Board No.: 2008-03

Decision: January 15, 2010

IN THE MATTER OF THE **YUKON *HUMAN RIGHTS ACT***
AND IN THE MATTER OF
Les Carpenter and
the Yukon Human Rights Commission
v
Town of Faro

BOARD DECISION

Appearances

Les Carpenter	Complainant
Susan Roothman	Counsel for the Yukon Human Rights Commission
Gary Whittle	Counsel for the Respondent Town of Faro

Panel Members

Michael Dougherty, Acting Chief Adjudicator
Donna Mercier, Adjudicator
Laura MacFeeters, Adjudicator

Heard: Whitehorse, Yukon on August 18-21, August 24-27, August 31 and September 29, 2009

Index

1.0 Background

1.1 What is the complaint about?

This human rights complaint was laid with the Yukon Human Rights Commission by Les Carpenter on June 21, 2004. He alleged that the Town of Faro discriminated against him on "the basis of his ancestry, including colour and race, in the area of employment and specifically during the hiring process to fill the position of Chief Administrative Officer of the Town of Faro."

The complaint alleged a contravention of the Yukon *Human Rights Act* (RSY 2002, c116) sections 7(a) "ancestry including race and colour" and 9(b) "in connection with any aspect of employment or application for employment."

1.2 Who are the Parties?

The Complainant is Mr. Carpenter who, during the time of the alleged discrimination, was Director of Radio at CHON-FM in Whitehorse, Yukon. He currently is a resident of Yellowknife, N.W.T. where he has an appointment to the Oversight Committee of the Indian Residential Schools Truth and Reconciliation Commission.

The Yukon Human Rights Commission was represented by Susan Roothman. The Commission carried the complaint referred to the Board of Adjudication.

The Respondent, the Town of Faro, was represented by Gary Whittle.

1.3 What are the circumstances giving rise to the complaint?

On or about the dates cited:

Late fall 2003: Mr. Dave Powers, then Chief Administrative Officer (CAO) for the Town of Faro, resigned.

December 2003/January 2004: The Town of Faro advertised for a CAO with applications to be accepted until January 16, 2004.

January 4, 2004: Jeanne Clarke, a nurse, having decided to return to a position at the Faro Nursing Station from a job in Haines Junction, called Val Benoit, her neighbour and Town Councillor, to assist in opening her home.

In the course of the conversation Ms. Clarke informed Councillor Benoit that her boyfriend, Mr. Carpenter, was probably going to apply for the advertised CAO position. Ms. Clarke had a conversation with Michelle Vainio, a Town Councillor, during which she asked whether the Town of Faro would hire an aboriginal person as CAO. Councillor Vainio answered positively.

January 5, 2004: Bonnie Neumann, a clerk at the Faro Nursing Station, stated that in a conversation with Councillor Benoit, a custodian at the Faro Nursing

Station, she allegedly heard Councillor Benoit say something to the effect of “We don’t need his kind representing the Town of Faro. I can imagine going to meetings and seeing him there with a braid down his back.” Ms. Neumann believed the comments to be in direct relation to the possibility of Mr. Carpenter applying for the CAO position.

January 16, 2004: The application process for the CAO position closed. Mr. Les Carpenter did not apply, though Ms. Clarke had implied in a conversation reported with Mayor Forbes that Mr. Carpenter would apply.

Later in January 2004: Councillors of the Town of Faro short-listed four candidates and interviewed them by phone. As a result, two candidates were chosen to bring to Faro and interview again in person.

February 5, 2004: The first candidate, a man from Whitehorse, was interviewed in Faro.

February 11, 2004: The first candidate was offered the position.

February 18, 2004: The first candidate declined the employment offer.

February 28, 2004: The second candidate, Larry Baran, and his wife were flown in from Alberta and interviewed by the Council. The Council offered the job to Mr. Baran.

March 3, 2004: Mr. Baran notified Mayor Forbes that he had to decline the offer.

March 10, 2004: Council decided to advertise the CAO position again.

March 15, 2004: Ms. Clarke called Mayor Forbes and informed her that Mr. Carpenter would be coming to Faro on the weekend and would like to find out about the CAO position. Mayor Forbes noted that she would be in Whitehorse and asked for Mr. Carpenter’s phone number. Ms. Clarke called Councillor Vainio and asked her what Mr. Carpenter should do to apply for the CAO position.

March 19, 2004: Mayor Forbes called Mr. Carpenter and met him at the Yukon Inn in Whitehorse where they talked about the CAO position for about 45 minutes at a breakfast meeting. Later Mr. Carpenter e-mailed Ms. Clarke and said that Mayor Forbes had suggested that he meet as many Council members as possible. Ms. Clarke told Councillor Benoit of the e-mail communication. Councillor Benoit told Ms. Clarke of a previous CAO applicant who had not dressed properly and to make sure that Mr. Carpenter did. Councillor Benoit contacted Councillors Jones, Miller and Vainio about meeting with Mr. Carpenter. Later Councillor Benoit came by Ms. Clarke’s home to tell her that she and one other councillor would meet with Mr. Carpenter the following morning for coffee at the restaurant. Councillor Benoit also noted that Councillor Vainio had reproved her for going outside of the usual application process.

March 20, 2004: Ms. Clarke typed up a résumé that Mr. Carpenter dictated to her. Mr. Carpenter and Ms. Clarke met Councillors Benoit and Vainio at a restaurant around 11:30 a.m. for an informal conversation. Mr. Carpenter left the résumé prepared earlier with Councillor Vainio. Mr. Carpenter testified that he told Councillors Benoit and Vainio that he had a full résumé which was available on request. Later Mr. Carpenter attended Councillor Gary Jones' birthday celebration along with Ms. Clarke at her behest.

