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September 30, 2024

***VIA* EMAIL**

BC Human Rights Tribunal
1270 – 605 Robson Street
Vancouver, BC V6B 5J3

Attention: **Devyn Cousineau, Tribunal Member**
Ijeamaka Anika, Tribunal Member
Robin Dean, Tribunal Member

Dear Panel Members:

RE: **BCTF obo CTA v Barry Neufeld, BCHRT Case No. CS-001372 – Counsel email of September 27, 2024**

At 6:06 PM PDT on Friday, September 27, 2024 I received the enclosed email, on which I was copied, sent by counsel for the Complainant to the Tribunal. Counsel had not contacted me prior to this email to alert me of her concern, such as it is.

The substantive content of counsel's email amounts to much ado about nothing, yet the communication demands a response because of its inappropriate nature. The underlying suggestion of counsel's email is that my client and I have engaged in some sort of imagined secret shenanigans, a suggestion that is, of course, scandalous and unbecoming.

The Content of the Improper Email

The email's first paragraph purports to "request the opportunity to make sur-reply" before segueing to an obfuscatory explanation of the supposed rules on point and the supposed facts of the matter. The second paragraph of the email sets out the Rule 28(5) exception to the Rule 28(4) restriction on further submissions, being "to address a new issue raised in a reply submission", before admitting that the Complainant's wish to make sur-reply does not fit into the Rule 28(5) exception.

The fourth paragraph of the email admits that the Complainant's wish to make sur-reply does not fit into the Rule 28(6) exception either, since the information the Complainant sought to disclose by way of sur-reply had been discoverable prior to the Complainant filing its response to the Respondent's adjournment application.

For further certainty, the Complainant admits in its email purporting to "request the opportunity to make sur-reply" that its "request" fits neither of the exceptions to the Rule 28(4) restriction on further submissions, whether explicitly, implicitly, or both.

Nevertheless, in the third paragraph of the Complainant's "request" to make further submissions, absent any rule that would permit the Complainant to make further submissions, the Complainant spontaneously launches into further "submissions", calling into question Mr. Neufeld's candour concerning his search for counsel and his truthfulness in declaring his candour concerning his search for counsel, on the basis of a post on Mr. Neufeld's website indicating that he had been connected with me, in the words of the email, "many years ago when the Justice Centre for Constitutional Freedoms offered to represent Mr. Neufeld and assigned Mr. Kitchen"—an accusation which necessarily extends to me, since I am Mr. Neufeld's counsel, and Mr. Neufeld's alleged ploy would be unsustainable were I not working in concert with him.

The oddest feature of the Complainant's email is that, while it clearly seeks to cast aspersions on the Respondent and his counsel, it is difficult to make out the precise object of the Complainant's fixation; it ***appears*** to be the fact that in 2018, while still a first year call, I was the junior assigned by the Justice Centre for Constitutional Freedoms to Mr. Neufeld's file, after which, approximately two months later, the Centre closed the file and Mr. Neufeld moved on to the private-practice law firm his professional liability insurer provided.

Whatever the Complainant's protestation in this regard, which is not entirely clear, it bears noting that prior to filing its response to the Respondent's adjournment application, the Complainant had both a right to cross-examine Mr. Neufeld on his affidavit, and an explicit invitation extended by Respondent counsel to do so. The Complainant declined to exercise its right to cross-examine Mr. Neufeld. Having done so, the Complainant is not now entitled to cast unfounded aspersions before the Tribunal.

For the reasons set out herein, the Respondent submits that the Tribunal should:

1. Decline to receive any further material from the Complainant regarding the Respondent's Application for an adjournment; and
2. Direct a case conference be held on or before October 2, 2024 to address any outstanding matters and hear directly from counsel for the parties.

The Relevant Rule

Rule 28(4) of the BC Human Rights Tribunal Rules of Practice and Procedure ("Rules") reads: "The tribunal **will not consider** submissions other than those permitted in a schedule for submissions, **unless** it allows an application under **rule 28(5) or (6)**". [Emphasis added.]

