Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 45
Date: November 1, 2019
File No.: T2229/5117

Between:

Joyce Beattie and Nikota Bangloy

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Indigenous and Northern Affairs Canada

Respondent

Decision

Member: Colleen Harrington

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I. Overview

[1] The Complainants in this matter are Joyce Beattie, her daughter Nikota Bangloy, and Ms. Bangloy's 2 minor children ("the children"). All are "aboriginal peoples of Canada" as defined by section 35 of the *Constitution Act, 1982*.

[2] The Complainants say they are entitled to certain benefits provided pursuant to Treaty number 11, by virtue of their race or national or ethnic origin, which are grounds protected from discrimination under section 3 of the *Canadian Human Rights Act* ("the *Act*" or "*CHRA*"). They argue that the Respondent, Indigenous and Northern Affairs Canada, has discriminated against them contrary to section 5 of the *Act* by refusing to provide them with these treaty benefits. The Complainants also argue that the Respondent's refusal of these benefits is retaliation for filing a previous human rights complaint, contrary to section 14.1 of the *Act*.

[3] Treaty 11 is an agreement that was entered into between the Government of Canada and "the Indians occupying the territory north of the 60th parallel and along the Mackenzie river and the Arctic ocean"[1] in 1921. The Treaty states that "the Slave, Dogrib, Loucheux, Hare and other Indians inhabiting the" tract of land defined in the Treaty "do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His Successors forever, all their rights, titles, and privileges whatsoever to the lands included within the" Treaty tract. In exchange for this land, the Government made certain promises to the Indigenous signatories. The 2 provisions of Treaty 11 that are relevant to this complaint are as follows:

> HIS MAJESTY, also agrees that during the coming year, and annually thereafter, He will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, to each Headman fifteen dollars, and to every other Indian of whatever age five dollars, to be paid only to heads of families for the members thereof. [emphasis added]
>
> …

[1] Exhibit A-1, Common Book of Documents, Volume 1 at Tab 41: Report of the Commissioner for Treaty No. (Number) 11.

> FURTHER, His Majesty agrees to pay the salaries of teachers to instruct the children of said Indians in such manner as His Majesty's Government may deem advisable.[2]

[4] The Complainants argue that they are entitled to both the $5 per year treaty annuities and the education funding pursuant to Treaty 11, as they are descendants of "Indian inhabitants of the Northwest Territories who adhered to Treaty number 11 on July 21, 1921."[3] They say that, since 2014, the Respondent has refused to provide them with these treaty benefits.

[5] The Respondent says that, during the course of a previous Canadian Human Rights Tribunal hearing, it paid the Complainants' treaty annuities up to 2013. However, when the Complainants decided that they no longer wanted their names on the Band list of any Treaty 11 Band, which was a requirement of the Respondent's treaty annuities payment policy, the Respondent notified them that it could no longer pay them annuities. Just prior to the inquiry into this complaint, the Respondent determined that the Complainants fall within an exception to this policy requirement, and so have agreed to pay their annuities back to 2014.

[6] The education funding complaint relates to Ms. Bangloy's request that the Respondent reimburse her for tuition she has paid for the children to attend private schools in Alberta. The Respondent says that the Treaty's education benefits do not apply outside of the tract of land defined in the Treaty, which is mainly in the Northwest Territories. It says that this issue was already determined by the Federal Court of Canada and so should not be considered by the Tribunal.

[7] I agree that the Complainants experienced retaliatory discrimination through the Respondent's delay in evaluating their entitlement to treaty annuities on an individual basis until just prior to the scheduled hearing dates in this matter. I do not agree that they were the victims of a discriminatory practice relating to the denial of educational funding for Ms. Bangloy's children, and therefore dismiss that aspect of the complaint.

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[2] *Ibid* at Tab 41: Treaty No.11.
[3] *Beattie v Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCA 105 at para.2.

II. Issues

[8] While the substance of this complaint relates to discrimination and retaliation under sections 5 and 14.1 of the *Act*, the Respondent has argued that the complaint, or parts of it, should be dismissed on the basis of preliminary issues that it has raised. I agree that I must deal with these preliminary issues prior to considering the alleged discriminatory practices under the *Act*. The following issues are considered in this decision:

A. Preliminary Issues

i) Is the treaty annuities issue moot because the Respondent agreed prior to the hearing to pay the Complainants' annuities, without requiring them to be on a Band list?

ii) Has the education funding issue already been decided by the Federal Court?

B. Section 5 Discrimination

i) Did the Respondent discriminate against the Complainants contrary to section 5 of the *Act* by failing to provide Ms. Bangloy with information about how to receive Treaty 11 education funding for her children's private school tuition?

ii) Did the Respondent discriminate against the Complainants contrary to section 5 of the *Act* by refusing to pay their treaty annuities because they were not on a Band list?

C. Section 14.1 Retaliation

i) With respect to the education funding aspect of the complaint, did the Respondent retaliate against the Complainants contrary to section 14.1 of the *Act*:

   a) by failing to provide Ms. Bangloy with information about how to receive education funding for her children's private school tuition? or

   b) by failing to reimburse her for the tuition she has paid for her sons to attend private schools in Alberta?

ii) With respect to the treaty annuities aspect of the complaint, did the Respondent retaliate against the Complainants contrary to section 14.1 of the *Act*:

a) by refusing to pay their treaty annuities because they were not on a Band list? or

b) by refusing to pay the children's annuities back to their births? or

c) by refusing to add the Complainants' names to the Loucheux No.6 Band list?

III. Evidence

[9] At the hearing into this complaint, documentary evidence in the form of a Common Books of Documents was filed on the consent of both parties. Oral testimony was provided by Ms. Beattie and Ms. Bangloy for the Complainants, and Adrian Walraven for the Respondent, on the issue of education funding. The parties also filed an Agreed Statement of Facts.

[10] Joyce Beattie was born in 1949 in the community now known as Tsiigetchic in the Northwest Territories ("NWT"). Her biological mother was a member of the Fort Good Hope Band. Shortly after her birth she was custom adopted by parents who were members of what was then known as the Loucheux No.6 Indian Band. Both the Fort Good Hope Band and the Loucheux No.6 Band were signatories to Treaty 11.

[11] Ms. Beattie filed a previous human rights complaint against the Respondent in 2011 (the "adoption complaint"). Tribunal Member Lustig, who inquired into Ms. Beattie's adoption complaint, concluded that she had been discriminated against by the Respondent on the basis of her family status, for the time that the Respondent refused to recognize her custom adoption as a basis to change her registration under the *Indian Act*, and for refusing to remove her name from the band list of her biological mother's Fort Good Hope Band.

[12] During the course of the previous complaint proceeding, Ms. Beattie's registration under the *Indian Act* was amended to reflect her custom adoption. This resulted in her grandchildren becoming eligible for registration for the first time due to the passage of the *Gender Equity in Indian Registration Act*, S.C. 2010, c.18 ("*GEIRA*"),

which came into force in January of 2011.[4] In September of 2013, around the time of the Tribunal's inquiry into the adoption complaint, the Respondent paid Ms. Beattie, Ms. Bangloy, and Ms. Bangloy's children their treaty annuities up to and including 2013.

[13] The Tribunal released its decision in the adoption complaint in January of 2014. Following this, Ms. Beattie and Ms. Bangloy requested treaty annuities for themselves and the children for 2014. However, because they had asked to have their names removed from the Fort Good Hope Band List, and did not want to be added to the Band list of any other Treaty 11 Band, the Respondent denied them ongoing treaty annuities. The Respondent says this was based on its Treaty Annuity Payment Policy, which required those requesting treaty annuities to be registered members of a Band whose membership list is maintained by the Respondent.

[14] Ms. Bangloy had also requested annuities for the children from the date of their respective births until 2010. The Respondent denied this request, saying the children had only become eligible to receive annuities upon their registration under the *Indian Act*, which was only possible once the *Indian Act* was revised as a result of *GEIRA* in 2011.

[15] In addition to her request for treaty annuities, Ms. Bangloy asked where she should send the receipts for tuition that she had paid for her children to attend private schools in Alberta. The Respondent's NWT Regional Office, with whom Ms. Bangloy was communicating, advised that it did not provide for the reimbursement of education fees.

[16] On July 11, 2014, Bruce Beattie, who is the Complainants' representative in this matter, sent an email to the Respondent, saying that its response to the Complainants' requests for treaty annuities and education funding "raises a serious issue of retaliatory treatment by the Respondent against Joyce Beattie and each of her descendants in respect to the statutory band membership issue addressed during the Tribunal inquiry and forming part of the final resolution of the discrimination complaints" in the Tribunal's

[4] See *Beattie v. Aboriginal Affairs and Northern Development Canada,* 2014 CHRT 1 ["*Beattie v. AANDC*"]

January 10, 2014 decision.[5] He suggested that the response indicated "a post-decision attempt to administratively abrogate all of the Complainant's and each of her descendant's existing Treaty 11 rights and entitlements. It is the Complainant's view that such treatment by the Respondent constitutes deliberate retaliation which is prohibited by s.14.1 of the" *CHRA*. He said a formal complaint would be submitted shortly to the Canadian Human Rights Commission ("Commission") about this alleged retaliation.

[17] In August of 2014, Ms. Bangloy communicated again with the Respondent's NWT office, asking for a contact person in Ottawa to whom she could direct her questions about Treaty 11 education funding. Janice Ploughman from the NWT office replied to say she had sent an email asking for contact information for someone "on the Education File in Ottawa to assist you with your inquiry regarding the reimbursement of Education receipts. I will send contact information as soon as I get it."[6] Ms. Ploughman also indicated that the Complainants' names had been moved to "the General Band List for the NWT in July of 2013", although the Tribunal did not hear any further evidence about this list at the hearing.

[18] From this point, I will separate the evidence relating to education funding from the evidence relating to treaty annuities, for the sake of clarity.

Education Funding

[19] On September 4, 2014, Ms. Ploughman emailed Ms. Bangloy to ask whether the education receipts were for "K-12 or post-secondary".[7] She said she was searching for further information in order to direct Ms. Bangloy's education inquiry. Ms. Bangloy advised that the receipts were for Montessori preschool for both children, as well as for all years of their elementary education in private schools. Ms. Ploughman wrote back to Ms. Bangloy to provide her with the name of a contact person in another regional office, although this person was unable to assist Ms. Bangloy.

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[5] Exhibit A-2, Common Book of Documents, Volume 2 at Tab 138.
[6] *Ibid* at Tab 141
[7] *Ibid* at Tab 143

[20] On December 29, 2014, Ms. Bangloy wrote to Ms. Ploughman asking her to, "please provide me with a contact person in Ottawa that I should be directing my questions to".[8]

[21] Ms. Bangloy testified that she did not receive any response from the Respondent to her December 2014 request to be provided with a contact person in Ottawa, nor did she receive any information about how or where to submit her tuition reimbursement request. She said that, as a result, she continued to pay to send her children to a private school in Alberta, which she has determined is the most suitable education for them.