March 23, 2004: Councillors Benoit and Vainio met Mayor Forbes and informed her of their meeting with Mr. Carpenter. They informed her that Councillor Vainio had received a résumé from Mr. Carpenter and that it had been filed with the others.

March, 2004: Dora McLachlan testified that during a drive to Whitehorse in March 2004 with Councillor Benoit she heard Councillor Benoit say "there is no f*xx*king way we want an Indian with a braid down his back as our CAO."

April 2, 2004: Councillor Benoit informed Ms. Clarke that she would recommend Mr. Carpenter for an interview for the CAO position. At 4:00 p.m. the Council for the Town of Faro met. The entire Council, with the exception of Councillor Miller who did not participate, reviewed the applications separately and made their own short-lists of their top four choices for candidates. Saskia Bunicich, the Community Development Officer for the Town of Faro, was asked by Mayor Forbes to prepare a short list as well. No one listed Mr. Carpenter among their top four names.

Following the meeting, Mayor Forbes contacted the four short-listed candidates. She set up phone interviews with three of them. After those interviews, one candidate was selected for a face-to-face interview in Faro.

During the week of April 5, Ms. Neumann told Ms. Clarke of the conversation she had with Councillor Benoit on January 5 about Mr. Carpenter applying for the CAO position. Around the same time, Ms. Neumann told Debra Edwards, the nurse practitioner in charge at the Faro Nursing Station, about the conversation she had with Councillor Benoit.

April 14, 2004: Ms. Clarke informed Mr. Carpenter of the comments by Councillor Benoit reported to her by Ms. Neumann. Soon after, Ms. McLachlan told Ms. Clarke of her conversation in March with Councillor Benoit which supported Ms. Neumann's account of Councillor Benoit's January 5, 2004, statement to her.

May 1, 2004: Mr. Baran called Mayor Forbes and requested the opportunity to re-apply for the CAO position. Following the call, Mayor Forbes canvassed all the councillors who agreed to make the choice between the round 2 candidate and Mr. Baran.

May 7-9, 2004: The round 2 candidate was interviewed in Faro.

May 8, 2004: Ms. Clarke informed Mr. Carpenter of her conversation with Ms. Neumann.

May 11, 2004: The Council met and unanimously decided to offer the CAO position to Mr. Baran. Ms. Clarke drafted a letter to the Council alleging racism on the part of Council. Ms. Clarke gave Mayor Forbes the letter. After some discussion as to whom the sources were, the first letter was shredded. Ms. Clarke returned with another version of the same letter which has been entered into evidence.

May 11, 2004: Mayor Forbes called Councillor Benoit into her office. A staff member, Ms. Bunicich, was present when Mayor Forbes presented Councillor Benoit with Ms. Clarke's second letter. Upset by this, Councillor Benoit went to Ms. Clarke's home and denied the statements attributed to her.

May 13, 2004: Ms. Clarke told Councillor Jones that she thought the Council was racist because of what Councillor Benoit had said to Ms. Neumann and Ms. McLachlan.

May 17, 2004: Council responded to Ms. Clarke's letter. Mayor Forbes delivered Council's written response to Ms. Clarke.

Mid-June 2004: Ms. Clarke informed Mr. Carpenter that a non-aboriginal person had been hired for the CAO position.

June 14, 2004: Mr. Baran began work as the Town of Faro CAO.

June 22, 2004: Mr. Carpenter filed a complaint with the Yukon Human Rights Commission alleging discrimination in the hiring of a CAO based on his native ancestry.

1.4 Positions of the Parties

The Yukon Human Rights Commission carrying the case for the Complainant identified in October 2008 documentation three ways in which the Complainant might be seen to have suffered racial discrimination: access discrimination in the hiring process, unfavourable treatment by the Respondent, and the hiring of someone no better qualified.

The Commission argued during the hearing that the primary issue was "access discrimination" in that the Complainant was not fairly considered and was treated unfavourably in the hiring process "even before he applied". The Commission emphasized that the Complainant's full résumé, while offered, was not requested or considered.

The Respondent framed the issue as a matter of whether or not the criteria used to select the successful candidate and to exclude the Complainant were related solely to *bona fide* qualifications. The Respondent emphasized the importance of assessing whether or not race was a decision criterion, not whether or not any decision-makers ever made racist remarks.

2.0 Issues

2.1 Access discrimination in the hiring process

Did Mr. Carpenter apply for the CAO position for the Town of Faro in March, 2004?

Did the failure of the Town of Faro to ask Mr. Carpenter for his full résumé deny him the opportunity to apply for the job?

2.2 Unfavourable treatment by the Respondent

Were negative racial stereotypes held by some members of the Town Council of Faro?

If so, did they cause Mr. Carpenter to be discriminated against in the hiring process?

Did the pre-application meetings between Mr. Carpenter and members of the Town Council of Faro constitute an effort to screen Mr. Carpenter out of the competition for the CAO position?

2.3 Hiring

Was someone no better qualified but not with the distinguishing characteristics of Mr. Carpenter hired for the CAO position?

3.0 The law and analysis of evidence

3.1 Legal tests

When discrimination is alleged, the Complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is made when the Complainant presents evidence that covers the allegations made and which, if believed, is complete and sufficient for a decision in favour of the Complainant. Further, in *Lincoln v. Bay Ferries Ltd*., 2004 F.C.A. 204, the Federal Court of Appeal provided additional guidance as to the approach to be taken by the Board. The Court noted that the deliberative body should not take into account the Respondent's answer before deciding whether the Complainant has established a *prima facie* case.

