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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Ryan J. Mathison

COMPLAINANT

A N D:

James Easton and Musqueam Indian Band

RESPONDENTS

**REASONS FOR PRELIMINARY DECISION
JURISDICTION TO ACCEPT COMPLAINT**

Tribunal Member:

Lindsay M. Lyster

Counsel for the Complainant:

Judith Doulis

Counsel for the Respondents:

Jim Reynolds

Introduction

[1] On October 24, 2005, Ryan Mathison filed a complaint in which he alleged that the Musqueam Indian Band and James Easton discriminated against him in relation to his employment with the Band, contrary to s. 13 of the *Human Rights Code*. Mr. Mathison filed a number of amendments to his complaint, including two filed January 9, 2006, in which he alleged that the respondents retaliated against him for filing the initial complaint, contrary to s. 43 of the *Code*.

[2] On January 12, 2006, the Tribunal wrote the parties, seeking their submissions with respect to whether the Tribunal had jurisdiction over the complaint, or whether the matter was under exclusive federal jurisdiction. Both parties filed submissions. On February 17, 2006, I issued a decision in which I held that Mr. Mathison's s. 13 complaint was outside the Tribunal's jurisdiction: *Mathison v. Musqueam Indian Band and Easton*, 2006 BCHRT 91. I asked for further submissions with respect to Mr. Mathison's s. 43 complaint. Mr. Mathison submitted that the Tribunal has jurisdiction over that aspect of his complaint, while the respondents submitted that it does not.

Analysis

[3] In order to determine whether the s. 43 complaint is within the Tribunal's jurisdiction, it is necessary first to consider the process by which complaints are filed with the Tribunal and how the Tribunal determines whether to accept them for filing. I then consider whether Mr. Mathison has met the preconditions for filing a s. 43 complaint. Finally, I consider whether his s. 43 complaint is within the Tribunal's jurisdiction.

i. The processing of complaints by the Tribunal

[4] Section 21(1) of the *Code* provides that:

Any person or group of persons that alleges that a person has contravened this Code may file a complaint with the tribunal in a form satisfactory to the tribunal.

[5] “Complaint” is defined in s. 1 as meaning “a complaint filed under section 21.”

[6] On receipt of a complaint, the Tribunal screens it in accordance with Rule 11 of its *Rules of Practice and Procedure*. Rule 11 provides:

1. When a complaint is filed, the tribunal will screen the complaint to ensure that:
 - a. the Complaint Form and, if applicable, the Representative Complaint Form, is complete; and
 - b. the complaint appears to be within the jurisdiction of the tribunal.
2. If the Complaint Form or the Representative Complaint Form is not complete, the tribunal will deliver the incomplete form to the complainant, identifying the part of the form that is not complete.
3. The complainant must file the completed form within the time allowed by the tribunal.
4. If the complainant does not file the completed form within the time allowed, the tribunal may refuse to accept the complaint for filing.
5. If the complainant files the completed form within the time allowed, the tribunal will treat the complaint as filed on the day it was first filed rather than the day the completed form was filed.
6. If it is clear that the tribunal does not have jurisdiction to proceed with the complaint or part of the complaint, the tribunal will refuse to accept the complaint or that part of the complaint for filing and will give reasons for its refusal.
7. If the tribunal accepts a complaint for filing, this is not a final decision that the tribunal has jurisdiction over the complaint.

[7] Only once the screening process has been completed is the complaint accepted for filing by the Tribunal and served upon the respondent. The Tribunal’s screening process was recently considered by the British Columbia Supreme Court in *Lake City Casinos Ltd. v. British Columbia (Human Rights Tribunal) et al.*, 2006 BCSC 88 (“*Rossiter*”). That case involved a question as to when the six-month time limit for filing a complaint ran from – the date upon which the complaint was first filed, or the date of any subsequent amendments prior to the complaint being accepted for filing. The Court said:

The Tribunal has chosen to focus on the filing of a complaint of contravention as the critical date against which the six-month limitation period is measured. The Tribunal has chosen not to focus on the substance of the complaint – presumably it will be sufficient for a complainant to make some allegation in his first filing, but the Tribunal will allow that allegation to be revised or even supplanted by another in the course of the screening process. It is entirely reasonable for the Tribunal to conduct its process in this way. The Tribunal’s screening method gives it the latitude necessary to deal with persons having human rights complaints, and to fully and properly carry out its mandate. The screening method does not frustrate the *Code*’s six-month limitation period – the screening method merely permits the Tribunal to effectively perform its function.

