CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MAURICE BRESSETTE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

KETTLE AND STONY POINT FIRST NATION BAND COUNCIL

Respondent

REASONS FOR DECISION

MEMBER: Athanasios D. Hadjis

2004 CHRT 40
2004/12/24

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[1] The Complainant, Maurice Bressette, alleges that the Respondent, the Kettle and Stony Point First Nation Band Council, did not hire him because he was not related to the Band's Chief. He claims that this refusal constitutes discrimination on the basis of his family status, in contravention of s. 7 of the *Canadian Human Rights Act*.

[2] The complaint was filed with the Canadian Human Rights Commission (**Commission**) on March 30, 2002. On January 15, 2004, the Tribunal granted the Complainant's motion to amend his complaint to include an additional allegation of retaliation under s. 14.1 of the *Act*. He asserts that he was the victim of numerous incidents of reprisal on the part of the Respondent following the filing of his complaint.

[3] The Complainant acted on his own behalf at the hearing. The Respondent was represented by legal counsel. The **Commission** opted to not appear at the hearing.

I. FACTS

A. Facts Relating to the Section 7 Allegations

[4] The Complainant is a member of the Kettle and Stony Point First Nation Band Council (**Band**). The Band's reserve is located northeast of Sarnia, Ontario. Many members of this community have the same family names although they are only distantly related to each other, if at all. In the case at hand, the Complainant and the Chief, Tom Bressette, bear identical last names but they are not related to one another.

[5] The Complainant holds a Certificate from Lambton College's Human Services Foundation Program, which he completed in 1997. As part of his training, the Complainant was assigned to work within the Band's social services department for about six months. His functions included assisting the Band's social services administrator, performing clerical duties, and meeting with the department's clients.

[6] In April 2000, the Complainant followed up his certificate with a Diploma from the same college in its Social Service Worker Program. The training for this program also provided for a six-month co-operative work assignment, which he completed within the Band. The Complainant was posted to the Family and Community Development Program operating within the Band's health centre. His duties included making observations regarding the centre's clients, preparing their case files, and providing them with referrals. In addition, he helped set up a drop-in centre for people with substance abuse problems.

[7] In October 2000, the Band hired the Complainant as a casual employee assigned to work within the Children's and Family Services Program. He assisted in the preparation of case files and in the organization of events such as Christmas festivities, community dinners and fundraising activities. He joined the Band's youth worker on home visits to children who were on supervised care with family members. He also occasionally accompanied the program's workers when they were required to attend court hearings. Whenever time allowed, the Complainant took the opportunity to review some of the material available at the office regarding Ontario's *Child and Family Services Act*. His term was scheduled to conclude at the end of December 2000 but it was renewed for two more months. A second renewal was not offered and his employment came to a close at the end of February 2001.

[8] In July 2001, the Respondent announced a competition for the full-time position of "family caseworker", under the auspices of the Children's and Family Services Program. The job's duties included the development of an individualized casework plan to assist children and families in receipt of family support services that are delivered in the home. The successful applicant was required to have a good familiarity with the culture and attitudes of native people, as well as knowledge and experience in administrative procedures and report writing. Excellent interpersonal and communication skills were also called for, in addition to an understanding of all applicable legislation. The successful candidate had to possess a valid driver's licence and a vehicle. All applicants were required to provide criminal reference checks.

[9] The Complainant sent in his letter of application for the position on July 20, 2001. He was one of five candidates who were invited shortly thereafter to an interview conducted by Laura Wilde (a Band elder), Sharon Henry (the coordinator of the Children's and Family Services Program) and Robert Bressette (a member of the Band Council). The interviewers were provided with a set of questions and possible answers, which had been prepared in advance. The candidates were asked to explain, amongst other things, the level of their involvement within the community, their opinion on the role of the Children's & Family Services Program in the community, and the obligation of a family caseworker in law to report child abuse.

[10] The Complainant was not given any news about the outcome of the competition for several months following the interview. In November 2001, Stan Sabourin, the Band administrator at the time, told the Complainant that the Band's Finance Committee and the Council were still dealing with the matter. In February 2002, the Complainant finally learned that he had not been selected. Some weeks later, he came to know that Eva Bressette, Chief Tom Bressette's sister, had been transferred internally into the position.

[11] Eva Bressette had worked for the Band since 1994. Most recently, she had been officially employed as the Band Representative. Her duties consisted of representing the Band's interests in child welfare proceedings before the courts. Her office was located within the Children's & Family Services Building in which the Complainant had also worked as a casual employee.

