during her absence and that her daughter-in-law, Dina Blackbird (Dina), who worked for the housing department, had supported Muriel when necessary.

[149] According to Dolores, Dina had told her that it was Karen who had sent the band council resolution to both her and Muriel. That said, Dolores was not present when that happened. Muriel, for her part, testified that it was Dolores who had spoken to her about the existence of the resolution in September 2013. When she was asked whether it had not actually been Karen who had given her the resolution, Muriel said that she did not remember.

[150] Karen, for her part, confirmed that she had been an employee of the band council in September 2013. She explained that she was not aware that Tracy had not received her income assistance benefit for September 2013. When asked whether she could identify the person who had given the resolution to Dina, she claimed that she did not know anything about that. When it was suggested that she was the one who had given a copy of the resolution to Dina, she replied that she did not remember that being the case.

[151] The evidence shows that Karen was the executive secretary of the band council in September 2013, when the resolution was brought to the attention of the income assistance program officers. One of the executive secretary's functions is to keep the binders containing the band council's minutes and resolutions. Resolutions and minutes are only accessible to councillors, the chief and the executive secretary.

[152] According to the Commission, based on a balance of probabilities, I should find that it was Karen who gave the resolution to the program officers, in light of her role within the council in 2013, the testimony given by Dolores, as well as the fact that in April 2014, Karen had posted vulgar comments mentioning Tracy, who had requested services from the community.



[153] Quite frankly, the Commission's request of me in this regard, based on a balance of probabilities, is a bit far-fetched. Dolores was not present when the department managing the income assistance program was informed of the resolution. Dolores testified that it was Dina who had told her that Karen was the one who had provided the resolution, which is hearsay. Hearsay, while admissible in our proceedings, also has limitations. Here, there is no information to validate Dolores's memories or Dina's supposed claims. Unfortunately, Dina was not called as a witness, so she cannot substantiate Dolores's memories. Muriel, for her part, believes that it was Dolores who told her about the band council resolution. Dolores was absent from the office, which raises even more questions. Finally, Karen does not remember giving the resolution to program officers.

[154] The witnesses were testifying about events that had taken place in September 2013, five years before the Tribunal hearing. Memory has its limitations and the information provided by the witnesses does not allow me to reach a firm conclusion regarding what happened or how the program officers were informed of the resolution.

[155] Tracy and the Commission bear the onus of proving, based on a balance of probabilities, that it was Karen who sent the resolution to the department responsible for the income assistance program, and that she did so for discriminatory considerations. I do not believe that they discharged their burden of proof, and the balance of probabilities does not support the factual findings that the Commission is asking me to make.

[156] Therefore, I cannot conclude that it was Karen who, for discriminatory reasons, sent the resolution to the officers.

[157] Second, the Commission believes that the altercation between Tracy and Karen on March 14, 2014, as well as Karen's Facebook post, in which she mentioned Tracy's race and national or ethnic origin, poisoned the environment surrounding the provision of services, which constitutes a violation of section 5 of the *CHRA*. Moreover, the Commission believes that I should also take into consideration the fact that Karen was the executive secretary at that time, which is an important senior position within the Nation.

[158] Karen did not deny posting the vulgar comments on Facebook. She testified that she had been very angry about her altercation with Tracy and that she had never

experienced before an attack like the one against her on March 14, 2014. In the evening, she had therefore vented her frustrations via her Facebook account.

[159] Karen's comments were mean and vulgar. I strongly deplore this type of post made on Facebook. Karen should have shown restraint, even though she was angry. Facebook is a public forum and it is unfortunate that individuals vent their ill-feelings and anger on such a medium.

[160] In fact, I believe that the evidence clearly shows that these comments were made. Even though Karen's post did not specifically identify Tracy, the chronology of events, the timing between the altercation and the time that the comments were posted, the content of the comments, which included a reference to services, the disturbing comments about her perceived race and her national or ethnic origin, all support the theory that Karen was actually referring to Tracy and her efforts to obtain services from the Nation.

[161] That said, do the comments constitute discrimination against Tracy under section 5 of the *CHRA*, because they poisoned the environment surrounding the provision of services? I do not think so.

[162] As argued by the Commission, I am willing to accept that repeated or persistent actions or conduct, or a single serious act could create a hostile or poisoned service environment. If related to a prohibited ground of discrimination, it could be deemed to be discriminatory under section 5 of the *CHRA*.

[163] The principles concerning the notion of a hostile or poisoned environment are generally used in an employment context. That said, the case law seems to recognize that these principles apply equally to the provision of services (see for example *City of Toronto v. Josephs*, 2018 ONSC 67 (CanLII), at paras. 28 to 30; *Davidson v. Cummer Avenue United Church*, 2017 HRTO 1000 (CanLII), at para. 79; *George v. 1735475 Ontario Limited*, 2017 HRTO 761 (CanLII), at para. 54; *Brar and others v. B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151 (CanLII), at para. 741).

[164] In this case, I do not believe that Karen's role in the provision of services is as important as the Commission and Tracy are trying to demonstrate. The evidence shows

that even though Karen is the executive secretary of the Nation and reports directly to the council and the chief, she does not, in fact, have any power over the officers who manage the income assistance program. She also does not exercise any power over the band council and the chief and does not have any decision-making power within the Nation. Consequently, she does not have any role, power or influence relating to the provision of services and more specifically, the income assistance program.

[165] I also do not believe that Karen's interventions could, on their own, create a hostile or poisoned service environment.

[166] It is the council and the chief who sign the contribution agreements and who seek to obtain funds to manage the program. Dolores was also clear about the fact that the council and the chief do not interfere with her decisions. Her instructions are to follow the established policies and guide. Chief James also explained that the council and the chief do not get involved in the decisions made by the officers responsible for the income assistance program.