[22] Adrian Walraven testified on behalf of the Respondent. He has been the Senior Director of Policy and Planning in the education and social development programs branch of Indigenous Services Canada[9] in Gatineau, Quebec since January of 2015. Mr. Walraven confirmed that no records could be located within his department of any communications relating to Ms. Bangloy's tuition reimbursement request. He stated that he did not know why she had not received a reply to her inquiry and, in response to questions posed by Ms. Bangloy in cross-examination, he apologized to her for this.

[23] Mr. Walraven testified that the Respondent's view is that Ms. Bangloy is requesting the same educational benefits for her children that had already been considered and rejected by the Federal Court with respect to her own education.

[24] The evidence provided in the Common Book of Documents shows that Joyce Beattie asked the Respondent to pay the educational costs for her children in the 1980s and 1990s. This included her daughter Nikota's private schooling. The documents show that the Respondent did cover some of their educational costs because the family was residing on various reserves in British Columbia and so qualified for education funding administered by the Respondent.

[25] According to Mr. Walraven, although education is generally a provincial, and not a federal, responsibility, the Respondent, pursuant to the *Indian Act*, has taken

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[8] *Ibid* at Tab 152

[9] I understand that, since the complaint was filed, there has been a dissolution of Indigenous and Northern Affairs Canada (INAC) into 2 departments: Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada.

responsibility for the education of First Nations students ordinarily residing on reserves or Crown land. He testified that, if a child ordinarily resident on a reserve attends a provincial public or private school, rather than a school on their reserve, the Respondent provides funding through the student's Band to help pay the school fees.

[26] The documentary evidence shows that the amount the Respondent will pay towards such school fees is fixed, and is set out in a "Master Tuition Agreement" between the Respondent and the Ministry of Education for a particular province. The Master Tuition Agreement between Canada and British Columbia dated March 31, 1988 says that the Respondent will pay "a tuition fee in an amount determined … for each Indian student attending a public school."[10] The amount of tuition provided is based on the average within the school district in which a particular school is located.[11]

[27] Mr. Walraven testified that, although the Master Tuition Agreement refers to attendance at a provincial public school, the Respondent will also pay the same fixed amount for a student to attend a private school. Any difference between the tuition charged by the private school and the amount set out in the Tuition Agreement must be paid by the child's family or community. This is what the Respondent agreed to pay towards Nikota's private schooling, so long as the Beatties were residing on a reserve. The documents show that, then as now, the Beatties were of the view that "residence on or off reserve has no bearing on rights or entitlements under Treaty 11" and that Treaty 11 education benefits are the entitlements of "individual Indians not bands."[12]

[28] The Beatties had requested that the Respondent pay the full amount of Nikota's private school tuition, rather than only the amount set out in the Master Tuition Agreement, which left them to pay the difference. In response to this request the then Minister of Indian Affairs and Northern Development wrote to Joyce Beattie on December 12, 1990, reiterating that the *Indian Act* provides the Respondent department with the legislative authority to provide schooling to "registered Indian children ordinarily

[10] *Supra* note 1 at Tab 4.
[11] *Ibid* at Tab 5
[12] *Ibid at* Tab 6

resident on reserve or Crown land". He said that such schooling "is provided for all registered Indian children living on reserve, whether they are treaty Indians or not."[13]

[29] The documentary evidence shows that, after the Beatties advised the Respondent that they were no longer residing on a reserve, the Respondent wrote to say that it would not "recognize tuition payments for your children after that date."[14]

[30] The Beatties commenced an action in the Federal Court of Canada, claiming the Respondent was responsible for paying all of the education costs for their children pursuant to the education provision in Treaty 11. The issue decided by the Federal Court was whether the benefits under the education provision in Treaty 11 were confined to the Treaty area. In dismissing the Beatties' applications, the Court decided that the education benefits do not extend beyond the boundaries of the Treaty area.[15] The Complainants did not appeal the Federal Court's decision.

[31] Ms. Bangloy testified that, while she is familiar with the 1997 Federal Court decision, she is of the view that that case was different from the present complaint, which involves her children's education as opposed to her own.

[32] Mr. Walraven testified that the Respondent continues to fund education for children living on reserve in the same manner as set out in the Minister's 1990 letter.

[33] Ms. Bangloy and her family reside in Okotoks, Alberta, not on a reserve, nor within the area defined in Treaty 11.

Treaty Annuities

[34] On November 7, 2014, the Respondent advised the Complainants that their requests for Treaty 11 annuities were under review.

[35] During the course of the adoption complaint proceedings, the Respondent recognized the Complainants' entitlement to be added to the Band list of Ms. Beattie's

[13] *Ibid* at Tab 18
[14] *Ibid* at Tab 23
[15] *Beattie v. Canada (Minster of Indian Affairs and Northern Development),* [1998] 1 F.C. 104, 1997 CanLII 6343 (FC)

adoptive parents. As a result, in December 2014 and January 2015, Bruce Beattie contacted the Respondent, asking that the Complainants be added to the Loucheux No.6 Band List. The Respondent replied that the name of this band had changed several times since Treaty 11 was signed in 1921 and is now called the Gwichya Gwich'in Band. It said it would not maintain a separate band list for the Loucheux No.6 Treaty 11 Band.

[36] Mr. Beattie indicated that he considered the Respondent's position to be retaliatory and unconstitutional and that the Complainants would file a new human rights complaint about this issue. The Complainants filed the present human rights complaint on January 26, 2015. One of the allegations in the complaint is that the Respondent retaliated against the Complainants by refusing to reflect their proper membership in the band of Ms. Beattie's adoptive parents.

[37] Although they had received no further reply from the Respondent following its November 7, 2014 email advising that their annuity requests were under review, in August of 2017, both Ms. Beattie and Ms. Bangloy submitted Treaty Annuity Payment Requests for themselves and the children, writing "Treaty 11" as the name of their Band. Following this, Ms. Ploughman sent an email to Sean Sullivan, who was to be the Respondent's witness at the hearing to testify about the treaty annuities issue, saying: "We need to deal with this family. No response does not put us in a good light."[16]

[38] The Complainants testified that they received no reply to their August 2017 request to be provided with treaty annuities.

[39] The inquiry into this complaint was scheduled to begin on December 3, 2018. In a letter dated November 29, 2018, the Respondent advised the Complainants and the Tribunal that it had reviewed its treaty annuities policy. As a result, it had determined that the Complainants' situation was more akin to one of the exceptions set out in Chapter 4 of its Treaty Policy Manual, which do not require band membership in order to qualify for treaty annuities. As such, the Respondent advised that it would pay the

[16] Exhibit A-3, Common Book of Documents, Volume 3 at Tab 209.

Complainants' Treaty 11 annuities without requiring them to be members of a Treaty 11 Band.

[40] In this November 29, 2018 letter, the Respondent stated that, while it did not admit that its conduct was discriminatory under section 5 of the *Act*, it was willing to consent to an award of $5,000 "to account for any inconvenience or hardship the Complainants may have experienced related to the treaty annuities issue." The Respondent stated that, as it was of the view that the treaty annuities issue was now moot, it would not be calling its witness to testify about that issue at the hearing the following week.

[41] On December 18, 2018, at the request of the Tribunal, the Respondent provided a letter explaining that, as all four Complainants had already received treaty annuities up to and including 2013, they would receive annuities from 2014 onwards without the need to be members of a Treaty 11 Band. The Respondent noted that Joyce Beattie and Nikota Bangloy had previously received Treaty 11 annuities from birth as a result of the settlement of a previous Federal Court action. As part of that settlement, the Respondent provided them with a letter from the then Deputy Minister dated April 22, 1993, which states:

> Joyce Wilma Beattie, Nikota Beattie, and T'Seluq Beattie's Treaty Eleven entitlements are not linked to status but may be linked to other factors, one of which is ancestry. In the case of Joyce Wilma Beattie, Nikota Beattie and T'Seluq Beattie, the annuity entitlements pursuant to Treaty Eleven accrued at birth and thereafter have continued to exist, and are treaty entitlements that have been recognized and affirmed by s.35(1) of the *Constitution Act, 1982*.[17]

[42] In its December 18, 2018 letter, the Respondent also repeated its position that the children had only become eligible to receive treaty annuities upon their entitlement to registration and band membership as a result of *GEIRA*, which came into force in 2011.

[43] The Complainants responded to the December 18, 2018 letter on December 21, 2018, stating their view that the Respondent's reference to the children's entitlement to

[17] *Supra* note 1 at Tab 1.

annuities from 2011, rather than from their respective births, was a threat of further retaliation against the children contrary to section 14.1 of the *Act*. The Complainants' view is that registration under the *Indian Act* has no relation to one's eligibility for Treaty 11 benefits such as treaty annuities.

[44] The Respondent did not call any witnesses to testify with respect to the Treaty Annuities issue.

IV. Analysis

A. Preliminary Issues

(i) The Treaty Annuities Issue is Not Moot

(a) Respondent's Position

[45] The Respondent says the doctrine of mootness applies where the decision of a court will not have the effect of resolving a controversy that affects the rights of the parties. It argues that the Tribunal should not exercise its discretion to determine the treaty annuities issue because the Respondent agreed, in its November 29, 2018 letter, to pay the Complainants' annuities without requiring actual Band membership. It has also consented to an award of $5,000 for any inconvenience or hardship the Complainants may have suffered. As there is no longer a live controversy between the parties, the Respondent claims that the treaty annuities complaint is moot.

(b) Complainants' Position

[46] The Complainants disagree that the issue is moot. They point out that the Respondent similarly changed its position and then argued their complaint was moot in a previous human rights case.

(c) The Law: Mootness

[47] In the Supreme Court of Canada case of *Borowski v. Canada,* the Court said that if, subsequent to the initiation of the proceeding, "events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."[18] Mootness is "an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question."[19] Once a court or tribunal has determined "whether the required tangible and concrete dispute has disappeared and the issues have become academic", it must then decide whether to exercise its discretion to hear the case.[20]

[48] In determining whether to exercise its discretion to consider a particular issue in such circumstances, a court or tribunal should consider the rationale underlying the policy and practice of applying the mootness doctrine. In *Collins v. Abrams et al,*[21] the British Columbia Supreme Court summarized the rationale at paragraph 6:

> (1) A court's competence to resolve legal disputes is rooted in the adversary system, and in the absence of an adversarial context the issues may not be well and fully argued;
>
> (2) Judicial resources should be conserved for where they are needed; and
>
> (3) Courts must remain within their proper law-making function. Pronouncing judgments in the absence of disputes affecting the rights of parties may be viewed as intruding on the sphere of the legislative branch.