[12] The Complainant believed that Ms. Bressette lacked the proper qualifications for the position. He found out, for instance, that at the time of her transfer, Ms. Bressette's driver's licence had been suspended and that she did not possess a vehicle. Yet, according to the statement of qualifications for the position, both were required.

[13] The Complainant suspected that Ms. Bressette was hired because she was the Chief's sister, prompting him to file the complaint that is before this Tribunal. It appears that when the Complainant signed his complaint, he was of the belief that Ms. Bressette had participated in the same competition. However, the evidence at the hearing revealed that this was not the case - she had not applied for the position in connection with this competition.

[14] Of those individuals who had in fact applied, five were screened into the interview phase of assessment, including the Complainant. The interview panel ultimately decided to recommend Deborah Herman as its first choice to the Band Council, and Dorothy French as an alternate. Neither candidate was related to Chief Bressette nor, for that matter, to any of the interview panel members. When the panel's recommendation came before the Band Council some time later, however, it was rejected. The Band Council determined that neither Ms. Herman nor Ms. French possessed the requisite background and qualifications for the caseworker position. As a result, the post remained vacant.

[15] During the same period, the Band's Finance Committee realized that some serious problems had developed regarding the Band's finances. The Band was facing a fairly large accumulated deficit combined with a significant diminishment in its cash flow. The Finance Committee sought to develop a deficit reduction strategy that would at the same time eliminate the cash flow problem. It was in the context of dealing with this financial predicament that Mr. Sabourin

raised the possibility of transferring employees internally to maximize the utilization of available government funding.

[16] He had observed that the funding for the Band Representative's position came from the Department of Indian and Northern Affairs Canada and was intended to compensate a workload of up to 20 hours per week. Ms. Bressette was in fact working well beyond this level. Aside from her Band Representative duties, which themselves exceeded 20 hours per week, she performed several tasks within the Children's and Family Services Department, including many that were ordinarily executed by a caseworker, for which she was being paid from the Band's general funds. The Band had also engaged the full-time services of in-house general counsel, Jonathon George. He was being paid from the Band's general funds as well. Meanwhile, the funding from the Ontario Government for the family caseworker's position was being left untapped due to the job's ongoing vacancy.

[17] Typically, both Mr. George and Ms. Bressette were in attendance at all court proceedings relating to child and family services, each in their respective capacities as Band counsel and Band Representative. Mr. Sabourin proposed that Mr. George assume both functions. A portion of Mr. George's salary as in-house legal counsel would thus be paid from the Federal Government's funding of the Band Representative's position. Ms. Bressette, in turn, would be transferred internally to the vacant caseworker's post. In this way, her entire full-time salary would be paid from the provincial funding scheme. Her work would include many of the functions that she had already been performing, for which she was previously being paid from the Band's own funds, as well as any additional tasks arising from the formal caseworker's position. Thus, the Band could maintain the services of in-house legal counsel and a Band Representative, while gaining the services of a family caseworker and reducing overall spending from its general funds.

[18] The Band's Finance Committee agreed with the recommendation when the matter came before it at a meeting held on February 6, 2002. The Complainant raised some concerns at the hearing about this Finance Committee meeting. Chief Bressette was not formally a member of this committee. However, the minutes document his arrival just after the meeting was called to order and the agenda approved. It is noted that Chief Bressette provided the committee with an update on several matters. There is no specific mention of his having left the session prior to the question of his sister's internal transfer coming up for discussion later that evening. The Complainant contends that the Chief remained present and influenced the decision taken by the Committee. He also points out that the Committee may have lacked quorum when the decision regarding the caseworker position was taken.

[19] The Finance Committee's recommendation came before a meeting of the Band Council on March 21, 2002. The Band Council approved the transfer, effective the same day, the minutes noting that the position was "budgeted for". Chief Bressette was not present at this session as he was "away on business". In accordance with the Band's decision, Ms. Bressette assumed the functions of the family caseworker position and Mr. George took over her duties as Band Representative.

B. Facts Relating to the Allegation of Retaliation (s. 14.1 of the *Act*)

[20] The Complainant filed his human rights complaint on March 30, 2002. In June of the same year, he was elected as a member of the Band Council. He alleges that since his election, he has been singled out and treated in a differential manner by the Band Council, and Chief Bressette in particular, in retaliation for his having filed the human rights complaint.