Lake City also argued that Mr. Neuenfeldt’s decision was not correct, or was patently unreasonable, because it denied Lake City the opportunity to test whether the disability discrimination complaint should go ahead because it would be in the public interest to do so and delay had worked no substantial prejudice on any party. Of course, those tests would only apply if the complaint was filed out of time. I cannot find that it was patently unreasonable or even incorrect for Mr. Neuenfeldt to conclude that the screening process permits a complainant to substantially revise or even rewrite his complaint. The *Code* and the *Rules of Practice and Procedure* do not prohibit such revision or rewriting. The *Code* and the *Rules* contemplate only one filing date for a complaint and the *Rules*, specifically Rule 11, operate to back-date screening revisions to that filing date. Given that the *Code* and the *Rules* do not impose a requirement that complaints be substantially perfect when first filed, it cannot be wrong or patently unreasonable for the *Code* and *Rules* to be applied, as Mr. Neuenfeldt did, to ensure that a complaint articulates its proper substance before it leaves the screening process and becomes a more formal complaint which might then be amended subject to the more formal provisions of Rule 25. (at paras. 30-31)

[8] A number of consequences flow from the manner in which the Tribunal screens complaints. One is that some time will pass between the date that the complaint is first filed and the date upon which the Tribunal serves it on the respondent.

[9] That is what happened in the present case. Mr. Mathison filed his initial complaint on October 24, 2005. On November 23, 2005, the Tribunal wrote to Mr. Mathison. In that letter, the Tribunal identified the issue with respect to whether the complaint was under provincial or federal jurisdiction. It also identified an issue with respect to who the intended respondents to the complaint were, and asked for further information with respect to the details of the discrimination alleged. In accordance with

Rule 11, the Tribunal informed Mr. Mathison that if he provided the information requested by December 23, 2005, the complaint would be treated as filed on the date it was first received by the Tribunal.

[10] Mr. Mathison complied with the Tribunal's requests, and filed two amendment forms with respect to the identity of the respondents and the details of the complaint on December 22, 2005. On January 9, 2006, he filed a further two amendment forms, in which he made the complaint of retaliation. On January 12, 2006, as indicated above, the Tribunal wrote the parties, seeking their submissions on jurisdiction.

[11] In my earlier decision, I held that Mr. Mathison's s. 13 complaint was outside the Tribunal's jurisdiction, as follows:

Based on the principles described in *Azak v. Nisga'a Nation and others; Robinson and Lincoln v. Nisga'a Nation and others*, 2003 BCHRT 79, and *John v. Ehattesaht Tribe and Billy (No. 2)*, 2005 BCHRT 397, it is clear that Mr. Mathison's s. 13 complaint is outside the Tribunal's jurisdiction. Federal jurisdiction arises in this case by virtue of the combined effect of ss. 91(24) and 91(12) of the *Constitution Act, 1867*, which grant the federal government exclusive jurisdiction over "Indians, and Lands reserved for Indians" and fisheries, respectively. The Band is a federally regulated employer, and, as a general rule, under the jurisdiction of the Canadian Human Rights Commission. (at para. 6)

[12] I observed that the matter was not so clear with respect to s. 43:

Section 43 is an important provision, which provides the Tribunal with the authority to protect persons who have engaged the Tribunal's processes from retaliation for having done so. Here, Mr. Mathison filed a complaint with the Tribunal. That complaint has been determined to be outside the Tribunal's jurisdiction, and therefore has not been accepted. This is not an uncommon situation, as many complainants are unsure of the proper jurisdiction in which to file their complaint. Mr. Mathison alleges that, after filing his original complaint, he was retaliated against by the respondents for having filed that complaint. The question which arises is whether the subsequent retaliation complaint is within the Tribunal's jurisdiction.