[49] In *Beattie v. AANDC* the Respondent changed its positions during the course of the complaint proceedings. It agreed that Ms. Beattie could change her registration under the *Indian Act* and remove her name from the Fort Good Hope Band list, based on her custom adoption. The Respondent then argued that its revised positions

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[18] 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at para.15.
[19] *Ibid*
[20] *Ibid* at para.16.
[21] 2002 BCSC 1774; The case was upheld on appeal by the British Columbia Court of Appeal in *Collins v. Abrams et al,* 2004 BCCA 96 (CanLII).

rendered moot the issue of whether its initial refusal of the Complainant's requests constituted discrimination under s.5 of the *Act.*

[50] Member Lustig disagreed. He stated:

> [88] … If a person voluntarily ceases the conduct that is alleged by a Complainant to be discriminatory prior to a hearing being held into the Complaint, the Complaint can still be found to be substantiated by the Tribunal for the period of time prior to the cessation that the conduct took place, notwithstanding that a remedy may not be imposed. Hence a matter does not become moot simply because the person allegedly carrying on the impugned conduct decides to stop the conduct or because no remedial order might be imposed if the Tribunal makes a finding that the conduct was discriminatory while it was carried on and finds that the Complaint is substantiated.

[51] Member Lustig determined that liability was still a live issue for the period of time before the Respondent changed its positions, and that the issue of both personal and public interest remedies remained to be considered. He also concluded that, as the hearing had already taken place and "the issues fully argued in an adversarial context involving important quasi-constitutional rights, there is no valid argument here in support of saving scarce judicial resources, etc., as per the tests set out for mootness by the case law."[22]

(d) Analysis

[52] I agree with the Tribunal's reasoning at paragraph 88 of *Beattie v. AANDC,* as set out above, and apply it to the present case. Liability is still a live issue in this matter. While the Respondent has again voluntarily ceased the conduct that is alleged to be discriminatory prior to the hearing into this matter, I agree that the Tribunal can consider the time period prior to the cessation of the conduct.

[53] Remedy is also a live issue, despite the Respondent's argument that this case raises no issues of public importance because it does not refer to any individuals beyond the Complainants. In terms of the remedies sought by the Complainants, they indicate in their closing submissions that, while they do not object to the payment of

[22] *Supra* note 4 at para.90.

$5,000 for the “inconvenience or hardship” they experienced, as offered by the Respondent just prior to the hearing, they would request that that amount be paid to each of the four Complainants under s.53(2)(e) of the *Act,* as compensation for pain and suffering. They are also seeking $20,000 for each complainant as compensation for wilful or reckless discrimination under s.53(3) of the *Act*.

[54] While I appreciate that, by offering to pay the Complainants $5,000 for the inconvenience and hardship caused by its delay in determining the treaty annuities issue, the Respondent hoped to avoid the need for a hearing into this issue, the Complainants were not required to accept this money. It was offered only four days before the hearing was scheduled to begin. Remedies are to be considered by the Tribunal on a case by case basis, and are dependent on its factual findings and the applicable law. The offer of money prior to the hearing does not make the matter moot.

[55] As in *Beattie v. AANDC*, the hearing has already taken place. As such, the risk of wasting judicial resources is not in issue.

[56] Finally, it was only after the hearing that the Respondent provided the Complainants with a summary of how much each Complainant would be paid in retroactive annuities. In doing so, it highlighted the fact that the Complainants were requesting annuities for Ms. Bangloy’s children back to their respective births, rather than to 2011, an issue that clearly needs to be addressed.

[57] I am of the view that the live controversy between the parties did not disappear as a result of the Respondent’s pre-hearing letter. As such, the treaty annuities issue is not moot and will be dealt with in this decision.

(ii) The Education Funding Issue Has Already Been Decided by the Federal Court

(a) Respondent’s Position

[58] The Respondent argues that the issue of whether it is responsible, pursuant to Treaty 11, for paying the tuition costs for Ms. Bangloy’s children to attend private

schools outside of the Treaty area has already been decided by the Federal Court in a case involving the same Complainants: *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*.[23]

[59] In *Beattie v. MIAND*, Ms. Beattie argued before the Court that her daughter Nikota's private school tuition, which was incurred outside the Treaty area, should be covered under the "salaries of the teachers" provision of Treaty 11.

[60] The Respondent says the Federal Court considered the context in which Treaty 11 was negotiated, including historical documentary evidence, and concluded that any education benefits conferred by Treaty 11 do not extend beyond the Treaty area. Justice Tremblay-Lamer stated that, by virtue of subsection 35(1) of the *Constitution Act*, 1982, "treaty children" are "constitutionally guaranteed to have access to free education", although the free education, "is confined to the area defined in the treaty".[24]

[61] The Respondent points out that the Complainants are now seeking the same relief from the Tribunal that the Federal Court previously denied. They are asking yet again for the Respondent to pay the tuition for private schools not located in the Treaty area, based upon the "salaries of the teachers" provision of the Treaty.

[62] The Respondent argues that the Federal Court's decision, which was not appealed, is final, and so permitting the education complaint to proceed in a different forum would be contrary to the doctrines of issue estoppel, abuse of process, and collateral attack. In particular, the Respondent says allowing this complaint to proceed would endorse an inappropriate method of challenging the validity, and undermine the finality, of the Federal Court decision, and would risk creating inconsistent interpretations of the scope of the education provision of Treaty 11. As such, it argues, I must dismiss this complaint.

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[23] [1998] 1 F.C. 104, 1997 CanLII 6343 (FC) ["*Beattie v. MIAND*"]
[24] *Ibid* at para.42

(b) Complainants' Position

[63] The Complainants do not respond directly to the Respondent's argument that they are attempting to relitigate the same issue before the Tribunal as was already decided by the Federal Court. Rather, they make various arguments about why Treaty 11 supports their request for education funding.

(c) The Law: Finality Doctrines

[64] This Tribunal in *Todd v. City of Ottawa* recently stated that, "The finality doctrines of collateral attack, issue estoppel and abuse of process by relitigation stem from one of the most basic principles of the common law: that an issue, once determined by a competent court or tribunal, cannot be redetermined except by an appeal or judicial review of the initial decision."[25]

[65] In *British Columbia (Workers' Compensation Board) v. Figliola*, the Supreme Court of Canada noted that, "At their heart, the [finality] doctrines exist to prevent unfairness by preventing 'abuse of the decision-making process' …".[26] The Court set out the principles underlying these doctrines:

- It is in the interests of the public and the parties that the finality of a decision can be relied on;
- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings;
- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature;
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision;

[25] 2017 CHRT 23 ["*Todd*"] at para.36.
[26] [2011] 3 SCR 422, 2011 SCC 52 (CanLII) ["*Figliola*"] at para.34.

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.[27]

[66] In order to dismiss a complaint on the basis of issue estoppel, a decision maker must be satisfied that 3 preconditions are met: 1) the same question has already been decided; 2) the earlier decision was final; and 3) the parties, or their privies, were the same in both proceedings.[28]

[67] The Supreme Court has held that, even where the preconditions for issue estoppel are not strictly met, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as, "judicial economy, consistency, finality and the integrity of the administration of justice".[29]

[68] The Supreme Court has also said that, "the application of the finality doctrines is a highly discretionary exercise, driven by the needs of both substantive and procedural justice."[30] In *Penner v. Niagara (Regional Police Services Board)*, the Supreme Court stated that, "a judicial doctrine developed to serve the ends of justice should not be applied mechanistically to work an injustice".[31]

[69] In order to ensure fairness, a decision-maker is to follow a two-step analysis when deciding whether issue estoppel should be applied in a particular case. The first step requires a determination as to whether the 3 pre-conditions for issue estoppel are met. If so, the decision-maker must then determine as a matter of discretion whether the doctrine should be applied in the specific circumstances of the case.[32]

[70] In *Penner*, the Supreme Court observed that unfairness may arise in 2 different ways when applying the doctrine of issue estoppel. First, the prior process itself may have been unfair. Second, even if the prior proceeding was conducted fairly, it may still

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[27] *Ibid*
[28] *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248 at p. 254; *Figliola*, *supra* note 26 at para.27.
[29] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ["*Toronto (City)*"] at para.37.
[30] *Figliola, supra* note 26 at para.38.
[31] 2013 SCC 19 ["*Penner*"] at para.30.
[32] *Murray v. Canada (Human Rights Commission),* 2014 FC 139 at para.46; *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 ["*Danyluk*"] at para.33.

be unfair to rely on the result of that process to preclude the subsequent claim.[33] This may arise "where there is a significant difference between the purposes, processes or stakes involved in the two proceedings", although the decision-maker must assess such differences while also recognizing the importance of finality in the law.[34]

[71] The Tribunal in Todd noted that the criteria to be considered when determining the fairness of applying issue estoppel in a particular case are not fixed, but may include:

- The purpose of the legislative framework enacted for each proceeding;
- The availability of an appeal;
- The procedural safeguards available to the parties;
- The expertise of the decision makers;
- The circumstances giving rise to the prior proceeding; and
- The potential injustice of applying an estoppel.[35]

[72] In *Toronto (City)*, Justice Arbour stated that the discretionary aspect that applies to prevent issue estoppel from creating an unfair or unjust situation, should equally apply to the doctrine of abuse of process.[36]

(d) Analysis

[73] I will first consider whether I am barred from considering this complaint on the basis of issue estoppel. In order to do so, I must determine whether the previous decision meets the 3 preconditions set out above.

1) Was the same question already decided by the Federal Court?

[74] In *Beattie v. MIAND*, Joyce Beattie argued that Treaty 11's education clause had no necessary connection to the land that was ceded in the Treaty, and so the obligation

[33] *Penner*, supra note 31 at para.39.
[34] *Ibid* at para.42.
[35] *Todd*, *supra* note 25 at para.53; *Danyluk*, *supra* note 32 at paras.68-80.
[36] *Toronto (City)*, *supra* note 29 at para.2.

to pay the salaries of teachers was not expressly made payable at any specific location. The Court disagreed, deciding that the education benefits in Treaty 11 are indeed confined to the Treaty area.

[75] The Complainants are now asking the Tribunal to order as a remedy under the *Act*, that the Respondent pay the children's educational costs pursuant to Treaty 11, even though they were incurred outside of the Treaty area. While the Complainants in this case are arguing that they were discriminated against on the basis of race or national or ethnic origin in the provision of Treaty 11's educational benefits, a key question that the Tribunal would have to decide is whether the Treaty's education clause applies outside of the Treaty area. The Respondent will argue that its *bona fide* justification for not providing the funding requested is that the Treaty education benefit does not apply outside of the Treaty area. The question considered and answered by the Federal Court in *Beattie v. MIAND* is the same one the Tribunal would be required to answer if it agreed to consider this complaint.