[21] On July 8, 2002, the Band Council conducted its first meeting following the election. Councillors were required to take an oath of confidentiality according to which they undertook to not disclose any information gained by reason of their official duties. The Complainant declined to take his oath claiming that he wanted to study its terms and consider its implications before doing so. He eventually swore his oath one month later. The Complainant claims that his initial refusal provoked a negative reaction from the Chief during the meeting. In criticizing the Complainant, Chief Bressette berated him for having brought a "lawsuit" against his sister, Eva Bressette. An argument ensued in public until the Chief decided to call an *in camera* session, during which he continued accusing the Complainant of "bringing lawsuits" against the Band. It is important to mention here that at the time, there existed an outstanding complaint filed by the Complainant's spouse against the Band under the *Canada Labour Code* regarding her employment as a teacher in the Band's school. Beginning in mid-2001, the Complainant had sent numerous letters of complaint to the Band Council regarding her claim, and he had circulated several notices within the community criticizing the Band about this matter.

[22] The Complainant takes issue with the criticism he faced for having initially resisted taking the oath of confidentiality. Another Band Council member, Ron George, had still not taken his oath by the time he testified at the hearing into this complaint, in April 2004. Mr. George explained that his frequent business travel resulted in his being absent on the occasions when the Justice of the Peace was available to administer the oath. Nevertheless, it is common ground that Mr. George has never been criticized for having failed to take his oath and he has been allowed to participate in *in camera* sessions of Council meetings.

[23] In September 2002, the Band Council held a post-election orientation workshop during which councillors identified the committees in which they would prefer to participate. The Complainant and two other councillors requested membership on the Finance and Personnel Committee. At the next Band Council meeting, however, the Complainant was removed from the list and only the other two individuals were retained. The Complainant contends that the removal was made in retaliation for his having filed his human rights complaint against the Band. On the other hand, Lorraine George testified that only two councillors could be designated to sit on this committee, according to the committee's terms of reference. The other two nominees were chosen because of their prior experience on the committee. Ms. George maintained that the Complainant's human rights complaint against the Band had no bearing whatsoever on Council's decision.

[24] The Complainant alleges that in February 2003, he was unjustifiably denied a copy of the "Ron Commons Report", a study commissioned by Council into the activities of the Band's board of education. Council took the position that the Complainant could not view the document because it contained confidential information about the Band's position regarding his spouse's *Canada Labour Code* claim. The Complainant objected to this stance arguing that as he had by then taken his oath of confidentiality, he could be entrusted with the information contained in the document. The Band Council maintained its position and the document was never communicated to the Complainant.

[25] During the Band Council meeting of June 28, 2003, an *in camera* session was called to discuss the Complainant's human rights complaint. He was asked to step out of the meeting for reasons of conflict of interest, and he willingly complied. However, he objected to the fact that Chief Bressette and several other relatives of Eva Bressette were allowed to remain. The Complainant contends that since his complaint centres around Ms. Bressette's appointment, all of her relatives sitting on the Band Council were in conflict of interest and should have been asked to withdraw from the room, not just he.

[26] The Complainant invokes a series of events, which commenced at the Band Council meeting of November 24, 2003, as additional indicia of the retaliatory treatment to which he was being subjected. Shortly after the meeting was called to order, Chief Bressette brought forth an issue regarding the confidentiality of some Council proceedings. He explained that certain information that had come before Council in confidence had somehow been released to persons outside Council. It was clear that Chief Bressette was pointing to the Complainant as being the source of the leak. The Chief then left the meeting room to allow debate on the matter to occur. In the ensuing discussion, the Complainant engaged in what the minutes describe as a "belligerent" exchange with other Councillors, to the point that the Chairperson advised him that if he did not immediately correct his behaviour, the police would be called to escort him out of the room. Things

apparently calmed down thereafter and Chief Bressette returned to the meeting. The minutes record that after some further discussion, all parties agreed (including the Complainant and Chief Bressette) that an independent inquiry, headed possibly by the local Justice of the Peace, be established to look into the charges.

[27] Council apparently also decided at this time to arrange for a special meeting in the following days to discuss how the inquiry would be conducted. According to Faye Jackson, who recorded the minutes, and Lorraine George, the Band Administrator, it was understood by all that the Complainant and Chief Bressette would not be invited to this organizational meeting, although no mention of this was entered in the minutes. The Complainant denies ever having agreed to not being present. In any event, Ms. George set November 26th as the date for this second meeting, to which Ms. Jackson called and invited all of the Councillors except the Complainant. The Chief was telephoned and informed of the date of the meeting but he was told that he was not to attend. The Complainant did not receive a similar call and he only learned of the meeting from other sources. He was incensed at not being invited and presented himself at the November 26th meeting nonetheless. The minutes record that he "showed up with angry feelings" at not having been invited, but that Band Council decided at this point to let him sit in on the meeting. The Band Council later formally apologized to both Chief Bressette and the Complainant for not having properly informed them that the meeting was to take place without their presence.

