Federal Court Cour fédérale

Date: 20230227

Docket: T-454-22

Citation: 2023 FC 267

[ENGLISH TRANSLATION]

Vancouver, British Columbia, February 27, 2023

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

GILBERT DOMINIQUE (on behalf of the members of the Pekuakamiulnuatsh First Nation)

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review is set against the backdrop of the troubled historical relationship between First Nations and the various non-Indigenous police forces across the country.

[2] It focuses on the *First Nations Policing Policy* [**Policy**] adopted by the Government of Canada in response to studies and reports that concluded that non-Indigenous police forces are not only inadequate for but also prejudicial to First Nations. More specifically, it focuses on the First Nations Policing Program [**FNPP**], created to implement the Policy.

[3] The Attorney General of Canada [**AGC**] is asking the Court to intervene and to set aside the Canadian Human Rights Tribunal's decision, which concluded that the Pekuakamiulnuatsh, members of the Mashteuiatsh community, suffered adverse treatment as a result of the implementation of the FNPP on the ground of race and national or ethnic origin within the meaning of paragraph 5(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [**CHRA**].

[4] According to the applicant, the adverse treatment stems from insufficient funding provided to the First Nation for maintaining its own police force, which resulted in inadequate service that is not comparable to the services provided to non-Indigenous communities, and in a significant annual deficit.

II. Decision under review

A. *Preliminary matters*

[5] Before beginning its analysis of the complaint, the Tribunal addressed some preliminary matters raised by the AGC.

[6] First, the AGC argued that the First Nation's complaint was quite simply a collateral attack on the *Police Act*, CQLR, c P-13.1 [**PA**], a provincial statute over which the Tribunal has no jurisdiction. This argument, which is being raised again before the Court, was rejected by the Tribunal. We will return to it later.

[7] The AGC then argued that the Superior Court decision in *Takuhikan c Procureur général du Québec*, 2019 QCCS 5699 [***Takuhikan SCQ***] was *res judicata* and had disposed of the issues that were before the Tribunal. According to the AGC, the First Nation was raising before the Tribunal the same arguments based on the Crown's obligation to negotiate in good faith and to act with honour in its dealings with First Nations as those put forward before the Superior Court of Québec and rejected by it.

[8] The Tribunal rejected this preliminary argument on the ground that neither the issues nor the parties before the court and the Tribunal were the same. It also stated that it would not address the Crown's obligation to act with honour towards First Nations because the Superior Court of Québec had already ruled on this and rejected that argument.

[9] Since this application for judicial review was heard, the Quebec Court of Appeal has set aside the Superior Court's decision (*Takuhikan c Procureur général du Québec*, 2022 QCCA 1699 [***Takuhikan CAQ***], application for leave to appeal to SCC filed by the AG of Quebec only) and found that the honour of the Crown is engaged. We will return to the impact of that decision on this case later on.

B. *Analysis of the complaint*

[10] The Tribunal first set out the steps for determining whether there was a discriminatory practice within the meaning of paragraph 5(b) of the CHRA, namely, whether (i) the complainant has a characteristic protected from discrimination under the CHRA; (ii) the complainant experienced an adverse impact with respect to the provision of a service customarily available to the general public; and (iii) the protected characteristic was a factor in the adverse impact (*Moore v British Columbia (Education)*, 2012 SCC 61 at para 33).

(1) First component of the *Moore* test

[11] The Tribunal obviously did not spend much time on the first component of the test. It was not in dispute that the complainant and all the other members of the Pekuakamiulnuatsh First Nation have one of the personal characteristics listed in section 3 of the CHRA and constituting a prohibited ground of discrimination, namely, those of race and national or ethnic origin.

(2) Second component of the *Moore* test

[12] The Tribunal then began its analysis of the second component of the *Moore* test by providing background information on the FNPP, Indigenous policing and, more generally, policing in Quebec.