2) Was the earlier decision final?

[76] The decision of the Federal Court was not appealed by either party. I was provided with no case law to indicate the Federal Court decision has been overruled. As such, I accept that it is a final decision.

3) Are the parties or their privies the same in both proceedings?

[77] *Blacks Law Dictionary* defines a "privy" as "one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment."

[78] In *Beattie v.MIAND*, Joyce Beattie was the plaintiff, requesting reimbursement by the Respondent for educational costs incurred on behalf of her children. In this human rights proceeding, Ms. Beattie is the Complainant, along with her daughter Ms. Bangloy, requesting reimbursement for costs incurred on behalf of her grandchildren. Although it is Ms. Bangloy who has incurred the private school tuition costs for her children, and who seeks reimbursement in this case, the 2 proceedings involve the same family

asking the same Respondent to provide the same benefit for the same reason, under the auspices of the same authority. I agree that the parties or their privies are the same in both proceedings.

[79] I find that the preconditions for issue estoppel are satisfied. However, even if the strict preconditions of issue estoppel are not satisfied, I am of the view that the doctrine of abuse of process precludes a relitigation of the same issue that has already been decided by the Federal Court. The Tribunal's comments in Todd apply in the present case: "The doctrine of abuse of process is engaged where a party, dissatisfied with the result obtained before one decision maker, seeks to achieve a different result in another forum to the effect of wasted time and resources for the parties and the proper administration of justice".[37] I agree that allowing this complaint to proceed would "violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice."[38]

[80] As I have concluded that both issue estoppel and abuse of process apply in this case, there is no need to consider whether the finality doctrine of collateral attack also applies.

Is it fair to apply the finality doctrines to stop this proceeding?

[81] In making this decision, I must consider whether the prior proceeding was fair and whether it would be unfair to use the results of that proceeding to stop this complaint. In doing so, I must consider whether there are significant differences between the purposes, processes or stakes involved in the 2 proceedings.

[82] The purpose of the Federal Court proceeding was to determine whether the Respondent was required by Treaty 11 to pay the educational costs, including private school tuition, incurred by the Complainants outside of the Treaty territory. The purpose of this human rights proceeding is to determine whether the Respondent has discriminated against the Complainants by not paying, pursuant to Treaty 11, for the children's private school tuition incurred outside the Treaty territory.

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[37] *Todd, supra* note 25 at para.67.
[38] *Toronto(City), supra* note 29 at para. 37.

[83] I have no reason to believe that the Federal Court's proceeding was unfair in any way. Indeed, if the Complainants felt that was the case, they should have availed themselves of the right to appeal the decision, and they did not do so.

[84] There are no significant differences between the 2 proceedings in terms of the purpose, processes or stakes involved. I see no unfairness in applying the doctrines of issue estoppel and abuse of process to stop this complaint from proceeding further, and I therefore dismiss the complaint on this basis.

[85] As I have decided to dismiss the education funding complaint on the basis of issue estoppel and abuse of process, there is no need to discuss the Complainants' arguments about why Treaty 11 does, in fact, support their request for reimbursement of the children's educational costs.

B. Section 5 discrimination

The Law: Establishing discrimination under section 5 of the *Act*

[86] In order to show that they have been discriminated against pursuant to section 5 of the *Act*, a complainant has the burden of establishing what the Supreme Court of Canada refers to as a "*prima facie* case" of discrimination.[39] In doing so, a complainant must prove that:

1) they have a characteristic or characteristics protected from discrimination under the *Act*;

2) they have been denied a service, or adversely impacted in the provision of a service by the respondent; and

3) the protected characteristic was a factor in the adverse impact or denial.[40]

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[39] See, for example, *Ontario Human Rights Commission v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536 ["*O'Malley*"], *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 ["*Moore*"], *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 S.C.R. 789, 2015 SCC 39 ["*Bombardier*"], *Stewart v. Elk Valley Coal Corp.*, [2017] 1 S.C.R. 591, 2017 SCC 30 ["*Elk Valley*"].

[40] *Moore, ibid* at para.33; *Elk Valley, ibid* at para.24; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 *["FNCFCSC"]* at para.22.

[87] The second element of this *prima facie* discrimination test requires the complainant to establish that the respondent is involved in the provision of a service that is customarily available to the general public, as contemplated by section 5 of the *Act*. If the complainant can establish this, they must then demonstrate that they were denied this service or adversely impacted by the respondent in the provision of the service.[41] The Tribunal has previously found that the provision of funds can constitute a service under section 5 of the *Act*.[42]

[88] In order to prove the third element of the *prima facie* test, the complainant must show that there is a connection between the first 2 elements. The protected characteristic need not be the only factor in the adverse impact, and a causal connection is not required. The Tribunal can consider the evidence of all parties to determine whether there is a connection.

[89] As in this case, a respondent can try to refute allegations of *prima facie* discrimination by showing that the alleged discriminatory practice is not in respect of a service customarily available to the general public. A respondent can also present an explanation for the conduct that the complainant says is discriminatory so as to negate the alleged connection between the protected characteristic and the adverse impact. Where a respondent refutes the allegation of discrimination, this explanation must be reasonable, it cannot be a "pretext" — or an excuse — to conceal discrimination.[43]

[90] A *prima facie* case of discrimination must be established on a balance of probabilities, meaning the Tribunal must find that it is more likely than not that the events described by the complainant happened that way. Discriminatory intent on behalf of the respondent is not required to establish *prima facie* discrimination.[44]

[91] If the complainant establishes a *prima facie* case of discrimination, the burden shifts to the respondent to justify its decision or conduct. One way it can do this is by relying on the *bona fide* justification defence under subsections 15(1)(g) and 15(2) of

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[41] *FNCFCSC, ibid* at para.24.
[42] *Ibid* at para.40.
[43] *Moffat v. Davey Cartage Co.(1973) Ltd.,* 2015 CHRT 5 (CanLII) *["Moffat"]* at para.38.
[44] *Elk Valley, supra* note 39 at para.24; *Bombardier, supra* note 39 at para.40.

the *Act*. In doing so it will be required to prove, on a balance of probabilities, that it accommodated the complainant to the point of undue hardship. If the respondent fails to justify the discriminatory conduct, discrimination will be found to have occurred.

(i) Failing to provide Ms. Bangloy with information about how to receive Treaty 11 education funding for her children's private school tuition is not discrimination under section 5 of the *Act*

(a) Complainants' Position

[92] Ms. Bangloy, on her own behalf and on behalf of the children, alleges that the Respondent has differentiated adversely in relation to, and denied them, a service on the basis of their race or national or ethnic origin, contrary to subsections 5(a) and (b) of the *Act*. She argues that the service in question is the provision of information about how to qualify for education funding under Treaty 11.

(b) Respondent's Position

[93] The Respondent argues that disclosing information about how to apply for Treaty 11 education funding is not a "service" as contemplated by section 5 of the *Act*. As such, it says the Complainants have not established *prima facie* discrimination with regard to this allegation.

(c) Analysis

[94] The Tribunal must consider all of the evidence and arguments presented by the parties to determine whether the Complainants have proven on a balance of probabilities each of the 3 elements of the *prima facie* discrimination test.

1) Do the Complainants have a characteristic or characteristics protected from discrimination under the Act?

[95] It is accepted that the Complainants are Aboriginal Persons of Canada pursuant to the *Constitution Act, 1982*, who are entitled to registration under the *Indian Act*. The Complainants share both a common geographic origin, being the territory ceded by

Treaty 11, and descent from a small number of common ancestors who were members of Bands that signed Treaty 11 in 1921.

[96] The Respondent's Deputy Minister agreed in 1993 that Ms. Beattie's and Ms. Bangloy's entitlements under Treaty 11 are linked to their ancestry. I accept that the Complainants' shared ancestry forms part of their race and ethnic or national origin,[45] and agree that they qualify for protection from discrimination under section 3 of the *Act* on these grounds.

2) Have the Complainants been denied a service, or been adversely differentiated against in the provision of a service by the Respondent?

[97] Ms. Bangloy argues that the Respondent discriminated against her by not providing her with the name of a contact person from whom she could request information about how to apply for Treaty 11 education funding for her children.

[98] The Respondent argues that its impugned conduct is not a "service" within the meaning of section 5 of the *Act*. It refers to a Federal Court of Appeal case in which the Court stated that section 5 of the *Act* contemplates "something of benefit being 'held out' as services and 'offered' to the public" in the context of a public relationship.[46] The Respondent says the Court of Appeal expressly rejected the idea that all government actions constitute services for the purpose of section 5.

[99] The Respondent submits that its failure to disclose information about how to receive education funding under Treaty 11 "is not something of benefit held out as a service or offered to the public by the Respondent, and does not become a service simply because the Respondent is a government agency."[47]

[100] The Respondent agrees with the Commission's February 2017 Assessment Report, which concluded that the service at issue in this complaint is not the provision of information about administrative procedures, but rather "education or funding for education-related expenses".[48] At the time of the Commission's Assessment Report, the

[45] See *Tanner v. Gambler First Nation*, 2015 CHRT 19 at paras. 31 and 37.
[46] *Jason Watkin v. Attorney General of Canada*, 2008 FCA 170 at paras.31-32.
[47] Written Argument of the Respondent dated February 11, 2019 at para.115.
[48] *Supra* note 16 at Tab 184.

Complainants were not alleging that they had been denied funding for education-related expenses, but only that they had been denied the name of a contact person to request further information.

[101] The Tribunal has employed a two part analysis when determining whether a respondent's conduct or activity can be considered a "service" under section 5 of the *Act*.

[102] The first part of the analysis involves determining what the "service" is, based on the facts before the Tribunal, by considering the "benefit" or "assistance" being held out. The Tribunal has said, "[i]n this respect, it may be useful to inquire whether the benefit or assistance is the essential nature of the activity".[49]

[103] The second part of the analysis "requires a determination of whether the service creates a public relationship between the service provider and the service user."[50] In doing so, the Tribunal must consider all relevant factors in a contextual manner. The Tribunal has noted that the "public" to which the service is being offered is "defined in relational as opposed to quantitative terms", and may in fact be a very small segment of the general public.[51]

[104] Mr. Walraven testified about the types of educational programs the Respondent funds. I appreciate that the funding and programming are the main benefits provided to the Indigenous people the Respondent serves, and who constitute its "public" for this purpose. However, the Respondent also provides assistance to members of this public by providing information about the funding and programs. While not all government conduct meets the definition of a service under section 5 of the *Act*, it is difficult to agree that answering the questions of an Indigenous person about how to apply for reimbursement under Treaty 11's educational entitlement is not part of the service provided by the Respondent.