[28] One of the conclusions reached during the November 26th meeting, according to the minutes, was that Council would no longer tolerate listening to the "discord" between Chief Bressette and the Complainant, and that attempts should be made to resolve the conflict. The Complainant contends that Council mistreated him over the course of these two late-November meetings and that this mistreatment came about at least in part because of his human rights complaint.

[29] On November 27th, six Councillors signed a letter addressed to the Complainant informing him of their disapproval of his conduct, noting specifically certain comments made by him about Chief Bressette and another Council member during the November 24th meeting.

[30] In early December 2003, the Band Council released an open notice to the community. The communiqué was said to be in answer to a letter and a bulletin that had recently been distributed throughout the community, criticizing Council for its secrecy regarding two pending legal actions against the Band, including one that had been taken by the Complainant's brother, Miles Bressette. The Band Council explained in its reply notice that details about both claims were being kept confidential so as not to prejudice the Band's position. However, the document also stated that "Maurice Bressette, who is an elected member of

Council and who authored at least one of the referenced letters released to the community, also has a Human Rights Claim against the First Nation". The notice went on to say that this fact, together with the Complainant's ongoing interest in obtaining more details about the other legal claims against the Band, were hampering the Council's ability to conduct business in an "open, transparent manner". The Complainant claims that this charge was made in retaliation to his human rights complaint.

[31] The Complainant alleges other incidents of differential and retaliatory treatment on account of his human rights complaint. At the same November 24th Band Council meeting referred to above, a motion was passed designating him and Peter B. Cloud as delegates to the Southern First Nations Secretariat's Annual General Assembly to be held a few days later in London, Ontario. Yet, in a follow-up letter sent to the Secretariat by the Band Council's Executive Assistant, Faye Jackson, the Complainant is not identified as a representative to the General Assembly, his name having been replaced by that of another councillor. Ms. Jackson testified that while she had no specific recollection of how this change came about, ordinarily Council resolutions could only be modified in either of two ways: by a subsequent resolution, which had not occurred in the present instance, or as a result of a specific direction from the Chief.

[32] On March 11, 2004, the Band Council convened a special "Task Force" meeting to deal with certain comments made to the media by a councillor regarding an important community issue. It appears that all but two members of Council were invited to this meeting - Ron George and the Complainant. Ms. Jackson testified that she would have called Mr. George but did not do so because she knew he was away on business. Thus, it was only the Complainant who was not specifically invited. He contends that he was again being singled out due to his having filed a human rights complaint against the Band. For her part, Ms. Jackson explained that the decision not to call the Complainant was hers alone. Chief Bressette had simply instructed her to notify all "senior" Council members about this meeting. Since the Complainant was in his initial term as a councillor, having been first elected in 2002, she did not include him in this list. However, another councillor, Maynard (Sam) D. George, who was also not a sitting member of Council when he was elected in 2002, was invited. Ms. Jackson testified that what distinguished Mr. George from the Complainant was that he had served on Council in a previous term several years prior and as such, she perceived him as being a "senior" member.

II. LEGAL FRAMEWORK

[33] It is a discriminatory practice under s. 7 of the *Act* to refuse to employ an individual on a prohibited ground of discrimination. For the purposes of the *Act*, a

person's family status constitutes a prohibited ground of discrimination (s. 3). It is also a discriminatory practice for a person against whom a complaint has been filed to retaliate or threaten retaliation against the complainant (s. 14.1).

[34] The burden of proof is on a complainant to establish a "*prima facie* case" of discrimination - in other words, a case at first glance. According to the Supreme Court of Canada, in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28, a *prima facie* case in this context is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. If a reasonable explanation is given, it is up to the complainant to demonstrate that the explanation is merely a pretext for discrimination (see *Basi v. Canadian National Railway Company (No. 1)* (1988), 9 C.H.R.R. D/5029 at para. 38474 (C.H.R.T.); *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at paras. 17-23).

[35] The Federal Court of Appeal noted, in *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para. 7, that discriminatory considerations need not be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the employer's decision.

[36] In relation to employment, two tests have emerged to assist a tribunal in the determination of whether a *prima facie* case of discrimination has been established. The first was articulated in the case of *Shakes v. Rex Pak Ltd.*, (1981), 3 C.H.R.R. D/1001 at para. 8918 (Ont. Bd. Inq.). The Ontario Board of Inquiry held that a *prima facie* case could be established by proving:

a) that the complainant was qualified for the particular employment;

b) that the complainant was not hired; and

c) that someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position.

