Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 4
Date: January 31, 2022
File No.: T2251/0618

[ENGLISH TRANSLATION]

Between:

Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation)

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Public Safety Canada

Respondent

Decision

Member: Gabriel Gaudreault

Table of Contents

I. Preamble

[1] The Canadian Human Rights Tribunal ("Tribunal"), by its very nature, deals with sensitive and delicate issues that affect what Canadians certainly value most: their self-identity, that is, what they are inherently as human beings.

[2] The Tribunal is a quasi-judicial entity that applies the *Canadian Human Rights Act* ("CHRA"), an act that guarantees "quasi-constitutional" rights (*Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII); *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2016 FCA 200 (CanLII)).

[3] The purpose of the Tribunal is to review litigation involving fundamental rights and freedoms that are undeniably guaranteed to everyone. Guaranteeing these rights is of paramount importance in a free and democratic society like Canadian society, and these guarantees help to safeguard human dignity (*Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34, at para. 51 [*Polhill*]).

[4] In *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497, at paragraph 53, the Supreme Court of Canada wrote the following:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

[5] Complaints involving First Nations across Canada have their own contexts and their own specific characteristics, again, by their very nature. No one contests that courts and tribunals across the country can take judicial notice of the systemic and historical factors

affecting First Nations (*R v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 [*Williams*]; see also *Willcott v. Freeway Transportation*, 2019 CHRT 29 (CanLII) [*Willcott*], at para. 234; *Nielsen v. Nee Tahi Buhn Indian Band*, 2019 CHRT 50 (CanLII) [*Nielsen*], at para. 136).

[6] 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 (CanLII) [*Family Caring Society 2016*], at paragraph 402, the Tribunal repeated that the social, political and legal contexts must be taken into account in its analysis when determining whether there has been discrimination in a substantive sense.

[7] In the context of Indigenous peoples, stereotyping and prejudice resulting from colonialism, population displacements and the residential school system are all relevant (same reference; see also *R v. Turpin*, 1989 CanLII 98, [1989] 1 SCR 1296, at page 1332; *Corbière v. Canada (Minister of Indian and Northern Affairs Canada)*, 1999 CanLII 687, [1999] 2 SCR 203, at para. 66*; Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 SCR 950, at para. 69; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483, at para. 59 [*Kapp*]).

[8] Although the decision was a criminal and penal matter, the Supreme Court's reasons in *R. v. Ipeelee*, 2012 SCC 13 (CanLII) [*Ipeelee*], at paragraph 60, are, without doubt, entirely relevant in the circumstances. The Court wrote the following:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.
> [Emphasis in original.]

[9] The Tribunal recognizes the suffering that First Nations, their communities, and their families have experienced and continue to experience to this day. The Tribunal salutes their strength and their courage in this pursuit of justice and healing, on a path towards truth and reconciliation.

[10] That being said, the Tribunal must base its decision on the evidence presented to it and decide, on a balance of probabilities, whether the complaint is substantiated or not (section 53 of the CHRA).

II. Background of complaint

[11] The case before the Tribunal concerns a complaint filed by Gilbert Dominique, on behalf of the Pekuakamiulnuatsh (the "Complainant"), who are members of the Mashteuiatsh community in the Saguenay–Lac-Saint-Jean region of Quebec.

[12] The complaint was filed with the Canadian Human Rights Commission ("Commission") on February 12, 2016, against Public Safety Canada (the "Respondent") under section 5 of the CHRA.

[13] Specifically, the Complainant alleges he experienced adverse differential treatment by the Respondent in the provision of services (paragraph 5(b) of the CHRA) resulting from the implementation of the First Nations Policing Policy (C-4, the "Policy"), which implements the First Nations Policing Program ("FNPP" or the "program"), on the basis of his race and national/ethnic origin.

[14] The Complainant essentially submits that the adverse differential treatment was a result of the inadequate funding he was provided, the short durations of the agreements he is required to sign, and the subpar level of the police services offered to the members of the community.

[15] It must be noted that this decision by the Tribunal only aims to determine whether there was any discrimination or not. The parties and the Tribunal agreed to separate the hearing into two distinct parts, one leading to a decision on liability and the other to a decision on the remedies to be granted, if any.

[16] The five-day hearing was held on December 15, 16, 21, 22, and 23, 2020. Because of the global health crisis, which is also affecting Canada, the Tribunal heard the parties' evidence by videoconference. No significant problems arose during the hearing with regard to the use of technology, and any minor hiccups were resolved in a timely manner.

[17] In this same vein, and although it has no effect on its decision, the Tribunal cannot ignore the very high level of professionalism of the representatives of each party in this matter. The Tribunal recognizes their sustained work and efforts in bringing this case to term. They respected all the Tribunal's directives to the letter throughout the case management stage, during evidence management, and at the hearing. The collegiality between the representatives was palpable, making an inherently litigious and adversarial process much more serene and efficient.

III. Tribunal's decision

[18] The Tribunal must inevitably rule on the dispute on the basis of the evidence the parties presented to it at the hearing.

[19] For the reasons that follow, the Tribunal finds the complaint to be substantiated (subsection 53(2) of the CHRA).

IV. Issues

[20] The Tribunal will follow the analysis developed in *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), at paragraph 33 [*Moore*], to determine whether the complainant was the victim of discrimination by the Respondent in the provision of services under paragraph 5(b) of the CHRA.

[21] The issues are therefore the following:

(1) Is there a prohibited ground of discrimination under the CHRA?

(2) Was there adverse differential treatment (adverse impact) in the provision of a service customarily available to the general public under paragraph 5(b) of the CHRA?

(3) Was the prohibited ground of discrimination a factor in the adverse impact?

[22] The Tribunal will first address the two arguments made by the Respondent, who raised some concerns regarding the Tribunal's jurisdiction to deal with the complaint, on the one hand, and regarding the possible application of *res judicata*, on the other.

V. Discrimination law

[23] The purpose of the CHRA is set out in section 2. The CHRA aims to guarantee that all individuals have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on prohibited grounds of discrimination.

[24] It is well accepted in the case law that the onus is on the complainant to, first of all, meet their burden of proof on a balance of probabilities. This is what is traditionally called proof of *prima facie* discrimination.

[25] Specifically, the complainant must present a *prima facie* case on a balance of probabilities. As the Supreme Court of Canada stated in *Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536, at paragraph 28 [*Simpsons-Sears*]:

> A *prima facie* case . . . is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[26] In this same vein and as developed in *Moore*, a complainant must prove the following three elements:

(1) that there is a prohibited ground of discrimination under the CHRA;

(2) that they experienced an adverse impact (in this case, under section 5); and

(3) that the prohibited ground of discrimination was a factor in the adverse impact.

> (See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 789 (CanLII), at para. 63 [*Bombardier*]; *Simpsons-Sears*, at para. 28).

[27] As the Tribunal has stated on several occasions, an intention to discriminate is not required, nor is a complainant required to show that the prohibited ground of discrimination was the sole cause of the adverse impact (*Bombardier*, at paras. 40 and 44).

[28] It is also recognized that discrimination is generally neither open nor intentional. This is why the Tribunal must consider all the circumstances of the complaint to determine if there is a "subtle scent of discrimination", as the Tribunal has described it (*Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT) [*Basi*]). The Tribunal can therefore draw certain inferences from the circumstantial evidence in cases where the evidence offered in support of the allegations makes such an inference more probable than the other possible inferences or hypotheses. Nonetheless, this circumstantial evidence must be tangibly related to the impugned decision or conduct of the respondent (*Bombardier*, at para. 88).

[29] It is also well established that when the Tribunal must decide whether a complainant's burden of proof has been met, it must consider the evidence as a whole, which includes the evidence submitted by the respondent (*Bombardier,* at para. 58; *Lally v. Telus*, 2014 FCA 214 (CanLII), at para. 31).

[30] In doing so, the Tribunal could, for example, find that the complainant did not meet the burden of proof for their case if the evidence they presented is incomplete or if the respondent is able to present evidence refuting the complainant's allegations (*Dulce Crowchild v. Nation Tsuut'ina*, 2020 CHRT 6 (CanLII), at para. 10; *Brunskill v. Canada Post Corporation*, 2019 CHRT 22 (CanLII), at paras. 64 and 65 [*Brunskill*]; *Nielsen,* at para. 47; *Polhill*, at para. 58; *Willcott,* at para. 12).

[31] On the other hand, if the complainant is able to meet the *prima facie* burden of proof, and depending on the circumstances of the complaint, the respondent may rely on defences in the CHRA, particularly under paragraphs 15(1)(a) and (e) of the CHRA, which are based on the existence of *bona fide* occupational requirements or justification, and the defence under section 16 of the CHRA, regarding special programs.

[32] Lastly, the respondent could also present evidence to limit their liability under subsection 65(2) of the CHRA, when applicable in the circumstances.

VI. Preliminary matters

A. Tribunal's jurisdiction—collateral attack on the PA

[33] As the Tribunal noted at paragraph 22 above, the Respondent introduced a major argument that the Tribunal does not have jurisdiction in this case. The Tribunal cannot agree with the Respondent's claims, for the reasons that follow.