This is not a question which the Tribunal's letter requesting submissions directed the parties to consider. In the circumstances, I consider it appropriate to request further submissions from the parties with respect to this important question. (at paras. 10 - 11)

ii. *Has a complaint been “filed” such as to engage the protection of s. 43?*

[13] I now go on to consider whether the preconditions to a valid s. 43 complaint have been met in this case. Section 43 reads as follows:

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code.

[14] In *Cariboo Chevrolet Pontiac Buick GMC Ltd. v. Becker*, 2006 BCSC 43, the British Columbia Supreme Court held that in order to sustain a complaint under s. 43, a previous complaint must have been filed with the Tribunal. As a result, the Court held that a retaliation complaint filed before filing another complaint with the Tribunal should have been dismissed as failing to disclose a contravention of the *Code*. It is helpful to reproduce the Court’s reasons on this point at length:

The issue in regards to the s. 43 complaint is whether or not a claim can be sustained under s. 43 if a complaint is sanctioned before bringing a complaint under the *Code*. It has been long held that human rights legislation is to be broadly interpreted. Saunders J.A. summarized the authorities in *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at ¶ 24:

Courts approach human rights legislation using a broad, liberal and purposive approach to "advance the broad policy considerations underlying it", to interpret the provisions "in a manner befitting the special nature of the legislation", giving it "such fair, large and liberal interpretation as will best ensure the attainment of their objects": *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at p. 89, 40 D.L.R. (4th) 577; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; and *North Vancouver School District No. 44 v. Jubran* (2005), 253 D.L.R. (4th) 294, 39B.C.L.R. (4TH) 153, 2005 BCCA 201. At the same time, as observed by Lamer C.J. in *University of British Columbia v. Berg*, [[1999] 2 S.C.R. 353]], in a passage referred to by La Forest J. in his concurring reasons in *Gould v. Yukon Order of Pioneers*, [[1996] 1 S.C.R. 571]], at para. 50: "[t]his interpretative approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found."

...

The interpretation of s. 43 has been a matter of some dispute at the Tribunal. In *Hendrickson v. Long and McQuade Limited* (1998), 31 C.H.R.R. D/117 (B.C.H.R.T.) the Tribunal Member held that in order to make out a complaint under s. 43 of the *Code*, the complainant must establish that a complaint had been filed pursuant to the *Code*, that the employer knew that the complaint had been filed and that the employer retaliated because the complaint had been filed. Similar conclusions were reached in *Bland v. The Board of School Trustees School District No. 60*, 2004 BCHRT 97 and *Quarrington v. Salt Spring Island Community Services Society*, 2003 BCHRT 59. A contrary conclusion was recently reached in *Talkkari v. City of Burnaby and others*, 2005 BCHRT 68. In that case, the Tribunal Member refused to follow the aforementioned decisions and held that a s. 43 claim could proceed even though no complaint had been filed under the *Code* when discipline was imposed. Section 43 does not appear to have been the subject of any decision in this court.

A broad reading of the section is not without attraction. Given that the purpose of s. 43 is to protect those who complain or assist in a complaint under the *Code* from being punished or retaliated against, if s. 43 is interpreted as only applying to those who have filed a complaint, a person could be without redress for retribution if disciplined before the complaint is made. A broad reading would encourage individuals to address their complaints first to their organizations internal system.