[37] In *Israeli v. Canadian Human Rights Commission*, ((1983), 4 C.H.R.R. D/1616 at 1618 (C.H.R.T.), aff'd (1984), 5 C.H.R.R. D/2147 (C.H.R.T.- Rev. Trib.)), the Canadian Human Rights Tribunal developed a second test to address situations where the complainant is qualified but is not hired, and the employer then continues to look for a suitable candidate. In such cases, a *prima facie* case may be established by demonstrating:

a) that the complainant belongs to one of the designated groups under the *Act*;

b) that the complainant applied and was qualified for a job that the employer wished to fill;

c) that, although qualified, the complainant was rejected; and

d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications.

[38] While the *Shakes* and *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case (see *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 at para. 161 (C.H.R.T.), aff'd [2000] F.C.J. No. 417 (F.C.T.D.) (QL); *Premakumar v. Air Canada*, [2002] C.H.R.D. at para 77 (C.H.R.T.) (QL)). The circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate.

III. ANALYSIS

A. Section 7 complaint

(i) *Prima facie* case

[39] Depending on one's interpretation of the facts in this case, either of the above noted tests might apply. On the one hand, based on the description set out in the complaint, the *Shakes* test would seem appropriate. The Complainant claims that he was qualified for the position, that he was not hired and that Eva Bressette, the Chief's sister, obtained the position even though she was no better qualified, if not entirely lacking in some of the qualifications required for the job.

[40] On the other hand, the evidence is that no one was hired into the position at the close of the competition process. The candidates recommended by the interview panel to Band Council (Deborah Herman and Dorothy French) were not hired because they were not deemed to be fully qualified. The position remained vacant for a time, until the decision was made to hire Eva Bressette, who had not participated in the initial competition. It can thus be said that the employer continued to seek applicants, as contemplated by the *Israeli* test.

[41] I am not persuaded that the Complainant has made out a *prima facie* case of discrimination under either test. Both approaches require the Complainant to demonstrate that *he* was qualified for the family caseworker position. The evidence indicates that he was not.

[42] The Complainant alleged in his complaint that he met all of the posted requirements of the position. It is true that he apparently satisfied all the necessary criteria to be screened into the interview stage of the assessment process. After interviewing him, however, the interview panel determined that he was not sufficiently qualified to justify referring his candidacy to the Band Council. As events would unfold, even the two candidates whose names were put forward were ultimately deemed unqualified by Council. No evidence was introduced to indicate that the panel's decision was biased or influenced by Chief Bressette, nor that either of the candidates recommended ahead of him were related to the Chief.

[43] If one were even to assume that the Complainant was qualified for the job, the decision to not hire him was not made by the Respondent. It was made by the interview panel, a decision that, as I just stated, was not affected or influenced by the Complainant's family status. It cannot be said that someone "lacking the distinguishing feature" was selected instead of the Complainant, for in fact both of the recommended candidates, Deborah Herman and Dorothy French, possessed the same distinguishing feature as the Complainant - they were not related to Chief Bressette.

[44] Even when the *Shakes/Israeli* tests are not relied upon, I am not persuaded that a *prima facie* case of discrimination on the basis of the Complainant's family status can be made out. Quite frankly, there is no evidence to support, even at first glance, the contention that the Complainant was discriminated against. The Band Council appointed Eva Bressette months after the interview panel determined that the Complainant's candidacy was simply not strong enough to even forward his name to Band Council for consideration. Indeed, if the decision to appoint Ms. Bressette was in any way influenced by her relationship to the Chief, the appropriate persons to file a complaint would have been Deborah Herman or Dorothy French, for it was their candidacies that were rejected by the Band Council, not the Complainant's.

[45] Were I to have concluded that the Complainant had made out a *prima facie* case, his complaint would still not be substantiated. Transfering Eva Bressette into the then still vacant caseworker position was a sound financial and human resource management decision. The explanation provided was reasonable and no evidence was tendered to bring that into doubt.