[34] First, the Respondent alleges that the proceeding brought by the Complainant is, in part, a collateral attack on the Quebec legislation that provides for police services on its territory, the *Police Act,* CQLR, c. P-13.1 ("PA"). Because this is a provincial act, the Tribunal would therefore not have jurisdiction. In this vein, the Respondent submits that, in his statement of particulars, the Complainant argued that the PA and the tripartite agreements are responsible for the alleged discrimination and that the tripartite agreements are necessarily linked to the provincial act.

[35] In other words, the Respondent considers that when the Complainant argues that the PA and the tripartite agreements do not provide for minimum level 1 police services—which would be discriminatory—it is actually a collateral attack on the PA. It therefore argues that the Complainant did not challenge the validity of the PA in the appropriate forum and that the question of levels of police services offered is closely linked to the PA, a provincial act, and therefore excluded from the Tribunal's jurisdiction.

[36] It further argues that any suggestion by the Complainant that the fact the tripartite agreements do not set any levels of police service is a discriminatory act amounts to a collateral attack on the PA. It adds that it would be impossible for the federal government to provide such a level of police service because this is under the exclusive jurisdiction of the province (subsection 92(14) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in RSC 1985, App. II, No. 5 ("*Constitution Act, 1867*").

[37] I disagree with the Respondent, and I believe the Tribunal has jurisdiction to hear this complaint. As previously noted, I do not agree with the Respondent's argument that the complaint is, in whole or in part, a collateral attack on the PA.

[38] It is undisputed that the Tribunal has no jurisdiction over a provincial act because it can only address issues under the Parliament of Canada's jurisdiction. The purpose of the CHRA, stated in section 2, is clear on this:

> The purpose of this Act is to extend the laws in Canada to give effect, **within the purview of matters coming within the legislative authority of Parliament** . . .
> [Emphasis added.]

[39] It is also undisputed that police services are under provincial jurisdiction, in accordance with the authority the provinces have over the administration of justice (subs. 92(14) of the *Constitution Act, 1867*; see also *Quebec (Attorney General) v. Picard*, 2020 FCA 74, at para. 42).

[40] However, the evidence is clear that the FNPP is a federal program. The three parties involved have obligations and rights that result from the application of this program, as set out in the tripartite agreements (between the federal government, the provincial or territorial government and First Nations).

[41] It is also clear from the evidence that one of the main components of applying the FNPP and implementing the tripartite agreements is the funding itself, which is provided, in part, by the Government of Canada. The Tribunal writes "in part" because the implementation of the FNPP is funded by the federal government and the province on a well-defined pro-rata basis of 52 percent and 48 percent of the cost of the police services, respectively.

[42] However, this funding distribution only becomes effective in implementing the FNPP. In other words, if it did not apply the program, the federal government would not be involved in Indigenous police services since it is the province that ensures its territory is served by a police service, in accordance with the separation of powers set out in the *Constitution Act, 1867* (at subs. 92(14)).

[43] This funding allows First Nations communities to establish an Indigenous police service according to various existing models that are set out in the FNPP. The evidence also indicates that the federal government's funding therefore circumscribes the funding offered by the provinces or territories; the Tribunal will address this aspect later in the decision.

[44] The Tribunal is satisfied that the FNPP, its application and its implementation fall under its jurisdiction.

[45] Additionally, the Tribunal notes that the Respondent's arguments regarding the issue of jurisdiction completely ignore the Tribunal's analysis in *Family Caring Society 2016*, at paragraphs 78 to 86.

[46] We must remember that Parliament retains its exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*. On this point, the Tribunal will not repeat the analysis of members Marchildon and Lustig in *Family Caring Society 2016*, but it notes that this analysis, in the circumstances of the present complaint, is entirely relevant, convincing and unassailable.

[47] While the Tribunal understands that Public Safety Canada does not offer **direct and "on the ground"** police services to Indigenous communities on reserve, which was shown by the evidence, it nonetheless funds part of the police services that are offered on reserve.

[48] Depending on the model chosen, these police services can be offered by the province or territory or, as in the case of the Mashteuiatsh community, by the First Nation directly. In other words, Mashteuiatsh established its own Indigenous police service to provide on-reserve policing.

[49] Therefore, police services **on First Nations' reserves** necessarily overlap the jurisdictions of the Parliament of Canada and of the provinces and territories. The federal government retains its exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" (subsection 91(24) of the *Constitution Act, 1867*) while the provinces and territories retain their jurisdiction over the administration of justice (subsection 92(14) of the *Constitution Act, 1867*), which includes police services.

[50] The federal Parliament decided to become involved in Indigenous police services as permitted under the Constitution, and in accordance with the division of powers set out in the *Constitution Act 1867*. It did not decide to offer police services on the Mashteuiatsh reserve, strictly speaking, but it did make a deliberate decision to become involved,

specifically by creating a funding program for First Nations police services. In creating and implementing the FNPP, it decided to develop a program, implement it and finance it.

[51] It is acknowledged that once the federal Parliament decides to become involved in this regard, it cannot do so in a discriminatory manner; this is reflected in the Supreme Court's reasoning in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624*,* at paragraph 42 [*Eldridge*].

[52] In that case, and although it was ruling on a comparable situation involving the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Canadian Charter"), the Supreme Court found that the government cannot escape review under the Canadian Charter by entering into commercial or private agreements. The Tribunal adopted this analysis in *Family Caring Society 2016*. These conclusions by the Supreme Court are just as relevant in the circumstances of the present case.

[53] Although the federal government is not necessarily becoming involved by providing police services itself in the Mashteuiatsh community, it did decide to implement a funding program that is managed by Public Safety Canada.

[54] The fact that police services are offered by a third party, for example the province or territory or even the First Nation itself, as in the case of Mashteuiatsh, does not mean that the Government of Canada can escape human rights reviews under the Canadian Charter (*Eldridge*, at para. 42) or the CHRA (*Family Caring Society 2016*, at paras. 83 to 86).

[55] In this regard, paragraph 86 of *Family Caring Society 2016* is echoed in our case: the federal government, because of its constitutional obligation to First Nations, is in a situation where it offers Indigenous peoples the possibility of establishing an Indigenous police service via the implementation of the FNPP. Acting through a federal department, Public Safety Canada, it supervises the program, negotiates tripartite agreements and requires a degree of accountability from the First Nations. Thus, the Tribunal has the jurisdiction to determine whether Public Safety Canada, in this area, discriminated against the complainant.

[56] On another note, although the Complainant alleges in his statement of particulars that neither the PA nor the tripartite agreements [TRANSLATION] ". . . provide policing coverage that meets the basic minimum level for the communities served by an Indigenous police force" (Complainant's Statement of Particulars, at para. 12), the Tribunal finds that it is the part involving the application and implementation of the FNPP and the resulting tripartite agreements that is relevant in the case before it.

[57] This observation is confirmed when paragraph 13 of the Complainant's statement of particulars is read together with paragraph 12. In that document, the Complainant states that the level of funding from the FNPP does not allow him to offer a minimum of policing coverage on the reserve, equivalent to the coverage offered by non-Indigenous police forces in Quebec.

[58] The Tribunal does not understand this argument by the Complainant, who aims to challenge the minimum threshold of services set out right in the PA, which in any event is allegedly not under its jurisdiction. The Tribunal instead understands that he is alleging that the funding offered through the implementation of the FNPP, a federal program, does not allow him to ensure his members have a minimum level of police service, which would be equivalent to the level 1 minimum threshold under the PA. Therefore, the level of services is closely linked to the funding itself, which would affect the services offered to members of Mashteuiatsh. This assertion was already conceded by the Respondent in its outline of argument, at paragraphs 159 and 160.

[59] Therefore, the Tribunal is not satisfied that the exercise the Respondent is asking it to do is required in the circumstances. The Tribunal is not persuaded that the Complainant's complaint is, in whole or in part, a collateral attack on the PA.

[60] At any rate, the Tribunal will not need to take a position on the PA. The Tribunal is able to determine, on the evidence presented at the hearing, whether the FNPP and its application have discriminatory effects under the CHRA stemming from the funding offered and the resulting level of police services, as well as from the duration of the agreements.

[61] For these reasons, the Tribunal dismisses this part of the Respondent's arguments and continues its analysis.

B. Res judicata—Superior Court of Québec and appeal to Court of Appeal of Québec

[62] The Respondent argued that the Complainant is attempting to present the Tribunal with a legal debate that has already been heard before another court of law.

[63] Indeed, the Superior Court of Québec ("Superior Court") ruled on an originating application on December 19, 2019, and dismissed the plaintiff's action (*Takuhikan c. Procureur général du Québec*, 2019 QCCS 5699 (CanLII) [*Takuhikan*]). That decision was, however, appealed. As of the date of the present decision, the parties have not informed the Tribunal whether the Court of Appeal has ruled on that appeal.

[64] The Respondent argues that in the Tribunal proceeding, the Complainant is raising the same legal reasoning with regard to the Crown's obligations to negotiate in good faith, act with honour and fulfill its fiduciary duty to First Nations

[65] In its opinion, all the arguments tied to this reasoning were already decided by the Honourable Robert Dufresne in *Takuhikan* and are therefore *res judicata*, such that the Tribunal cannot reconsider them.

