Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2024 CHRT 11
**Date:** March 8, 2024
**File No(s).:** T2673/4921 and T2674/5021

**Between:**

**Christopher Coyne and Penny Way**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Salt River First Nation**

**Respondent**

# Ruling

**Member:** Athanasios Hadjis

**Table of Contents**

## I. OVERVIEW

[1] The parties had finished presenting all their evidence in this matter and were scheduled to make their final arguments in a few weeks. However, in the meantime, the Complainants, Christopher Coyne and Penny Way, learned that the Respondent, the Salt River First Nation (SRFN), had sent a letter to its members, which the Complainants claim is a form of retaliation against them for having filed their human rights complaints. They filed motions asking the Tribunal to amend their complaints to add an allegation of retaliation, under s. 14.1 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA), and to reopen the hearing to allow evidence to be heard about the letter.

[2] The SRFN opposes the motions. The Canadian Human Rights Commission (the "Commission") consents.

## II. DECISION

[3] For the following reasons, I grant the Complainants' motions.

## III. BACKGROUND

[4] The Complainants are members of the SRFN, the territory of which is situated close to the town of Fort Smith, Northwest Territories. The SRFN distributes annual payments, called Per Capita Distribution (PCD) payments, to its members derived from a trust established under a treaty settlement agreement with Canada that was signed in June 2002. The SRFN stopped distributing these payments to the Complainants in 2017. It maintains that only persons who were on the membership list at the time of signature or their descendants born after June 2002 are entitled to the payments.

[5] Mr. Coyne's biological mother is a member of the SRFN. He was adopted by a non-Indigenous family as an infant and was only added to the SRFN's membership list in 2012. Ms. Way's paternal grandmother was from the SRFN, but she lost her "Indian" status under the *Indian Act*, R.S.C., 1985, c. I-5, when she married a non-Indigenous person. She could not pass the status on to Ms. Way's father. He only acquired the status and became a

member of the SRFN after *An Act to Amend the Indian Act*, S.C. 1985, c. 27, also known as Bill C-31, was adopted. He was still not allowed to pass status to his children. That restriction was removed with the adoption of the *Gender Equity in Indian Registration Act*, S.C. 2010, c 18, also known as Bill C-3, and Ms. Way obtained her registration as a status Indian in 2011. Both Complainants were born before 2002.

[6] They allege that their family status, which is a prohibited ground of discrimination, was a factor in the SRFN's decision to deny them PCD payments.

[7] The hearing of their complaints was held in person in Edmonton from October 30 to November 10, 2023. The hearing continued by videoconference on January 9 and 10, 2024, for the testimony of the SRFN's last witness. The case was then adjourned until March 26 and 27, 2024, when the parties were scheduled to present their final arguments by videoconference, after first exchanging outlines of their submissions in writing.

[8] On February 14, 2024, the Complainants filed these motions. They explained that a SRFN member residing in Fort Smith recently informed them that a letter had come in the mail. It was sent in an envelope bearing the SRFN logo. As the SRFN explains in its submissions on the motions, it first provided copies of this letter to members who attended a lunch in Edmonton in November 2023, when PCD payments were distributed to members in attendance. The SRFN also mailed copies of the letter to its members. The SRFN typically holds these annual lunches to meet with members located outside of Fort Smith to distribute the annual PCD payments to them.

[9] The letter states that it was drafted to address questions that the SRFN's Chief and Council had received regarding the "ongoing claims about the PCD payments." It then purports to explain what had transpired not only in the current case but also in a matter involving another member that had gone before the Federal Court, which also related to PCD payments. The Federal Court decided in favour of that member, but the SRFN has appealed the decision to the Federal Court of Appeal where the case is still pending.

[10] The letter identifies the Complainants and their witnesses by name. Ms. Way argues that the tone of the letter feels like an attack against the Complainants and those who have assisted them. She claims some portions serve to intimidate or threaten everyone involved

in her case. Mr. Coyne concurs that he feels intimidated and alienated by the SRFN's letter. They both maintain that the letter is a form of retaliation within the meaning of s. 14.1 of the CHRA and therefore constitutes a discriminatory practice.

## IV. ISSUES

[11] I must address two issues.

1. Should the Complainants be allowed to amend their complaints to include an allegation that the SRFN engaged in a discriminatory practice by retaliating against them, pursuant to s. 14.1 of the CHRA?

2. Should the hearing be reopened to allow the Complainants to lead evidence regarding the letter?

## V. ANALYSIS

### A. The Complainants can amend their complaints to add a s.14.1 allegation

[12] The Tribunal has the authority to amend a complaint to add an allegation of retaliation (*Saviye v. Afroglobal Network Inc.*, 2016 CHRT 18 at para 14). An amendment should be granted if the allegation of retaliation is by its nature linked to the original complaint and discloses a tenable claim for retaliation (*Virk v. Bell Canada (Ontario)*, 2004 CHRT 10 at para 7). The amendment should not be permitted if it is plain and obvious that the allegation could not possibly succeed. There must be sufficient notice to the respondent so that it is not prejudiced and can properly defend itself (*Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at paras 5-6).