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[49] *FNCFSCS*, *supra* note 40 at para.30.
[50] *Ibid*, at para.31.
[51] *Ibid*

[105] The documentary evidence submitted by the parties shows that Ms. Ploughman of the NWT Regional office was in fact trying to find the information requested, or the name of a contact person to assist Ms. Bangloy with her question about where she should send her tuition receipts. Mr. Walraven testified that he did not know why no one ever got back to Ms. Bangloy and he apologized to her for the lack of service provided to her by his department.

[106] Even if the Respondent was of the view that Ms. Bangloy's question itself was unnecessary, because the same issue had already been definitively answered by the Federal Court in a case involving the same Complainants, this does not mean that the Complainants were not trying to access a "service" offered by the Respondent to the public. As such, I accept that Ms. Bangloy was denied a service that is customarily available to the public.

3) Was a protected characteristic a factor in the adverse impact or denial of service?

[107] I do not agree that Ms. Bangloy's, or her children's, race or national or ethnic origin were a factor in the Respondent's failure to provide her with the requested information.

[108] The documentary evidence shows that Ms. Ploughman continued to make efforts to assist Ms. Bangloy with her education funding question for several months, even providing her with a contact person in another regional office, although Ms. Bangloy said this person was unable to help her.

[109] While Mr. Walraven was unable to explain why no one had gotten back to Ms. Bangloy about the tuition receipts, he testified that that the Respondent was of the view that the Federal Court had already settled the matter. The Respondent likely felt there was no need to provide the requested information, as Ms. Bangloy had been one of the subjects of the Federal Court case and so should have known the answer to her question. While the absence of a response from the Respondent could be categorized as poor service, it is not discriminatory. The Complainants have provided no evidence of a connection to Ms. Bangloy's, or her children's, race or national or ethnic origin.

[110] To the extent that the Complainants are suggesting the Respondent required them to be members of a Treaty 11 Band in order to receive education funding,[52] and so by extension to receive information about how to apply for education funding, I must reject this argument. The Complainants have provided no evidence to support their contention that the Respondent linked Band membership with eligibility for Treaty 11 education funding.

[111] The Federal Court has already decided that Treaty 11 education funding cannot be provided outside of the Treaty area. If the Respondent now took the position that the Complainants could actually receive education funding outside of the Treaty area, so long as their names appear on a Treaty 11 Band list, it would be acting contrary to the Federal Court's decision.

[112] As the Complainants have not proven on a balance of probabilities that there was a connection between the adverse treatment or denial of service and their protected characteristics under the *Act*, they have not established a *prima facie* case of discrimination with respect to this allegation. As such, I dismiss this aspect of the complaint.

(ii) Refusing to provide treaty annuities to the Complainants because they were not on a Band list maintained by the Respondent is not discrimination under section 5 of the *Act*

(a) Complainants' Position

[113] The Complainants allege that, by requiring them to be registered on a Band list maintained by the Respondent in order to receive Treaty 11 annuities, the Respondent has differentiated adversely in relation to, and denied them, goods and services on the basis of their race or national or ethnic origin, contrary to subsections 5(a) and (b) of the *Act*.

[52] This position was taken by the Complainants in their closing Written Submissions dated January 7, 2019 at para.11.

(b) Respondent's Position

[114] The Respondent argues that the Complainants have failed to establish a *prima facie* case of discrimination because Band membership is not a distinction, nor comparable to distinctions, based on race or national or ethnic origin. It argues that the complaint should be dismissed.

(c) Analysis

1) Do the Complainants have a characteristic or characteristics protected from discrimination under the Act?

[115] I have already found that the Complainants qualify for protection from discrimination under section 3 of the *Act*, on the basis of their race or national or ethnic origin.

2) Have the Complainants been denied goods or services, or been adversely differentiated against in the provision of goods or service by the Respondent?

[116] It is not disputed that, in administering and providing the $5 annual payment provided for by Treaty 11, the Respondent is engaged in the provision of a service for the purposes of section 5 of the *Act*.

[117] The Tribunal in *Beattie v. AANDC* stated that, "for a complaint to be substantiated under the *CHRA*, the failure to provide the service in a non-discriminatory manner, either through denial thereof or through adverse differentiation, on the basis of a prohibited ground, must be found to have an adverse or negative impact on a person."[53]

[118] The adverse impact on the Complainants is clear. Not only did they not receive the treaty annuities they were entitled to, but they felt it necessary to file another human rights complaint in order to obtain this benefit.

[119] I accept that the requirement, from 2014 to November of 2018, that the Complainants' names appear on a Treaty 11 Band list in order to receive their annuities,

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[53] *Supra* note 4 at para.96.

when the Respondent knew that the Complainants otherwise qualified for these payments, amounted to adverse differentiation in the provision of a service and a denial of service.

3) Was a protected characteristic a factor in the adverse impact or denial?

[120] The Respondent's July 2, 2014 letter in response to Ms. Bangloy's request for treaty annuities says:

> … on your annuity request form you have put the Band name as "Treaty 11". To receive Treaty 11 annuities, it is required that an individual be on the Band List of a Treaty 11 Band. I understand that your name was formerly on the Band List for Fort Good Hope, but that you requested to have your name removed last year. Please advise if you and/or your children have applied to have your names added to the Band List of another Treaty 11 Band. We cannot address your annuity request until we receive this information.[54]

[121] The Complainants consider this Band list requirement to be unnecessary and unlawful. They say that, "Band membership is not a requirement of Treaty 11 or any other law and was found in a previous complaint between the same parties to be a personal choice protected from discrimination by the *CHR Act*. The Respondent's entirely pretextual explanation for its impugned conduct is that it was complying with its internal administrative policy."[55]

[122] The question I must answer is whether the Band list requirement is discriminatory. In order to prove this, the Complainants must show that there is a connection between this requirement and their race or national or ethnic origin. In my view, there is no such connection.

[123] The Complainants are entitled, as a result of their ancestry or their ethnic origin, to be registered with a Treaty 11 Band. They were, in fact, on the Fort Good Hope Band list at one time and, as the Tribunal recognized in *Beattie v. AANDC*, "It is open to the Complainant and her descendants to apply to have their names added to the Gwichya

[54] Exhibit A-4, Agreed Statement of Facts at para.12 and *Supra* note 5 at Tab 135.
[55] *Ibid*

Gwich'in Band List, if they wish. The Complainant has confirmed that she no longer wants this to happen."[56]

[124] Other Indigenous people who are descendants of Treaty 11 signatories, who therefore share the Complainants' race or national or ethnic origin, and who are registered on a Band list of one of the Treaty 11 Bands, would meet the Respondent's condition for receiving annuities. The only reason the Complainants were denied their annuities is because they chose to not be registered on a Band list, not because of their national or ethnic origin or their race. As such, I do not find that their treatment by the Respondent was contrary to section 5 of the *Act*.

[125] As the Complainants have not proven on a balance of probabilities that their race or national or ethnic origin were factors in the adverse treatment they experienced in relation to a service offered by the Respondent, I conclude there was no *prima facie* discrimination with respect to this allegation and therefore dismiss this aspect of the complaint.

Conclusion section 5 discrimination

[126] The complaint under section 5 of the *Act* is dismissed.

C. Section 14.1 retaliation

The Law: Retaliation

[127] Section 14.1 of the *Act* provides that "it is a discriminatory practice for a person against whom a complaint has been filed … or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim."

[128] An act of retaliation is an independent discriminatory practice.[57] Retaliation complaints are founded on the fact that a previous human rights complaint was filed,

[56] *Supra* note 4 at para.43

rather than on a prohibited ground of discrimination.[58] The onus is on the complainant to establish a *prima facie* case of retaliation by showing that:

1) they previously filed a human rights complaint under the *Act*;
2) they experienced adverse treatment following the filing of their complaint from the person they filed the complaint against or anyone acting on their behalf; and
3) the human rights complaint was a factor in the adverse treatment.[59]

[129] With respect to the third element, the Complainant must establish a connection between the filing of a complaint and the adverse treatment following the complaint. If this connection is not demonstrated in a complete and sufficient manner, the complainant will not have met the burden of proof. A causal connection is not required, and the previous complaint need not be the sole reason for the adverse treatment, nor must a complainant show proof that the respondent intended to retaliate.[60]

[130] To prove that a previous human rights complaint was a factor in any adverse treatment a complainant has suffered, the Tribunal may consider any relevant evidence including the reasonableness of the complainant's perception. The requirement that there be a reasonable perception of retaliation provides an objective element to the test and ensures the respondent is not held accountable for "unreasonable anxiety or undue reaction by the complainant".[61]

[131] Respondents may present evidence to refute the allegation of *prima facie* retaliation, although their explanation must be reasonable and not a pretext.[62] A respondent may also present a defence to the allegation of retaliation, for example arguing that an employer should not be found liable for the retaliatory conduct of an employee, as contemplated by section 65 of the *Act*.

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[57] *Gainer v. Canada (Export Development Canada)*, 2006 FC 814 at para.36; *Millbrook First Nation v. Tabor*, 2016 FC 894 ["*Tabor*"] at para.60.
[58] *Tabor, ibid* at para. 62; see also *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian and Northern Affairs),* 2015 CHRT 14 at para.5.
[59] *Dixon v. Sandy Lake First Nation,* 2018 CHRT 18 ["*Dixon*] at para.22 citing the test for *prima facie* discrimination established in *Moore v. British Columbia (Education),* 2012 SCC 61 at para.33.
[60] *Dixon*, *ibid* at paras.23-24 & 26.
[61] *Dixon*, *ibid* at para.25; *Tabor*, *supra* note 57 at para.64.
[62] *Dixon*, *ibid* at para.28.

[132] Since the standard of proof in retaliatory discrimination cases is the ordinary civil standard of the balance of probabilities, "[a]n inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses".[63]

[133] The Complainants have alleged a number of retaliatory actions by the Respondent in relation to both their requests for education funding and annuities under Treaty 11. I will deal with each of these below.

Retaliation relating to education funding under Treaty 11

(i) Failing to provide Ms. Bangloy with information about how to receive Treaty 11 education funding for her children's private school tuition is not retaliation under section 14.1 of the *Act*

(a) Complainants' Position

[134] The Complainants argue that the same conduct that they allege constitutes discrimination under section 5 of the *Act* – the failure to provide them with a contact person or information about where to submit their tuition receipts for reimbursement – also amounts to retaliation for filing a previous complaint against the Respondent, and so is contrary to section 14.1 of the *Act*.

(b) Respondent's Position

[135] The Respondent denies that failing to provide such information to the Complainants was retaliation for filing a previous complaint.

(c) Analysis

[136] The first element of the *prima facie* test for retaliation under section 14.1 of the *Act* is met. The Complainants filed a previous human rights complaint against the same Respondent in 2011. This complaint was decided by the Tribunal on

[63] Béatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at p. 142.