[66] Moreover, the Respondent submits that certain findings of fact, of law and of mixed fact and law that were previously decided by the Superior Court should not be brought before the Tribunal again. The Respondent listed a series of conclusions the Superior Court drew in this regard (Respondent's Outline of Argument, at para. 75).

[67] The Respondent relies on *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII) [*Toronto*] and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII) [*Penner*] and bases its arguments on the principles of issue estoppel, the availability of more appropriate recourse, and the avoidance of multiplicity of proceedings and contradictory judgments.

[68] It is important to note that the Respondent is not asking for the complaint before the Tribunal to be dismissed in its entirety on the basis of issue estoppel. It is instead asking that the findings of fact, of law and of mixed fact and law made by the Superior Court not be

challenged at the hearing of the complaint before the Tribunal (Respondent's Outline of Argument, at para. 76).

[69] The Tribunal finds that it must review the key principles of issue estoppel. First, there are multiple doctrines enshrining the finality of judicial decisions:

- issue estoppel and cause of action estoppel (subcategories of *res judicata*);
- collateral attack; and
- abuse of process.

[70] These doctrines have a fundamental place in our legal system, under both common law and Canadian civil law. They are the vehicles our legal systems have used to embody in the litigation process the principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice. All these principles emanate from the greater principle of fairness (*British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52 (CanLII) [*Figliola*], at para. 25*).*

[71] As noted by my colleague Colleen Harrington in *Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 (CanLII), at paragraph 64, confirmed by the Federal Court of Appeal in *Bangloy v. The Attorney General of Canada*, 2021 FCA 245 [*Beattie and Bangloy*], and relying on the reasons of our colleague Kirsten Mercer in *Todd v. City of Ottawa*, 2017 CHRT 23 (CanLII), at paragraph 36, the greater doctrine of finality provides that once an issue is decided by a competent court or tribunal, it cannot be relitigated, except in an appeal or a judicial review proceeding.

[72] First of all, the Supreme Court recognized that this doctrine and its related discretionary power apply to administrative tribunals and their decisions (*Penner*, at para. 31; *Figliola*, at para. 26).

[73] In the present case, when the Respondent states that the issues of fact, law and mixed fact and law that the Superior Court has already decided should not be relitigated by the Tribunal, we understand that the respondent is referring to the principle of issue

estoppel. It is therefore in light of this principle that the Tribunal will analyze the Respondent's arguments.

[74] The test for applying the doctrine of issue estoppel as described in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), at paragraph 33 [*Danyluk*], requires a two-step analysis.

[75] First, for issue estoppel to apply, three conditions must be met*:*

(1) the same question has been decided;

(2) the earlier decision was final; and

(3) the parties or their privies were the same.

(See *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), at page 254 [*Angle*]; *Figliola,* at para. 27; *Beattie and Bangloy*, at para. 66).

[76] It has also been established that the decision maker retains discretion to not apply issue estoppel when its application would work an injustice (*Penner*, at para. 29). As noted by the Supreme Court in *Danyluk*, at paragraph 1, this discretion is based on the idea that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

[77] In other words, if the three conditions are met, the Tribunal must then ask whether, in exercising its discretion, this form of estoppel ought to be applied (*Danyluk*, para. 33).

[78] The Tribunal will analyze these three conditions in the next paragraphs.

(i) Res judicata

[79] First, the issue before the Tribunal was not decided by the Superior Court.

[80] It is agreed that same facts (or the same "factual matrix") can lead to two different causes of action (*Danyluk*, at para. 54; *McIntosh v. Parent*, 1924 CanLII 401 (ON CA), at page 423). This is true in the present case.

[81] For the purposes of applying issue estoppel, however, care must be taken to not confuse “cause of action” and “issue”, the first being covered by issue estoppel, which does not apply in this case since the causes of action are clearly different (see for example E. Charbonneau, “Préclusion, res judicata et préclusion découlant d’une question déjà tranchée : des éclaircissements s’imposent”, in the Canadian Bar Review, Vol. 93, No. 2, 371, at page 381).

[82] The Tribunal also notes that “issue” and “facts” must not be confused (*Mangat v. Canada (Citizenship and Immigration)*, 2019 FC 1299 (CanLII), at para. 23; *Alderman v. North Shore Studio Management Ltd.*, 1997 CanLII 2053 (BC SC), at para. 15). On this subject, the Supreme Court of Canada reminds us that

> . . . [issue] estoppel, in other words, extends to the issues of fact, law, and mixed fact and law **that are necessarily bound up with the determination of that “issue” in the prior proceeding**.
> (*Danyluk*, at para. 54)
> [Emphasis added.]

[83] In other words, and again from *Danyluk*, citing *Angle*, “[t]he question out of which the estoppel is said to arise must have been ‘fundamental to the decision arrived at’ in the earlier proceeding” (para. 24; see also Donald J. Lange, *The Doctrine of Res Judicata*, 2nd ed. (Markham: Lexis Nexis Butterworths: 2004), at page 385).

[84] The Tribunal again notes that the Respondent had filed a motion for a stay of the Tribunal’s proceedings in 2017 because of the originating application filed in Superior Court, which had striking similarities to the complaint before the Tribunal. The Tribunal dismissed the motion for the reasons stated in *Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2019 CHRT 9 (CanLII) [*Dominique 2019*].

[85] Without presenting the Tribunal’s reasoning in that ruling in its entirety, one of the important grounds in support of dismissing the motion was that the Superior Court and the Tribunal were asked to perform very different legal analyses, one based in part on the Crown’s obligations to negotiate in good faith, act with honour and discharge its fiduciary duties to the First Nations (*Dominique 2019*, at paragraphs 16 to 18). It is a notable

difference, in that the Tribunal must apply an analysis based on human rights and discrimination as developed in *Moore*, among other cases.

[86] It is relevant to cite certain excerpts from *Dominique 2019*. At paragraph 12, the Tribunal wrote:

> A court or tribunal must rule on the facts, interpret them and apply the law to the facts of each case. Based to its own jurisdiction and the nature of disputes that it hears, a court or tribunal is required to analyze the facts according to its own unique perspective. Therefore, two of them may hear evidence that is similar or identical on a number of different aspects, but they must analyze this evidence differently with a view to rendering judgments that will not have the same effects. Consequently, it is above all the nature of the dispute that is important.

[87] At paragraphs 16 to 18, the Tribunal concluded as follows:

> [16] The proceedings before the Superior Court involve aspects and principles which are not part of the analysis performed by the Tribunal and developed in *Moore*. The parties are asking the Superior Court to analyze, among other issues, whether the defendants failed to fulfill their obligations to negotiate in good faith, to act with honour and to discharge their fiduciary duties to the First Nation (see the originating application, as well as the issues set out in in the request for setting down for trial and judgment by way of a joint declaration). The Tribunal has not been asked to take a position on these aspects in these proceedings.
> [17] As noted by the Honorable Sandra Bouchard, this forms the cornerstone of the First Nation's action in the Superior Court (see paragraphs 32 and 33 of her judgment, *Pekuakamiulnuatsh Takuhikan c. Procureur général du Canada*, 2017 QCCS 4787). She provides useful insight into the foundations of the principle of the honour of the Crown and the Crown's fiduciary duty, as well as the potential vulnerability assessment concerning the plaintiff (see judgment, para. 46).
> [18] There is nothing in the analysis made by the Honourable Sandra Bouchard concerning the notions of fiduciary duties, the honour of the Crown or good faith negotiations that would suggest the need to present evidence concerning any prohibited ground for discrimination or adverse differential treatment that the complainant allegedly suffered in the context of the provision or denial of services. Moreover, there is nothing to suggest the need to present evidence concerning an existing link between these two aspects developed, most notably, in *Moore*.

[88] Having now had the opportunity to consult the Superior Court decision (*Takuhikan*, cited above), written by the Honourable Robert Dufresne, the Tribunal is even more persuaded that its analysis in *Dominique 2019* was reasonable and fair.

[89] Indeed, the Tribunal notes that the Superior Court did not perform any analysis of the plaintiff's originating application in respect of a question of discrimination and did not draw any conclusions on this subject.

[90] The analysis of the Superior Court judge focused solely on contract law, the obligation of the governments of Canada and Quebec to act with honour, and the federal Crown's fiduciary duties, as these questions were at issue, given the plaintiff's vulnerability (*Takuhikan*, at para. 54).

[91] At paragraphs 55 and following, the Court then analyzed the rules of contract law under the *Civil Code of Québec*, CQLR c. CCQ-1991, the concepts of free and informed consent, the civil liability regime resulting from contractual commitments and the related rules of interpretation.

[92] It continued its analysis of the tripartite agreements and the concepts of contract of adhesion, abusive clause and bad faith. Lastly, the judge considered the issues of the Government of Canada's fiduciary duty to the First Nation, the First Nation's degree of vulnerability, the lack of any particular or identifiable collective interest with regard to the police services in the community, and the obligation to act with honour.

[93] This is enough to satisfy the Tribunal that the Superior Court's analysis was vastly different from the analysis required in the present case. The Tribunal must determine whether there was discrimination, not whether the Respondent failed in its obligation to negotiate in good faith, act with honour and fulfil its fiduciary duty to First Nations.

[94] The issues in both cases are therefore not comparable. The Tribunal concludes that the issue in the present case was not decided by the other jurisdiction.