[46] I do not find the question raised by the Complaint about Ms. Bressette's qualifications (namely, her failure to possess a vehicle and a valid driver's licence

at the time of her transfer) to be indicative of a pretextual explanation. The evidence is that existing employees who held valid licences when they were first hired were not asked to show proof that they had maintained their licences thereafter, it was simply assumed. Only new employees were required to show proof thereof. Lorraine George, the Band Administrator, testified that as soon as she learned of Ms. Bressette's lapsed licence, in November 2002, the employee was instructed to rectify the situation forthwith, failing which disciplinary measures would be taken. Ms. Bressette complied with the order immediately and produced evidence of her renewed licence to the employer. As for the question of the vehicle, it appears that on the occasions when Ms. Bressette was required to travel outside the office, she had made arrangements with other employees for transportation. In other words, she was able to fulfill all of her employment duties despite her suspended licence and lack of a personal vehicle. In any event, it appears that she has since acquired a vehicle of her own. Neither of these issues have convinced me that the explanation given for opting to transfer Ms. Bressette into the caseworker position was pretextual.

[47] For all these reasons, I find that the s. 7 portion of the complaint is not substantiated.

B. Section 14.1 complaint

[48] Section 14.1 of the *Act* makes it a discriminatory practice for a person against whom a human rights complaint has been filed to retaliate or threaten retaliation against the person who filed the complaint. The parties did not refer me to any authorities specifically related to this issue. The matter was, however, dealt with at length by the Canadian Human Rights Tribunal in the case of *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No. 11 at paras. 213-229 (QL). The Tribunal stated that s. 14.1 should not be interpreted as requiring a complainant to prove an intention to retaliate, nor should the provision be viewed as different in operation from those sections in the *Act* that confer rights. The Tribunal noted that this is in keeping with the Supreme Court's statement in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, that the *Act* is remedial in nature, not punitive, and that therefore, the motives or intention of those who discriminate are not central to the concerns of the *Act*.

[49] The decision in *Wong* is consistent with the conclusions of the Ontario Board of Inquiry in *Entrop v. Imperial Oil Ltd. (No. 7)*, (1995) 23 C.H.R.R. D/213, regarding a similarly worded provision prohibiting reprisals under Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19. The Board held that even if a complainant *reasonably perceived* the impugned conduct by the respondent to be in retaliation to the human rights complaint, this could also amount to retaliation, quite apart from any proven intention of the respondent. However, as noted in *Wong*, 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.

[50] In the present case, I have determined that at least some of the incidents raised by the Complainant were retaliatory and prohibited under s. 14.1 of the *Act*.

[51] There is no doubt that there exists a long-standing animosity between the Complainant and his family on the one hand, and the Chief and Council on the other. The Complainant's spouse had filed an employment-related complaint that had put her at odds with Council, which had still not been resolved when the Complainant was elected to Council. The Complainant's brother had also been in litigation with the Band. The Complainant had advocated on their behalf within the community in a vocal and, at least in the eyes of the Chief and some councillors, abrasive manner. Politically, the Complainant stood unquestionably in opposition to the Chief and other members of Council.

[52] In this context, it can be difficult to discern whether certain incidents regarding the Complainant arose simply as a result of this ongoing conflict, or whether they were linked to his human rights complaint. Even so, I am prepared to accept that a *prima facie* case of retaliation was established in relation to each occasion on which the Complainant was treated differently than the other councillors. Without any explanation, it would be reasonable to perceive the human rights complaint as at least one of the factors in the differential treatment.

[53] The Respondent provided several explanations, most of which were rooted in the acrimony and political disagreements that prevailed between the Complainant and the Chief. For instance, the Band contends that the issues raised relating to the meetings of November 24 and 26, 2003, in Council chambers, were of the Complainant's own doing, namely, the release by him of confidential information and his "belligerent" attitude during the meeting. This explanation is consistent with the evidence of several witnesses who were present, some of whom later wrote him a letter expressing their disapproval of his conduct. In fact, even members of the Band Council's staff found it necessary, on December 3, 2003, to file a report about the Complainant's aggressive behaviour, alleging in particular that he had been very confrontational when attending the Band's offices.

[54] In all of the circumstances, I do not believe that the Complainant's human rights complaint was a factor in his not being invited to the November 26th follow-up meeting. It is significant that the Chief was not invited either. I am convinced that there was some misunderstanding regarding who was to be present at the second meeting, a misunderstanding for which the Band Council ultimately apologized to both the Complainant and Chief Bressette.

[55] I am equally not persuaded that retaliation was a factor in denying the Complainant access to the "Ron Commons Report". Whether or not he had taken his oath of confidentiality, I find it perfectly reasonable for Council to have felt it inappropriate for him to be made aware of Band strategy regarding its pending litigation against his own spouse. Similarly, I find the Respondent's explanation for not excluding the Chief from the June 28, 2003, *in camera* meeting that dealt with the Complainant's human rights complaint, to be reasonable. The complaint named the Band Council as Respondent, not the Chief. Although he was identified at the source of the alleged discrimination, it seems logical and fair for the Respondent to be able to consult with him about the allegations. After all, the Band Council was not acting as a neutral arbitrator in the matter, it was a named respondent to the complaint and it had no duty to deal at arm's length with both the Complainant and the Chief. I see no reason to consider any of these explanations as mere pretexts for otherwise discriminatory conduct.