January 10, 2014.[64] The alleged retaliatory conduct took place following the Tribunal's decision in 2014, and continued after the Complainants filed the present human rights complaint in January of 2015.

[137] I accept that the second element — adverse treatment by the same Respondent following the filing of these complaints — is also met, as I have already agreed that the Complainants were denied a service when the Respondent did not provide Ms. Bangloy with information or the name of a contact person as she had requested.

[138] The third element of the test is whether the previous or present complaints were a factor in the adverse treatment. I do not agree that they were.

[139] I do not find the Complainants' perception that the Respondent failed to provide them with information about how to apply for education funding under Treaty 11 because they had filed human rights complaints to be reasonable.

[140] Ms. Ploughman emailed Ms. Bangloy on July 2, 2014 to advise that the Respondent did not provide for the reimbursement of education costs. Simply because Ms. Ploughman's email followed the Tribunal's January 2014 decision in the previous adoption complaint does not provide the connection required for a finding of retaliation. It is more likely that the Respondent failed to provide Ms. Bangloy with information about how to be reimbursed for her children's tuition because it considered the issue of education funding under Treaty 11 to have been finally decided by the Federal Court in 1997, and not because the Complainants had filed either the previous or present human rights complaint.

[141] Nothing in the evidence presented by the Complainants supports a finding of retaliation. I am not satisfied that they have proven on a balance of probabilities that either human rights complaint was a factor in the Respondent's failure to provide them with the requested information. As such, I conclude there was no *prima facie* retaliation with respect to this allegation and dismiss this aspect of the complaint.

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[64] *Beattie v. AANDC, Supra* note 4.

(ii) Refusing to reimburse Ms. Bangloy for the tuition costs she has incurred for her sons to attend private schools in Alberta is not retaliation under section 14.1 of the *Act*

(a) Complainants' Position

[142] The Complainants argue that the Respondent's refusal to reimburse the children's private school tuition costs amounts to retaliation for filing a previous complaint against the Respondent, and so is contrary to section 14.1 of the *Act*.

(b) Respondent's Position

[143] The Respondent says that this issue was already decided by the Federal Court, and so it was under no obligation to pay the children's private school tuition.

(c) Analysis

[144] The first 2 elements of the *prima facie* test are satisfied. I accept that the Complainants experienced adverse treatment, by not receiving the funding they are seeking from the Respondent under Treaty 11's education provision.

[145] To satisfy the third element of the *prima facie* retaliation test, the Complainants must prove on a balance of probabilities that either the 2011 or 2015 human rights complaints were a factor in the Respondent's decision to not pay for the children's schooling.

[146] The Complainants' retaliation argument is based on an allegation that, prior to the filing of the 2011 complaint, "the Respondent's consistent practice at all times since 1982 was to reimburse all tuition costs paid by parents (in lieu of 'salaries of the teachers') for each child attending school."[65] The Complainants also state that, following

[65] Complainants' Written Submissions, *supra* note 52 at para.22.

the release of the decision in *Beattie v. AANDC* in January of 2014, they "requested but were denied the Treaty 11 goods and/or services which they had previously received."[66]

[147] The Complainants provided no evidence that the Respondent has ever reimbursed them for any educational costs pursuant to Treaty 11's "salaries of the teachers" provision. There was no evidence that the Respondent had previously funded the children's private schooling in Alberta or anywhere outside of the Treaty area. Ms. Bangloy's evidence was that the Respondent has never paid for her children to attend private schools in Alberta.

[148] Rather, the evidence provided by the parties shows that the Respondent paid a portion of the tuition fees for Joyce Beattie's children - including Ms. Bangloy - to attend private schools in British Columbia when the Beattie family was residing on a reserve in British Columbia. The Respondent did not pay the full cost of the private school tuition, but only the amount permitted by the Master Tuition Agreement. The documentary evidence also shows that, when the Beatties did not reside on a reserve, they did not qualify for funding from the Respondent for their children's education. The funding that was provided when the Beatties lived on a reserve in British Columbia was provided by the Respondent pursuant to its obligations under the *Indian Act*. The funding was not provided pursuant to Treaty 11's "salaries of the teachers" provision.

[149] The Complainants also argue that they have been denied Treaty 11 education funding since the Tribunal's 2014 decision "based solely on the fact that they are not affiliated with any band." This argument does nothing to support their allegation that they have been denied Treaty 11 education funding because of either their 2011 or 2015 human rights complaints.

[150] Finally, in their reply submissions, the Complainants note that "the parties have been in an adversarial relationship since 2011 that was caused by the Respondent acting unilaterally and entirely in its own interest."[67] This does not mean that every

[66] *Ibid* at para.6.
[67] Complainants' Reply dated February 25, 2019 at para. 24.

subsequent decision that the Complainants disagree with is retaliation under s.14.1 of the *Act*.

[151] I do not agree that either the previous or current human rights complaint has played any role in the refusal to pay for the private schooling of Ms. Bangloy's children. Ms. Bangloy and her children do not reside within Treaty 11 territory and, for this reason, they do not qualify for Treaty 11 education funding. The Respondent was of the view that the Federal Court had decided this same issue in its 1997 decision and I agree that this is the case. The Respondent could not fund the children's private schooling in Alberta because the Complainants were not eligible to receive funding for education offered outside of the Treaty area. I accept that the Federal Court has made the final decision on this issue to date.

[152] The Complainants have not proven on a balance of probabilities that there is a link between the filing of either human rights complaint and the Respondent's failure to provide education funding under Treaty 11 for the children's private school costs incurred outside the Treaty area. As such, I conclude there was no *prima facie* retaliation with respect to this allegation and therefore dismiss this aspect of the complaint.

Retaliation relating to treaty annuities

(i) Refusing to provide treaty annuities to the Complainants because they were not on a band list maintained by the Respondent is retaliation under section 14.1 of the *Act*

(a) Complainants' Position

[153] The Complainants say that, after the Tribunal's decision in *Beattie v. AANDC* was final, "the Complainants subsequently requested but were denied the Treaty 11 goods and/or services which they previously received." They allege the same conduct that constitutes discrimination under section 5 of the *Act* – the requirement that they be registered on a Treaty 11 Band list maintained by the Respondent in order to receive

treaty annuities – amounts to discriminatory retaliation for filing a previous complaint against the Respondent.

(b) Respondent's Position

[154] The Respondent denies that it retaliated against the Complainants by requiring them to be on a Band list in order to receive annuities. Rather, it says it was simply relying on its treaty annuities policy.

[155] The Respondent says that its conduct was neither intended to harm the Complainants as a result of their filing a previous complaint, nor could it reasonably be perceived as retaliation for bringing a previous complaint.

(c) Analysis

[156] I have already concluded that the first element of the *prima facie* test for retaliation under section 14.1 of the *Act* has been met. The Complainants filed complaints against the Respondent in both 2011 and 2015.

[157] I accept that the second element of the test, adverse treatment by the Respondent following the filing of the 2015 complaint, is also met. I have already agreed that the Complainants were denied a service, or treated in an adverse differential manner in the provision of a service, when the Respondent refused their request for treaty annuities for several years, despite knowing that they were eligible to be on a Band list for a Treaty 11 Band. Both the delay in receiving any correspondence from the Respondent about the annuities that they had applied for, and the actual denial of the annuities until November of 2018, had an adverse impact on the Complainants.

[158] The third element of the *prima facie* retaliation test is whether the human rights complaint was a factor in the adverse treatment. The Respondent argues that retaliation under section 14.1 of the *Act* requires either "wilful conduct meant to harm or hurt the person who filed a human rights complaint", or a reasonable perception that the

impugned conduct was in retaliation for bringing a human rights complaint. This reflects 2 approaches that the Tribunal has taken in assessing retaliation under the *Act*.

[159] I do not agree with the approach that requires a finding of "wilful conduct",[68] as this requires reviewing the motivations of the person accused of retaliation. This approach has been interpreted as requiring the complainant to prove that the respondent intended to retaliate against them.[69] Requiring intent to establish retaliation is inconsistent with the established principle that the *Act* is remedial in nature, not punitive, and so the motives or intentions of those who discriminate need not be considered when determining whether a respondent has engaged in a discriminatory practice under the *Act*.

[160] I agree with what the Tribunal often refers to as the Wong[70] approach, which requires a finding that the complainant reasonably perceived the impugned conduct to be in retaliation for the filing of a human rights complaint.[71] Under this approach, "the reasonableness of the complainant's perception must be measured. Respondents should not be held accountable for any unreasonable anxiety or undue reaction of complainants."[72]

[161] The Complainants and Respondent have quite a lengthy history, with the Complainants having filed several human rights complaints and court actions against the Respondent over many years. The Tribunal in *Bressette* noted that, when there is a history of conflict between the parties, it can be difficult to determine whether certain incidents occurred simply as a result of the ongoing conflict, or whether they were linked to the human rights complaint.[73] In approaching such a situation, the Tribunal Member in *Bressette* first determined whether he could accept, on a *prima facie* basis, that the human rights complaint was at least one of the factors influencing the adverse treatment experienced by the complainant. After establishing this was the case, the onus shifted to the respondent to provide a credible explanation for the treatment.

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[68] Followed in *Virk v. Bell Canada*, 2005 CHRT 2
[69] See, for example, *Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29
[70] *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT)
[71] See also *Bressette v. Kettle and Stony Point First Nation Band Council*,2004 CHRT 40 ["*Bressette*"]
[72] *Warman v. Winnicki*, 2006 CHRT 20 at para.115.
[73] *Supra* note 71 at para.52.

[162] In March of 2014, two months after the Tribunal issued its decision in the adoption complaint, the Complainants requested their 2014 annuities, as well as annuities for the children back to their birthdates. In July of 2014, Ms. Ploughman of the NWT Regional Office told the Complainants that they could not be paid annuities because they were not registered on a Band list.

[163] I do not agree that it is reasonable to believe that Ms. Ploughman's July 2014 response to the request for annuities was made in retaliation for the 2011 adoption complaint. It seems reasonable that Ms. Ploughman was simply following the Respondent's policy or practice of requiring Band membership, as had been done in the past, when the Complainants were members of the Fort Good Hope Band.

[164] In November of 2014, Ms. Ploughman emailed the Complainants to say that their annuities applications were being reviewed. The Complainants filed this human rights complaint shortly after that, in January of 2015. After the complaint was filed, the parties proceeded through the Commission's process, then the Tribunal's process. During all of this time, the Respondent did not correspond with the Complainants about their request for annuities.