[13] The Tribunal considered the *Indian Policing Policy Review Task Force Report* published in 1990 [**1990 Policing Report**] and the final report of the Public Inquiry Commission on relations between Indigenous Peoples and certain public services: listening, reconciliation and progress (2019) [**Viens Report**] together and found them to be relevant and probative for demonstrating the existence of discrimination. The first report contextualizes the creation of the FNPP, while the second captures the essence of the historical grievances of First Nations against non-Indigenous police services.

[14] The Tribunal considered the interaction between the constitutional and legal jurisdictions of the federal government and the provincial and territorial governments and acknowledged that Parliament had the discretion needed to define the responsibilities it wished to endorse with regard to policing on reserves. It noted, however, that the federal government decided to give free rein to the provinces and to instead contribute financially to Indigenous policing.

[15] The Tribunal stated the guiding principles and objectives of the Policy and identified the following as being the most relevant for the purposes of the issues before it:

(i) First Nations communities should have access to policing services which are responsive to their particular policing

> needs and equal in quality and level of service to policing services found in communities with similar conditions in the region.
>
> (ii) First Nations should have input in determining the level and quality of the services they are provided, but the model should be as cost-effective as possible.
>
> (iii) Police officers serving First Nations communities should have the same responsibilities and authorities as police officers serving non-Indigenous communities.
>
> (iv) First Nations communities should be policed by such numbers of police officers of a similar cultural and linguistic background as are necessary to ensure that police services will be effective and responsive to First Nations cultures.

[16] That said, under the Policy, funding is based on tripartite agreements between the federal and provincial governments and the Indigenous communities, under which the federal government pays 52%, and the province or territory pays 48% of the government contribution.

[17] In Quebec, the PA provides that the Sûreté du Québec [**SQ**] has jurisdiction throughout all of Quebec. In the absence of an Indigenous police service on a reserve, First Nations receive police services from the SQ. Section 90 of the PA allows the Quebec government to enter into agreements to establish Indigenous police forces. If the community uses that option, the Policy applies and a tripartite agreement is concluded.

[18] The *Regulation respecting the police services that municipal police forces and the Sûreté du Québec must provide according to their level of jurisdiction*, CQLR, c P-13.1, r 6, sets out six levels of service for police forces established under the PA. Municipal police forces must provide police services from one of five levels of service on the territory under their jurisdiction,

with Level 1 being for municipalities with a population of less than 100,000 and Level 5 being for municipalities whose population is over 1,000,000. Level 6 is reserved for the SQ.

[19] The community of Mashteuiatsh chose to create a police force administered by the First Nation. To its members, who are proud of their police force, the police force represents protection and security, concepts that have existed since the beginning of the Nation. The Nation signed its first agreement under the FNPP in 1996. Various agreements followed, ranging in duration from one to five years. The term of the latest agreement was from 2018 to 2023.

[20] In its final arguments before the Tribunal, the AGC conceded that Public Safety Canada provides a service within the meaning of the CHRA to the First Nation through the implementation and application of the FNPP. The AGC also conceded that services provided to First Nations living on reserves are influenced by the funding given to them, but contested the claim that the complainant was treated adversely in the provision of this service.

[21] The Tribunal then continued its analysis. relying on two key decisions on this subject: *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, and *Watkin v Canada (Attorney General)*, 2008 FCA 170. It first concluded that the legal question of the applicability of section 5 of the CHRA was within its jurisdiction.

[22] That said, once the Tribunal concluded that it was dealing with a service within the meaning of section 5 of the CHRA, it had to determine whether the service created a public relationship between the service provider and the service user. It answered this question in the

affirmative, specifying that the service was related to the implementation of the FNPP by the respondent, and not the direct provision of Indigenous police services on reserves. In this respect, the Tribunal referred to its decision in *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2. The Tribunal added, however, that implementing the FNPP involves more than funding, as Public Safety Canada monitors the program, provides related assistance to First Nations and requires accountability.