(ii) Final judgment

[95] This criterion is met. There is little to say since the Superior Court decision is final and binding, despite the appeal filed by one of the parties.

[96] On this point, the Tribunal notes that the finality of a decision does not affect an appellant's right of appeal or review. Final judgment instead refers to the idea that a competent court or tribunal has made a ruling that decides ". . . in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding" (subs. 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

[97] A final judgment addresses an issue essential to the verdict (*Duhamel v. The Queen*, 1984 CanLII 126 (SCC), at page 558). In other words, the competent tribunal or court has exhausted its jurisdiction, its authority; it has fulfilled the mandate assigned to it (*Constantinescu v. Correctional Service Canada*, 2019 CHRT 49, at paras. 78 to 81).

[98] This is indeed what the Superior Court did; it rendered a final judgment on the plaintiff's originating application by ruling on the merits of the case, thereby exhausting its jurisdiction.

(iii) Identity of parties

[99] There is no identity of parties in either case.

[100] The third condition for issue estoppel requires that the parties or their privies must be the same in both cases.

[101] To determine whether a person is a party's privy, there must be a sufficient degree of common interest between the party and the privy to make it fair to bind the party to the determinations made in the previous proceedings (see in particular *O'Connor v. Canadian National Railway*, 2006 CHRT 5 (CanLII), at para. 48 [*O'Connor*]; *Danyluk*, at para. 60).

[102] The Tribunal finds that the Complainant, Mr. Dominique, on behalf of the members of the Pekuakamiulnuatsh First Nation, is a privy of the Pekuakamiulnuatsh Takuhikan, the administrative organization of the band, of the First Nation. It is the representative of the

Pekuakamiulnuatsh First Nation, which itself is represented by Mr. Dominique in this complaint.

[103] With regard to the identity of the defendants before the Superior Court, already, the Attorney General of Quebec is not a party in the case before the Tribunal.

[104] As for the Attorney General of Canada, he was a defendant before the Superior Court, but before the Tribunal, the Respondent is, rather, the Department of Public Safety Canada.

[105] The Tribunal's reasoning in *Wade v. Canada (Attorney General)*, 2008 CHRT 9, at paragraphs 16 to 21 is relevant in the circumstances. Following this reasoning, it can be concluded that the Department of Public Safety Canada does not, in fact, have a legal personality. Therefore, the "proper respondent" to be named before the Tribunal would instead be the Attorney General of Canada (see also *Carter v. Fisheries and Oceans Canada*, 2014 CHRT 3, at para. 60, for similar reasoning).

[106] However, this observation is of little practical use in the circumstances before us because, at any rate, there is no identity of parties because of the presence of the Commission.

[107] The Commission was not a party in the Superior Court proceeding, but it is present in the case before the Tribunal, having participated fully in this matter.

[108] The Commission is certainly not a privy of the Complainant, who is himself a privy of the plaintiff in the Superior Court case. On this point, three Tribunal decisions are relevant: *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, 2002 CanLII 61853 (CHRT), *Parisien v. Ottawa-Carleton Regional Transit Commission*, 2002 CanLII 61850 (CHRT), and *Thompson v. Rivtow Marine Limited*, 2001 CanLII 38323 (CHRT).

[109] In the Tribunal's opinion, the Commission and the Complainant are both independent parties in this complaint filed under the CHRA (subsection 50(1) of the CHRA). The Commission does not represent the Complainant; its precise mandate is to represent the public interest (section 51 of the CHRA).

[110] As such, it would be contrary to the underlying principles of the CHRA to conclude that the Commission is a privy of the Complainant. If this were the case, in the words of the Honourable Anne Mactavish when she was a member of this Tribunal,

> . . . the ability of the Canadian Human Rights Commission to take positions that it believes are in the public interest [would be] inhibited by findings made in the context of other proceedings, proceedings of which the Commission would likely have had no notice and no opportunity to participate in. (*Thompson*, at para. 26; see also, in particular, *Tweten v. RTL Robinson Enterprises Ltd.*, 2004 CHRT 8, at para. 22 et seq.; *Campbell v. Toronto District School Board*, 2008 HRTO 62 (CanLII), at para. 34; *Ontario (Human Rights Commission) v. Naraine*, 2001 CanLII 21234 (ON CA), at para. 64).

[111] As long as the Commission was not present in the Superior Court case, the Tribunal could conclude that there is no identity of parties.

[112] As a result, and since two of the three issue estoppel criteria were not met, the Tribunal cannot apply this doctrine, and no argument on relitigation and *res judicata* can be accepted. The Tribunal therefore does not need to consider whether it is bound by the questions decided by the Superior Court, be they questions of fact, of law or of mixed fact and law.

(iv) Abuse of process and residual discretion

[113] Moreover, the Supreme Court, in *Toronto*, found that if the conditions required for issue estoppel to apply are not met, the abuse of process doctrine can apply, in certain cases.

[114] The reasoning is as follows: there would be abuse of process where allowing relitigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice (*Toronto*, at para. 37).

[115] In the present case, the Respondent did not ask the Tribunal to apply the principle of abuse of process in the event that all the conditions regarding issue estoppel were not met. Even though it does not have to rule on this issue, the Tribunal points out that in this case, the Complainant is not seeking to relitigate. The Tribunal notes its conclusion that it is

dealing with different causes of action. As a result, given the circumstances of this case, the Tribunal will not apply the principle of abuse of process.

[116] Lastly, the Tribunal also has residual discretion to refuse to apply the issue estoppel doctrine, even when all three conditions are present, if applying it would work an injustice (*Danyluk*, at paras. 1 and 62). The Supreme Court recognized that this power is broader for administrative tribunals, considering their raison d'être (*Danyluk*, at para. 62). Justice Mactavish exercised this residual discretion as a member of this Tribunal, in *Parisien v. Ottawa-Carleton Regional Transit Commission*, 2002 CanLII 61850 (CHRT), at paragraph 34.

[117] Now, even though the Tribunal has already found that the three criteria have not been met, it is not satisfied that, in any event, there would be an injustice if it were to continue its analysis on the issue of discrimination. On the contrary, the Tribunal finds that it is in the interests of justice to decide the issue of discrimination raised in this case. As a result, even if the Tribunal had concluded that issue estoppel applied, it would nonetheless have used its discretionary power not to apply it.

(v) Additional remarks regarding some of the Complainant's arguments

[118] Several arguments presented by the Complainant require additional remarks by the Tribunal.

[119] The Tribunal does not intend to dwell on some of the Complainant's arguments because they are not relevant or necessary for it to decide the case on its merits.

[120] In particular, the Tribunal will not address the Complainant's arguments involving the Crown's obligation to act with honour towards First Nations, the fiduciary relationship and the duties associated with it, the Crown's commitments to the well-being and safety of Indigenous people, the vulnerability of First Nations, specific Indigenous interests, and the concept of contracts of adhesion.

[121] The Tribunal notes that the Complainant argued these issues before the Superior Court. These arguments have already been the subject of a judicial debate resulting in a decision, which is being appealed.

[122] The Tribunal also does not intend to analyze the Complainant's arguments involving the Canadian Charter, in particular when the Complainant raises section 7 and the right to security, section 35 and the principle of self-government, and section 15 with regard to equality rights.

[123] It is not within the Tribunal's jurisdiction to consider these issues in this case or to find there is a violation of constitutional rights set out, in particular, under section 7, 15 or 35 of the Canadian Charter. The Tribunal will focus its analysis on the approach established in *Moore* to determine whether the Complainant was the victim of discrimination under section 5 of the CHRA.

VII. Analysis

[124] As stated earlier, the complaint filed by the Complainant concerns police services offered in the community of Mashteuiatsh and more specifically as part of the implementation of the FNPP.

[125] The Complainant alleges that he was treated adversely in the provision of services customarily available to the general public in three crucial areas relating to the implementation of the FNPP: funding, the level of police service, and the duration of the tripartite agreements.

[126] For section 5 of the CHRA to apply, the Complainant must demonstrate

1) that he has a characteristic protected from discrimination under the CHRA;
2) that he experienced an adverse impact with respect to the provision of a service customarily available to the general public; and
3) that the protected characteristic was a factor in the adverse impact (*Moore*, at para 33).

[127] The Tribunal must analyze the evidence, including evidence presented by the Respondent, as a whole in order to determine whether the Complainant has met his burden of proof (*Bombardier* at para 58). The Tribunal will analyze these three steps in the following sections.

[128] It should be noted that the parties filed a considerable number of documents during the hearing. However, the Tribunal does not need to refer to each and every piece of evidence that was filed and entered in order to make a finding of discrimination.

[129] In the interest of brevity and to conduct the proceeding as expeditiously as possible (subsection 48.9(1) of the CHRA), the Tribunal will focus solely on the elements it considers to be essential, necessary, and relevant in making this decision (*Turner v. Canada (Attorney General)*, 2012 FCA 159 (CanLII), at para 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 (CanLII), at para 54; *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2, at para 32).

A. Prohibited grounds of discrimination – Race and national or ethnic origin

[130] There is little to say with regard to this first element of the analysis in *Moore*. The Complainant alleges that because of his race and national or ethnic origin he experienced an adverse impact in the provision of a service, under section 5 of the CHRA.