[13] The link between the original complaints and the allegation of retaliation is evident. The letter speaks explicitly about the complaints. It gives details about the hearing, including who testified and when. It recounts the SRFN's perspective on the history leading up to its decision to stop providing PCD payments to the Complainants and other members in similar circumstances. The letter concludes by informing members of what, in the SRFN's view, the

possible impact would be for the SRFN and its members if the complaints were substantiated. I am satisfied that the link is established.

[14] The next question is whether the allegation discloses a tenable claim of retaliation. The Complainants speak about the tone of the letter and how it feels like an attack against them, particularly by naming them. The letter characterizes Ms. Way's witnesses as having testified "against SRFN", and those called by SRFN as having testified "for SRFN." The Commission submits that this could result in community members turning against the Complainants and further alienating them from the community. It could also serve as an intimidation tactic to deter members from testifying in future claims around PCD payments.

[15] The letter also indicates that if the complaints are successful, members' PCD payments will get smaller and may eventually result in no payments being made at all. The Complainants disagree that this would be the outcome but, moreover, maintain that this statement will just further turn other members against them. Mr. Coyne contends that naming him in the letter as the person whose human rights complaint could result in the members losing their PCD payments is an attempt to smear his reputation. Ms. Way states that she fears further retaliation from other members based on the perception they will gain about her from the letter and that the SRFN is trying to get the membership to stand up against her and Mr. Coyne. She contends that the letter changes the perception that the membership will have of every individual named. Ms. Way also points to the timing of the letter. She questions whether the alleged retaliation was timed to occur after the Complainants had closed their cases, thereby making it more difficult to amend their complaints or otherwise enter the letter into evidence.

[16] The SRFN counters by noting that a successful retaliation complaint would need to establish that the complainant experienced adverse treatment and that the human rights complaint was a factor in the treatment (*Beattie v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 at para 128, aff'd *Bangloy v. Canada (Attorney General)*, 2021 FCA 245). The SRFN maintains that it is plain and obvious that there is no adverse treatment found in the allegation. The letter merely provides a factual account of what has happened in this case and in the other Federal Court case. It sets out the names of the Complainants and witnesses. This is a matter of public record.

[17] As for the use of the terms “for” and “against,” the SRFN points out that it is “standard language” in litigation to say that a witness called by one party is testifying for that party and against the opposing party. No adverse effect will flow from this.

[18] The Commission had referred in its submissions to the Tribunal decision in *Dixon v. Sandy Lake First Nation*, 2018 CHRT 18, where the Tribunal dealt with the merits of a s. 14.1 retaliation complaint. The Tribunal held that the posting on a bulletin board of the Commission’s decision not to refer the complainant’s human rights complaint constituted adverse treatment. The SRFN contends that the *Dixon* facts are distinguishable. The poster was disclosing information about the Commission’s investigation, which is not a matter of public record, in contrast to details about the Complainants’ hearing, which is conducted in public.

[19] Finally, the SRFN disagrees with the Complainants’ claim that the letter threatens the future distribution of PCD payments. The letter itself does not deny or revoke any payments. It merely reiterates the SRFN’s formal public position that it has expressed throughout the proceedings that members will suffer undue hardship if the settlement trust income ends up being severely depleted, resulting in reduced PCD payments.

[20] Accordingly, the SRFN argues that the Complainants’ proposed allegation of retaliation is not tenable. I am not persuaded. The SRFN has certainly raised significant arguments that it can rely upon to make the case that the allegation of retaliation should not be found to be substantiated. But at this stage, it is not plain and obvious that the claim would be unsuccessful. The possibility does exist for the Complainants to lead evidence and argue that the contents of the letter, in tone and when interpreted in light of the full context, including how it was circulated, was adverse treatment.

[21] Regarding the final question of notice, there is no question that the SRFN is sufficiently aware of the letter. It issued it in November 2023. As I elaborate later in this ruling, I will allow the hearing to be reopened to hear evidence about the letter, and we will use the hearing dates that we had already set aside for final submissions (March 26 and 27, 2024). I have already vacated the dates originally scheduled for the exchange of written submissions and final oral arguments. Consequently, final arguments can realistically not

take place until May 2024 at the earliest. Given this lead time, I am satisfied that the SRFN will not be prejudiced if the allegation of retaliation is added to the complaints.

[22] I am therefore satisfied that the criteria for granting an amendment to add an allegation of retaliation under s. 14.1 of the CHRA have been satisfied. The Complainants' requests should be granted.

## B. The hearing should be reopened to allow evidence regarding the allegation of retaliation

[23] The factors to consider before reopening a hearing were addressed by the Supreme Court of Canada, in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983 [*Sagaz*]. It held that a court should consider whether the evidence, if presented, probably would have changed the result and whether the evidence could not have been obtained before trial by the exercise of reasonable diligence. In *Dorais v. Canadian Armed Forces*, 2023 CHRT 6 [*Dorais*], the Tribunal reiterated those factors and observed that a third component has emerged in the jurisprudence—whether exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit additional evidence.