While a broad interpretation may be more consistent with objects of the *Code*, as noted by Lamer C.J.C. in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 the court does not have license to ignore the words used in the Act. The phrase that must be interpreted is “complains under the Code”. “Complains” is not defined, however, “complaint” and “complainant” are. A “complaint” means a complaint filed under s. 21 of the *Code*. A “complainant” means a person or group of persons that files a complaint under s. 21. Section 28(4) of the *Interpretation Act* directs that “complains” must be given a corresponding meaning. This inexorably leads to the conclusion that the phrase “complains under the Code” is limited to persons who have filed a complaint pursuant to s. 21 the *Code*. In contrast to the B.C. legislation some provinces have provided protection to individuals who have made or may make complaints: *The Human Rights Code*, S.M. 1987-88, c. 45, s. 20; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 45.

Ms. Becker made no complaint under the *Code* before she was terminated. In the circumstances, her complaint under s. 43 cannot succeed and should have been dismissed under s. 27(1)(b). The Tribunal is prohibited from proceeding with that complaint. (at paras. 47 – 55) (emphasis added)

[15] Under *Becker*, then, a complaint must have been filed in order for a subsequent s. 43 complaint to be filed. *Becker* did not consider the point under consideration here, which is whether the previous complaint must have been accepted for filing by the Tribunal in order for the subsequent s. 43 complaint to be sustained.

[16] In my view, the plain language of s. 43, considered in the context of the purposes and structure of the *Code* as a whole, establishes that it is sufficient for the complainant to have filed a previous complaint; that complaint need not have been accepted for filing.

[17] Mr. Mathison had filed a complaint with the Tribunal as of October 24, 2005. As of that date, he had the status of a “complainant” and had “complained”, within the meaning of the *Code*. The complaint was lodged with the Tribunal, which was engaging in its usual screening process. In my earlier decision, I did not accept the s. 13 complaint for filing. That decision did not, however, negate the fact that Mr. Mathison had filed a “complaint” in accordance with s. 21 of the *Code*. The language of s. 43 was therefore satisfied.

[18] This conclusion is only strengthened when one considers the broader structure and purposes of the *Code*. As explained in *Rossiter*, it may take some time for the complaint screening process to be completed. While the Tribunal does not inform respondents of complaints until that process is complete and the complaint is accepted or submissions are requested, it is entirely possible for respondents to learn of such complaints through other means. In this case, Mr. Mathison alleges that he informed the respondents of his complaint on November 14, 2005, and that he was retaliated against after that date. If it was necessary for a complaint to be accepted for filing before a complainant could seek the protection of s. 43, a complainant in such circumstances would be left without any protection from retaliation. Further, in cases where the complaint was ultimately not accepted, the complainant would never obtain any retaliation protection, leaving a respondent free to engage in retaliation unhindered by the *Code*.

[19] This cannot have been the intention of the Legislature in enacting statutory protection from retaliation. Section 43 must be interpreted as providing, at a minimum, protection from retaliation in any case where a complaint was filed with the Tribunal, regardless of whether the complaint was ultimately accepted for filing or not.

[20] For these reasons, I conclude that the precondition to a valid s. 43 complaint were fulfilled in the present case, in that Mr. Mathison had previously filed a s. 13 complaint, and subsequent to that filing, filed an amendment alleging that he had been retaliated against for filing the initial complaint.

iii. Is the s. 43 complaint within the Tribunal's jurisdiction?

[21] What I must next consider is whether the s. 43 complaint is within the Tribunal's jurisdiction in the sense that it is under provincial as opposed to federal jurisdiction. The respondents submit that the s. 43 complaint is not within the Tribunal's jurisdiction, for essentially the same reasons that the s. 13 complaint was held to be outside the Tribunal's jurisdiction. They submit that the Band is a federally regulated entity, and that it would be inconsistent for the Tribunal to claim jurisdiction over the s. 43 complaint given the rejection of the s. 13 complaint. They say that "such a claim would amount to an unconstitutional attempt to do indirectly what is prohibited directly and constitute a backdoor method of exercising jurisdiction over an area that is within the exclusive federal jurisdiction, and more specifically, the jurisdiction of the Canadian Human Rights Commission", thereby offending the doctrine of interjurisdictional immunity applied in the Tribunal's earlier decisions, such as *Azak*.