[131] The personal characteristics of race and national or ethnic origin are commonly invoked in claims of discrimination against Indigenous peoples (for example, see *First Nations Child and Family Caring Society 2016*; *André v. Matimekush-Lac John Nation Innu*, 2021 CHRT 8 (CanLII); *Nielsen*). These prohibited grounds of discrimination are listed in the CHRA (section 3 of the CHRA).

[132] That being said, the Complainant and the Pekuakamiulnuatsh are of First Nations heritage is not contested. This is ample reason for the Tribunal to conclude that the Complainant has the personal characteristics of race and national or ethnic origin that are prohibited grounds of discrimination under the CHRA (section 3 of the CHRA).

B. Adverse treatment on a prohibited ground of discrimination in the provision of a service (paragraph 5(b) of the CHRA)

[133] For the reasons that follow, the Tribunal finds that Public Safety Canada provides a service as defined in the CHRA to the Complainant through the implementation and application of the FNPP. The FNPP is a federally financed police services program created for First Nation communities.

[134] The Tribunal also finds that the Complainant was treated adversely by the Respondent in the provision of this service because of his race and national or ethnic origin.

(i) Police services

[135] The Tribunal believes it is necessary to first provide background information on the FNPP and Indigenous policing as well as policing in the province of Quebec. The reader will thus be able to better understand the complaint, its context, and the reasoning behind this decision.

(a) Indigenous policing and the FNPP

[136] The Tribunal understands that there is a long history of policing on Indigenous reserves in Canada. The Complainant and the Commission have filed several documents that describe the history of policing on reserves (for example, exhibits C-2, C-9, C-13, C-36, P-19, P-30, P-31, to name a few).

[137] In particular, the Indian Policing Policy Review Task Force Report (the “1990 Policing Report”) published in January 1990 (C-2) allows us to contextualize the creation of the FNPP. Then, the final report of the Public Inquiry Commission on relations between Indigenous Peoples and certain public services: listening, reconciliation and progress (2019) (the “Viens Report”) (C-36) captures the essence of the historical grievances of First Nations against police services in a very contemporary context.

[138] Though the Tribunal is aware that these pieces of evidence do not, in themselves, demonstrate the existence of discrimination, they are nevertheless relevant and probative. The Tribunal has the power to accept evidence that it sees fit, regardless of whether the evidence would be admissible in a court of law (paragraph 50(3)(c) of the CHRA). It is in considering the reports, studies, and other such documents together that their meaning emerges.

[139] These pieces of evidence make it possible to contextualize policing on reserves and allow the Tribunal to better understand past (and present) issues that are necessarily related to this complaint.

[140] Thus, they reveal that policing has definitely evolved over the years and has not always been offered or funded under the same model or in the same way. In the interest of brevity, the Tribunal will not examine the entire history and will focus its analysis on the most relevant and decisive factors in the circumstances.

[141] The FNPP was created to update the Policy. This program provides First Nations communities across the country with, among other things, a professional and effective police service that is culturally appropriate and accountable to local populations.

[142] The program is a response to the 1990 Policing Report. This report was the culmination of the work of a federal cross-departmental task force established in 1986. The purpose of the task force was to study the national Indian reserve policing policy.

[143] As the 1990 Policing Report states, prior to this task force, there was no comprehensive policy to guide decisions relating to federal government involvement in the matter or to the development of future programs. The existence of multiple funding types and formulas as well as an increase in requests for expanded police services led the Treasury Board of the day to review the federal Indian reserve policing policy in depth. It was known at that time, and the task force also noted, that members of First Nations were over-represented in the Canadian criminal justice system.

[144] On page 2 of the 1990 Policing Report, the task force stated that:

> [e]quality of access to appropriate policing services on-reserve, at a level and quality available to other similarly situated communities in the region, should be the overall aim of the concerned parties.

[145] The task force added that similar results could not be expected across Indigenous communities, as conditions can differ from one community to another. It also acknowledged that Indigenous and non-Indigenous societies are markedly different, in socio-economic as well as spiritual and cultural terms.

[146] The 1990 Policing Report also highlighted certain tensions between the constitutional and legal jurisdictions of the federal government and the provincial and territorial governments. It had already been established that Parliament had the discretion needed to define the responsibilities it wished to endorse with regard to policing on reserves.

[147] However, as of the date of this decision, Parliament has not legislated in the area, thereby giving free rein to the provinces. The Government of Canada decided instead to contribute financially to policing on Indigenous reserves.

[148] This being said, the FNPP is based on the principle of partnership between the federal government, the provinces and territories, and First Nations. This partnership takes the form of tripartite agreements to implement police services that are responsive to the needs of Indigenous communities.

[149] The Tribunal understands that the FNPP has undergone several modifications over time, but that these modifications have not substantially altered the underlying principles of the program.

[150] In fact, as stated in the introduction to the Policy that created the FNPP, the federal government reaffirmed its commitment to support First Nations in becoming self-governing and self-sufficient, and to maintain partnerships based on trust, mutual respect, and participation in decision-making.

[151] More specifically, the objective of the program is:

> . . . [to improve] social order, public security and personal safety in First Nations communities . . . .

Additionally, it:

> . . . provides a **practical way** to improve the administration of justice for First Nations through the **establishment** of First Nations police services that are professional, effective, and responsive to the particular needs of the community. This is accomplished **through the provision of cost-shared funding of police services, and related support and assistance**.
>
> (C-4, at page 3.)
>
> [Emphasis added.]

[152] The Policy states that it is also a way of implementing Indigenous peoples' inherent right to self-government and to the negotiation of that self-government, which is consistent with the application of the federal policy in that regard.

[153] The three main objectives of the Policy are: 1) to strengthen public security and personal safety, 2) to increase responsibility and accountability, and, lastly, 3) to build a new type of partnership with First Nations communities. The Policy is based on certain guiding principles, some of which are more relevant than others to this case.

[154] For example, the Policy is based on the principle that communities should have access to police services that are adapted to their needs and that are equal in quality and quantity to services provided in neighbouring communities with similar conditions. The Policy also provides that First Nations should have input regarding the level and quality of service provided to them, and that First Nations police officers should have the same responsibilities and authorities as other police officers in Canada. Additionally, the services must be provided by a suitable number of police officers of cultural and linguistic backgrounds similar to those of the communities they serve in order to ensure that services are effective and culturally appropriate.

[155] The Policy also states that police service models in First Nations communities should be at least equivalent to those offered in neighbouring communities with similar conditions, and that First Nations should be involved in choosing a model that is adapted to their particular needs while being as cost-effective as possible. Finally, First Nations should have an effective and appropriate role in directing their police service, with the understanding that the police service must be accountable to the population.

[156] That being said, the Policy sets out the manner of funding for police services in First Nations communities and provides that this funding is based on tripartite agreements. Under these agreements, the federal government pays 52 percent, and the province or territory pays 48 percent of the government contribution toward the cost of First Nations policing services. The Policy also encourages First Nations communities to pay, where possible, for a portion of the cost of their policing service, particularly for enhanced services.

[157] The Policy also proposes examples of police service models. It should be noted that, in this case, Mashteuiatsh chose a self-administered police service model. However, this is not the only possible model.

(b) Police services in the province of Quebec

[158] The evidence shows that the Sûreté du Québec (“SQ”) is the “national police force” of Quebec, that is, the provincial police force in the province of Quebec (section 50 of the PA).

[159] It is common ground that the SQ has jurisdiction throughout all of Quebec, including Indigenous reserves, as they are not exempt from the application of provincial legislation, in this case, the PA (see *Cardinal v. Attorney General of Alberta*, 1973 CanLII 980 (SCC)). The evidence makes clear that in the absence of an Indigenous police service on a reserve, First Nations receive police services from the SQ.

[160] Mr. Jean-Sébastien Dion (“Mr. Dion”), who was the Directeur des organisations policières aux activités [Director of Police Organization] at the Ministère de la Sécurité publique [Department of Public Safety] of Quebec on the date of his testimony, provided the Tribunal with much useful and relevant information about the structure of police services in Quebec.

[161] The evidence demonstrates that there are five types of police forces that may act in Quebec: 1) the SQ, 2) municipal police forces, 3) Indigenous police forces, 4) the Royal Canadian Mounted Police (“RCMP”), and 5) specialized police forces, which include the UPAC (Unité permanente anticorruption, an anti-corruption squad) and the BEI (Bureau d’enquête indépendante).

[162] The SQ's responsibilities include applying the *Criminal Code* (R.S.C. 1985, c. C-46) and municipal regulations applicable in the territory in question. Indigenous police, for their part, are assigned the same roles on reserves as the SQ as well as any roles set out in their agreements.

[163] Sections 90 and following of the PA provide for the establishment of "Native police forces". More specifically, section 90 of the PA allows the Government of Quebec to enter into agreements to establish a Native police force.

[164] In this regard, Mr. Dion testified that the vast majority of these agreements are tripartite, that is, between the Government of Quebec, the Government of Canada, and the First Nation. That said, he qualified his statement by adding that the PA does not specifically provide for tripartite agreements. Rather, section 90 mentions an "agreement", which could be between the Government (of Quebec) and one or more Indigenous communities, each represented by its band council.

[165] The evidence also demonstrates that police services in Quebec are divided into six levels, where level 1 is the lowest level of services and level 6 is the highest level of services. Mr. Dion described the levels as follows: the higher the level, the more complex the police services provided.