[167] That said, Dolores testified that some clients who were not satisfied with decisions had complained to the band council and the chief in the past. Nevertheless, she believes that the council and the chief respect the decision-making process and refrain from interfering with it.

[168] She also explained that Indigenous Services Canada is very strict in terms of applying policies. Funds for the income assistance program are very limited and everything must be done properly. In the event of unjustified overpayments, the Nation is required to reimburse these paid amounts, which would cause difficulties.

[169] Dolores stated that Chief James was also very strict in applying the Nation's procedures and policies, including those related to the income assistance program. She therefore wanted to ensure that everything was in order. Despite the altercation and what happened on Facebook, Dolores continued to offer services to Tracy, without interruption. She was aware of the existence of the resolution. A solution had to be considered. Dolores explained that she needed assistance and clarifications from the band council and the

chief in order to continue her efforts. Dolores was also clear and unequivocal about the fact that she had not been aware of Karen's posts in March and April 2014.

[170] I have already determined that the council resolution was not discriminatory. Unfortunately, the resolution still existed, even though it was invalid. The evidence does not show that Dolores was also aware that the resolution was considered to be unenforceable by the council and the chief. Ultimately, she was able to draw the council's attention to the problem. A meeting was held on April 18, 2014. Minutes of that discussion were prepared.

[171] The minutes indicate that Tracy had requested income assistance benefits and was asking for a letter confirming that she could not receive such benefits. The resolution was discussed, including the reasons why it had been adopted, namely, Tracy's harassing behaviour towards an employee. There were also discussions about the fact that she owned a house or farm and that it was allegedly in her daughter's name. The minutes further indicate that there was some discussion about the fact that she could be declared the head of the household, but that the head of the household needed to be a member of the Nation. The council also discussed the fact that the Nation was not obliged to declare a person head of the household.

[172] A reading of the minutes also indicates that the council and the chief subsequently discussed giving Tracy benefits that she could receive as part of a couple, and that they wondered whether the Nation could be reimbursed therefor. Some options were suggested such as giving her benefits through Wes or giving her benefits as a single woman on her own, while claiming everything back from the province. They also mentioned that a letter should be written and that it should indicate that Tracy lives in the community with Wes.

[173] The minutes also stated that if the resolution had been better drafted, "she may not apply for welfare". With respect to this aspect, no one was able to confirm exactly what it meant. The minutes indicated that the situation was serious and that a legal opinion would be considered.

[174] Chief James explained that he remembered Tracy's eligibility to receive income assistance benefits being discussed by the council. He recalled that council had wondered whether she owned a house or farm outside the community, whether she was receiving benefits or whether she had other forms of income. Chief James explained that there had been a number of audits within the Nation during that period and that he had needed to ensure that everything was in order and in compliance with the criteria, that files were complete, and that all documents were included therein.

[175] He also explained that each file under the income assistance program was subject to review and that if there were any overpayments, the Nation was responsible for reimbursing the funds in question. According to him, that year, the Nation had approximately \$80,000 in payments to recover.

[176] Chief James testified that the department responsible for the income assistance program had been concerned about making errors during that period. Whenever there were any doubts, the officers would turn to the band council. That said, he explained that normally, the band council did not get involved with such decisions.

[177] He confirmed the band council had decided to reinstate Tracy's benefits. No legal opinion was requested. According to the council, Tracy was eligible for the program through Wes. This was also confirmed by Dolores who had been informed of the council decision and who reinstated the benefits on May 1, 2014.

[178] I do not see how the environment surrounding the provision of services could be considered to have been poisoned. There is insufficient evidence to determine that Karen's Facebook comments created a toxic environment. Dolores continued her efforts as planned by requesting instructions from the band council. Furthermore, the evidence does not show that the band council was aware of the altercation between Tracy and Karen or of the existence of the comments on Facebook.

[179] Karen had nothing to do with the administration of the program. Dolores demonstrated that she had been in control of the situation and that she had taken all the necessary steps to clarify the situation with the council and the chief.

[180] The council reviewed the question of Tracy's eligibility for the income assistance program and the situation was discussed thoroughly to ensure that everything was in order. The minutes of April 18, 2014, do not, in my opinion, reveal any discriminatory considerations. I would again point out that I concluded that the council resolution was not discriminatory.

[181] In my opinion, the testimony given by Chief James seemed to be consistent with the minutes as well as with the testimony given by Dolores. I have no reason to question their credibility.

[182] The Commission and Tracy bore the burden of persuading me that Karen's comments on Facebook had in fact poisoned the service environment and created an adverse impact. Not only were they unable to meet their burden of proof, but I believe that Dolores and the council acted promptly to resolve the situation. Such efforts take time, and after the meeting on April 18, 2014, the benefits were reinstated.

[183] For all these reasons, I find that Karen did not interfere with the provision of services and I am dismissing this portion of the complaint.

**(d) Filing of the complaint and reinstatement of benefits**

[184] Finally, Tracy believes that her benefits were reinstated because she filed a complaint against the Nation.

[185] I will not dwell at length on this aspect. Dolores explained that on April 18, 2014, she received the decision of the band council and the chief, deciding that the benefits of Tracy, as Wes's dependent, should be reinstated.

[186] Tracy started to receive her benefits again on May 1, 2014, a few days after she had filed a complaint with the Commission. Tracy claimed that once her complaint had been filed, she gave a copy to Dolores in the band council office. Dolores does not remember receiving a copy of the complaint. Moreover, the evidence does not support Tracy's theory that the Nation had received a copy of her complaint and that it precipitated the reinstatement of her benefits.

[187] The evidence reveals rather that the council and the chief discussed the issue of Tracy's benefits on April 18, 2014, as recorded in the minutes. A decision determining that she was entitled to receive these benefits was rendered.