[56] I also accept as reasonable and not pretextual the explanation given regarding the allegedly disparate treatment afforded to Ron George and the Complainant, regarding the oath of confidentiality. There is a clear and justifiable distinction to be drawn between the two councillors. The Complainant initially refused to take the oath outright, whereas Mr. George was simply unavailable to take the oath. The respective situations are therefore quite different.

[57] I also see no reason to dismiss Lorraine George's explanation regarding the composition of the Finance and Personnel Committee. It was perfectly reasonable for Council to appoint councillors who were more experienced than the Complainant to sit on one of its most important committees.

[58] This all having been said, there were other alleged incidents of retaliation where I am not convinced of the reasonableness of the explanations advanced by the Respondent. At the first Council meeting of the new session, held on July 8, 2002, Chief Bressette's concern regarding the Complainant's failure to swear an oath of confidentiality may have been well founded. But, rather than deal exclusively with this problem, he reacted by also singling out the Complainant for having filed a human rights complaint against the Band. No evidence was adduced to contradict the Complainant's version of events at this first meeting. The notice that the Band Council circulated in December 2003 raises a similar issue. Council was clearly upset with the letter and bulletin that had just been distributed throughout the community, criticizing its activities. I am satisfied on the evidence that the Complainant was likely involved in the preparation and distribution of at least one of these documents. A reply by Band Council was certainly justified, but Council chose to go beyond merely setting out its position on the questions raised. It asserted that the reason why Council was no longer able to function in an "open" manner was in part because the Complainant had filed a human rights complaint - in effect, putting the blame on his shoulders, merely because he had exercised his right to file a complaint under the *Act*.

[59] It is reasonable to perceive such differential treatment as being in retaliation for having filed a human rights complaint. Complainants who find themselves singled out in this manner may develop an unwillingness to proceed with their complaints. This is precisely the mischief that s. 14.1 seeks to cure or prevent. It is important for complainants to remain confident that they can exercise and enforce their human rights without fear of suffering any prejudicial consequences thereafter.

[60] At roughly the same time that Council was publishing these remarks about the Complainant, his designation as a delegate to the Southern First Nations Secretariat's Annual General Assembly was mysteriously revoked. The Respondent provided no explanation, but the clear implication from Ms. Jackson's testimony was that this reversal could only have come about through some intervention by the Chief. When the Task Force meeting was convened about four months later, in March 2004, the Complainant was the only councillor not invited. The explanation given was that the meeting was organized for "senior" Council members only, and it was Ms. Jackson who determined which members met this criterion. I do not doubt that she followed these instructions dutifully and in good faith. Indeed, her assessment that the Complainant was effectively the only non-senior member appears sound. It is precisely because of this fact that one may wonder whether the instructions provided to her were intended to have the effect of excluding the Complainant. In any event, whether or not such intent actually existed, a reasonable person would perceive this exclusion as well as the decision to revoke his delegate status as forms of reprisal against him. The reprisals may be linked to the many conflicts that existed between the Complainant and the Chief and Council, but one of those disagreements related to the filing of his human rights complaint. In light of the other comments made by the Chief and Band Council with regard to the complaint, it would be reasonable to perceive that the pending human rights claim was at least one of the factors in these particular acts of retaliation.

[61] In sum, I am satisfied that the Complainant's perceptions of retaliation were reasonable, as they relate to the particular incidents referenced above. Considering the acrimonious relations that prevailed between the Complainant and Chief Bressette on a whole range of issues unrelated to the complaint, I am not persuaded that the Respondent intended to retaliate against the Complainant because of the human rights complaint. After all, the Complainant had filed a complaint against a public institution that is accountable to its constituents, the members of the Kettle and Stony Point First Nation Band Council. It is understandable for Chief and Council to openly discuss any legal actions pending against the Band. But the manner with which the Chief and Council raised the issue in some instances created a reasonable perception of retaliation. The Complainant's claim under s.14.1 of the *Act* has therefore been substantiated.