The Board’s first task is to determine if the facts meet the legal test of being discrimination. Only if a *prima facie* case of discrimination is made does it

become necessary to consider a justification or alternative explanation for the conduct. The Board analyzed the evidence accordingly. Two tests were put forward by Counsel for the Board's consideration.

3.1.1 *Radek* test

The Commission argued that the landmark racial discrimination case, *Radek vs Henderson Development (Canada) Ltd*., [2005] B.C.H.R.T.D. No. 302 provides an appropriate test for this case as the alleged discrimination happened before the hiring and as such is prohibited under S 9(b) of the Yukon *Human Rights Act* not as “employment” but as “any aspect of … application for employment.” The *Radek* test provides that:

> ...a complainant must prove the following, on a balance of probabilities
>
> (a) that she is a member of one or more of the protected groups against whom discrimination is prohibited by the Code;
>
> (b) that a service was denied or that she was discriminated against (sometimes referred to as “differential treatment” in order to distinguish it from the ultimate finding of discrimination) in relation to a service … the denial or differential treatment must have some sort of adverse effect on the complainant .. ; and
>
> (c) membership in the protected group or groups was a factor in the denial or discrimination.
>
> — *Radek vs Henderson* para. 458

The Commission argued that though the *Radek* test has its origin in a case related to access to services (the *Radek* case dealt with access to a shopping mall), it can be related to aspects of employment. In applying the *Radek* test to *Carpenter v. Faro*, the Board should not narrowly focus on employment or hiring as it may be defined in other jurisdictions but rather consider the more broad Yukon human rights definition of “any aspect of employment or application for employment.” *Human Rights Act* sec. 9b

The Respondent argued that the *Radek* test was not appropriate to this matter as the case before the Board addressed employment and was not focused on an issue of services or other prohibited actions where the *Radek* test might apply. The Board accepts the Commission’s argument that the *Radek* test is applicable to assessing if the Complainant suffered discrimination under Yukon law. The *Radek* test has been used by this Board in previous human rights cases including the *Donna Shopland v. Watson Lake Buslines* case respecting termination of employment.

In applying the *Radek* test the Board finds as follows:

3.1.1.1 Membership in a of protected group

With respect to the first criteria of a *prima facie* case under the *Radek* test, the Board finds that there is no question the Complainant is an aboriginal person, specifically an Inuvialuit citizen, and thus a member of a protected group under the Yukon *Human Rights Act* 7(a).

3.1.1.2 Different treatment

Radek asks if the Complainant received different and unfavourable treatment. The Commission argued that there were three ways in which the Complainant was treated differently and unfavourably: (1) in having pre-application meetings with members of the Town Council, (2) in not being asked for his full résumé, and (3) in being eliminated or screened out at the paper review.

In dealing with each of these instances the Board made the following determinations:

A. Meetings

The Commission stated that two pre-application meetings were "devised" by the Town of Faro Council to facilitate racial discrimination. The Commission characterized the meetings as initiatives of the Respondent, not used with any other applicant or potential applicant. These they argue had the effect of treating the Complainant differently and unfavourably and screening him out based on his aboriginal ancestry.

The first meeting occurred on March 19, 2004 in the Yukon Inn restaurant between the Complainant and Mayor Forbes and members of her family. The meeting had been facilitated by the Complainant's girlfriend, Ms. Clarke. It followed a March 15, 2004 phone call from Ms. Clarke to Mayor Forbes informing the mayor of Mr. Carpenter's upcoming weekend visit to Faro. In that phone conversation, Mayor Forbes informed Ms. Clarke that she would be going to Whitehorse and would be happy to meet with Mr. Carpenter there. Mayor Forbes' affidavit evidence is that at the Whitehorse meeting she "outlined all the various parts of the job" to the Complainant. On parting, she informed Mr. Carpenter that "the Town of Faro would be glad to accept his résumé" and the Complainant thanked her for her time.

Mr. Carpenter testified that at the end of the "very informal" meeting, Mayor Forbes suggested he "should meet with a couple of councillors" on his upcoming weekend visit to Faro. Following that meeting with Mayor Forbes, Mr. Carpenter informed Ms. Clarke of the conversation with Forbes. Soon afterward Ms. Clarke called Councillor Benoit and asked her to arrange a meeting among as many councillors as possible and Mr. Carpenter.

While Mayor Forbes did call the Complainant to set up their meeting, her affidavit evidence and the testimony of Ms. Clarke are consistent in recognizing that the meeting was initiated by Clarke who told Mayor Forbes that the Complainant would like to meet with her. Similarly the meeting with Councillors Vainio and Benoit in Faro was arranged by Councillor Benoit but at the request of Ms. Clarke. This initiative followed a request to Ms. Clarke by the Complainant who was acting on a suggestion by Mayor Forbes. Forbes' affidavit is silent on the matter of suggesting a meeting with councillors. The Complainant's evidence is only that Mayor Forbes suggested he might try to see other councillors when he was in Faro the weekend following their breakfast meeting in Whitehorse. The Board is not persuaded by the evidence that Mayor Forbes was suggesting a structured meeting at all.

Councillor Benoit contacted all councillors regarding a meeting with the Complainant in Faro. Councillor Jones said in testimony that he did not attend because "I didn't think it was fair to the other applicants." Councillor Miller stated in his testimony that he also did not attend as he was "not on the hiring committee and felt it was not appropriate." Councillor Vainio stated she was reluctant to attend because she "didn't want to give anyone any favouritism." She stated she was clear to Councillor Benoit that this was "not an interview" and on that basis she attended.

The meeting of approximately one hour was held in the Faro Hotel coffee shop on Saturday March 20, 2004. The Commission argued that the meeting was an interview where the Complainant was asked "qualifying questions". Councillor Vainio, according to Councillor Benoit, did most of the talking. The Complainant also stated that Councillor Vainio "controlled the conversation".