(3) Third component of the *Moore* test

[23] Here it had to be determined whether the members of the First Nation experienced an adverse impact on the basis of race and national or ethnic origin in the provision of the service. The First Nation argued that three key elements of the provision of the service constitute discrimination : the funding itself, the duration of the agreements and the level of policing services provided to the members of the Mashteuiatsh community.

[24] Given that funding and level of service are intrinsically linked, the Tribunal addressed those two elements together. To do so, it reviewed the extensive documentary evidence before it, including the transcript of the evidence considered by the Superior Court in *Takuhikan SCQ*.

[25] The Tribunal first noted that the agreements provided for seven police officers from 1996 to 1999, eight officers from 1999 to 2004, ten from 2004 to 2008 and eleven from 2008 to 2015. It then noted that the First Nation ran a budget deficit year after year. Everyone was well aware that the amounts were insufficient, but the answer from the federal and provincial governments

remained simple: there was no more money available in the envelope, and, when the envelope was empty, it was empty. The deficits were absorbed by the First Nation from a self-sustaining fund, which was normally used as economic leverage for the community. The First Nation had no choice but to dip into that fund because it could not collect taxes in the same way as a municipality.

[26] In sum, the level of funding received from applying the FNPP did not allow the Mashteuiatsh police to provide policing coverage of a level equal to that provided by other non-Indigenous police forces. The evidence showed that the Mashteuiatsh Indigenous police force was never able to provide the members of the First Nation with a Level 1 police service, as prescribed in the Regulations, despite its repeated requests in this regard.

[27] The Tribunal noted that section 70 of the PA specifically provides that the levels of service apply to municipal police forces as well as the SQ, but not to Indigenous police, and that the tripartite agreements do not specifically provide for a minimum level of service. However, the successive tripartite agreements and section 93 of the PA all provide that the mission and responsibilities of Indigenous police forces are essentially the same as those of other Quebec police forces: maintaining peace, responding to emergency calls, ensuring the conduct of investigations, implementing crime prevention measures and programs, etc. They are bound by the same guiding principles and share the same role.

[28] The Tribunal therefore concluded that, because of this similarity, it was legitimate and reasonable for the Mashteuiatsh community to want to provide its members with a level of

service comparable to that provided to other residents of Quebec. However, although in theory Mashteuiatsh police officers have the same powers and duties as their non-Indigenous colleagues and receive the same initial training, they face particular challenges because of a lack of equipment and resources.

[29] The Tribunal therefore rejected the AGC's argument that the level of policing provided by the Mashteuiatsh police force did not have to be a Level 1 service and that it was the SQ who had that responsibility throughout Quebec.

[30] It also rejected the argument that, in any case, the SQ made up for the lack of service in the community. This argument does not take into account the problems of historical and systemic discrimination, nor does it take into account the objective of the Policy and the FNPP to support First Nations in becoming self-governing and self-sufficient.

[31] In sum, the Tribunal rejected the argument that the FNPP was only a funding or contribution program and that the Government of Canada was not obliged to fully fund Indigenous police services. "[O]nce the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73).

[32] Finally, the Tribunal rejected the AGC's arguments that the Mashteuiatsh community was in some ways in a better position than non-Indigenous communities: it was able to establish its own police force even though its population is under 50,000, it did not have to pay for the

supplementary services provided by the SQ, and, in general, its outlook had improved since the FNPP had been adopted. Relying on the Supreme Court of Canada decision in *Withler v Canada (Attorney General)*, 2011 SCC 12, the Tribunal found that it was not necessary to conduct a comparative analysis between groups with the same or similar characteristics in its substantive equality analysis. It was of the view that it was difficult, if not impracticable, to compare First Nations with each other or with other groups in Canada because of their unique position (*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, at paras 337 and 340, aff'd 2013 FCA 75). The concept of substantive equality is intended to assess the true situation of the group concerned and the risk that the challenged measure will aggravate the situation (*Landry v Wolinak Abenakis First Nation*, 2021 FCA 197 at para 91).