Rule 28(5) permits a party to request that the Tribunal consider a further submission "to address a **new issue raised in a reply submission**". Rule 28(6) permits a party to request that the Tribunal consider a further submission "to address **new information not available to the participant when they filed their submission**". [Emphasis added.] Neither the Rule 28(5) exception nor the Rule 28(6) exception is presently in play.

The Complainant first attempts to transform these two rules into some sort of mutant rule approximating "The Respondent didn't bring up anything new in his reply, but something in there made me think of something new, so it's new". That, of course, is not how this works.

The Complainant next attempts to cobble together the Tribunal's "broad power to govern its own process" with half of Rule 28(6)—the whole of which the Tribunal doubtless made ***as part of its broad power to govern its own process***—resulting in another invented chimera rule that would have this Tribunal ignore any part of the rule which fails to serve the Complainant.

The Complainant's claim, "Our request to tender material by way of sur-reply arises not from a new issue raised in reply per-se, but from new information relevant to a point made in reply", is both false and misleading. The "new information" to which the Complainant refers is not new information pursuant to the definition of new information in Rule 28(6), which contemplates new information **"not available to the participant when they filed their submission"**. Two paragraphs on, the Complainant "acknowledges" that the information was available before it filed its response to the adjournment application.

Notably, "fairness" is not a consideration independent of the requirements of the Rule 28 test for accepting further submissions, being a new issue or new information, as defined in the rule. *Umolo v Manchanda Corp Ltd (cob Shoppers Drug Mart)*, 2021 BCHRT 166 decides that fairness is the third of **three requirements**:

> [T]he Tribunal only permits sur-replies when all of the criteria in Rule 28 are met:
>
> (1) new issues or information are raised in the reply submissions of another party;

(2) the new information was not available to party when they made their own submission; **and**

(3) fairness requires that the Tribunal consider the further submission: Rule 28(6).

I agree with Shoppers that Mr. Umolo raised new issues and information in his reply, about the reasons for his delay, including: the impact of the Covid-19 pandemic, and a family member's illness [the New Information]. The New Information was not available to the Respondents when they filed their responses. If the New Information had any bearing on my decision in this matter, fairness would require that I accept and consider Shoppers's sur-reply. However, I have not found it necessary to consider the New Information in arriving at this decision. As a result, I do not accept this New Information raised in Mr. Umolo's Reply. Therefore, I assess Mr. Umolo's late-filed complaint without taking into account the New Information provided in Mr. Umolo's reply, or Shoppers's sur-reply (at paras 20-1). [Emphasis added.]

Accordingly, more is required than is reflected in the Complainant's submission that the Tribunal "has the ability to consider this additional material should it determine the circumstances warrant it". The Rules are clear about the circumstances that warrant the Tribunal's consideration of additional material, as is the case law.

The Tribunal Precedents on the Rule

Numerous BCHRT cases reflect the tripartite test for determining whether the Tribunal should accept further submissions, with the first two factors being (1) new issues or information which were (2) unknown or unavailable, and the final factor being (3) "fairness", which determines whether such new issues or information will be considered: *Pereira v Corporate Classics Caterers*, 2015 BCHRT 31 [*Pereira*] at para 35; *Pearson v JV Logging Ltd*, 2020 BCHRT 5 at para 21; *Ali v North Peace Seniors Housing Society*, 2017 BCHRT 88 [*Ali*] at para 20; *Minasyan v Strata Plan LMS 3845*, 2015 BCHRT 134 at para 13; *Broe v Board of Education of School District No 67 (Okanagan Skaha)*, 2023 BCHRT 157 at paras 25-6; *C v Vancouver Coastal Health Authority*, 2021 BCHRT 22 at para 45; *Humphrey v BL Resort Ltd*, 2023 BCHRT 195 [*Humphrey*] at para 7; *Malhi v Langara Students' Union Assn*, 2018 BCHRT 64 at para 11; *Patrick v British Columbia (Emergency Health Services)*, 2024 BCHRT 124 at para 60; *Shachak v Doctor Rahil Faruqi Inc*, 2015 BCHRT 55 at para 19; *Shahgou v Strata Plan No BCS 3495S*, 2024 BCHRT 176 at para 18; *Simpkin v Stl'atl'imx Tribal Police Board*, 2014 BCHRT 255 at para 20; *Singh v Prime Deals International Ltd*, 2024 BCHRT 161 at para 23.