Councillor Vainio told the Complainant about the job and the promotion of the town. The Board finds that the only evidence of a direct interview-style question was Councillor Vainio's question about the first thing the Complainant would do if hired and his response about painting the bridge. The response was described by the Complainant as being almost in jest and by Councillor Vainio as showing lack of understanding of jurisdiction for road works. While the Complainant's response likely did not advance his interests, the Board finds that the question was neither racially motivated nor significant in his subsequent elimination from the competition. On the whole, the Board finds the discussion at the coffee shop meeting did not include what can be construed as "qualifying questions" as argued by the Commission and was not an interview.

Counsel for the Commission pointed the Board toward the testimony of Dr. Bruce Miller regarding the possible negative impact of such a meeting on an aboriginal person. He suggested that "an Aboriginal person confronted by a potential employer who holds stereotypical views and regards them as suspicious may find the process of answering questions to be yet another attack on their integrity as a person." Dr. Miller's affidavit and testimony evidence were objected to by the Respondent on the basis of his expertise in racism,

discrimination and matters of employment in the Yukon being limited. The Board accepts Dr. Miller's evidence but gives it limited weight as only suggestions about how non-aboriginal people might see aboriginals, how aboriginals might react to actions of non-aboriginals and how a process of discrimination might develop from stereotypes possibly leading to racism and possibly discrimination.

The Board does not find Dr. Miller's supposition that an aboriginal person may feel their integrity attacked when "confronted by a potential employer who holds stereotypical views" to have been the case in regard to the Complainant at either meeting. The Complainant, by his own testimony, felt that the pre-application meetings went well and were "breaking the ice." "I thought that they might welcome my application." Further under cross-examination, the Complainant affirmed his positive feelings about the Faro coffee shop meeting when he testified that he "took it as a good sign."

While the Board finds these two in-person pre-application meetings between an employer and a potential candidate to be irregular, the Board is of the opinion that it would not be unusual for an employer to have a conversation with a potential applicant to explain a job and/or to encourage application. The Board finds, based on the evidence of Mayor Forbes and Councillor Vainio, that explaining the job and encouraging the Complainant to apply was the Respondent's primary purpose for participating in the meetings.

On the evidence of Ms. Clarke, Mayor Forbes and Councillor Benoit, the Board finds the meetings were held at the instigation of the Complainant or Ms. Clarke acting on his behalf and not the Town of Faro acting on its own initiative. The Board finds that the meetings were different treatment of the Complainant but had no adverse effect on the Complainant. The Board finds no evidence of unfavourable treatment at these purely informational meetings and sees no later impact from them during the formal screening process, as will be addressed further in the decision.

Another meeting with some Council members occurred on Saturday evening March 20, 2004, when Ms. Clarke took Carpenter to a birthday party for Councillor Jones. Little was recalled about this gathering by anyone in testimony before the Board other than it was another opportunity to mingle and "socialize out in the community" according to Ms. Clarke. The Board finds the Complainant's attendance at the birthday party had no impact on the hiring process.

B. Application

The Commission strongly argued that the Complainant was prevented from applying for the position and that he was screened out "even before he applied". The evidence is that upon leaving the March 20, 2004, meeting in the Faro Hotel coffee shop, the Complainant handed Councillor Vainio his résumé with a covering letter. Mr. Carpenter had prepared these earlier that day with Ms. Clarke's assistance at her home. The first sentence of the cover letter reads

“Please find attached my Résumé, to be considered for the position of Chief Administrative Officer for the town of Faro.” At the end of the following two-page résumé and statement of skills, he notes “References available on request.” Councillor Vainio accepted the résumé. She told the Complainant that “it would go with the rest.” The date on the cover letter notes its receipt by the Town of Faro on March 22, 2004.

The Board accepts the testimony of the Complainant that he told Councillors Vainio and Benoit that he “had a more detailed C.V. in Whitehorse and could provide it to them if required.” Neither Councillor Vainio nor Councillor Benoit recalls having heard him offer another fuller résumé to them if desired. The Complainant's offer was not acted upon. The Commission argued that Mr. Carpenter's verbal offer obligated the Town of Faro to follow up on it. The Board finds the onus was on the Complainant, as a matter of common business practice, to present the most favourable application possible to the Town of Faro and not for the Respondent to request it from him. The Board also finds that the Town of Faro not following up on Mr. Carpenter’s offer of a fuller résumé cannot be construed as evidence of the Complainant being “pre-screened” by the Respondent on the basis of his ancestry.

The Board notes the Complainant testified that he himself considered the handing over of the three-page document to Councillor Vainio to be submitting an application for the CAO position. Accordingly, the Board finds that the Complainant did apply for the position of CAO for the Town of Faro.

The Board finds that the Respondent’s acceptance of the document submitted by the Complainant as an application was not a matter of different treatment but rather Mr. Carpenter was treated the same as all the other applicants.

The job advertisement entered into evidence shows that the Complainant had over two weeks from the time he initially handed over the application at the coffee shop meeting until the competition closed. The Complainant could have submitted further documentation on his own initiative. The Board does not find it unusual that that the Respondent used only the materials submitted as the basis for screening the candidates for later interviews and did not ask for any follow-up information. The Board notes that other candidates said in their letters or résumés, included in the evidence provided, that further information was available on request but no request to the Board’s knowledge was made to those candidates either.

C. Screening

On April 2, 2004, the Town of Faro Council met to deliberate on the CAO applications received by the closing date. Councillor Miller was absent for medical reasons. Earlier that day Councillor Benoit informed Ms. Clarke that she would be recommending the Complainant be short-listed.