[188] Therefore, it appears that the decision to reinstate Tracy's benefits was made before Tracy filed her complaint. This is consistent with the testimony given by Dolores and Chief James, as well as with the minutes. There is no evidence that would allow me to conclude that the Nation engaged in such a discriminatory practice.

[189] In short, I would even add that in her testimony, Dolores was candid and sincere in stating that she may have made a mistake. She indicated that she should perhaps have reinstated Tracy's benefits when the council had made its decision, on April 18, 2014. While I appreciate the sincerity of this witness, I do not believe that this had anything to do with any discriminatory act the Nation might have engaged in.

**(e) Differences in amounts provided in July and August 2013 versus May 2014**

[190] I have already explained that Tracy received benefits in July and August 2013, but that the benefits were stopped in September 2013, when the resolution resurfaced, raising questions about Tracy's eligibility.

[191] That said, the amount allocated in July and August 2013 was \$220 per month. Dolores explained that there is a difference in the amount allocated based on whether the person is considered to be the head of the household (\$220 per month) or whether the person is considered to be a dependent (an additional \$175 per month to the head of the household).

[192] Tracy was initially approved for the income assistance program through the Nation for the amount of \$220 per month. Given this amount, it appears that she was considered to be the head of the household. However, the evidence clearly shows that Tracy was never the head of a household within the Nation. I was not presented with enough evidence to explain why this was the case.

[193] When the benefits were reinstated in May 2014, Tracy was considered to be Wes's dependent. As a result he received \$175 more in benefits. He therefore received \$220 as the head of the household and an additional \$175 for Tracy, amounting to a total of \$395. This is clearly reflected in Wes and Tracy's claim and payment histories, which were filed at the hearing.

[194] Once again, even though I am not persuaded that these elements are part of Tracy's complaint, I believe that there is insufficient evidence to conclude that the reduction in the benefits allocated to Tracy constitute a discriminatory practice by the Nation. Instead, it is my view that the difference in the amount is simply due to the fact that in 2013, she appeared to have been recognized as the head of the household while in 2014, she was recognized as Wes's dependent.

**(ii) Adverse differential treatment in the provision of residential accommodation (paragraph 6(b) of the CHRA)**

[195] It is a discriminatory practice to differentiate adversely in relation to any individual in the provision of residential accommodation based on a prohibited ground of discrimination under the *CHRA* (paragraph 6(b) of the *CHRA*).

[196] Tracy explained to the Tribunal that because of the passing of the resolution by the band council, as well as the pressure and the harassment she was subjected to within the community, she was left with no alternative but to leave the community and start afresh in her daughter's home. She therefore claimed that she was subjected to adverse differential treatment in the provision of accommodation, because she was forced to leave the home belonging to Wes, her partner.

[197] As a member of the Nation, Wes owns a home in the community. The evidence shows that Tracy does not own a home in the community and she therefore lived with Wes, in his home, notably in the summer of 2013.

[198] It was when Tracy's benefits were stopped in September 2013 that she left the community and applied to the provincial income assistance program. By moving outside the community, she was able to receive provincial benefits.



[199] I agree with the Commission's position that Tracy's departure from the community appears, more than anything else, to have been an effect, a consequence of the interruption of her benefits and is therefore more closely related to section 5 of the *CHRA*. Even though she indicated that she experienced difficult times, due, in part, to pressure from certain members of the community and alleged harassment, the interruption of the benefits actually seems to have been the culminating point that precipitated her departure. This is also consistent with the fact that she immediately applied to the provincial income assistance program, once she had established her home as her daughter's home.

[200] Therefore, it is rather difficult to link her departure from Wes' house to any adverse differential treatment in the provision of residential accommodation within the meaning of paragraph 6(b) of the *CHRA*.

[201] At most, even if I accept that the Nation indirectly provided Tracy with accommodation through Wes, the adverse differential treatment must still be linked to a prohibited ground of discrimination. However, in this case, Tracy's departure was due to the interruption of her benefits and her benefits were interrupted because of the council resolution; as I have repeated several times in this decision, the resolution is not based on discriminatory grounds.

[202] Therefore, the adverse differential treatment in the provision of residential accommodation that Tracy claims to have experienced at the hands of the Nation would not, in itself, be discriminatory.

[203] Tracy bore the burden of demonstrating that she was subjected to adverse differential treatment in the provision of residential accommodation because of her race or her national or ethnic origin, but she was unable to discharge this burden.

**(iii) Harassment (section 14 of the *CHRA*)**

**(a) Creation of a hate group**

[204] Tracy also testified that she believes that a hate group was created within the community and that it targeted her directly, partly through the Nation's actions or inaction. According to her, this hate group included Dianne, Karen and Shirley Cochrane.

[205] Quite frankly, even though it can be said that there were tensions within the community and that Tracy, for example, was the target of virulent comments on Facebook, I do not believe that there is enough evidence to determine that the Nation or one of its officers could have been at the root of the harassment reported by Tracy.

[206] The provision concerning hateful propaganda was removed from the *CHRA* in 2013. The only possible avenue for evaluating the argument concerning a hate group is section 14 of the *CHRA*, which protects against harassment.

[207] However, the harassment must still be linked to the provision of goods, services, facilities or accommodation, to the provision of commercial premises or residential accommodation or to matters related to employment (see paragraphs 14(a), (b) and (c) of the *CHRA*).

[208] In this case, Tracy was unable to link the creation of the hate group to any of the provisions in section 14 of the *CHRA*. Without minimizing the fact that she may, be it rightly or wrongly, have felt affected or targeted by certain individuals within the community, which I am not required to determine, I would reiterate that the mandate of the *CHRA* is not to protect persons who are subjected to harassment **in its general sense**.