[165] When the Complainants made another request for annuities in August of 2017, Ms. Ploughman wrote to Sean Sullivan, expressing her view that the Complainants should be provided with a response, which had clearly been lacking for many years (since her November 2014 email saying their applications were under review). She was correct that the lack of response put the Respondent in a bad light. Yet the Respondent still did not correspond with the Complainants about this issue.

[166] The Respondent submits that it did not pay the Complainants' annuities from 2014–2018 because it was relying on its treaty annuities policy. It did so, apparently, until it assessed the Complainants' requests and determined that their situation is similar to the exceptions set out in Chapter 4 of its Treaty Policy Manual. This was first communicated to the Complainants on November 29, 2018, four days prior to the scheduled start of the hearing, by the Respondent's legal counsel.

[167] The Tribunal received no evidence from the Respondent with respect to its change of position. I was not provided with a copy of an actual treaty annuities policy, but only a Treaty Annuity Payments Policy Manual dated 2017. It is unclear if this is the same Policy Manual the Respondent relied upon to deny the Complainants' annuities from 2014-2018. However, the 2017 Policy Manual clearly says the Respondent can exercise discretion when fulfilling its responsibilities and obligations related to the administration of annuity payments.

[168] Chapter 2 of the 2017 Manual says that, "In general, treaty annuity is payable to an individual who is a registered Indian and is a member of a treaty Band (or would be a member if INAC still maintained the membership list for that band)."[74] The Manual notes that there are a number of exceptions to this rule, although these are set out in Chapter 2, and not Chapter 4, of this Policy Manual. The Manual also says that, "Eligible Indians are entitled to receive treaty annuities as of the year they were registered or date of their application for registration or reinstatement."

[169] I was provided with insufficient evidence about what the Respondent was doing with the Complainants' annuities requests during the time period from January 2015 to November of 2018, or when it decided to review them to see if discretion could be exercised in the circumstances.

[170] I note that Mr. Sullivan was to be the Respondent's witness at the hearing into this complaint to "provide evidence of how the respondent administers treaty annuities based on Band membership generally and how the Complainants' requests were processed in this case."[75] The Respondent says that, as "there is already more than sufficient evidence in the record about how the Complainants' request was processed," and there was no longer a live controversy between the parties on the treaty annuities issue, "there was no longer a need for Mr. Sullivan as he no longer had key evidence to present."[76]

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[74] *Supra* note 16 at Tab 183.
[75] Supra note 47 at para.53.
[76] *Ibid*

[171] The Respondent took the position that the annuities issue was moot following its November 29, 2018 letter in which it indicated it would now pay the Complainants their annuities. At the hearing, the Respondent stated that it was not raising mootness as a preliminary issue, but asked that the Tribunal decide this issue it its final decision. The Respondent took a risk by not calling evidence relating to its decision with respect to the Complainants' annuities, knowing the Tribunal could find that the issue was not moot.

[172] I disagree with the Respondent's assertion that there is more than enough evidence in the record about how the Complainants' request was processed. There is in fact very little evidence in the record about this. All the Tribunal has in the way of documentary evidence is the 2017 Treaty Annuities Payment Policy Manual, which was provided without explanation or context. While this document suggests that the Respondent has the discretion to pay treaty annuities to people who are not on Band lists, it offers no information about when or why the decision was made to pay the Complainants just prior to the hearing. This is the type of evidence Mr. Sullivan presumably could have provided.

[173] I must determine, based on all the evidence provided by the parties, whether it is more probable than not that retaliation occurred. I was provided with insufficient evidence to rule out a finding that the filing of the 2015 human rights complaint against the Respondent was at least one of the factors influencing its refusal to pay the Complainants' annuities until 2018.

[174] In this case, I find that the Complainants have established a *prima facie* case of retaliation by the Respondent with respect to the delay in individually assessing their applications and advising them that they could receive annuities even if they were not on a Band list, until the eve of the hearing. Specifically, I agree that the Complainants' perception that they were being retaliated against by the Respondent for filing yet another human rights complaint is reasonable.

[175] I agree that there are likely factors aside from the 2015 human rights complaint that influenced the Respondent's decision to not pay the Complainants' treaty annuities until just prior to the hearing. However, I find that the Respondent has failed to provide a

credible explanation for treating the Complainants in this way. The Respondent did not show that retaliation was not an element that motivated it to adhere strictly to its Band list policy requirement right up until the eve of hearing.

[176] I find that the Complainants' perception that they were retaliated against at least in part because they filed their human rights complaint in January of 2015 is reasonable. The Respondent did not provide sufficient evidence to refute the allegation of *prima facie* retaliation, nor establish a defence to the allegation. As such, I conclude that it is more probable than not that retaliation has occurred.

(ii) Refusing to pay the children's annuities back to their respective births is not retaliation under section 14.1 of the *Act*

[177] The Complainants also allege a threat of further retaliation against the children as a result of the Respondent's December 18, 2018 letter stating that the children would receive retroactive treaty annuities only from 2014, and not from their respective birthdates as requested by the Complainants.

[178] I do not agree that the December 18, 2018 letter is retaliation or a threat of retaliation on the part of the Respondent.

[179] The Respondent's position regarding the date of the children's eligibility for annuities has not changed from the time the Complainants first made their request that the children be paid annuities back to their births. The Respondent has always maintained that the children did not qualify for treaty annuities until they became eligible for registration under the *Indian Act* in 2011, as a result of *GEIRA*.

[180] Ms. Beattie actually sought annuities arrears for the children as a remedy in the previous adoption complaint proceeding. In his 2014 decision, Member Lustig declined to make such an award because it was beyond the scope of the matters at issue in that hearing. However, he did state in the decision that the children were not eligible to

receive Treaty benefits, including annuities, prior to their eligibility for registration under the *Indian Act* in 2011.[77]

[181] I do not find the Complainants' perception that they were refused these benefits in retaliation for filing a human rights complaint to be reasonable. I conclude that neither the 2011 adoption complaint, nor the 2015 complaint, were a factor in the Respondent's refusal to pay the children's annuities back to the years of their respective births. As the Complainants have not established discriminatory retaliation on a balance of probabilities, I dismiss this aspect of the complaint.

(iii) Refusing to enter the Complainants' names on the Loucheux No.6 Band list is not retaliation under section 14.1 of the *Act*

[182] Finally, the Complainants made an allegation in their January 2015 human rights complaint relating to their request to be added to the "historic Treaty 11 Loucheux No.6 Band" list. This was the band that Ms. Beattie's adoptive parents were members of at the time of her adoption. The Respondent refused this request, because the Loucheux Band has changed its name and is now called the Gwichya Gwich'in Band. As such, there is no current list for the Loucheux Band to which their names could be added.

[183] The Complainants take the position that the Tribunal, in its January 2014 decision in respect of the adoption complaint, recognized their right to be added to the Loucheux No.6 Band list. They say that, by refusing to do so, that the Respondent is retaliating against them in relation to the adoption complaint.

[184] It is clear that the Complainants have misinterpreted the Tribunal's 2014 decision. Member Lustig did note that, by the date of the hearing into that complaint, the Respondent had recognized Ms. Beattie's entitlement to be added to the Band list of her custom adoptive parents.[78] However, the Tribunal also stated at paragraph 43 that, "it is open to the Complainant and her descendants to apply to have their names added to the Gwichya Gwich'in Band List, if they wish." It is clear that, in referring to the Band of

[77] *Beattie v. AANDC*, supra note 4 at para.98.
[78] *Ibid* at para.109(ii).

her custom adoptive parents, the Tribunal meant the Gwichya Gwich'in Band, which is the contemporary name for the Loucheux No.6 Band.

[185] Adding the Complainants' names to a Band list that no longer exists is not a "service" offered by the Respondent, pursuant to section 5 of the *Act*. Refusing to add the Complainants' names to such a non-existent list is not retaliation under to section 14.1 of the *Act*.

[186] As I find that the refusal to add the Complainants' names to the Loucheux No.6 Band list is neither discrimination nor retaliation under the *Act*, I dismiss this aspect of the complaint.

Conclusion section 14.1 retaliation

[187] I find that the unexplained delay from January 2015 to November 2018, in responding to the Complainants' request for annuities, and the failure to pay their annuities during this time when it was clearly possible to pay them under an exception to its policy, constitutes retaliation against the Complainants for the filing of a human rights complaint, contrary to section 14.1 of the *Act*.

V. ORDER

[188] Having found that the Respondent engaged in a discriminatory practice under section 14.1 of the *Act*, I may make an order pursuant to subsection 53(2) of the *Act*. The aim of a remedial order under this section is not to punish the Respondent but to eliminate, to the extent possible, the discriminatory effects of the practice.[79] In order to accomplish this through an order, the Tribunal must exercise its remedial discretion on a principled and reasonable basis, considering the causal link between the discriminatory practice and the loss claimed, as established through the particular circumstances of the case and the evidence presented.[80]

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[79] See *Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC) at para.13.
[80] See *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII) at para.37; *Hughes v. Elections Canada,* 2010 CHRT 4 at para.50.

[189] The Complainants say the principal remedies they seek are “restitution for past mistreatment and enforcement of treaty requirements going forward.” They seek an order requiring the Respondent to consult and reconcile with them, pursuant to subsection 53(2)(a) and (b) of the *Act*. They also request payment of all treaty annuities owed to them pursuant to s.53(d), compensation for pain and suffering under s. 53(e), and special compensation under s.53(3).

1. Order for consultation and reconciliation

[190] The Complainants seek what they describe as a “preventative remedy” pursuant to subsections 53(2)(a) and (b) of the *Act*. These sections of the *Act* provide the Tribunal with the authority to order respondents to:

a) …cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future; and

b) …make available to the victim of the discriminatory practice … the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.

[191] Pursuant to these subsections, the Complainants are seeking an order that the Respondent “meaningfully consult and reconcile, if possible, with the Complainants regarding their personal Treaty 11 annuity and education rights, in order to prevent the same or similar discriminatory practices from occurring in the future, as it is constitutionally required to do.”

[192] This complaint is not about the breach of constitutional rights, it is about the breach of statutory human rights. I have found that the Respondent retaliated against the Complainants pursuant to section 14.1 of the *Act*, by refusing to pay their treaty annuities and failing to communicate with them about their annuities from the time of the filing of their human rights complaint in January of 2015, until November of 2018. The order sought by the Complainants is outside of the scope of the Tribunal’s findings with respect to what constitutes the discriminatory practice in this case.

2. Order to pay treaty annuities owing

[193] Under subsection 53(2)(d), the Complainants seek full payment of their treaty annuities and the educational costs for the children to attend private schools in Alberta.

[194] With respect to the treaty annuities, the Respondent agreed prior to the hearing to pay the annuities owing to the Complainants, back to 2014, without requiring them to be members of a Treaty 11 Band. They have also agreed to pay them on an ongoing basis. As such, there is no need for an order in this regard.