As in round 1 of the CAO search process, copies of the application letters and résumés were circulated. The Mayor and councillors each independently prepared a short-list of the four best candidates. Mayor Forbes also asked Ms. Bunicich, a Town of Faro employee, to review the résumés and short-list candidates.

No one listed the Complainant among their top four choices. Councillor Jones stated under cross-examination that he had listed the Complainant as a fifth choice because Ms. Clarke was a friend. Councillor Benoit raised the Complainant's name also stating that it was because Ms. Clarke was a good nurse and more likely to stay if Mr. Carpenter was hired. Councillors Vainio and Benoit were consistent in their evidence that Councillor Benoit "relented" in her position on the short-listing of the Complainant when she was challenged on the inappropriateness of the goal of keeping Ms. Clarke as a local nurse as the grounds for considering the hiring of her boyfriend, Mr. Carpenter. Mayor Forbes called the successful candidates to arrange for phone interviews.

There is no question that the Complainant was screened out of the second round of the competition at the résumé-review phase along with and at the same time as all but four of the other candidates. Only one of the remaining four was brought to Faro for a face-to-face interview.

The Board finds the screening for interviews based on the paper applications submitted did not treat the Complainant differently from other applicants, although it did have an unfavourable outcome for the Complainant.

3.1.1.3 Membership a factor in treatment

The final point argued by the Commission on the *Radek* test centered on the question, "Was the Complainant's aboriginal ancestry a factor in how he was treated"?

The Board heard the argument by the Commission that the alteration of the advertisement for the position of CAO for the Town of Faro between the first and second postings should be construed as evidence of the intent to exclude First Nation applicants generally and the Complainant specifically. The changes tightened the focus on desired senior management experience. Municipal management experience was deemed preferable.

The first ad had a sentence encouraging applicants "with management experience working for other levels of government such as federal, territorial or First Nations" to apply. For the second ad, that sentence was deleted. This deletion occurred prior to the Complainant applying for the position. The Board finds this change is wholly within the purview of the Town of Faro and finds it cannot be seen as prejudicial to the Complainant or credible evidence of a calculated plan to specifically discourage his possible application.

As noted above, the Board finds that the two pre-application meetings did constitute treating the Complainant differently from other candidates for the position notwithstanding the meetings were at the instigation of the Complainant or Ms. Clarke, acting on his behalf. However this fact alone is not sufficient to prove discrimination.

In reference to this point, the Board refers to *Oxley v. British Columbia Institute of Technology* (para 89):

> Even if I were to accept … that the selection process was flawed, this would not be sufficient to justify a complaint of discrimination on the basis of race, colour or ancestry … unless a link can be made to a discriminatory reason for such a decision, a case of discrimination is not made out. To be successful in his complaint of discrimination the Complainant must also show that his race, colour or ancestry was a factor in the design and implementation of the selection process such that he was denied the opportunity to compete for the position.

In assessing if and how aboriginal ancestry and racism might have influenced how the Complainant was treated the Board is guided by several sources. In *Gaba v. Lincoln County Humane Society* (C.H.R.R. D/3985 (Ont. Bd.Inq. 1987), the Board of Inquiry distinguished an employer's prejudice against an employee (as evidenced by the use of racial slurs) from the fact that the employee was refused a promotion because of a lack of experience and a better qualified candidate. The Board found that proof of prejudice does not necessarily equate to discrimination unless the impugned behaviour can be shown to have influenced the decision in question.

> The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics…
>
> — *Quebec c. Montreal* (S.C.C.) para 36

Dr. Miller noted in his written submission that "stereotyping can lead to prejudicial attitudes of hatred and contempt that are the basis for discriminatory and racist behaviours and policies towards the stereotyped group." He further stated that negative stereotypes "may reinforce the systemic exclusion of minorities because they confirm the belief that minorities are not qualified for particular jobs." As noted above, the Board considered Dr. Miller's proposals only as possible interpretations of how a process of discrimination may develop.

There was considerable evidence about Councillor Benoit holding negative stereotypes of aboriginal people. Councillor Benoit's work colleagues,

Ms. Neumann and Ms. McLachlan, both reported incidents involving Councillor Benoit conveying negative stereotypes in direct reference to the hiring of a CAO for the Town of Faro. Each of these incidents occurred in private conversations with the two individuals separately. Ms. Neumann understood the negative comments to be directly in reference to the Complainant. Councillor Benoit denied the words attributed to her by Ms. Neumann and Ms. McLachlan. Councillors Jones, Miller and Vainio denied ever hearing Councillor Benoit state the racist phrases she was reported to have uttered in the private conversations.

The Board prefers the testimony of Ms. Neumann and Ms. McLachlan and, while recall of exact phrasing may be faulty after five years, on a balance of probabilities, finds Councillor Benoit did, in private, make statements that an aboriginal person would not be appropriate for the Town of Faro CAO position.

In its closing statement, the Commission argued that “the majority of the town councillors were operating on the basis of subtle stereotyping and that Councillor Benoit’s conduct and statements were basically condoned by all those who joined in during the informal meetings with the Complainant.”

Councillor Miller testified to having heard Councillor Benoit make stereotypical statements about First Nation people. These referred to the notion of time. Councillor Miller did not believe the statements to be a slur and in his testimony mirrored this same belief in relation to his work at the Faro mine with First Nation employees. Councillor Vainio in her testimony related that she, as well, had heard Councillor Benoit make comments relating to First Nation people’s concepts of time and dates. Councillor Vainio in cross-examination stated she recognized cultural differences with First Nation peoples in their concepts of time.