[33] The Tribunal concluded that the implementation of the FNPP was perpetuating existing discrimination and that the goal of substantive equality was not being achieved by the FNPP because of its very structure. According to the Tribunal, the subtle scent of discrimination manifests itself in the choice imposed on the First Nation in the circumstances: either accept a non-Indigenous police service not adapted to their needs, customs and traditions or settle for a lower level of service. This lack of real choice only perpetuates the community’s dependency on the other levels of government.

[34] With respect to the discriminatory effect caused by the limited length of the tripartite agreements, the Tribunal noted that this issue was closely linked to the issue of funding. The short length of the agreements made the situation precarious, but it left the door open to it receiving more funding in the short term. The Tribunal noted that, unfortunately, the

community's hopes were in vain precisely because of the inadequate implementation of the FNPP.

[35] The Tribunal therefore concluded that the First Nation discharged its burden of proof, that is, it made a *prima facie* case of discrimination.

(4) AGC's defence

[36] The Tribunal rejected the AGC's defence based on subsection 16(1) of the CHRA and concluded that the FNPP was not a special program. If the AGC's position was to be accepted, the defence based on subsection 16(1) of the CHRA would become an absolute defence because any program with a positive impact would be exempt from the application of section 5 of the CHRA. In the Tribunal's opinion, subsection 16(1) is intended to prevent challenges to special programs by individuals or groups of individuals who are not covered by the programs and who may argue that they discriminate against them.

[37] The Tribunal concluded that the defence used by the AGC was contrary to the very essence of the CHRA and rejected it.

[38] The Tribunal therefore found that there was a prohibited ground of discrimination protected by the CHRA, that there was adverse treatment in the provision of a service and that the prohibited ground of discrimination was a factor in the adverse impact. It found the First Nation's complaint to be substantiated and postponed determining the appropriate remedy to a later date.

III. Issues

[39] In my view, this application for judicial review raises the following issues:

A. *What is the applicable standard of review?*

B. *Did the Tribunal err in finding that it had jurisdiction to hear the First Nation's complaint?*

C. *What is the impact of* Takuhikan CAQ *on this application?*

D. *Did the Tribunal err in finding that the First Nation was discriminated against on a prohibited ground in the provision of a service within the meaning of section 5 of the CHRA?*

IV. Court's analysis

A. *What is the applicable standard of review?*

[40] In his Memorandum of Fact and Law, the AGC argues that the standard applicable to the issues raised in this application is reasonableness, with the exception of (i) the issue of whether the government has a positive obligation to completely eradicate any form of social inequality, and (ii) the alleged collateral attack on the PA. According to the AGC, the first of these issues is a general question of law that is of fundamental importance and broad applicability, with significant legal consequences for the justice system as a whole or for other institutions of government (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 59). The second concerns jurisdictional boundaries between administrative bodies (*Vavilov* at paras 63–64). In both cases, the correctness standard should apply.

[41] At the hearing of this case, the AGC put forward a new argument in favour of applying the correctness standard to all the issues raised by this application. The AGC relied on the Supreme Court of Canada decision in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [***SOCAN***], rendered one week after he filed his Applicant's Record and in which the Supreme Court introduced a new exception to the presumption of reasonableness.

[42] Before analyzing the new exception presented in *SOCAN*, I will consider the two *Vavilov* exceptions originally argued by the AGC.

[43] In *Vavilov*, the Supreme Court states that "[the] revised framework for determining the standard of review...starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (*Vavilov* at para 16).

[44] The Supreme Court determined that the presumption of reasonableness review can be rebutted where the rule of law requires that the standard of correctness be applied, more specifically, in the following cases:

> This will be the case for certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[45] First, the issue of whether the government has a positive obligation to fully eradicate all forms of social inequality was not, in my view, before the Tribunal, nor is it raised by this

application. The Tribunal did not decide on all federal programs with aspects of a special program, but on a service provided to the First Nation. As we will see later on, the AGC removed from his analysis any obligations that the Government of Canada might have towards First Nations to equate the FNPP to a special program. The Tribunal's analysis, like that of the Court, focuses only on applying the FNPP to the Mashteuiatsh First Nation in light of the vast amount of evidence presented to the Tribunal.