[166] The levels of service are set out in 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 ("Police Services Regulation").

[167] Each level of services includes the services from the levels below. In other words, level 2 comprises services specific to level 2 as well as all services from level 1; level 3 comprises services specific to level 3 as well as all services from levels 1 and 2; and so forth.

[168] As the provincial police of Quebec, the SQ provides level 6 services (subsection 70(3) of the PA) and therefore provides all services from all levels.

[169] This means that the SQ can play a supplemental role or a superior role. It can assist other police forces when the latter are unable to provide certain services for different

reasons. The SQ plays a “supplemental” role when it assists a police force by providing a service that the police force should provide according to its level, but which it is unable to provide. The SQ plays a “superior” role when it provides a higher-level service that a police force does not provide at its level. We will see later in the decision that the SQ does indeed assist the Mashteuiatsh police.

[170] Without getting into all the details and particularities of certain municipalities, we can state that the evidence shows that police services are provided by the SQ to municipalities with fewer than 50,000 inhabitants and by a municipal police force to municipalities with more than 50,000 inhabitants (section 72 of the PA). Payment for police services provided by the SQ to municipalities with fewer than 50,000 inhabitants is established by regulation using a predetermined formula. It is unnecessary to enter into details on this subject, as it is not determinative in the circumstances.

[171] Mr. Dion testified that, on the dates of the Tribunal hearing, the SQ was providing police services to 11 Indigenous communities in the territory of Quebec. Testimony by Richard Coleman (“Mr. Coleman”) is also relevant to this matter. On September 11, 2019, the day he testified before the Superior Court, Mr. Coleman was working as the Director of the Bureau des relations avec les autochtones [Indigenous Relations Bureau] of the Bureau du sous-ministre [Deputy Minister’s Office] at Quebec’s Department of Public Safety. Although Mr. Coleman did not testify before the Tribunal, the parties filed the transcripts of his testimony before the Superior Court as evidence in this case.

[172] Mr. Coleman also confirmed that 11 First Nations, together comprising 55 Indigenous communities, are recognized in Quebec. In 44 of these communities, police services are provided by an Indigenous police service administered by the First Nations themselves.

[173] Mr. Coleman explained that in 7 of the 11 communities currently receiving police services from the SQ, police services had once been provided by Indigenous police, but had been discontinued. The SQ now provides police services in these communities. There are communities in other situations, including some that are considered to be municipalities within a regional county municipality (“RCM”), but the Tribunal does not believe it necessary to consider them further as they are not determinative in the circumstances.

[174] What is important to note is that the evidence shows that the communities receiving police services from the SQ are not billed for these services. There is no charge to them, as Mr. Dion states. Similarly, the assistance provided by the SQ to Indigenous police forces is also free of charge. The costs are not billed to the community and are a part of the SQ's budget and, therefore, covered by the taxpayers of Quebec.

[175] The evidence shows that the SQ supports and has supported Sécurite publique de Mashteuiatsh [Mashteuiatsh Public Safety] by lending, for example, personnel, two senior officers for a period of approximately two years, and by providing access to an indoor firing range.

[176] In the same vein, Ms. Ginette Séguin, a police officer with more than 28 years of policing experience, including in certain remote regions, explained that the SQ supports the Mashteuiatsh police service by providing certain services that the latter is unable to offer, for example, services requiring an all-terrain vehicle or marine surveillance.

(c) Police services in the community of Mashteuiatsh

[177] The community of Mashteuiatsh has an administrative and political body (Pekuakamiulnuatsh Takuhikan) that manages various services, including Mashteuiatsh Public Safety.

[178] Mr. Clifford Moar, who was chief of the First Nation at the time of the hearing, and who had been chief for many years in Mashteuiatsh, testified before the Tribunal. He explained that, given the long history of the *Indian Act* (R.S.C. 1985, c. I-5) and its objective of assimilating Indigenous peoples, the First Nation wanted to provide its members with services that were adapted to the needs and culture of the community. The First Nation decided to take back as much control as possible over its programs. The protection of the Nation and its language, culture, and institutions, as well as its long-term survival, are all challenges that the First Nation must face.

[179] Without going into all the details, the Tribunal understands from the evidence that the history of policing in Mashteuiatsh began with the RCMP. Mr. Moar recalled that when an

RCMP officer came to the reserve, it was to enforce the law. Other than that, there was no RCMP presence on the reserve.

[180] After that, a first police force was created in Pointe-Bleu (Mashteuiatsh); this force was replaced by the Amerindian Police in the late 1970s and early 1980s. Mashteuiatsh then decided to leave the Amerindian Police Council because of a lack of resources and funding. The Mashteuiatsh police service then came into being and was later expanded.

[181] Mr. Moar testified that it was particularly important for the community to have police services. In fact, along with education, it was one of the first services to be created within the community.

[182] For Mr. Moar and his community, police services represent protection and security, concepts that have existed since the beginnings of the Nation. In the words of Mr. Moar, police services are a shield for protecting themselves from others, but also for protecting each other. The Tribunal understands that the police service is a source of pride for the First Nation.

[183] Importantly, Mr. Moar also testified that he has seen a shift in attitudes among the members of his community, since the police force, which is Indigenous, is no longer seen as an enemy, but rather as a form of protection.

[184] That being said, the evidence does in fact show that the police service model chosen by Mashteuiatsh is that of an Indigenous police force administered by the First Nation itself.

[185] This choice therefore opens the door to funding from the federal government under the FNPP. The First Nation decided, of its own accord, to benefit from the FNPP by signing its first agreement in 1996.

[186] Under the program, tripartite agreements must be signed by the federal government, the Government of Quebec, and the First Nation, and the federal government and the province are responsible for 52 percent and 48 percent of the funding, respectively. As mentioned earlier, the Policy states that First Nations communities will, where possible, be encouraged to pay a portion of the cost of their services, particularly for enhanced services.

[187] The community of Mashteuiatsh did indeed enter into several tripartite agreements with the governments of Canada and Quebec. Some of these agreements were filed with the Tribunal by the Respondent. In the Tribunal's record, the earliest agreement is from October 1996 and sets out various methods and timelines for Mashteuiatsh to assume complete responsibility for the financial management of police services in the community.

[188] The agreements cover the following periods:

- July 1996 to March 1999
- April 1999 to March 2004
- April 2004 to March 2009
- April 2009 to March 2010
- April 2010 to March 2011
- April 2011 to March 2013
- April 2013 to March 2014
    - An amendment to the agreement was signed by the signatories in order to add a special financial contribution for the 2013–2014 financial year.
- April 2014 to March 2015
- April 2015 to March 2016
    - An amendment to the agreement was signed by the signatories in order to extend the term of the agreement by two years, such that the agreement applies to the periods 2016–2017 and 2017–2018, and, consequently, to add funding for these additional financial years.
    - In another document, the signatories also agreed to modify the payment schedule for Canada, remove the requirement to provide ledger accounts, and adjust the submission date for audited financial statements.

[189] Finally, although the Tribunal did not have access to this agreement, the evidence shows that Mashteuiatsh signed an agreement for five years, from 2018 to 2023.

(ii) Public Safety Canada provides a "service" under section 5 of the CHRA

[190] For the reasons that follow, the Tribunal finds that, through the implementation and application of the FNPP, Public Safety Canada provides a service within the meaning of the CHRA.

[191] The Respondent conceded in its final arguments that the FNPP is a federally funded program established for the benefit of First Nations and that it therefore provides a "service" within the meaning of section 5 of the CHRA through the combination of the FNPP and the tripartite contribution agreements (Respondent's plan of argument at para 159).

[192] The Respondent also concedes that the services offered to First Nations that live on reserves are influenced by the funding given to them (Respondent's plan of argument at para 160.) Nevertheless, the Respondent contests the claim that the Complainant was treated adversely in the provision of this service.

[193] That being said, the Complainant filed his complaint under section 5 of the CHRA. The English and French versions of section 5 read as follows:

> It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
>
> Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : a) d'en priver un individu; b) de le défavoriser à l'occasion de leur fourniture.

[194] Two key decisions guide the Tribunal on this subject: *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) [*Gould*] of the Supreme Court and *Watkin v. Canada (Attorney General)*, 2008 FCA 170 [*Watkin*], of the Federal Court of Appeal.

[195] First, the legal question of the applicability of section 5 of the CHRA is within the Tribunal's jurisdiction. In other words, it is for the Tribunal to decide whether section 5 of the

CHRA applies in the circumstances of the case before it (*Gould* at para 15; *West v. Cold Lake First Nations*, 2021 CHRT 1 at para 76).

[196] The Tribunal must first determine whether it is dealing with a "service" within the meaning of the CHRA. To do so, the Tribunal must define and analyze the very substance of the act, action, or activity reproached by the Complainant (*Watkin* at paras 31 and 33; *Gould* at paras 16 and 60; *First Nations Child and Family Caring Society 2016* at para 30).

[197] In *Watkin* at para 31, the Federal Court of Appeal reminds us that a "service" is something advantageous or of benefit that is offered or made available to the public.