[209] Harassment must **first be based on a prohibited ground of discrimination** under the *CHRA* (subsection 14(1) of the *CHRA*). It must, in addition, **be linked to the provision of goods, services, facilities or accommodation, to the provision of commercial premises or residential accommodation or to matters related to employment** (see paragraphs 14(a), (b) and (c) of the *CHRA*), which was not demonstrated in the case at bar.

[210] For these reasons, I am dismissing this portion of the complaint.

**(b) Comments by Karen on Facebook**

[211] Tracy attempted to prove that the comments which Karen posted on Facebook in March 2014 constitute harassment within the meaning of section 14 of the *CHRA*.

[212] I agree that the language used by Karen was particularly shocking and that individuals should refrain from posting these types of comments on Facebook. Moreover, as I have already indicated, I also believe that the comments made reference to Tracy's request for service. That said, do the comments on their own constitute harassment within the meaning of the *CHRA*? I do not believe this to be the case.

[213] That said, I recall that harassment is not defined in the *CHRA*. However, the case law is consistent about the different elements that must be present for actions to constitute harassment.

[214] Harassment is generally defined as unsolicited or unwelcome conduct related to a prohibited ground of discrimination that has an adverse impact on the victim. On its own, a joke that is vulgar, crude or in bad taste, would not generally constitute harassment. There must be a certain form of persistence or repetition in the impugned conduct. However, a single serious or grave incident could be enough to constitute harassment (see for example *Stanger v. Canada Post Corporation*, 2017 CHRT 8, at paras. 19 to 22).

[215] I have already stated that I deplore the fact that Karen posted those crude statements on a public medium. Nevertheless, more than that is required for me to be able to determine that her actions in this regard constitute harassment under the *CHRA*.

[216] Without diminishing the power of the words used and Tracy's feelings when she read the comments, I do not believe that the comments, on their own, are of sufficient gravity to constitute harassment. Furthermore, the evidence does not demonstrate that the actions were repeated or persistent.

[217] I do not have any additional evidence to show that Karen's comments were part of a series of events that were sufficiently serious or persistent enough to constitute harassment under section 14 of the *CHRA*.

[218] For these reasons, I am dismissing this portion of the complaint.

**(iv) Retaliation**

[219] In matters related to retaliation, complaints are not founded on a prohibited ground of discrimination but on the filing of the complaint itself (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* 2015 CHRT 14, at paragraphs 4 and 5). That said, the complainant must show:

- 1) that they **filed** a previous complaint;
- 2) that they suffered an adverse impact;
- 3) and that filing the complaint was a factor in this adverse impact.

[220] Tracy believes that she was subjected to retaliation by the Nation or its officers, which the latter strongly deny.

[221] The Nation does not dispute the fact that Tracy filed a complaint with the Commission. The Nation also acknowledges that acts of retaliation perpetrated against a third party to a complaint (for example Wes or Tracy's daughter) could be considered to be acts of retaliation against the complainant herself.

[222] That said, I will address each alleged act of retaliation individually. Moreover, the fact that all the incidents in question occurred after Tracy filed her complaint, in April 2014, is also not in dispute.

**(a) Comments by Jen Bone**

[223] Jen Bone (Jen) is the daughter of Chief Norman. Jen and Wes had some discussions on Facebook about issues concerning the community. Tracy explained that Jen had wanted to install a teepee at 61A Clear Lake and that Wes had offered to help her.

[224] According to the testimony given by Wes, the discussion between himself and Jen had stemmed from a misunderstanding between her father, Chief Norman, and Wes concerning land leases.

[225] Regardless of how the discussion started, during the discussion, which degenerated, Jen had called Wes a *weenug*. According to Tracy, when a woman calls a man a *weenug*, it is an insult. This term refers to male genitals. According to Wes, Jen did not understand the significance of the word she was using.

[226] For Chief Norman, it was, in fact, a word that could be viewed as an insult. That said, he explained that young people who use the term have lost sight of its true meaning. Without repeating the reference to male genitals, the term *weenug* could also be used in the sense of *stop acting silly* or *don't be an idiot*.

[227] Tracy believes that this constitutes an act of retaliation by Jen, in response to the complaint she had filed in April 2014. I find that the evidence is insufficient to conclude that this incident was in any way related to the complaint filed by Tracy.

[228] According to her, that incident occurred in 2016, because it happened around the time that her son sadly passed away. This incident happened almost two or more years after Tracy had filed her complaint in April 2014. Furthermore, there are no additional elements that would allow me to conclude that Jen acted in response to the filing of the complaint, that she was aware of the existence of the complaint or that Chief Norman had something to do with this incident.

[229] I am also not convinced, based on a balance of probabilities, that it constitutes an act of retaliation within the meaning of the *CHRA*. For these reasons, I am dismissing this portion of her complaint.

**(b) Fake Facebook account created in Wesley Bone's name**

[230] Tracy testified that a fake Facebook account was created in the name of her partner, Wes Bone, in October 2016. I was able to view a few images of the account. The

fake account contains information that is not necessarily flattering. For example, the profile of this Wes Bone contains an image of a revolver and bottles of alcohol.

[231] Tracy believes that the Nation or one of its officers created this fake account in order to harm Wes and by extension, her too. She believes that it was an act of retaliation in response to the filing of her complaint. More specifically, she believes that it is Jen, Chief Norman's daughter, who created this fake profile.

[232] She also explained the fake account was created in October 2016, that is, around the same time that Wes and Jen Bone had an altercation on Facebook. The content of the account, the timing and the attacks led Tracy to believe it was not a coincidence.

[233] I do not believe the evidence filed by Tracy at the hearing is sufficient to demonstrate that it was the Nation or one of its officers who created this Facebook account in response to her complaint. There is no information whatsoever to establish a correlation between the fake account and the Nation.

[234] It was impossible for Tracy and Wes to prove the source of this fake Facebook account. No one knows who created the account. The individual responsible, whether real or not, is unknown.