[46] With respect to the alleged collateral attack on the PA, I am also of the view that the AGC is skewing the debate to justify a more rigorous analysis by the Court of the Tribunal's reasons. The Tribunal neither interpreted nor attacked the PA. It acknowledged the respective areas of jurisdictions of the two levels of government and noted that, for the FNPP to apply in a province or territory, that province or territory must permit the creation of an Indigenous police force. However, the FNPP itself describes the level of policing services provided in surrounding communities as a scale or comparator. Therefore, the FNPP, which is a federal program, cannot be applied without reference to provincial legislation. This is not a collateral attack, but a reference.

[47] But there is more. In *Vavilov*, the Supreme Court ceases to recognize jurisdictional questions as a distinct category attracting correctness review (*Vavilov* at para 65), limiting the application of the correctness standard to the resolution of questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 63). This exception is therefore not applicable here.

[48] Let us now return to the new category of issues justifying the application of the correctness standard, as recently set out in the Supreme Court decision in *SOCAN*, namely, when courts and administrative bodies have concurrent first instance jurisdiction. The Supreme Court stated the following in this respect:

> [39] Third, this correctness category can be defined with precision. It will apply when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute. Such situations are rare. "Concurrent jurisdiction at first instance seems to appear only under intellectual property statutes where Parliament has preserved dual jurisdiction between the tribunals and the courts". Administrative bodies will also continue to benefit from the presumption of reasonableness in other circumstances. The Board's decision on tariff rates, for example, will continue to be reviewed on a standard of reasonableness as that is a matter that comes within the Board's exclusive jurisdiction. [citation omitted]

[49] The AGC submits that such concurrent jurisdiction exists between the superior courts and the Tribunal, relying on the decision of the Superior Court of Québec in *Singh c Montréal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP ltée)*, 2016 QCCS 4521, aff'd 2019 QCCA 1494, leave to appeal to SCC refused, 38916 (30 April 2020). The AGC argues that, in *Singh*, the Superior Court correctly exercised its jurisdiction and ruled on discrimination allegations under section 5 of the CHRA. Not only will we see that this is not the case, but the new exception only applies when the legislation itself grants concurrent first instance jurisdiction to a court and an administrative body. The CHRA grants no first instance jurisdiction to rule on a complaint filed under its section 5, be it to this Court or to the provincial superior courts. Rather, this Court has exclusive judicial review jurisdiction over first instance decisions rendered by the Tribunal. These are two completely separate roles.

[50] The AGC argues that, in *Singh*, the Superior Court considered an allegation of discrimination under section 5 of the CHRA, thereby exercising concurrent jurisdiction over that matter. However, as Justice André Prévost observed, the plaintiffs did not rely on or base their action on the CHRA:

> [TRANSLATION]
> [112] The plaintiffs base their action exclusively on the application of certain provisions of the *Canadian Charter* and the *Quebec Charter*.

[51] The judge himself states, in *obiter*, that his conclusion would be the same whether he applied the Canadian Charter, the Quebec Charter or the CHRA. However, he further notes the following:

> [TRANSLATION]
> [138] It should also be noted that the plaintiffs did not avail themselves of the rights conferred upon them by law, that is, the right to lodge an application or complaint with the Canadian Human Rights Commission.

[52] Rather than supporting the AGC's arguments, Justice Prévost's reasons contradict them. In my view, *SOCAN* is not at all applicable to this case, and the reasonableness standard applies to all the issues raised in this application for judicial review.

B. *Did the Tribunal err in finding that it had jurisdiction to hear the First Nation's complaint?*

[53] The AGC argues that the Tribunal exceeded its jurisdiction in finding that a provincial statute, in this case the PA, had a discriminatory impact. In the AGC's opinion, the Tribunal

assumed the power to decide who must provide Level 1 policing services on First Nations territories.