The only evidence of the stereotypes being shared with others was the evidence of Councillor Benoit’s conversations with her work colleagues, Ms. Neumann and Ms. McLachlan, as well as a comment to Councillor Miller. Counsel for the Respondent argued that all of these were private conversations and the Board should recognize them as protected by freedom of expression in accordance with the *Canadian Charter of Rights and Freedoms*, s.2(b). This argument was not challenged by the Counsel for the Commission. This Board concurs that holding negative stereotypes is not illegal unless a nexus between the opinion expressed and discriminatory treatment in the hiring process can be found. Whether or not this nexus existed was the issue for the Board.

The Board finds that Councillors Benoit, Vainio and Miller held some negative stereotypes about First Nation people or Indians. The fact of statements or stereotypes before the Board is not sufficient to prove that prejudice based on ancestry was a factor in their decision to meet with and screen out the Complainant.

The Commission asked the Board to infer that racial prejudice led the Respondent to construct the meetings and then provided a pretext for screening.

Counsel for the Respondent directed the Board to consider *Nimako v. Canadian National Hotels* (Ont. Bd. Inq), para 135:

> Reprehensible though they most emphatically are, isolated uses of racial slurs, even by those in a supervisory position, are not contraventions of the Code.

and *Parsonage v. Canadian Tire Corp.* (Ont Bd. Inq.), para 113:

> A single improper and insulting joke, told over the luncheon table by employees on break does not constitute a violation of the Human Rights Code … [t]hat is so even if the epithet is used by a supervisor, if the episode is isolated …

In considering the circumstantial evidence the Board also looked to *Fortune* as quoted in *Daniels v. Annapolis Valley Regional School Board* para 44:

> The appropriate test in matters involving circumstantial evidence … may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

The Board finds the meetings, while different treatment, were not based on race. The Board rejects the Commission's analysis that the meetings were “devised” to screen out the Complainant based on race. The Board finds, based on the evidence of Councillors Forbes and Vainio and Ms. Clarke, that the more probable inference is that the meetings were in response to the Complainant’s request to find out more about the job.

The Board finds the information from the pre-application meetings was not a factor in the screening out of the Complainant. The Board finds no direct or indirect evidence of a link between the pre-application meetings and Mr. Carpenter not getting the CAO position.

The Board finds it is not probable to infer discrimination against the Complainant from the stereotypes held by Councillors Benoit, Vainio and Miller or from the racist statements of Councillor Benoit. The Board does not believe that Councillor Benoit’s comments had a deleterious impact on the CAO hiring process with regard to the Complainant.

The Board finds on the evidence of Councillors Vainio, Benoit and Jones and its own comparative review of all the application résumés that the decision to screen out the Complainant was based exclusively on non-racial criteria, more

specifically, the decision was based on the qualifications of the other applicants submitted to the Town of Faro relative to the Complainant's application.

3.1.1.4 Finding on discrimination

Under the *Radek* criteria the Board finds that a *prima facie* case for discrimination is not made in this matter.

On the question of application or access to the hiring process, the evidence presented to the Board did not demonstrate, on a balance of probabilities, that the Complainant received different or unfavourable treatment based on his aboriginal ancestry.

3.1.2 *Shakes* test

The *Shakes* test was the initial focus of analysis for the Commission in its investigation and an alternative submission on the issues as presented to this Board. The Respondent argued the hiring discrimination as outlined in *Shakes vs Rex Pak Ltd*. was the only appropriate test for this matter. For completeness, the Board, after having exhausted the *prima facie* argument under the *Radek* test, also examined the argument for establishing discrimination under the *Shakes* test.

In what is referred to as the *Shakes* test of an employment complaint, the Commission must establish a *prima facie* case 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.
>
> — *Oxley v. British Columbia Institute of Technology* (B.C.H.R.T.), para 69

3.1.2.1 Qualified

Limited evidence was led by the Commission with respect to the Complainant's qualifications. The Complainant refused to answer most questions posed by Counsel for the Respondent with respect to his qualifications. He declined the opportunity to adjourn the proceedings so he could seek legal advice on the implications of this refusal.

On analysis of the qualifications for the position as outlined in the job description, and of the information the Complainant included in his three-page application, the Board finds that the Complainant may have been qualified for the position.

3.1.2.2 Not hired

It is clear and uncontested that the Complainant was not hired.

3.1.2.3 Comparative qualifications

The key element for the Board was the third element in the *Shakes* test that someone no better qualified but lacking the distinguishing feature subsequently obtained the position.

Uncontested evidence showed that all the members of the Town of Faro Council, with the exception of Councillor Miller who was excused for medical reasons, were provided copies of all round 2 applications at 4:00 p.m. on April 2, 2004. These applications had been received by the April 2, 2004, deadline. Mayor Forbes directed the councillors to independently compare qualifications and rank their top four candidates. Ms. Bunicich, a town employee, was asked by Mayor Forbes to prepare such a listing as well.

The Board reviewed the documents in Exhibit 6, Tab N, which included the hand-written notes of the councillors involved on their short-list choices of candidates and Ms. Bunicich's list. From these listings it was possible to establish the top candidates chosen from all round 2 applicants. With this evidence and applications provided by the applicants, the Board conducted an analysis of the five candidates who were on any of the individual hiring committee members' short-lists. In addition, the round 1 application of the successful applicant, Mr. Baran, was also analyzed relative to the Complainant's application. The Board's analysis was based on a comparison of five duties along with six factors relating to education or experience as outlined in the job description and three additional elements included in the job posting.

On a balance of probabilities, the Board finds it was reasonable for the Council to assess the candidates who were successfully short-listed to be more qualified than the Complainant. The Board finds the Complainant was screened out on job description-related criteria and not on the basis of any First Nation-related stereotypes held by two of the councillors involved in the selection process.