[235] Even though the account states this Wesley Bone lives in La Prairie, Manitoba, and he was born in Winnipeg, this evidence, in itself, is not sufficient to link it to the Nation or one of its officers.

[236] Lastly, Tracy also pointed out that most of this Wesley Bone's Facebook friends were individuals from the Sandy Bay community in Saskatchewan, which is the home community of the mother of Chief Norman's daughter Jen. Once again, this information does not link the Nation or one of its officers, even Jen, to the creation of this Facebook account.

[237] I would also point out that in matters related to retaliation, the filing of the complaint must also have been a factor in the adverse effect; this was also not demonstrated.

[238] For these reasons, I am dismissing this portion of the complaint.

**(c) The incident involving errant horses**

[239] When the Tribunal moved to Elphinstone to attempt to hold a hearing on April 17, 2017, there was an incident that possibly involved Tracy's horses.

[240] Chief Norman and Tracy are both horse owners. Their horses are held in the same area. By the time Chief Norman arrived at the hearing in the morning, he had already been informed that some horses had escaped from their pasture and that they were on the loose, close to the community.

[241] Therefore, he had first checked to ensure that his own horses were not on the loose. He then explained that he had thought that the errant horses might belong to Tracy and he had therefore given her that information at the beginning of the hearing.

[242] Tracy explained that this information had given her cause for concern at a time when the Tribunal hearing was supposed to start. Moreover, during the course of that morning, an officer from the Royal Canadian Mounted Police had also come to the location of the hearing in order to meet with Tracy. He told her that her horses were going to be seized if they were not moved. Tracy therefore reached an agreement with the officer, whereby her horses would be moved within a period of 24 hours.

[243] Apparently, the land where Tracy's horses were being held had been sold by the owner, without him giving her any warning. That is why the horses had to be relocated.

[244] Tracy alleged that on two occasions, she believes that Chief Norman had attempted to sell her horses for their meat, without her knowledge. Chief Norman confirmed that he had already sold 14 of his own horses for the meat. However, he denied trying to sell or having sold horses belonging to Tracy.

[245] In spite of the various witnesses I heard regarding these allegations, including Tracy, Wes and Chief Norman, I am unable to make any findings of fact concerning these events. Moreover, I do not see how these allegations are relevant to this case and how they could constitute retaliation in connection with the incident involving the errant horses in April 2017.

[246] It is Tracy who bears the burden of presenting evidence that is sufficiently complete to demonstrate that the Nation or one of its representatives engaged in retaliation. Although Tracy had previously filed a complaint, the complaint must still have been a factor in the adverse impact resulting from actions by the Nation or one of its officers.

[247] I agree with the Nation's position that there is insufficient evidence to conclude that retaliation occurred. Chief Norman was informed that horses were on the loose and he simply passed that information on to Tracy so that she could look into the matter herself. It is impossible to conclude that what Chief Norman did constitutes retaliation within the meaning of the *CHRA*, despite the stress that this information may have caused Tracy at the beginning of the hearing.

[248] Moreover, it is not possible to tie the situation involving the sale of the land and the presence of the Royal Canadian Mounted Police at the hearing to the Nation or one of its officers. There is no evidence that would allow me to conclude that the Nation, in response to the complaint filed by Tracy, was involved in this incident.

[249] For these reasons and based on a balance of probabilities, I am dismissing this portion of Tracy's complaint.

**(d) Anonymous call to the BC Employment and Assistance Office in British Columbia**

[250] Tracy has a daughter named Trina. Trina lives in British Columbia and I understand that she has a disability. She receives disability benefits from the Employment and Assistance Office in British Columbia because of her condition.

[251] Tracy testified that after the first attempt to conduct a hearing in April 2017, a call was made to that office. It was allegedly reported that Trina had sold property for the amount of \$300,000. Her benefits were therefore suspended until she could provide supporting documents. Trina was able to submit the necessary documents in order to have her benefits reinstated.



[252] Tracy explained that Trina cannot cope with too much stress because of her medical condition. Tracy believes that it was somebody from the Nation who had called the Office, in retaliation for the filing of her complaint: no one, other than someone from the Nation, would be interested in calling the Employment and Assistance Office in British Columbia for the purpose of troubling her daughter.

[253] I acknowledge that the situation is indeed sad. I also acknowledge the stress that it may have caused Trina and Tracy. That said, the evidence filed at the hearing fails to demonstrate that it was the Nation or one of its officers that contacted the Employment and Assistance Office in British Columbia.

[254] Tracy was not able to identify the person who called that office. Even if the call was made after the hearing, that fact is not sufficient to demonstrate that it was the Nation or one of its officers who made the call. Tracy also explained that her daughter did not have any enemies. With all due respect, this is not a compelling argument in this case.

[255] Furthermore, in matters related to retaliation, the filing of the complaint must have been a factor in the adverse impact; this was also not proven.

[256] For these reasons, I am dismissing this portion of the complaint.

**(e) Fake emails from Brian Sharpe**

[257] An unknown person using the name Brian Sharpe communicated with Wes by email in early May 2017. He explained that he was a doctoral student who was writing his dissertation on the First Nations of western Manitoba.

[258] Neither Wes nor Tracy know this individual and they did not understand how this person was able to get in touch with them directly. That said, Wes and Mr. Sharpe exchanged a series of emails during the months of May and June 2017.

[259] Tracy and Wes both testified that the conversation quickly became strange. Mr. Sharpe had particularly personal information concerning Tracy and Wes. They were both of the opinion that the emails had become intimidating and that they constituted retaliation by the Nation or one of its officers.

[260] It is not necessary for me to go over all the communications. That said, Tracy believes that Mr. Sharpe was used as a ruse to disguise the Nation or one of its officers for the purpose of intimidating both her and her partner. Therefore, Tracy also believes that this was an act of retaliation by the Nation or one of its officers.