[24] *Sagaz* dealt with a motion to reopen after judgment had been rendered. As the Federal Court observed in *Varco Canada Limited v. Pason Systems Corp.*, 2011 FC 467 at para 17 [*Varco*], the first *Sagaz* question should be modified where the trial has ended, but the matter is still under reserve, as in the present instance. The more appropriate first question to ask in such circumstances is whether the evidence, if it had been presented, could have had any influence on the result.

[25] Thus, in my view, where a final decision or reasons have yet to be issued, the Tribunal should ask:

1. Could the evidence, if presented, have any influence on the result?
2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

3. Do exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit additional evidence?

### (i) The evidence could influence the result

[26] Having granted the Complainants' requests to amend their complaints to include an allegation of retaliation, the proposed evidence regarding the SRFN's letter to its members could undoubtedly influence the result. If the Complainants are successful in proving the criteria to make out their case as discussed earlier in this decision, then the result of the case will be "influenced" by the new evidence.

### (ii) The evidence could not have been obtained before trial with reasonable diligence

[27] The Complainants only learned of the letter's mailout after the hearing of evidence had concluded in January 2024. Mr. Coyne informed the Tribunal that he would potentially be making a motion to amend his complaint within days after learning of the letter. The SRFN says that the letter was distributed to the persons in attendance at the November 2023 lunch in Edmonton where the PCD payments were handed out. Seemingly, the Complainants did not attend. I have no evidence of whether they were made aware of that lunch or whether, in the circumstances, they would have felt comfortable attending. One thing is fairly certain from the evidence already adduced in this case—the SRFN was not going to distribute a PCD payment to either Complainant. I am satisfied that the Complainants were not aware of the letter at the time of the hearing and could not have learned of the letter any earlier with reasonable diligence.

### (iii) Exceptional circumstances

[28] Given my findings under the first two components of the test, there is no need to explore whether exceptional circumstances exist to justify granting the request to reopen. In any event, having allowed the Complainants to amend their complaints to deal with evidence

that emerged after they had closed their cases, without question the circumstances warrant granting them the opportunity to lead that evidence.

### (iv) Other factors

[29] As the Tribunal observed in *Dorais*, the Tribunal should also consider questions of prejudice and natural justice in determining whether to reopen a hearing. I am satisfied in the present case that these concerns are adequately addressed.

[30] The evidence will be led at the hearing dates that we had already scheduled for final submissions (March 26 and 27, 2024). This is sufficient time for the parties to prepare themselves for the evidence regarding the narrow issue for which the case has been reopened—the SRFN's letter and whether it constitutes retaliation entitling the Complainants to any remedies under the CHRA. The parties will not be allowed to lead evidence outside this scope. The Tribunal will not be "distracted" or "confused" by the additional evidence, as suggested in the case law to which the SRFN referred. The case will not be unduly delayed as the dates for final written and oral submissions will likely be extended by no more than a couple of months. While some additional resources will inevitably be expended by all parties to deal with the additional evidence, it is in the interest of justice that the hearing be reopened.

[31] There was some discussion in the parties' submissions on the motions about whether the evidence surrounding the letter will be relevant to the Complainants' existing remedial claims, particularly under s. 53(3) of the CHRA. This is an issue that can be addressed in final argument. It should have no impact on the time required to present the additional evidence when the hearing reopens.

## VI. ORDER

[32] The Complainants' requests to amend their complaints to add an allegation of retaliation under s. 14.1 of the CHRA are granted.

[33] The Complainants' requests to reopen the hearing regarding the allegation of retaliation are granted.

[34] The hearing will reconvene on March 26 and 27, 2024, by videoconference.

[35] The Complainants will lead their evidence in chief, subject to cross-examination and re-examination. The Commission will participate in the same manner as previously in this case. The SRFN will be entitled to call evidence in the ordinary course in response if it so chooses.

[36] By March 15, 2024, the Complainants must provide will-say statements for any witnesses they intend to have testify at the reopening of the hearing regarding their s. 14.1 allegation. By the same date, they must also provide a detailed statement of the remedies that they may be seeking in relation to the s. 14.1 allegation and any additional disclosure of documents in their possession that are arguably relevant to the allegation.

[37] By March 22, 2024, the Commission and the SRFN must indicate if they intend to call any witnesses and provide will-say statements for them. They must also disclose any documents in their possession that are arguably relevant to the allegation of retaliation.

*Signed by*

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
March 8, 2024

## Canadian Human Rights Tribunal

## Parties of Record

**File Nos.:** T2673/4921 and T2674/5021

**Style of Cause:** Christopher Coyne v. Salt River First Nation – T2673/4921 and Penny Way v. Salt River First Nation – T2674/5021

**Ruling of the Tribunal Dated:** March 8, 2024

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Christopher Coyne and Penny Way, Self-represented

Sophia Karantonis and Jonathan Bujeau, for the Canadian Human Rights Commission

Colleen Verville and Jessica Buhler, for the Respondent