Information must be legitimately undiscoverable prior to submissions in order to be "new" within the meaning of the rule—for example, a freshly released decision: *Pereira* at para 37; *Ali* at para 23;

Humphrey at para 7. Even where information is new, it will only be considered if it is also relevant: *Emslie v Lululemon Athletica Canada Inc*, 2024 BCHRT 41 at para 13.

Where the Tribunal has expressed a willingness to depart from the Rule 28(5) and (6) criteria, some exceptional circumstance has factored into the Tribunal's reasoning, such as Tribunal error (*Alexander v Saanich (District)*, 2019 BCHRT 82 at paras 17-8); a self-represented party (*Thejoisworo v Northern Gold Foods Ltd*, 2021 BCHRT 121 at paras 63-4; *Deboo v British Columbia (Ministry of Public Safety and Solicitor General)*, 2018 BCHRT 10 at para 127; *SL v Michell's Farm Market Ltd*, 2024 BCHRT 54 at paras 33-4); a decision so overwhelmingly weighted against the party seeking to enter the submission, the Tribunal undertakes, as something of a formality, to ensure it has left no stone unturned (*AB v City*, 2024 BCHRT 196 at para 29; *Bruintjes v North Central Plumbing & Heating Ltd*, 2023 BCHRT 162 at para 26; *Colbert v North Vancouver (District)*, 2018 BCHRT 40 at para 10); or a correction to information previously given to the Tribunal, as outlined in *Woollacott v Canadian Forest Products and another*, 2014 BCHRT 61:

> [25] The overriding consideration is whether fairness requires an opportunity for further submissions. The circumstance specifically addressed in *Rule* 24(6) and (7), where new issues have been raised in reply, is one where fairness may require such an opportunity. There are others, as described in *Gichuru v. The Law Society of British Columbia (No. 2)*, 2006 BCHRT 201:
>
> As explained in the *Kruger* decision, the justification for permitting a sur-reply is fairness. In the vast majority of cases, this will be because new matters have been raised in reply and fairness requires that the other party be given an opportunity to respond. This consideration does not apply here.
>
> It is possible that a sur-reply might be allowed in other situations, i.e., to correct incorrect information previously given to the Tribunal. As well, I do not wish to foreclose the possibility that, in an appropriate case, new evidence might form the basis for a sur-reply. (paras. 21-22)

The Irrelevance of the Information in Any Event

The foregoing are the ***technical*** problems which are alone fatal to the Complainant's request. However, even were Rule 28(6) in play, which it is not, because the information to which the Complainant refers was "available to the participant when they filed their submission", leaving it outside the Rule 28(6) exception, there is no probative value in the information the Complainant seeks to place before the Tribunal. The information the Complainant has sleuthed simply in no way assists the Complainant. First, the Complainant states by way of Complainant counsel's September 27th email, "In reply, Mr. Neufeld submitted (at paragraph 8) that he had been completely candid about his search for counsel". The pinpoint

to which counsel refers, here reproduced, does not appear to disclose what the Complainant claims it discloses:

> In the *Rostas* complainant's case, those were the BC Human Rights Coalition, CLAS, and barbara findlay. In Mr. Neufeld's case, those were the Justice Centre for Constitutional Freedoms, Freedoms Advocate, the Democracy Fund, and Paul Jaffe. The idea that the Complainant has somehow shown by way of this isolated paragraph that the *Rostas* complainant "assiduously and conscientiously" pursued legal representation and Mr. Neufeld by comparison did not lacks foundation. Certainly this one cherry-picked pinpoint does not get the job done. Further, the *Rostas* tribunal based its decision in part on the complexity of the case:
>
> 32 With respect to the efforts made by Ms. Rostas to obtain legal representation, I note that the reason she offered for making the First Application in July 2006 was that she was then seeking assistance from the Coalition. She was subsequently represented briefly by Ms. findlay, apparently on a *pro bono* basis, and then by CLAS. Although, for reasons that are not apparent, CLAS did not file a Notice of Appointment until February 2007, Ms. findlay's October 5 letter, which she copied to Respondents' counsel, clearly indicates that CLAS had agreed to represent Ms. Rostas in or about early October 2006. This is not a case in which a complainant failed to take active steps to secure legal representation in a timely manner. Ms. Rostas assiduously and conscientiously pursued that objective.
>
> 33 In the matter before me, the particular relevant circumstances include the staffing issues presently confronting the lawyers employed by CLAS. Rather than the usual complement of four, there are currently only one part-time and two full-time lawyers available to represent complainants under the *Code*. This has resulted in the unfortunate and difficult dilemma in which Ms. Rostas and her counsel find themselves; a situation for which neither bears responsibility.
>
> 34 In addition, in the matter before me, there are two factors which were apparently not before the Tribunal in the cases cited by the Respondents. First is the complexity of the issues and the length of the anticipated proceedings at the hearing. As I have noted, the Complaint is against not one, but three Respondents. The possible liability under the *Code* of each Respondent will be relevant, both with respect to the evidence adduced at the hearing and with respect to legal issues arising from the evidence. A total of 17 witnesses will be called to give evidence and be subjected to cross-examination. Compared to a more straightforward complaint, the proceedings will be lengthy and complex.

But whatever the Complainant is referencing, the fact is, Mr. Neufeld did not claim he had never heard of Mr. Kitchen or met Mr. Kitchen in the past. In fact, Mr. Neufeld outright declared in his reply submission that Mr. Kitchen has both worked on cases for the organizations Mr. Neufeld approached for legal representation, and that Mr. Kitchen had served as in-house counsel at one of them. Announcing these facts in one's reply submission would have been an odd tack were secrecy the objective.

In any event, the Complainant's information has no bearing on the adjournment application. For a clear understanding of the rare situation in which Mr. Kitchen now finds himself *vis-à-vis* Mr. Neufeld, consider the unlikelihood of a former CLAS lawyer who enters private practice rubbing shoulders with or trawling for business among the impecunious clients he or she had represented seven years earlier while at CLAS, and *vice versa*. Legal aid is a world apart from private practice. Moreover, Mr. Kitchen is out-of-province. Once Mr. Kitchen launched a website identifying both experience in, and a willingness to take on, certain kinds of human rights cases, people who would otherwise not have availed themselves of Mr. Kitchen's services have contacted him. As Mr. Neufeld pointed out at paragraph 18 of his reply submission, Mr. Kitchen was not on his radar until September of this year:

> The Complainant complains of insufficient details around the retention of Mr. Kitchen by Mr. Neufeld, but the Complainant was at liberty to cross-examine Mr. Neufeld on the point, which it declined to do despite Mr. Kitchen's explicit offer of making himself and Mr. Neufeld available for cross-examination. Doubtless the fact Mr. Kitchen created a website in early September significantly increased his visibility such that a person like Mr. Neufeld could find him. The Complainant need only have asked.

The larger point, as noted in reply, is that the Complainant was at liberty to cross examine on any or all of these points and details, and chose not to exercise its right to do so.

Paradoxically, the same Complainant that wants to eliminate from the adjournment equation the time period between Guild Yule LLP's withdrawal as Mr. Neufeld's counsel and his June 2024 application to adjourn evidently wants to travel back in time to make an issue of Mr. Kitchen's early career in public interest law to see if it can unearth a cudgel with which to beat Mr. Neufeld on an adjournment application. This is unseemly, to say the least.

Finally, Mr. Neufeld has concerns with the underhanded way in which the Complainant has sought to bring its request: after close of business on a long-weekend Friday, absent the proper forms, and in disregard of the rules detailing the only bases for such requests and the prescribed method by which they are to be brought.

Even had the Complainant been able to satisfy the Rule 28(6) prerequisite for its request—"new information not available to the participant when they filed their submission"—Rule 28(6)(c) and Rule 28(6)(d) specify that the proper method of submitting the request is to "state in the application when the new information came to the participant's attention and why fairness requires that the tribunal consider the submission and new information" and "attach the submission and new information to the application".