[54] First, and as indicated above, it is the Policy and the FNPP themselves that refer to various provincial and territorial statutes in providing for the establishment of Indigenous policing services in the provinces and territories that permit this and in stating the objective of providing First Nations with a policing service that is equal "in quality and level of service to policing services found in communities with similar conditions in the region". A review of the various provincial and territorial statutes is therefore needed to determine, first, whether it is permitted to create an Indigenous policing service and, second, to what level of service this service should be compared. No one is questioning the structure of the PA or Quebec's jurisdiction in the administration of justice.

[55] But neither is anyone questioning the federal government's jurisdiction and responsibilities in Indigenous matters or the fact that the Policy and the FNPP fall under this jurisdiction and these responsibilities.

[56] The First Nation does not dispute the SQ's jurisdiction on its territory. That would constitute an indirect attack on the PA. It argues instead that its police force should be able to provide the basic service provided by other police forces to neighbouring municipalities, which in Quebec is equal to Level 1 service, as defined in the PA. The First Nation does not dispute that it will have to use the SQ's higher-level policing services just as the neighbouring municipalities do.

[57] In my view, the AGC is raising a red herring and his argument must be rejected.

C. *What is the impact of* Takuhikan CAQ *on this application?*

[58] As indicated above, since this application was heard, the Quebec Court of Appeal has set aside the Quebec Superior Court's decision dismissing the First Nation's action in damages against the AGC and the Attorney General of Quebec. The First Nation was essentially seeking to be reimbursed for the deficits accumulated since the FNPP has been applied, on the basis of each level of government's respective share of financial responsibility.

[59] Since the Quebec courts considered essentially the same evidence as that submitted to the Tribunal, I invited the parties to make representations regarding the impact of *Takuhikan CAQ* on this application.

[60] Unsurprisingly, they have changed their positions since the application was heard. The AGC, who at the time was asking me to seriously consider *Takuhikan SCQ*, is now asking me to ignore *Takuhikan CAQ*. For its part, the First Nation, which was trying to have *Takuhikan SCQ* ignored at the application hearing, is now arguing that *Takuhikan CAQ* is a persuasive decision that militates in favour of greater deference to the Tribunal.

[61] It should be specified that the AGC filed a preliminary motion to dismiss with the Tribunal on the ground of issue estoppel. The Tribunal dismissed that motion and found that, although the facts giving rise to both proceedings were essentially the same, the issues to be decided were different. The Tribunal was being asked to determine whether there was

discrimination, while the Superior Court had to determine whether the attorneys general had failed in their duty to negotiate in good faith, to act with honour and to fulfill their fiduciary duties to First Nations.

[62] That said, in *Takuhikan SCQ*, the trial judge based his analysis on contract law, as it applies in Quebec, and rejected all of the First Nation's constitutional arguments. He ignored the history of discrimination, which led to the adoption of the Policy and the creation of the FNPP; he even sustained an objection to the evidence concerning the production of certain reports, including the 1990 Report and the Viens Report, but also reports noting that, in practice, the tripartite agreements have significant shortcomings with respect to funding. The trial judge noted that, under the tripartite agreements, the First Nation was responsible for the deficits and found that the agreements were not contracts of adhesion and that the evidence did not make it possible for him to conclude that the governments negotiated them in bad faith. Therefore, he dismissed the application.

[63] For the reasons of Justice Jean Bouchard and the concurring reasons of Justice Marie-France Bich, the Quebec Court of Appeal unanimously allowed the appeal and ordered the attorneys general to reimburse the First Nation for the deficits accumulated over the years.

[64] First, the Court of Appeal provided a background to the various events that led to the adoption of the Policy and the FNPP, stated the objectives and principles set out therein and cited the clauses dealing with program funding, according to which the financial responsibility is

shared between the federal and provincial governments at a ratio of 52% to 48%, and the First Nation is responsible for any shortfalls.