By coincidence, the Board concurs with but gives little weight to the analysis of the applications offered to it in the affidavit of Colin J. Dean, admitted by consent of the Parties as evidence for the Board. Later, the affidavit of Mr. Dean was objected to by the Commission as irrelevant and was not subject to cross-examination. The Board considered it only insofar as it provided comment as to how a hiring panel might approach the résumé-screening task.

In assessing the relative qualifications of the Complainant and the candidate hired, the Board follows the direction of *Daniels v Annapolis Valley Regional School Board* that it must consider the information that was before the Respondent when the determination was made.

> The question was not whether the Complaint had better qualifications in hindsight, but whether the qualifications in her application were better than the males who were short-listed …. I also agree that there is an onus on an applicant to ensure that the application documents give sufficient information to the employer so that they may reasonably determine the candidate's qualifications.
>
> — *Daniels v.Annapolis Valley Regional School Board*, para 37 and 47

Therefore, it is well within the purview of the Town of Faro to have made its decision based on the applications received.

It is the opinion of the Board that the hastily prepared presentation of the application by the Complainant may have been a contributing factor in his not being short-listed for an interview. Additional qualifications outlined by the Complainant in his oral testimony and in a fuller résumé tendered as an exhibit before the Board were not considered by the Town of Faro hiring committee. The Board also notes its earlier finding that the onus was on Mr. Carpenter to present a full résumé for the decision-makers' consideration.

After his request for reconsideration, Mr. Baran's name was added to the short-listed round 2 applicants. While his re-application was not part of the screening process that eliminated the Complainant's application, the Board considered his application in its *Shakes*-test analysis. The Commission presented no evidence to challenge Mr. Baran's qualifications for the position or to negatively compare them to the Complainant's. The Board found Baran's qualifications were superior to those of the Complainant.

With regard to the issue of the Town of Faro Council deciding to alter its own hiring process, the Board finds this reconsideration of Baran was wholly within the purview of the Town of Faro. In deciding to reconsider Baran, the Board agrees with the position stated in *Stein v. British Columbia* as follows:

> I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor the court to consider the wisdom of the procedures.
>
> — *Stein v. British Columbia (Housing Management Commission)* (B.C.C.A.), para. 21

3.1.2.4 Finding on discrimination

Under the *Shakes* criteria the *prima facie* case for discrimination has not been made.

4.0 Decision on complaint

The Board held a 10-day hearing on the merits of the complaint. The Board heard oral evidence and received written submissions from all Parties. Further, the Board considered the issues raised by all Parties within the context of the evidence and the relevant provisions of the Yukon *Human Rights Act*. The Board thoroughly reviewed the evidence presented and applied evidentiary tests (primarily the tests referred to as *Radek* and *Shakes*) pointed out to it by the Commission and the Respondent.

On a balance of probabilities, this Yukon Human Rights Board of Adjudication unanimously finds in the case of *Les Carpenter & the Yukon Human Rights Commission v. the Town of Faro* that no discrimination occurred in "connection with any aspect of employment or application for employment". This Board dismisses the complaint.

5.0 Remedy

5.1 Legal framework and positions

The Respondent asked for a remedy of costs plus damages should the complaint be dismissed.

Section 25 of the *Human Rights Act* outlines the authority of the Board to make awards. It expressly states:

> If the board of adjudication concludes that the complaint was frivolous or vexatious or that the proceedings have been frivolously or vexatiously prolonged the board may order the commission to pay the respondent
>
> a) part or all of the respondent's costs of defending against the complaint; and
>
> b) damages for injury to the respondent's reputation.
>
> — *Human Rights Act*, Revised Statutes of the Yukon 2002, c. 116, s.25

The Respondent sought remedy from the Commission and made it clear to the Board that the filing of the complaint and the conduct of the Complainant were not issues in the matter of remedy. The Respondent argued that the Commission frivolously or vexatiously prolonged the proceedings.

The concepts of “frivolous” and “vexatious” are key in the Board’s consideration of a remedy for the Respondent. The Board understands that ‘A pleading is frivolous if it is without substance, is groundless, fanciful, “trifles with the court” or wastes time.’ (*Borsato* v. *Basra* (2000), 43 C.P.C. (4th) 96, [2000] B.C.J. No. 84.) It further accepts that ‘Federal authorities have interpreted “vexatious” as being broadly synonymous with the concept of abuse of process.’ (*Wilson v. Revenue Canada* (2006)

The Respondent argued that the proceedings themselves had been frivolously and vexatiously prolonged by the Yukon Human Rights Commission. Counsel for the Commission argued the Commission has an obligation under the *Human Rights Act* to investigate complaints made to it. Only after investigating the complaint can it “ask a board of adjudication to decide the complaint.” (*Human Rights Ac*t, Revised Statutes of the Yukon 2002, c. 116, s.21). The Commission considered its actions were in accordance with its normal procedures; therefore, they argued the Commission cannot be seen as having frivolously or vexatiously prolonged the proceedings.

As to the nature and intent of the term” proceedings” the Board made a ruling on August 28, 2009. On August 25, 2009, the Board invited Counsel for the Parties to make submissions as to the timeframe of “proceedings” in this matter as referred to in Section 25 of the *Human Rights Act* The Board considered submissions from the Respondent and the Human Rights Commission and the reply to the Respondent’s submission put forward by the Human Rights Commission.

The Board noted that both the Respondent and Human Rights Commission supported the concept of a broad rather than narrow interpretation of the word “proceedings” in Section 25 of the Act. In particular, the Board noted the Human Rights Commission’s point that the “plural form of the word indicates a broader meaning than just the Board’s proceeding commencing at referral of the complaint.”