[22] In my view, the doctrine of interjurisdictional immunity does not have the effect submitted. The application of the doctrine of interjurisdictional immunity was explained as follows in *Azak*:

This means that I must reject the Complainants' theory that the *Code*, as a law of general application in the province, may validly apply to the Respondents, either concurrently with the *Canadian Human Rights Act* or exclusively, with the result that the Tribunal would have jurisdiction over these Complaints. The jurisprudence is clear that, as relates to labour relations and human rights law, the federal and provincial governments do not have concurrent jurisdiction. As stated in *Four B, supra*:

With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional nature of their operations and their normal activities, can be characterized as

federal undertakings, services or businesses. (at 1045)
(emphasis added in the original)

In respect of human rights and labour relations, the Supreme Court of Canada has consistently applied the doctrine of interjurisdictional immunity. Where the doctrine of interjurisdictional immunity applies, the province has no jurisdiction over a vital part of a federal undertaking, and any otherwise valid provincial law which would affect a vital part of a federal undertaking will be held to be inapplicable to that federal undertaking. Thus, for example, in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, a case dealing with the applicability of the *Family Relations Act*, R.S.B.C. 1979, c. 121, to lands reserved for Indians, the Supreme Court held:

When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction. (at para. 42)

The doctrine of interjurisdictional jurisdictional immunity was applied with respect to the application of provincial occupational health and safety laws to a federal communication undertaking in *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749. The Supreme Court held that such laws could not apply to Bell Canada, because, were they to do so, they would affect the “basic, minimum and unassailable content” assigned to the federal Parliament. (at paras. 34 – 36)

[23] It is important to note that *Azak*, and the many Tribunal decisions which have followed it, dealt with allegations of discrimination in protected areas of the *Code*, such as employment and the provision of services customarily available to the public. They did not address the application of the doctrine in circumstances where a complainant alleged that they had been subsequently retaliated against for having filed such a complaint with the Tribunal.

[24] The doctrine of interjurisdictional immunity was recently summarized by the Supreme Court of Canada in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, as follows:

The doctrine of interjurisdictional immunity is engaged when a provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. The doctrine provides

that, where the general language of a provincial statute can be read to trench upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations: *Grail, supra*, at para. 81. The doctrine has limited the application of a provincial statute to a matter of exclusive federal power in numerous contexts. For example, in *Grail*, a provincial statute of general application was found to have the effect of regulating indirectly an issue of maritime negligence law. The provincial statute had the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively altered rules within the exclusive competence of Parliament. Accordingly, the provincial statute of general application was read down so as not to apply to a maritime negligence action. In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, this Court held that a provincial occupational health and safety statute was inapplicable to a federal undertaking. More relevant, for present purposes, in *Delgamuukw, supra*, at para. 181, Lamer C.J. held that s. 91(24) protects a "core" of Indianness from provincial laws of general application, through operation of the doctrine of interjurisdictional immunity. See also *Kitkatla Band, supra*, at para. 75: in that case it was not established that the impugned provisions affected "the essential and distinctive core values of Indianness", and thus they did not "engage the federal power over native affairs and First Nations in Canada". (at para. 15)

[25] The doctrine of interjurisdictional immunity therefore prevents provincial laws of general application from applying to federal undertakings where the application of such laws would affect a vital part of the operation or management of such a federal undertaking. In relation to First Nations entities such as Indian Bands, the application of the doctrine has prevented provincial laws of general application from being applied where they would affect what has variously been described as "Indians *qua* Indians" or "the status and capacities of Indians" or "the essential and distinctive core values of Indianness": see Hogg, Peter W., *Constitutional Law of Canada*, 4th ed. (looseleaf edition) (Scarborough: Thomson Carswell, 1997) at 27-11. As cases like *Azak* and the cases cited therein demonstrate, human rights and labour legislation may have the capacity to affect "Indians *qua* Indians", with the result that the doctrine of interjurisdictional immunity has been applied to render provincial legislation inapplicable. It was for this reason that I declined to accept Mr. Mathison's s. 13 complaint for filing.