[261] There is no evidence to support the conclusion that this individual, Mr. Sharpe, is related to the Nation or one of its officers in any way whatsoever. Mr. Sharpe is an unknown person who has never been identified. Tracy and Wes were never able to meet him in person. The source of the emails was never established.

[262] Tracy attempted to prove that the timing of the emails, the fact that they were first sent a few weeks after the first attempt to conduct a hearing in April 2017, makes the theory that they constitute more likely as an act of retaliation by the Nation. She also added that this Brian Sharpe had access to private information and knew Chief Norman as well as the farms around the community, and so forth.

[263] Tracy also explained that the Nation had previously done business with a company whose name included the word "Sharpe" for the purpose of preparing its financial report. According to her, there could therefore be a link between Mr. Sharpe, this company and the Nation.

[264] Tracy also admitted that she did not have any other evidence that could link Mr. Sharpe to the Nation or one of its officers.

[265] Once again, the evidence presented by Tracy concerning this incident is extremely flimsy. The balance of probabilities does not support the position that Mr. Sharpe was linked to the Nation or one of its officers in any way whatsoever or that he could have sent those emails in response to the complaint filed by Tracy.

[266] For these reasons, I am also dismissing this portion of the complaint.

**(f) Incidents involving Wes Bone's home**

[267] Tracy attempted to prove that Wes, her partner and witness, was subjected to retaliation by the Nation due to the filing of her complaint. She believes that the Nation

intentionally failed to repair Wes's home, which had been damaged by flooding in the basement and also had problems with mould. She believes that the Nation was not providing them with other services, such as septic tank pumping or garbage collection, whereas other residents were receiving these services. She also explained that their electricity was cut off.

[268] The evidence presented by Tracy is insufficient and does not meet the burden of proof required to conclude that retaliation occurred. Tracy was not able to establish a link between the allegations that she believes to constitute acts of retaliation by the Nation and the filing of her complaint in April 2014.

[269] The evidence reveals that requests for repairs to homes within the community must be directed to the Nation's housing department.

[270] Wes explained that he believes that repairs to homes are ultimately decided by the band council and the Chief. He added that in his opinion, he would need to have ties to the Chief and the council in order for his home to be repaired. I agree with the Nation's position that these elements were not proven at the hearing. In a way, this implies that the Nation favours individuals based on the ties that they may have to the aforementioned council and the Chief.

[271] The evidence also shows that an email was sent to the *West Region Tribunal Council* by Tracy and Wes, stating that in matters related to accommodation, the Nation was violating the rights of individuals living within its community.

[272] Alvin Bone (Alvin), who is the manager of the Nation's housing department, came to testify at the hearing. He explained that the *West Region Tribunal Council* has nothing to do with home repairs, but that it provides support to the community for such purposes. It is the Nation's housing department that is responsible for repairs.

[273] Wes explained that he noticed that several homes that had had problems with mould had been repaired, but that his home had not. He claims that he informed Alvin of the problems affecting his home, but Alvin denies that he did so. Alvin explained that in 2014, the community was affected by torrential rains, which had caused flooding in the

homes. The individuals who had been so affected had contacted him. He had taken steps to repair 22 houses, and this work had ended in 2015. According to him, Wes never made such a request; if the request had been made, his home would have been repaired, just like the others.

[274] I also heard Wes testify that his septic tank was backing up inside the house. He explained that during his lunch hour, he had gone to the home of the person who drove the truck for pumping septic tanks. He allegedly also wrote to this same person on his Facebook wall.

[275] Alvin explained that home owners were responsible for calling the department so that their tank would be emptied. The procedure involved calling the band council office and making a formal request. Workers would then go to the home in order to empty the tank.

[276] According to Alvin, the only way a tank would overflow was if residents of the home continued to use water when the tank was already full.

[277] That said, both Wes and Alvin confirmed that some repairs to Wes's home were completed in 2015. However, Wes considered the repairs to have been inadequate and insufficient.

[278] For his part, Alvin indicated that the repairs were done by contractors who are generally from the community and have experience in carpentry work. He recalled that it was Jeremy Bone who had done the repairs in the home. He added that he checks the work completed by the contractors. If the work is not satisfactory, he does not pay the contractors as a consequence. Alvin also indicated that neither Wes nor Tracy followed up with him on their complaint or dissatisfaction with the work that was done.

[279] I also heard evidence concerning a report that had allegedly been requested by Wes and Tracy and prepared by an inspector from outside the community. Does this report help me determine whether the Nation engaged in discrimination? No.

[280] I am sensitive to the fact that the home is still in poor condition. According to Tracy, the house is currently inhabitable because of the air quality and the repairs that need to be done.

[281] That said, I must determine whether the Nation engaged in acts of retaliation against Wes, as a result of the filing of Tracy's complaint, by failing to repair the house. There is no evidence that would allow me to establish any link whatsoever to the filing of Tracy's complaint. Once again, I would point out that there must be a link between the filing of the complaint and the Nation's actions. Tracy was not able to establish this link.

[282] I also heard evidence regarding the fact that the electricity in Wes's home was allegedly cut off and the claim that this constituted an act of retaliation by the Nation, because of the complaint filed by Tracy.

[283] The evidence shows that when an individual receives income assistance benefits and owns a home, it is the program that also pays the electricity bill for that house.

[284] Even though I am unclear about the timing of when the electricity was cut off, the evidence shows that when this happened, Wes and Tracy were no longer living in the home in the community. They would also have been receiving benefits from the province, since they were no longer residing within the boundaries of the community. That said, the electricity bill would no longer be paid through the community's income assistance program.