Rule 28(6)(d) contemplates ***attaching*** the submission and new information to the application, as distinct from using the application process—let alone an email—to disclose potentially prejudicial material before the Tribunal has even had an opportunity to consider whether viewing the material is appropriate. The proper procedure preserves the integrity of the Tribunal's process.

Rule 28(6) does not contemplate blurting out in an email unsolicited information, to say nothing of groundless accusations, ensuring that **irrespective of whether the Tribunal considers the application for further submissions, it will not be able to unsee the implicit disparagement of the Respondent and his counsel.**

Rule 28(6) makes a clear distinction between how the **fact of** information is disclosed and how **information itself** is disclosed. It appears the Complainant has attempted an end run around the rule precisely because it knows it does not satisfy the criteria for bringing the application.

The BCHRT's own discussion in its "General applications" section entitled "GA8: File a further submission on application" provides the following easy to understand primer of the proper process and the legal test for asking to make further submissions:

> **What are "further submissions"**
>
> Submissions are a participant's arguments and evidence.
>
> When a participant applies for an order, the Tribunal may set dates for:
>
> - the other participants to respond
> - the participant who made the request to reply.
>
> Usually, the Tribunal will not allow more "submissions". Everyone has had their say. The process would go on and on if participants keep adding new points or evidence.
>
> **<u>You must apply to give the Tribunal more arguments or evidence.</u>**
>
> **Deadline to apply**
>
> There is a deadline to apply after:
>
> - you receive a reply submission and want to respond to **<u>something new</u>** in it
> - you get **<u>new information</u>** you want to give the Tribunal
>
> **Immediately:** Tell the Tribunal and other participants that you are **<u>going to apply</u>**. Tell them by phone or in writing.
>
> **Within one week: <u>Apply</u>**.

How to apply

When you apply to file a further submission on an application, you must **attach** the further submission.

Legal test for making a further submission

You **must** show three things:

1. **Something new** in the submission **or** new information
2. Your further submission **only** responds to **what is new**
3. It would be unfair if you couldn't respond

1. New issue or information

If you want to respond to a point in a submission, **explain**:

- The new point is not in the other participant's earlier submission
- The new point is not in your earlier submission
- **Why you couldn't have dealt with the point in your earlier submission**

If you want to give the Tribunal new information, **explain**:

- How you just learned of the information
- **Why you couldn't give it with your earlier submission**

2. Submission limited to what is new

You must attach your further submission to your application.

Explain that you are **only responding to a new point** or **giving the new information**

Do not repeat your earlier submission or **talk about other things.**

3. Fairness

Explain why it would be unfair if you can't make a further submission.

How is the new point or information important to the application?

[Emphasis added.]

Sur-reply should rarely be granted and should not be granted in this situation.[1] The Complainant had a right to cross-examine Mr. Neufeld, which it declined. The information to which the Complainant refers

[1] *Chopra et al. v Treasury Board (Department of Health)*, 2011 PSLRB 99 at para 1: "…the grievors requested an opportunity to make a sur-reply to the employer's reply submissions. I have determined that there is no requirement for a sur-reply. **Sur-reply should only be allowed in the rarest of cases. Sur-reply is not appropriate when a party wishes to clarify the record, respond to attacks on credibility, or respond to the mischaracterization of evidence or submissions.**" [Emphasis added.]

was discoverable prior to the submission of its response to Mr. Neufeld's adjournment application. The date Mr. Neufeld was connected with Mr. Kitchen during the latter's in-house tenure at a *pro bono* organization "many years ago" is irrelevant. The only relevant date is the date Mr. Kitchen was retained as counsel for Mr. Neufeld, which was September 18. Even had the Complainant satisfied the conditions for bringing this application pursuant to Rule 28, there is no probative value to this inquiry and therefore no justification for permitting it.

In any event, an unsolicited communication containing no information which can properly be called "new", accusing the Respondent and his lawyer of something not quite defined but meant to convey something unseemly, transmitted to the Tribunal on the pretense of constituting an application, on the basis of a rule the Complainant admits does not apply, on the Friday evening of a long weekend, with the explicit suggestion that the Tribunal might "wish to consider it" is highly inappropriate and potentially prejudicial.