[26] I view the s. 43 complaint differently. Section 13 of the *Code* prohibits discrimination in employment, an area which has consistently been held to be one where the application of provincial law could affect the core of a federal undertaking. Section 43, by contrast, does not relate to employment. Rather, it relates to the Tribunal's processes, and is designed to safeguard the integrity of those processes by ensuring that those who engage them, whether as complainants, witnesses or in some other capacity, do not suffer retaliation as a result of doing so.

[27] Put another way, the doctrine of interjurisdictional immunity does not render federal undertakings immune from all provincial legislation. Nor, as the passage just quoted from *Paul* makes clear, where it applies does it necessarily render federal undertakings immune from the application in all circumstance of all provisions of a given piece of legislation. Rather, it renders them immune from provincial legislation the application of which would affect a vital part of such undertakings. The prohibition on retaliation contained in s. 43, unlike the *Code's* more general prohibitions on discrimination in employment, does not affect a vital part of a federal undertaking to which it applies.

[28] I note that the Tribunal has previously held that it has the jurisdiction to order costs for improper conduct against the respondent to a complaint, notwithstanding the fact that the complaint was ultimately found to be outside the Tribunal's jurisdiction on division of power grounds. In *Altakla v. Power and another (No. 3)*, 2004 BCHRT 253, the Tribunal found that the respondent was a federal undertaking. It also found that the respondent had engaged in improper conduct in the course of the complaint prior to the decision on jurisdiction being made. The Tribunal considered whether it had the jurisdiction to order costs against the respondent, as follows:

The respondents also submit that the Tribunal lacks jurisdiction to order costs against them in light of its finding that it has no jurisdiction over the complaint. This submission is inconsistent with their own application for costs against Mr. Altakla. In any event, I do not agree that the Tribunal lacks jurisdiction to order costs in these circumstances.

The Tribunal, as a creature of statute, has those powers granted to it by statute, including those which arise by necessary implication from its constituent act, its structure and purpose. Here, the Tribunal is granted the

express statutory power to order costs against parties who engage in improper conduct in the course of a complaint.

...

If the fact that the Tribunal ultimately determines that it does not have jurisdiction over a complaint meant that it cannot have jurisdiction to order costs against a participant, it would leave the Tribunal unable to control its own processes. The practical implications of such a finding would be very troubling. A participant could engage in the most egregious conduct, and the Tribunal would be bereft of any power to control or punish that behaviour. In this connection it is important to note that it may not be until a full hearing on the merits of a complaint has been conducted that the Tribunal will be able to conclude that it does not have jurisdiction. In such a case, the Tribunal would be unable to order costs against any party in its final decision, regardless of their conduct. It would also mean that any preliminary decisions it had made in which it ordered costs would become retroactively void. Such results cannot have been the intention of the Legislature when it granted the Tribunal the authority to order costs.

Given the Tribunal's explicit statutory authority to order costs, there is, in my view, no need to resort to the doctrine of necessary implication in order to establish the Tribunal's authority to order costs in the circumstances of this case. If I am wrong about that, then I would, for the reasons just given, find that the Tribunal has, by necessary implication, the power to order costs in these circumstances. In *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722, the Supreme Court of Canada stated the following with respect to necessarily implied powers:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. (at 1756)

That passage from *Bell Canada* was relied upon by the British Columbia Court of Appeal in *Canadian Union of Public Employees, Local 394 v. Crozier et al*, 2001 BCCA 77, where it stated:

If a contextual analysis of a statute leads to the conclusion that the power in question must have been intended because otherwise the purposes of the statute would be sterilized or defeated, it may be logical to infer that the tribunal had the power "by necessary implication". In relation to a human rights

statute, the relevant context must include, of course, the mischief to which the legislation was directed. (at para. 25)