[198] Second, the Tribunal must determine whether the service creates a public relationship between the service provider and the service user. To do so, the Tribunal must consider all factors relevant to the context of the case (*Watkin* at paras 32 and 33). As my fellow members Marchildon and Lustig state in *First Nations Child and Family Caring Society 2016* at para 31:

> As part of this determination, the Tribunal must decide what constitutes the "public" to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the "public" (see *University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353 at pp. 374–388; and, *Gould* per La Forest J. at para. 68). A public relationship is created where this "public" is extended a "service" by the service provider (see *Gould* per La Forest J. at para. 55).

[199] As will be explained in the following paragraphs, the Tribunal finds in this case that Public Safety Canada offers a "service" for the benefit of the Complainant and the Pekuakamiulnuatsh through the FNPP. The Tribunal also finds that a public relationship is necessarily created between the Respondent, the service provider, and the Complainant and the Pekuakamiulnuatsh, the beneficiaries, who therefore constitute a "public".

[200] Let us be clear: The service is related to the implementation of the FNPP by the Respondent, and not the direct provision of Indigenous police services on reserves. The evidence is clear in this regard, as Public Security Canada is not the body that provides police services on reserves.

[201] However, though the objective of the FNPP is not to provide police services to First Nations, one of the fundamental aspects of the program is to provide funding to First Nations for policing on reserves.

[202] In this regard, there are certain similarities with the decision for *First Nations Child and Family Caring Society 2016,* in which my fellow members Marchildon and Lustig found that the funding for the First Nations Child and Family Services Program was a "service" within the meaning of section 5 of the CHRA. In that case, the Tribunal also found that the program went beyond the simple funding of a service and that the role of the federal government was not limited to merely funding the service.

[203] In this case, the Tribunal similarly finds that the implementation of the FNPP involves more than simple "funding", as Public Safety Canada monitors the program, provides related assistance to First Nations, and requires accountability.

[204] The Policy specifically includes the following in its objectives:

> . . . the improvement of social order, public security, and personal safety in First Nations communities . . . .
>
> The Policy provides a practical way to improve the administration of justice for First Nations through the establishment of First Nations police services that are professional, effective, and responsive to the particular needs of the community. This is accomplished through the provision of cost-shared funding of police services, and related support and assistance.
>
> (C-4, at page 2).

[205] The testimony of Antoine Bourdage ("Mr. Bourdage") on the FNPP is relevant and conclusive in the circumstances. Mr. Bourdage provided useful insight regarding not only the program funding portion, but also the related assistance provided to First Nations for policing services, as well as the need for accountability.

[206] Although the Tribunal itself did not hear Mr. Bourdage, the parties filed, by agreement, transcripts of his examination before the Superior Court. The parties clearly agreed that these transcripts were filed as testimony and that the entire contents of this testimony formed an integral part of the evidence before the Tribunal.

[207] The Tribunal carefully read these transcripts and concludes that Mr. Bourdage is undoubtedly an important witness in this case, with extensive knowledge of the program, its implementation and most of its ins and outs. The Tribunal has no reason to question the credibility and reliability of his testimony. The written transcripts are clear, consistent, and detailed, and Mr. Bourdage's testimony is largely corroborated by the documentary evidence filed at the hearing as well as the testimony of other witnesses (including Richard Coleman, Dannye Bonneau and Valerie Tremblay).

[208] At the time of the hearing, Mr. Bourdage was still employed by Public Safety Canada and had been since 2011. In 2014, the FNPP fell under his responsibility. According to his explanations, he was then the director of the program, overseeing its operation and administration and ensuring its management and implementation. He was responsible for ensuring that the program was implemented consistently across Canada and coordinating all work with his colleagues in the field.

[209] According to Mr. Bourdage, when an agreement is signed under the FNPP, the work does not stop there, as the agreement must still be administered. For example, program recipients, including Mashteuiatsh, must submit annual reports, and payment requests must be processed by Public Safety Canada. These requests are subject to a review requiring quality control measures before payments are made, and it was Mr. Bourdage who signed the authorization for these payments.

[210] He added that when the agreements were renewed, the work necessarily intensified. His department worked closely with the policy team, which was responsible for putting together the proposals. His team, meanwhile, had the on-the-ground information about program administration and results, among other things.

[211] Mr. Bourdage specified that, during the renewal and negotiation of the agreements, he was personally involved in the negotiations with the First Nations. Since the budget envelope was his responsibility, he had to [TRANSLATION] "keep his finger on the pulse of that envelope to make sure we stayed within it" (Testimony dated September 10, 2019, at page 719).

[212] Mr. Bourdage characterized the FNPP as a discretionary federal contribution program. In this regard, he explained that the Canadian government could have been involved in a number of ways but instead opted for a contribution program, in other words, a transfer of money. More specifically, these are funding agreements with a specific purpose that are signed between the parties involved.

[213] Without going into detail, Mr. Bourdage testified that these types of contribution agreements are subject to a Treasury Board transfer policy and fall under the *Financial Administration Act*, R.S.C. 1985, c. F-11. These agreements, including those under the FNPP, have various terms and conditions, including ones related to duration, funding amounts and accountability.

[214] This is also revealed by Ms. Valerie Tremblay's testimony before the Superior Court on September 9 and 10, 2019, who worked in different positions within Pekuakamiulnuatsh Takuhikan (the band's administrative body). This included working in the unit responsible for finance, but also as the director of human relations, administration and financial resources, since she has a background as a chartered professional accountant. Again, as in the case of Mr. Coleman's testimony, Ms. Tremblay did not testify before the Tribunal. Nonetheless, the parties have filed in the Tribunal record the transcripts of her Superior Court testimony as evidence.

[215] Ms. Tremblay did explain the process surrounding this accountability, the preparation of financial statements and external audits of these statements.

[216] The money for these contributions comes from a consolidated fund of the Government of Canada, which is, in the words of Mr. Bourdage, a large bank account containing the money needed to administer federal programs. There is a process in place to access the money in this consolidated fund.

[217] Mr. Bourdage also explained that each year, between February and April, the expenditures that the Canadian government intends to make are [TRANSLATION] "accounted for in that budget" (Testimony dated September 10, 2019, at page 726). The Tribunal in fact understands that the federal Parliament sets a budget for this consolidated fund. Mr. Bourdage also explained that the line item for the Department of Public Safety includes

an amount budgeted and appropriated for the FNPP. This is how Mr. Bourdage's team gets its annual budget for the implementation of the FNPP.

[218] The process for receiving money from this consolidation fund follows its own cycle. Mr. Bourdage explained that a proposal must first be submitted to the ministers' offices. This proposal is based on material documents and data, which serve to inform and advise the ministers' offices. At this stage, the ministers' offices are not the ones who grant the authority to spend money. This is more of a policy stage; it is more of a statement of intent, like a business plan.

[219] Mr. Bourdage testified that when his department had approval from the ministers' offices, they had to go and get the necessary funding. The Treasury Board is the authorizing body for spending, and his department had to negotiate the funding with them. The submission to the Treasury Board was more detailed and rigorous, including the cost of the program and the justifications for the expenditures.

[220] Mr. Bourdage specified that in the case of the FNPP, which is a cost-shared program, the provinces and territories had to be contacted to determine if they were able to provide funding. Once this was done, negotiations with First Nations could begin.

[221] The evidence shows that the funding is determined by the federal government, which first sets the amount of its contribution. Quebec then provides 48 percent of that contribution. This is what Mr. Bourdage explained to the Tribunal, but this information is also corroborated by Mr. Coleman's testimony:

> [TRANSLATION]
> When we learn from Ottawa the… the level of the envelope available for Indigenous policing in Quebec, we must immediately mobilize to be able to put that money to work, so if, for example, Mr. Bourdage tells me "we have thirty million", well, I say to myself, well, I have to find the 48 percent.
>
> (Examination-in-Chief dated September 11, 2019, at page 1007).

[222] In the same vein, Mr. Coleman testified that, for Quebec, benefiting from this federal program has always been a priority. In fact, Quebec wants to benefit from the money available under the FNPP and to secure that money.

[223] As a result, on the provincial side, Quebec's 48-percent portion is then the provincial funding base for Aboriginal police forces, according to Mr. Coleman. He refers to the [TRANSLATION] "funding base" because the SQ still provides services of a higher level or complexity to these Indigenous police forces when necessary. The costs of these SQ services are then paid for by Quebec and are part of the overall costs of public safety in Quebec.

[224] Mr. Coleman went on to say that once the federal government's envelope for FNPP funding is established, the Quebec government must then take action to provide its matching funding, its 48-percent portion. Steps must be taken to release the necessary funds.

[225] The implementation of the FNPP is based on exchanges between the First Nations, the federal government and the provincial or territorial governments. The statements of several witnesses (Mr. Bourdage, Mr. Coleman and Ms. Bonneau, among others) confirm that Public Safety Canada works directly with Mashteuiatsh and the Quebec government to achieve the program's objectives.

[226] The Tribunal notes that there is a lot of work going on behind the scenes that goes beyond just "funding". As Mr. Bourdage mentioned, there is all the field work, as well as the related assistance that can be provided to First Nations where possible.

[227] For example, in the case of Mashteuiatsh, the evidence reveals that additional financial assistance was granted by the Respondent in 2016. In this regard, Mr. Bourdage explained that the federal government had a monetary surplus at the time and that it was possible to transfer, or reallocate, money from one program to another.