[285] Lastly, Tracy explained that Wes's home had been removed from the list of homes in the Nation that could benefit from services, including garbage collection and septic tank pumping. She believes that Wes's name was removed after she filed her complaint with the Commission. Insufficient evidence was presented to prove this claim.

[286] Once again, this incident was not reported in Tracy's initial complaint. Even if I were to consider that it was included within the scope of the complaint, it is clear to me that the evidence presented by Tracy is insufficient to conclude that it constituted an act of retaliation by the Nation in response to the complaint that she filed with the Commission in April 2014.

**(g) Incidents concerning the hay cutting contract**

[287] Tracy believes that the Nation engaged in acts of retaliation by getting involved in a hay cutting contract that she and Wes had concluded with the municipality of Harrison Park. This hay cutting was required to allow them use their sweat lodge and to minimize the risk of fire hazards.

[288] During the summer of 2016, Wes and Tracy approached the municipality of Harrison Park, which is adjacent to the Keeseekoowenin community and its other territories, for example, Clear Lake 61A and Bottle Lake. They asked the municipality to allow them to assume responsibility for cutting their hay.

[289] Tracy explained that she and Wes had an agreement with Chad, the head of administration in the municipality of Harrison Park, for the purpose of cutting the municipality's hay. The negotiated payment was \$90 an hour and the estimated time required for cutting the hay was 2 hours. According to her, Chief Norman intervened in the contractual relationship she and Wes had established with Chad. She believes that his involvement was an act of retaliation for the filing of her complaint against the Nation.

[290] Chad was called as a witness during the hearing. He confirmed that the municipality had in fact been approached by Wes and Tracy for the purpose of cutting the municipality's hay at Clear Lake 61A. He confirmed that the agreement was for \$90 an hour and that the municipality would provide the equipment.

[291] Chad then explained that he had contacted the Nation to discuss other topics. He recalled that someone else from the municipality, Reeve Ewashko, had also been present. He also recalled having a meeting with Councillor Barry and Chief Norman.

[292] At the end of their meeting, Chad explained that he broached the topic of the hay cutting situation with them. He explained that he had been questioning the feasibility of such an agreement. This was when Chief Norman told him that he could not have the hay cut as planned with Wes and Tracy. Chad added that he had wanted to discuss the matter with the Nation in order to obtain permission to cut the hay on its lands. According to him, this was simply a matter of courtesy, since the lands concerned were not part of the

municipality. However, he could not remember having discussed who would be responsible for assuming the hay cutting costs. According to Tracy, it was clear that she and Wes would be responsible for assuming these costs.

[293] On April 6, 2018, Chad prepared a letter for Wes and Tracy. In this letter, he reported on discussions that had involved his municipality, the Chief and the council. He explained that he had asked them about the feasibility of such a contract, the procedures to be followed, and so forth. Chief Norman had informed him that this type of request would have to be considered by the band council, since it involved lands owned by the Nation.

[294] Chad stated that Wes and Tracy made the same request again in 2018. That said, it was Mr. Ewashko and not Chad who discussed the issue with the Nation. To the best of his recollection, the municipality did not receive authorization to cut the hay at Clear Lake 61A.

[295] An email thread was filed at the hearing, concerning this other request. Apparently, Chad and his municipality felt as if they were being squeezed by the issue of territorial jurisdiction. More specifically, it is my understanding that there was a problem between the Chief of the Nation, Chief Norman, and Wes, who claims to be the hereditary Chief of Treaty 2 territory.

[296] Without being disrespectful to the ancestral traditions of Wes, Tracy and other people involved in this case, this battle concerning territorial jurisdiction between the Chief elected under the *Indian Act* and the hereditary Chief of Treaty 2 is not, in my opinion, relevant to the case.

[297] Wes, Tracy and the Nation, all shared their comments and opinions on the subject with me. I heard extensive evidence on this war between the chiefs. In his final submissions, counsel for the Nation spent a lot of time on the subject.

[298] I do not intend to get involved in these quarrels concerning territorial jurisdiction. I do not believe that they are relevant to the case and I do not need to dwell any longer on this issue.

[299] I acknowledge that there was a quarrel between Wes and Chief Norman concerning the role of the Chief, in that each believes he has jurisdiction over the land. That said, Chad clearly indicated in the email thread that he did not want to get involved in this power struggle. He clearly stated that in the event that it was not possible to determine the jurisdictional authority for the lands, he would defer to the Chief and the council elected under the *Indian Act*.

[300] In the same correspondence, he confirmed that Mr. Ewashko had taken a discussion with Chief Norman. Chief Norman had reiterated that he did not want the municipality of Harrison Park to cut the hay on his lands. Chief Norman had also requested that Wes contact the band council so that the work could be done by the Nation instead. Chief Norman also confirmed to Mr. Ewashko that some hay cutting had reportedly been done in that area.

[301] Chief Norman, for his part, explained that the Nation was responsible for hay cutting, and for maintaining the beaches and other locations within its territories. It is the Nation that pays for these services and hires the individuals who carry out the work. People living on community lands and who also own homes are responsible for mowing their own lawns. However, there are some exceptions for people with disabilities or for the elderly, for example.

[302] Chief Norman testified that he had never been approached by another municipality that was offering to cut the hay on his lands before. With respect to the request made by Tracy and Wes, Chief Norman simply stated that the territory fell under the jurisdiction of the Nation and that the Nation should therefore organize the requisite work. He also added that the Nation would not cut the hay on the municipality's territory.

[303] Chief Norman explained to Chad that Wes should have contacted the band council to manage the situation. According to him, Wes did not contact them, as suggested. Chief Norman added that if he and the council had provided the Harrison Park municipality with approval to cut the hay on its lands, the municipality would subsequently have billed the Nation for the cost of the services rendered.



[304] Chief Norman also explained that when the Nation does business with other municipalities and services are rendered, they work with service agreements.