Considering the context of the *Code* as a whole, the Tribunal must have the power to order costs for improper conduct in any complaint before it, regardless of the ultimate disposition of that complaint. To hold otherwise would be to sterilize or defeat the purposes of the *Code*, which include the promotion of a climate of understanding and mutual respect where all are equal in dignity and rights, and providing a means of redress for persons who are discriminated against: see s. 3 of the *Code*. The Tribunal's power to control the conduct of parties appearing before it, including through orders of costs, is necessary to ensuring that those purposes are fulfilled. (at paras. 17 - 23)

[29] Similar considerations apply in respect of the Tribunal's ability to consider whether retaliation has occurred and to provide remedies where it determines that it has. The Tribunal's powers to order costs and to protect persons from retaliation are both central to the Tribunal's ability to control its own processes. As has been frequently stated by the Supreme Court of Canada, human rights legislation is of a special, quasi-constitutional nature, and protects rights of fundamental importance: see, for example, *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at paras. 24 – 29, and the cases cited by Saunders J.A. in the passage from *Nixon* quoted at paragraph 14 above. In light of the fundamental nature of the rights protected by human rights legislation, the Tribunal's ability to protect those who engage its processes from retaliation serves a vital societal interest.

[30] In my opinion, the *Code*'s retaliation provision, like the power to order costs, is more closely related to the protection of the integrity of the Tribunal's processes than to the regulation of the substantive human rights obligations of employers. Neither ordering costs for improper conduct nor hearing retaliation complaints has the capacity to impair a vital part of the operation of a federal undertaking nor, in the case of an Indian Band, to impair the essential and distinctive core values of Indianness.

[31] It is worthwhile to consider what the effects of the position put forward by the respondents would be. Clearly, if the respondents' submissions were to be accepted, it would have the effect of making persons such as Mr. Mathison, who mistakenly file a human rights complaint in the wrong jurisdiction, vulnerable to retaliatory conduct on the

part of the person against whom they filed the complaint. The consequences would also be more far-reaching. It would mean, for example, that a witness who testified in a complaint before the Tribunal, whose federally-regulated employer took disciplinary action against them for missing work for attending the hearing to give evidence, would be without recourse against their employer under the *Code*.

[32] Nor would persons such as Mr. Mathison appear to have any recourse under the *Canadian Human Rights Act*. The retaliation provision in that *Act* provides as follows:

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[33] Part III of the *Canadian Human Rights Act* permits persons who believe they have been discriminated contrary to that Act to file complaints. Thus, a complaint to the British Columbia Human Rights Tribunal would not qualify as a complaint “that has been filed under Part III”, with the result that a person who had mistakenly filed a complaint with the Tribunal, and who was subsequently retaliated against by their federally-regulated employer, would be unable to file a retaliation complaint with the Canadian Human Rights Commission. This would mean that they would be absolutely without retaliation protection, either federally or provincially.

[34] The doctrine of interjurisdictional immunity has within it, if applied in an overbroad manner, without due regard for provincial legislative jurisdiction, the capacity to immunize federal undertakings from all provincial laws of general application: see the discussion in Hogg, *supra*, at 15 - 26–31. As the Supreme Court’s decision in *Paul* demonstrates, the doctrine must be confined to its proper ambit. As *Paul* also demonstrates, a provincially created administrative tribunal may properly consider issues related to First Nations, provided that in doing so, it does not trench upon the core of “Indianness”. The potential application of s. 43 to the respondents does not, in the circumstances of this case, trench upon the core of “Indianness”. In my view, it would be an overbroad application of the doctrine interjurisdictional immunity to apply it to render a federal undertaking immune from a s. 43 retaliation complaint in circumstances such as are alleged here.

Conclusion

[35] I find that Mr. Mathison's s. 43 complaint is within the Tribunal's jurisdiction, and accept it for filing. As stated by the respondents in their submission, this decision does not affect their right to make further submissions with respect to the merits of the complaint, to which the respondents will now be requested to provide a response in accordance with Tribunal's *Rules*.

Lindsay M. Lyster, Tribunal Member