[65] Unlike the trial judge, the Court of Appeal essentially based its analysis on the principle of the honour of the Crown and on the Crown's fiduciary duties to First Nations, although Justice Bich added that the trial judge also failed to take into account some provisions of the Civil Code of Québec in its analysis of the Crown's contractual obligations. In the Court of Appeal's view, the tripartite agreements were insufficient on their own to dispose of the dispute before it.

[66] The Court of Appeal considered it dangerous to base its analysis on the Supreme Court of Canada's case law regarding the Crown's fiduciary duty since it was of the view that this case law was not definitive given that the obligations arising from the tripartite agreements were not *prima facie* "in the nature of a private law duty" (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 85).

[67] In its analysis of whether the honour of the Crown principle applied, the Court of Appeal began by providing an important update regarding the allocation of resources to First Nations:

> [TRANSLATION]
> [103] I therefore believe that the issue of allocating resources to a First Nation must be analyzed, first and foremost, on the basis of the needs and priorities established by the First Nation, not those imposed on it by a government. That is how the federal Policy must be applied, but, as we will see, that is not how it was applied.

[68] That said, the Court of Appeal was of the view that the evidence showed that the funding provided under the tripartite agreements did not enable the First Nation to provide the members of its community with a service that complied with the Policy's principles, namely, policing services "equal in quality and level of service to policing services found in communities with similar conditions in the region" [citation omitted]. This led the Court to find as follows:

> [TRANSLATION]
> [118] In other words, in refusing to fund the appellant's police force so as to make it possible for the appellant to provide a service of equal quality to that provided to non-Indigenous communities, I am of the view that the respondents failed in their duty to act with honour and that the appellant's action should have been allowed for the amounts claimed.

[69] It is true, as acknowledged by the First Nation, that a decision made in another jurisdiction is, in accordance with the doctrine of *stare decisis,* not binding in itself (*Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at para 107). However, it can be persuasive (*Bilodeau-Massé* at paras 107, 152, and *Canada (Attorney General) v Utah*, 2020 FCA 224 at para 10, leave to appeal to SCC refused, 39582 (17 June 2021)).

[70] To determine the degree of persuasiveness of a decision, the Court must take several factors into account, including the nature of the dispute, the similarity of the facts and law, the date of the decision, the intelligibility of the reasons and the credibility of the decision-makers (Gerald L. Gall, *The Canadian Legal System*, 2nd ed, Toronto: Carswell Legal Publications, 1983, at 220). The reasonableness and intelligibility of the reasoning process are particularly important factors in that analysis (Jean E. Côté and Debra J. MacGregor, "Practical Legal Research", (2014) 52-1 *Alta L Rev* 145, at 153).

[71] There is no doubt that these factors lend a higher degree of persuasiveness to *Takuhikan CSA*.

[72] However, before concluding, Justice Bouchard conducted a similar exercise to the one I must conduct and considered with deference the Tribunal's findings and its analysis of the evidence:

> [TRANSLATION]
> [119] Before concluding, I find it appropriate to note that Gilbert Dominique, Chief of the Pekuakamiulnuatsh First Nation, also filed a complaint before the Canadian Human Rights Tribunal (CHRT) alleging discriminatory treatment by Public Safety Canada in its implementation of the FNPP.
>
> [120] Not only was the factual background of the complaint the same as in this case, but a significant portion of the Superior Court transcripts were filed with the CHRT to operate as testimony. The CHRT allowed Mr. Dominique's complaint and concluded that the members of his community had been discriminated against by Public Safety Canada.
>
> [121] It should be specified, however, that the CHRT's legal analysis is very different from the analysis performed by a Superior Court judge since the issues were not the same. I am well aware that the CHRT's reasoning cannot fully apply to this case. It should also be mentioned that the Attorney General of Canada has applied to the Federal Court for judicial review of the CHRT's decision. Yet, it is a legal fact that must be considered here because of its probative value [citations omitted].

[73] I must come to the same conclusion. The Quebec Court of Appeal's interpretation of the Policy and the FNPP and the scope it considers them to have are, in my view, very persuasive. I will retain them for the purposes of my analysis.