The Board determined that the ambit of the word “proceedings” in this case refers to the date from which Mr. Carpenter filed his complaint with the Human Rights Commission on June 22, 2004, to the conclusion of this Human Rights Board of Adjudication hearing [Sept. 29, 2009].” (BOA 2008-03, August 28, 2009)

In its August 28, 2009, ruling the Board also directed the Parties to present “full argument” concerning the Supreme Court decision of Madam Justice Kent (*Supreme Court of Yukon* Case No. 05-A0116 dated April 11, 2008). This request was in reaction to the Commission’s suggestion in its submission that the Justice Kent decision restricted the Board’s ability to consider the time period before Justice Kent’s decision. The Board stated specifically:

> The Board is cognizant of the submission by the Human Rights Commission regarding the Supreme Court decision of Madam Justice Kent entered April 11, 2008. If and when counsel make submissions under Section 25 with respect to the proceedings having been frivolously or vexatiously prolonged, the Board will expect to receive full argument as to the import of this Supreme Court decision on any determination under Section 25 regarding costs between June 2004 and July 2008.
>
> — BOA 2008-03, August 28, 2009

In considering proceedings for the purpose of remedy analysis the Board recognized two key time periods in the proceedings before it: (1) June 2004, when the complaint was filed with the Yukon Human Rights Commission to April 2008 when Madam Justice Kent rendered her decision on the Respondent's application, and (2) April 2008 until the end of the Board proceedings on September 29, 2009.

5.2 Time Period 1

With respect to the first period, Justice Kent's decision refers to *Blencoe v. British Columbia* when she wrote:

> Although the court found institutional problems with the process. Bastarche, J. said: [t]here must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected (para. 133). There is no evidence that that is the case here.

Counsel for the Commission states in her submission" that the issue of unreasonable delay has already been considered and decided by a higher forum" and therefore cannot be reconsidered by the Board. Counsel for the Respondent did not provide a counter argument on the binding effect of Justice Kent's decision on this Board's ability to consider the reasonableness of the delays in the time period prior to her decision. The Board accepts the argument of the Counsel for the Commission.

The Board accepts the finding of Justice Kent that she found no evidence of an unreasonable delay in the proceedings so as to prejudice them to the degree "that the public's sense of decency and fairness is affected."

This Board finds it cannot think otherwise and concludes therefore that from June 2004 until April 2008 the proceedings cannot be considered to have been frivolously or vexatiously prolonged.

Having accepted Justice Kent's finding, this Board holds that there is no foundation to award a remedy as sought by the Respondent for Time Period 1.

5.3 Time Period 2

Justice Kent's decision directed that this "matter shall proceed directly to a board of adjudication." A Board of Adjudication was struck and heard the complaint. The Board was not compelled to determine whether the very nature of the complaint was frivolous or vexatious, nor did it take this responsibility on itself. Further, the Board was not asked see the possible frivolous or vexatious prolongation of the proceeding as an abuse of the Board's own process. The question of the possible frivolous or vexatious prolongation of the proceeding was raised only with regard to actions of the Commission and to provide a remedy to the Respondent.

This Board is guided by reference to Ontario Human Rights Board decision *Bui v. B&G Foods Inc.* [2001], where Counsel for the Commission delineated the extent to which a Board may consider Commission proceedings:

> The Board has no supervisory jurisdiction over the Commission and unless there has been an abuse of the Board's process, the Board's role does not include a review of the actions or conduct of the Commission or its handling of a case leading up to a referral to the Board. The Board's task is not to determine whether the Commission has exceeded or failed to exercise its jurisdiction by acting fairly or failing to satisfy a statutory prerequisite or precondition. That is the job of the Divisional Court on judicial review. (para. 25)

Counsel for the Commission further directed the Board's attention to *Bui v. B&G Foods Inc.* [2001] when it noted that:

> [T]he Board remains in control of its own process and may be required to consider and assess what lasting impact matters that occurred prior to the referral have had on the fairness of the proceeding before it and whether continuing with the proceeding would be an abuse of the Board's process. (para. 28)

Following Justice Kent's determination to send the complaint directly to a Board of Adjudication, this Board assumed that responsibility to hear it. This Board is the master of its own process. The action by the Board clearly signalled that the Board did not see the fairness of the proceeding being compromising.

There were actions and delays that prolonged the process from April 2008 to September 2009. These commonplace occurrences encountered in the hearing process such as staff holidays, illness and administrative responses were thoroughly noted by Counsel for the Respondent. The Board does not find that these occurrences infringed upon the rights of any of the Parties in addressing the complaint before the Board.

The Board finds therefore that from April 2008 until September 2009 the proceedings cannot be considered to have been frivolously or vexatiously prolonged.

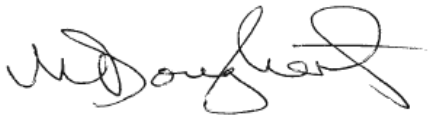
5.4 Decision on remedy

The Board concludes that from June 2004 until September 2009 the proceedings cannot be considered to have been frivolously or vexatiously prolonged.

This Board cannot exceed its authority under the *Human Rights Act*. Under the current legislation the frivolous or vexatious prolongation of proceedings must be found in order to trigger a remedy being ordered by this Board. This was not found. This Board therefore cannot order the Commission to pay costs to the Respondent for defending against the complaint.

Though Counsel for the Respondent also invited us to consider damages as well for injury to reputation, this Board similarly cannot do so. The necessary precondition that the proceedings were frivolously or vexatiously prolonged was not found by this Board.

Decided this 15 day of January 2010 at the City of Whitehorse in the Yukon



Michael Dougherty
Acting Chief Adjudicator
For the Yukon Human Rights Board of Adjudication