[305] During the Commission's cross-examination, Chief Norman stated that if it had been clear that Wes and Tracy were going to pay the Harrison Park municipality for the hay cutting services, such an agreement could have been accepted.

[306] I believe that the evidence is clear. It appears that there was a breakdown in communications between Wes, Tracy, the municipality of Harrison Park and the chief and council.

[307] I do not believe that the Nation's refusals and interventions were acts of retaliation under the circumstances; they had nothing to do with the complaint filed by Tracy in April 2014. The situation should have been clarified and it is difficult to understand why the parties were unable to find an effective solution to this problem. The tensions between Wes, Tracy and the Nation ensured that the different stakeholders were unable to speak the same language and understand each other.

[308] These palpable tensions were confirmed by Chad who, by his own admission, felt caught between a rock and a hard place: he felt trapped by the tensions between a hereditary chief and an elected chief.

[309] Tracy explained that the sweat lodge was important to her and Wes, most notably for their spiritual needs. I am very sensitive to the spiritual needs of each and every person and I understand that the situation may have inconvenienced Tracy and Wes. Nevertheless, as I mentioned earlier, there must be a link between the filing of a complaint and the acts committed in order for those acts to constitute retaliation under section 14.1 of the *CHRA*.

[310] Once again, the onus was on Tracy to demonstrate that the Nation's interventions with respect to the agreements between Wes, herself and the municipality of Harrison Park, like the Nation's refusal to approve having the hay cutting done by another municipality, were in some way linked to the complaint that she filed with the Commission in April 2014. Tracy was unable to discharge this burden of proof.

[311] I am therefore dismissing this aspect of the complaint.

**(v) Other allegation: funeral expenses**

[312] Tracy believes that the Nation discriminated against her by failing to give her access to special compensation for travel expenses, so that she could attend her son's funeral in October 2016 (paragraph 5(a) of the *CHRA*).

[313] This information was included in her amended statement of facts dated July 24, 2017. On October 26, 2017, I issued an order expanding certain aspects of Tracy's complaint (see *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34). That said, the non-payment of funeral expenses was never included in that decision.

[314] I also allowed the parties to amend their statements of facts in order to highlight the facts that were going to be presented at the hearing. All the parties amended their statements as a result. That said, Tracy added an aspect that was not covered in my decision, the issue of funeral expenses.

[315] The Nation believes that this aspect was not included in the complaint. Even though, I am, in fact, not convinced that this aspect was added to the complaint, I am also not convinced that this matter, based on a balance of probabilities, constitutes or would have constituted discrimination.

[316] Barb Sage, an officer for the Employment and Income Assistance Program in Manitoba, testified that depending on the provincial program, a maximum amount of \$250 could have been allocated to Tracy for her transportation. This amount would have been in addition to the base amount allocated for income assistance.

[317] Since Tracy was under the authority of the Nation, she should have submitted this request for special expenses to the Nation. Instead, she was allocated an advance of \$300 for travel by the Nation. This advance would subsequently have been deducted from her regular income assistance benefits, until it was fully reimbursed.

[318] In her testimony, Dolores explained that special expenses are part of a very specific budget. This budget is very limited and if the Nation exceeds it, Indigenous Services

Canada does not reimburse the difference. She acknowledged that the Nation lacks resources.

[319] It is my understanding, based on the testimony given by Dolores, that more services should be given to people living in the community. However, the Nation receives very limited funds.

[320] If the Nation exceeds its budget for special expenses, it would not be reimbursed by the federal government. Funds for special expenses are therefore reserved for urgent cases, such as newborn care or the purchase of home appliances and furniture, including beds, for the roughly 160 homes in the community. Dolores also explained that historically, the Nation has not provided travel expenses as special expenses, because of a lack of funds.

[321] That said, Tracy did in fact receive an advance, in the amount of \$300. According to Tracy, the decision to give her an advance of \$300, by asking her to subsequently pay it back through her monthly benefits, did not enable her to attend her son's funeral. She therefore did not accept the advance.

[322] I am sensitive to Tracy's feelings about the fact that she was not able to attend her son's funeral. I cannot imagine the range of emotions she must have experienced when she realized that she would not be attending. It is impossible to remain insensitive to this situation.

[323] That said, there is no evidence that would allow me to conclude that the Nation discriminated against Tracy in the provision of a service, because of her race or her national or ethnic origin. Furthermore, the evidence does not support the fact that this would have constituted an act of retaliation, because there is no demonstrated link to the filing of the complaint. Dolores simply explained the reasons for her decision, which had nothing to do with a prohibited ground of discrimination or the filing of the complaint.

[324] For these reasons, and without being convinced that it was included in the complaint in any way whatsoever, I find that Tracy did not meet her burden of proof.

**C. Justifications provided by the Nation or limitation of its liability**

[325] Since I have dismissed all aspects of Tracy's complaint because I have deemed that neither she nor the Commission were able to meet their burden of proof, it is unnecessary for me to address the explanations provided by the Nation (particularly under paragraph 15(1)(g) and subsection 15(2) of the *CHRA*) or the limitation of its liability for the acts of its employees (pursuant to section 65 *CHRA*).

**V. DECISION**

[326] Tracy's complaint is dismissed in its entirety.

*Signed by*

Gabriel Gaudreault  
Tribunal Member

Ottawa, Ontario  
9 octobre 2019

English version of the Member's decision

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2101/1715

**Style of Cause:** Tracy Polhill v. Keeseekoowenin First Nation

**Decision of the Tribunal Dated:** October 9, 2019

**Date and Place of Hearing:** September 17-21 and 24-28, 2018

Brandon, Manitoba

#### **Appearances:**

Tracy Polhill, for herself

Brian Smith, for the Canadian Human Rights Commission

J.R. Norman Boudreau, for the Respondent