IV. REMEDY

A. Compensation for pain and suffering (s. 53(2) e))

[62] The Complainant seeks compensation for the pain and suffering he experienced as a result of the discriminatory practice (s. 53(2) e)). The Complainant testified about the stress he has endured since the competition for the caseworker position. The Complainant associates most of this stress with the lost employment opportunity and the ensuing loss of a good steady income. This put a financial strain on him and his family. However, I have already determined that discrimination was not a factor in his failure to secure the caseworker's position. Consequently, no compensation is to be awarded for any pain and suffering regarding this "stress".

[63] Most of the pain and suffering that the Complainant attributes to acts of retaliation is in fact related to incidents that I have concluded are not associated with any form of retaliation, such as the disruptions that occurred during the November 24th Council Meeting.

[64] In my view, the few specific incidents that I have determined to be retaliatory have had but a modest effect on the Complainant. In these circumstances, an award to the Complainant of $2,000.00 for pain and suffering is justified (s. 53(2) e)).

B. Special Compensation (s. 53(3))

[65] Section 53(3) of the *Act* provides that the Tribunal can award special compensation to the victim where a respondent has engaged in the discriminatory practice wilfully or recklessly. I have not found evidence to support the claim that the Respondent intended to retaliate against the Complainant for filing his complaint. I have merely concluded that it was reasonable for the Complainant to perceive certain aspects of the Respondent's conduct as retaliatory. It has not been established therefore that the Respondent wilfully discriminated against the Complainant.

[66] Did the Respondent act recklessly? That is, did the Chief and Council know of the risk that their conduct would be perceived as retaliatory, and yet choose to proceed nonetheless? In my view, the evidence does not support this proposition. The Respondent's decision to deal with the Complainant's active political opposition by openly referring to his human rights complaint and by resorting to treating him differently from other councillors may have been ill-advised, but not reckless as contemplated in s. 53(3).

[67] The Complainant's claim for special compensation under s. 53(3) of the *Act* is therefore denied.

C. Expenses

[68] The Complainant seeks compensation for the following expenses incurred as a result of the discriminatory practice (s. 53(2) c)):

a) Witness fees: Many of the witnesses summoned by the Complainant to testify at the hearing were Band employees or councillors, or were otherwise closely associated with Band Council. At the request of Respondent Counsel, I issued an order obliging the Complainant to pay conduct fees at a specified rate to any witness who so requested. Since only the s. 14.1 portion of his complaint has been substantiated, I order the Respondent to reimburse the Complainant any fees paid to the following witnesses, whose evidence had some bearing on the issue of retaliation:

- Faye Jackson
- Chief Tom Bressette
- Ron George
- David Henry
- Robert Bressette
- Peter Cloud
- Lorraine George

b) Photocopying and other stationery costs: Under the Tribunal's Rules of Procedure, parties are required to disclose material facts and documents to one another in advance of the hearing, and to produce in multiple copies all exhibits entered into evidence. The Complainant testified that he had to rely on the services of an office supplies retailer located in Sarnia to prepare this documentation, at a total cost of $300. He also alleges that his numerous visits to the retailer cost him about $300 in travelling costs. Unfortunately, the Complainant was unable to produce receipts in support of this claim but the extensive use of photocopying services is apparent from the record and it is common ground that his residence, situated on the Band's reserve, is about 50 km from Sarnia. I therefore accept the Complainant's evidence that his total expenses in this regard were about $600. However, considering that only the s. 14.1 aspect of his complaint has been substantiated, I order the Respondent to pay the Complainant one half of these expenses, ie. $300.

c) Time spent: The Complainant is claiming $8,000 in compensation for the "time" he put into the "endeavour" of preparing his case. A similar claim was dealt with by the Federal Court - Trial Division in *Attorney General of Canada v. Lambie* (1996), 29 C.H.R.R. D/483. The complainant in that case was seeking a sum for "leave and time spent to develop and prepare his complaint". The Court rejected the claim, noting that the word "expense" is not broad enough to cover such claims and that in any event, these "expenses" are to be compensated only in "exceptional circumstances". There were no "exceptional circumstances" present here, particularly in connection with the case of retaliation, which was the only portion of the complaint to be substantiated. The claim is therefore dismissed.

D. Interest

[69] Simple interest shall be paid on all monetary awards made in this decision. The interest shall be calculated on a yearly basis at a rate equivalent to the Bank Rate (Monthly Series) set by the Bank of Canada, and shall be payable from the date when the complaint was amended to add the allegation of retaliation, January 15, 2004.

Signed by

Athanasios D. Hadjis

OTTAWA, Ontario

December 24, 2004

PARTIES OF RECORD

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APPEARANCES:

Maurice Bressette	On his own behalf
Jonathon George	For the Respondent