There is simply no justification for the Complainant emailing an overwrought note teeming with what amounts to irrelevant gossip, groundless accusations of Respondent and/or counsel impropriety, deceptive representations of the rules on point, and an entreaty to the Tribunal to essentially ignore those rules and consider the irrelevant information and groundless accusations ***over the holiday weekend***, since its decision is due next week, in order to gain an advantage over its opponent. This is far more than a Rule 4(6) technical defect or irregularity in form; this is a tactical decision in an effort to ensure Mr. Neufeld is unsuccessful on his adjournment application and therefore has inadequate representation on the merits of his case. It is not the type of behaviour I expect from an institutional client with experienced counsel.

Should this type of improper conduct persist, it will be met with an application for costs.

Regards,

James SM Kitchen
Barrister & Solicitor
Counsel for Barry Neufeld

Enclosure

RE: CS-001372 British Columbia Teachers Federation obo Chilliwack Teachers Association v. Barry Neufeld

From Lindsay Waddell [redacted]

To BC Human Rights Tribunal AG:EX<BCHumanRightsTribunal@gov.bc.ca>, [redacted]

CC [redacted]

Date Friday, September 27th, 2024 at 7:06 PM

Dear Panel Members,

I write, on behalf of the Complainant, to request the opportunity to make sur-reply (more specifically to put before the Tribunal one document that came to our attention at approximately 4pm this afternoon and which we believe may be relevant to the Tribunal's consideration of Mr. Neufeld's adjournment application). Although a request to make sur-reply is customarily submitted using one of the Tribunal's application forms, because the Tribunal has indicated that it intends to provide the parties with a decision next week, I will set out the Complainant's application briefly in email form in order to deliver it as quickly as possible in the event that the Tribunal wishes to consider it.

Rules 28(5) of the Tribunal's Rules of Practice and Procedure provides that, if a party wishes the Tribunal to consider a further submission to address a new issue raised in a reply submission, a participant must immediately notify the tribunal and bring an application within one week of receiving the reply submission. Our request to tender material by way of sur-reply arises not from a new issue raised in reply per-se, but from new information relevant to a point made in reply, information of which we were unaware when responding to Mr. Neufeld's application. The Complainant submits that, as between Rule 28(5) and the Tribunal's broad power to govern its own process, it has the ability to consider this additional material should it determine the circumstances warrant it.

In the Complainant's response to Mr. Neufeld's application, it noted (and emphasized) that Mr. Neufeld had not, among other things, provided information or evidence about when he first connected with Mr. Kitchen as potential counsel to represent him (as distinct from when Mr. Kitchen was formally retained). In reply, Mr. Neufeld submitted (at paragraph 8) that he had been completely candid about his search for counsel. However, late this afternoon, we became aware of a post on Mr. Neufeld's website indicating that he initially connected with Mr. Kitchen about this file many years ago when the

Justice Centre for Constitutional Freedoms offered to represent Mr. Neufeld and assigned Mr. Kitchen to be Mr. Neufeld's lawyer. The post suggests that this was before Mr. Neufeld came to be represented by counsel at Guild Yule. Mr. Neufeld's post goes on to describe his loss of representation by Guild Yule and says that "after months of not being able to find a lawyer, he finally connected again with Mr. Kitchen. The post does not indicate precisely when Mr. Neufeld reconnected with Mr. Kitchen.

We acknowledge that the post appears to be dated September 23, 2024 – before delivery of our response to the application to adjourn and that its apparent posting before the Complainants response may be a factor mitigating against its consideration. However, while it appears to pre-date our responding submission by two days, the Complainant was unaware of the post until late this afternoon.

Attached, should the Tribunal wish to consider it, is the full post from Mr. Neufeld's website.

Sincerely,

Lindsay

Lindsay Waddell (she/her)

MOORE EDGAR LYSTER LLP

Trade Union, Human Rights and Administrative Law

[redacted]

[redacted]

www.mooreedgarlyster.com

I gratefully acknowledge that I work on the shared lands of the xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish) & səlilw̓ətaʔɬ (Tsleil-Waututh).

This e-mail may contain confidential or privileged information. If you are not the intended recipient, please notify us immediately. Thank you.