D. *Did the Tribunal err in finding that the First Nation was discriminated against in the provision of a service on a prohibited ground within the meaning of section 5 of the CHRA?*

[74] First, it is important to note that the First Nation is not challenging the Policy or the FNPP, but rather the government's interpretation and application of them. The First Nation claims that it was discriminated against on a prohibited ground in the implementation of the FNPP through successive tripartite agreements.

[75] The parties are offering geometrically opposed interpretations of the Policy and the FNPP as well as of the federal government’s obligations and responsibilities with respect to Indigenous Peoples. The AGC is inviting the Court to interpret the FNPP by disregarding the historical background and all the federal government’s constitutional obligations to First Nations.

[76] However, it is well-known that court proceedings that raise Indigenous issues must take into account the Indigenous perspective and the historical, social and legal background specific to Indigenous Peoples (*R v Ipeelee*, 2012 SCC 13 at para 60; *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 49, 52–53; *R v Desautel*, 2021 SCC 17 at para 12).

[77] Taking these principles into account, I am of the view that the Tribunal made no error warranting the Court’s intervention when it found that the First Nation was discriminated against on a prohibited ground in the provision of a service by the federal government. The Tribunal thoroughly analyzed the evidence, and its decision is coherent and rational and bears the hallmarks of reasonableness: justification, transparency and intelligibility.

[78] The Tribunal was correct in rejecting the AGC's position that the FNPP is simply a contribution program to fund various Indigenous police forces or that its only purpose is to improve provincial policing services. That interpretation is fundamentally narrow and does not take into account the object and scope of the policy that aims to implement the inherent right of Indigenous Peoples to self-govern. The Policy and the FNPP enable Indigenous communities that desire to do so to form their own police force, adapted to their particular needs and in line with acceptable quantitative and qualitative standards. The Policy itself provides that such services should be equal to those provided in communities with similar conditions in the region. With respect to funding the program, the Policy provides that the federal government pay 52%, and the provinces, 48% of the government contribution.

[79] It is true that the Policy provides that "First Nations communities will, where possible, be encouraged to help pay for the cost of maintaining their police service, particularly for enhanced services."

[80] First, the Policy is not speaking of enhanced services here, but basic services, which Quebec has defined as Level 1 service for communities of less than 50,000 people, as per the Regulations.

[81] Second, like the Quebec Court of Appeal, I am of the view that this provision must take into account the First Nation's autonomy in allocating and managing its resources and that the government could not rely on this provision to interfere in the management of the First Nation's

budgets or to force it to dip into a fund it had for other purposes in order to offset the deficits in funding the police service. Yet that is what the government did.

[82] I am of the view that the AGC's interpretation of the federal government's obligations under the Policy and the FNPP is not well-founded.

[83] I am also of the view that it was reasonable for the Tribunal to find that, under section 5 of the CHRA, the First Nation was discriminated against on a prohibited ground in the provision of a service.

V. Conclusion

[84] The AGC has failed to persuade me that the Tribunal's interpretation of the Policy and the FNPP was unreasonable. He has also failed to persuade me that the Tribunal erred in its analysis of what constitutes discrimination within the meaning of section 5 of the CHRA: the Tribunal was correct in concluding that the First Nation was discriminated against on a prohibited ground in the provision of a service. The Court's intervention is therefore not warranted.

JUDGMENT in T-454-22

THE COURT'S JUDGMENT is as follows:

1. This application for judicial review is dismissed.

2. The Attorney General of Canada is ordered to pay the respondent, Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation), costs, in the lump sum amount of $5,000.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-454-22
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v GILBERT DOMINIQUE (on behalf of the members of the Pekuakamiulnuatsh First Nation) AND CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	NOVEMBER 15, 2022
JUDGMENT AND REASONS:	GAGNÉ A.C.J.
DATED:	FEBRUARY 27, 2023

APPEARANCES:

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