[195] As I have dismissed the education funding complaint, no remedy can be ordered. The same is true for the complaint regarding the children's annuities from their births to 2011.

3. Compensation for pain and suffering

[196] Subsection 53(2)(e) of the *Act* allows the Tribunal to award compensation to the victim of the discrimination "for any pain and suffering that the victim experienced as a result of the discriminatory practice", up to an amount of $20,000.

[197] The Complainants note that, in its November 29, 2018 letter, the Respondent proposed to pay $5,000 for any "inconvenience or hardship" the Complainants may have experienced related to the delay in processing their Treaty 11 annuities. The Complainants indicate in their closing submissions that this amount is "apparently intended as 53(2)(e) compensation" relating to the treaty annuities issue.[81] The Complainants say they do not object to this amount, so long as it is paid to each of the four Complainants and is not a deduction from any other remedy.

[198] The Respondent made it clear prior to the hearing that the $5,000 was not an offer to settle the complaint and so is not subject to any form of privilege. At the hearing, legal counsel indicated that the Respondent had conceded that the Complainants qualified for treaty annuities and that it was offering a remedy in the amount of $5,000 in respect of this. He indicated it was the Respondent's view that $5,000 is reasonable and

[81] *Supra* note 52 at para.23.

consistent with prior awards in similar circumstances. I understood from his submissions that the Respondent intended the offer of $5,000 to be compensation for pain and suffering.

[199] In its closing submissions the Respondent does not refute the Complainants' suggestion that the offer of $5,000 was intended as compensation for pain and suffering. While it responds to the Complainants' arguments with respect to remedies under other sections of the *Act*, it takes no position in its closing submissions with respect to the Complainants' request for damages for pain and suffering.

[200] The Tribunal's case law with respect to damages for pain and suffering is clear that there must be evidence that a complainant experienced pain or suffering, and there must be a causal link between the discriminatory practice and the pain and suffering experienced. Such evidence is usually established through a complainant's testimony. For example, in *Kamalatisit v. Sandy Lake First Nation*,[82] a recent case in which the Tribunal ordered the maximum allowable damages of $20,000 for pain and suffering, the Tribunal heard evidence and made findings that the Complainant "felt threatened, bullied, upset, disappointed, afraid and panicked, sick and distraught" in relation to her treatment by the Respondent. The Complainant was forced to leave her home, her family, her community, her job, and ended up living in a women's shelter.

[201] In the present case, the Complainants presented very little evidence about the pain or suffering they experienced as a result of the delay that I have found constitutes the retaliatory discrimination in this case. Ms. Bangloy described her repeated efforts to obtain information from the Respondent about annuities for herself and her children as "fruitless". She also stated: "I was not given any explanation, I was not consulted … there was no reconciliation of my Treaty 11 entitlements." The Complainants argued in their submissions that the impugned conduct had an "adverse effect of deprecating human dignity" and stated that, "no reasonable people wish to live in the past, shackled by archaic prejudices."

[82] 2019 CHRT 20

[202] I accept, from the whole of the evidence, that Ms. Beattie and Ms. Bangloy experienced frustration with the Respondent's silence in response to their request for annuities. The level of their frustration is also evident from their written communications with the Respondent. I also accept that the Complainants' frustration with the delay in providing their annuities could be characterized as pain and suffering, although at the very low end of the scale based on the evidence provided.

[203] While the annuity itself is objectively a very small amount of money, being $5 per year per person, I accept that treaty annuities are representative of the government's promise to the Indigenous peoples of the treaty area, and their descendants, to follow in good faith the terms of the treaty. As Justice Hennessy of the Ontario Court of Justice stated in *Restoule v. Canada (Attorney General)*, the principle of the honour of the Crown, "requires that the Crown act honourably in all of its dealings with the beneficiaries of" the treaties it made with Canada's Indigenous peoples.[83]

[204] In this case, the Respondent eventually did agree to pay the Complainants' annuities. The period during which they were delayed, and that constituted the retaliatory discrimination, lasted from January 2015 to November 2018.

[205] I was provided with no evidence about the impact of the retaliation on the children, or if they are even aware of the issue. I decline to order damages for pain and suffering to the children.

[206] I accept that, for Ms. Beattie and Ms. Bangloy, the refusal of the Respondent to pay them the $5 per year they were entitled to as Indigenous descendants of the original Treaty 11 signatories, was an affront to their dignity constituting pain and suffering and, in my view is worthy of an award of $500 each. While I recognize that this is a very low damages award, it is reflective of the paucity of evidence provided by the Complainants in support of their claim for these damages.

[83] 2018 ONSC 7701 at para.481.

4. Special compensation

[207] Under subsection 53(3) of the *Act*, the Complainants seek damages for willful or reckless discrimination. The maximum amount available for each complainant under this section is $20,000. They argue that such damages should cover 9 years, including a period of time during their previous complaint. They say the Respondent has willfully and recklessly defied constitutionally guaranteed aboriginal and treaty rights and that the "Honour of the Crown requires the aboriginal victims to therefore claim the maximum additional compensation for each of the Complainant/victims for the willful and reckless retaliation by the Respondent."

[208] The Respondent argues that an award under subsection 53(3) should be made only in extraordinary circumstances and that courts have concluded that such an award may only be ordered if the respondent's conduct can be described as intentionally discriminatory or devoid of caution. It argues that its actions cannot be characterized in this way and that there is no evidence that the Respondent "intended and perhaps wanted to discriminate" against the Complainants.

[209] It is clear that intention is not the only criteria the Tribunal can consider in awarding special compensation. If the Tribunal finds that the Respondent "either intended to retaliate against the Complainant or … acted in reckless disregard of the consequences of" its actions, it can award damages under subsection 53(3).[84] In *Canada (Attorney General) v. Johnstone*,[85] at paragraph 155, the Federal Court stated the following with regard to subsection 53(3):

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of willfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[84] See *Warman v. Winnicki, supra* note 72 at para.174.
[85] 2013 FC 113 (CanLII), aff'd 2014 FCA 110 (CanLII)

[210] In determining the appropriate award under this section, the Tribunal must focus on the Respondent's conduct, and not on the effect that the conduct has had on the Complainants.[86]

[211] As with damages for pain and suffering, the Tribunal tends to reserve awards of special compensation in the statutory maximum amount of $20,000 for the very worst cases. Section 14.1 of the *Act* seeks to deter conduct that results in an adverse impact on a complainant because they have filed a human rights complaint. The more egregious the Respondent's conduct, the higher the special compensation should be.

[212] As the time period of the adoption complaint has already been considered in the previous Tribunal decision, and special compensation awarded, I cannot compensate the Complainants again for the same time period. In any event, I have found that the discriminatory retaliation took place after they filed their 2015 complaint, up until November of 2018.

[213] I do not find, based on the evidence and the circumstances of the case, that the Respondent intended to retaliate against the Complainants during this period of time. However, I do find that it acted recklessly, in that its conduct showed disregard or indifference for the consequences of its actions, or in this case its inaction. Again, the annuities represent a promise by the government to the people who signed the Treaty and their descendants. Ensuring that all beneficiaries of the Treaty receive the benefits they are entitled to in a timely fashion is fundamental to upholding this promise.

[214] This is the second time the Respondent has behaved in this way towards the Complainants during a proceeding before this Tribunal. Prior to the last hearing, the Respondent conceded the main issue in the case and then argued it was moot. As in this case, the Tribunal disagreed. The Tribunal in that case heard evidence from the Respondent about the conduct that led to its discriminatory practice and, as a result of that, awarded $5,000 in special compensation. This time the Respondent chose not to call its intended witness, based on its view that the issue was moot.

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[86] *Warman v. Winnicki, supra* note 72 at paras.178 and 180.

[215] In order to determine the appropriate amount of special compensation to order for the Respondent's reckless retaliation in this case, I must consider the gravity and nature of the discriminatory practice.

[216] For nearly 4 years the Respondent says it relied on a policy that excluded the Complainants from receiving their $5 per year. Just prior to the hearing into this complaint, the Respondent was able to find a way to pay them this money, amounting to $5 each for the years 2014, 2015, 2016, 2017 and, by the time of the letter, 2018. This amounts to $25 per complainant, so $100 in total. It is difficult to understand how this matter got to the eve of a hearing, convened at great expense to all parties, over $100.

[217] The Federal Court's words in Johnstone seem apt in this situation and bear repeating: "Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly." *Blacks Law Dictionary* defines "heedless" as including, "the element of disregard of the rights or safety of others. Thoughtless; inconsiderate." The Respondent's treatment of the Complainants in this matter certainly appears to be thoughtless and inconsiderate. The Respondent's offer to pay the Complainants $5,000 for their "inconvenience and hardship" related to the treaty annuities issue further persuades me that it acted with full knowledge that it was not treating them fairly.

[218] However, in evaluating the gravity of the discriminatory practice, I must keep in mind that what I have found to be retaliatory discrimination was in relation to only $5 per year. I also note that I did not find the Respondent's refusal to pay the Complainants' annuities for this period of time to be discrimination under section 5 of the *Act*, whereas the Tribunal in *Beattie v. AANDC* did find the Respondent's conduct to be contrary to s.5. The distinction is relevant in that the Respondent's reckless conduct in this case was not related to who the Complainants are – i.e. to their race or ethnic or national origin – but rather was related, at least in part, to the fact that they filed another human rights complaint.

[219] I appreciate that the *Act* defines retaliation under s.14.1 as a discriminatory practice, the same as a contravention of section 5. A finding that there has been a

contravention of section 14.1 highlights the importance of protecting one's right to file a human rights complaint without fear of retribution. However, this is not one of the worst cases of discriminatory retaliation that the Tribunal has considered, nor is the Respondent's conduct so egregious as to warrant an award of special compensation at the high end of the range.

[220] I agree with the Complainants that each of them is entitled to special damages, as the Respondent's conduct was applied equally to all of them. I award each of the 4 Complainants the sum of $1,500.

5. Interest

[221] The Complainants also seek interest under subsection 53(4) of the *Act* for any amount ordered that is not paid within 30 days of the date of the decision. The Respondent asks that, if interest is ordered, it be given 3 months rather than 30 days to pay, due to the administrative complexity involved in the government processing an order for payment.

[222] I order the Respondent to pay the amounts owing to the Complainants within 3 months of the date of this decision.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
November 1, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2229/5117

Style of Cause: Joyce Beattie and Nikota Bangloy v. Indigenous and Northern Affairs Canada

Decision of the Tribunal Dated: November 1, 2019

Date and Place of Hearing: December 5–7, 2018

Calgary, Alberta

Appearances:

Bruce Beattie, for the Complainants

No one appearing, for the Canadian Human Rights Commission

Nicholas Claridge and Amy Zhao, for the Respondent