[228] As a result, Public Safety Canada was able to make a contribution of $400,000 to the Mashteuiatsh police for the purpose of training officers and acquiring equipment. Mr. Bourdage was aware that in 2016, the Mashteuiatsh police service was experiencing financial difficulties. He explained that they (his department) wanted to [TRANSLATION] "help as best [they] could" (Examination in Chief dated September 11, 2019, at page 795). However, Mr. Bourdage made it clear that there was no guarantee that this money would be available for future years, considering that the money came from a reallocation following a budget surplus.

[229] In light of all of the above and the teachings of the Supreme Court in *Gould* and the Federal Court of Appeal in *Watkin*, the Tribunal finds that Public Safety Canada, in implementing the Policy that led to the FNPP, is providing a service to the Complainant.

[230] This service consists largely of funding or the provision of financial contributions but also includes other actions taken by the Respondent in administering the program, such as reporting, negotiating and providing related assistance. As a matter of course, benefits and advantages are then offered to the First Nation.

[231] As the evidence demonstrates, the Tribunal is also satisfied that the Respondent is a service provider and that the Complainant and the Pekuakamiulnuatsh are the beneficiaries.

[232] It should be noted that the notion of "public" is relational rather than quantitative, just as the public may refer to only a small segment of the general Canadian public (*University of British Columbia v. Berg*, [1993] 2 SCR 353 at 374-388; *Gould* at para. 68; *Children's Aid Society 2016* at para. 31). In this regard, the evidence shows on a balance of probabilities that the service in question is offered or made available to the public, the public being the Complainant and the Pekuakamiulnuatsh, who are drawn from a broader public of First Nations. And the First Nations are the ones who can benefit from the advantages and advantages provided for in the Policy and the FNPP.

[233] The Tribunal will now proceed to the next stage of its analysis.

(iii) Adverse treatment based on a prohibited ground of discrimination

[234] Now that the Tribunal has found that there is a service within the meaning of the CHRA and has established this service's nature, it must determine whether the Complainant suffered adverse treatment on the basis of race and national or ethnic origin in the provision of that service.

[235] In light of the evidence presented, the Tribunal finds that the Complainant was indeed treated adversely by the Respondent on the basis of his race and national or ethnic origin.

[236] According to the Complainant, three key elements of the provision of the service (i.e., the implementation of the FNPP) constitute discrimination: the funding itself, the duration of the agreements and the level of police services offered to the members of the Mashteuiatsh community.

[237] The Tribunal will analyze these elements in the paragraphs below.

(a) Funding and level of policing

[238] For the sake of brevity, the Tribunal will address the funding and the level of police services in the same section since it seems logical to do so. Indeed, the level of police services that Mashteuiatsh Public Safety can offer is intrinsically linked to the funding that is received from the federal and provincial governments. The Respondent conceded this point.

[239] The funding affects, among other things, the salaries of the staff working for the police services, equipment, training and, of course, the services themselves that are offered in the community.

[240] The Tribunal has reviewed the extensive documentary evidence filed by the parties in this regard. It consulted, among other documents, the financial statements of Pekuakamiulnuatsh Takuhikan from 2010 to 2019 (exhibits I-38 to I-45 and I-98); the statements of operations of Mashteuiatsh Public Safety (exhibits P-2 to P-5); a table showing the deficits incurred between 1998 and 2016, from Pekuakamiulnuatsh Takuhikan (Exhibit I-13); and the tripartite agreements themselves, including their amendments, for the period from 1996 to 2018 (exhibits I-14, I-15, I-16, I-4 to I-12, I-22).

[241] What is important to understand is that each agreement sets out the amount of funding that will be provided to the First Nation for its police service. The number of police officers is also provided for. From 1996 to 1999, 7 police officers were provided, 8 from 1999 to 2004, 10 for the years 2004 to 2008 and 11 from 2008 to 2015.

[242] The evidence unequivocally demonstrates on a balance of probabilities that the Complainant, having chosen to take advantage of the FNPP and to have its own self-managed Indigenous police service, has found itself in a budgetary deficit, year after year.

It is not necessary to go into all the figures at this stage of the proceedings, as the Tribunal must only decide whether there is discrimination or not.

[243] Deficits began building up as early as 1998, following the first agreement signed by the First Nation. They culminated in a deficit in excess of $1 million for the 2014–2015 fiscal year.

[244] In 2014, a major event occurred in the Mashteuiatsh police service. In response to salary claims made by the police officers, an arbitration award dated July 17, 2014, was rendered. In that award, the arbitrator ordered a salary catch-up for the Mashteuiatsh police officers, to make their pay comparable to other police officers in other police forces. This is why the deficit exploded, as retroactive salary payments had to be made.

[245] For the 2013–2014 and 2015–2016 agreements, amendments were proposed, and additional contributions were made to provide financial relief for the First Nation's police services. Mr. Bourdage's testimony on the amendments is quite clear:

> [TRANSLATION]
> . . . [W]e were able to stall for time a bit and find ways to put… Band-Aids, finally, that's what I would call it, we… we were able to… to put a little bandage on, to stop the bleeding, and to keep the lights on for a little while longer, and we were able to… keep the police station from closing.
>
> (Examination in Chief dated September 11, 2019, at page 798.)

[246] Although the evidence shows that, throughout the period the FNPP was applied, the amounts of the contributions increased (between 1996 and 2009, then plateaued until 2013, and increased again from 2013 to 2014 to 2015), it nevertheless clearly demonstrates that the actual costs of managing the Mashteuiatsh police force were higher than the amounts received under the FNPP.

[247] The budget deficits are also corroborated by the testimonies of Mrs. Tremblay and Mrs. Bonneau, who had specific knowledge of the finances of the Mashteuiatsh police services.

[248] Ms. Bonneau worked for the Mashteuiatsh council for approximately 29 years, during which she held several positions, including middle and senior management positions. She

was also the assistant executive director and, in her last years, the executive director of the organization. Importantly, from 2013 to 2015, Ms. Bonneau took on responsibility for the executive management of Mashteuiatsh Public Safety, its finances and the budget, and she was also involved in the tripartite agreements.

[249] Ms. Bonneau testified that she remembers meetings with representatives of Quebec and Canada during which Mashteuiatsh explained its particular needs for its police services, and that the funds granted by the other two levels of government were clearly insufficient to meet the organizational needs of its police.

[250] Again according to Ms. Bonneau, the representatives of Canada and Quebec were well aware that these amounts were insufficient. Unfortunately, the answer remained simple: there was no more money available in the envelope (Examination on Discovery dated May 23, 2018, at page 20). Mr. Bourdage also testified on this point: there is a budget available for FNPP; when the envelope is empty, it is empty.

[251] All parties were therefore well aware that the needs for police services in Mashteuiatsh and the related costs were higher than the amounts that were provided for in the agreements.

[252] The evidence also shows that as of the 2015–2016 fiscal year, the First Nation's deficits stopped. That year, the financial contributions increased, and the number of police officers decreased from 11 to 10. Several witnesses confirmed that Mashteuiatsh Public Safety took the decision to abolish an operations manager position, which at the time was a managerial employee position. The objective was to minimize the organizational costs because of the lack of funding.

[253] The community's deficits were absorbed by the First Nation from a self-sustaining fund. The money held in this self-sustaining fund is used as economic leverage for the First Nation. Mr. Moar and Ms. Tremblay testified to this.

[254] Ms. Tremblay did explain that the First Nation cannot generate revenues in the same way as a municipality and that, for this reason, the First Nation had launched the

self-sustaining fund project to provide itself with investment power and to take advantage of business opportunities that may arise.

[255] For the purposes of this case, however, it is enough to understand that the First Nation dipped into this self-sustaining fund in order to cover its policing deficits. Ms. Tremblay testified that when the First Nation was accountable to the Government of Canada for the management of the police force and the use of financial contributions, cost overruns were not permitted. The First Nation had to achieve a zero deficit. Therefore, what was presented to the federal government was not representative of the actual budget of the police force, which was in deficit.

[256] The years 2015 to 2016 were pivotal for the First Nation as the council had made the decision to close its police station because of the significant lack of funding. In November 2015, Mr. Dominique, who was Chief of Mashteuiatsh at the time, wrote to the former Minister of Public Safety of Canada.

[257] Still on the subject of the closure of the Mashteuiatsh police service, Mr. Bourdage explained that both Canada and Quebec then sprang into action, since it was in no one's interest to see this police service close. He admitted, however, that it was not possible to work miracles, because of budgetary constraints. It was not possible to inject significant funds to support the police service. It was in this context that the amendments were signed, including for the $400,000 in 2015–2016.

[258] Both Ms. Bonneau and Mr. Moar explained that the First Nation continued to sign the agreements to keep receiving the funds, knowing that they were going to run deficits. According to them, if no money was given to them by the federal and provincial governments, the Mashteuiatsh Police Service would simply close. These funds were necessary for the survival of their police.

[259] All this evidence about the lack of funding highlights a huge controversy in the way the FNPP is perceived, its funding and the level of services that should be offered to the members of Mashteuiatsh.

[260] The Complainant pleaded that he must offer police services comparable to those provide in the neighbouring municipalities and to other citizens of the province of Quebec. In other words, the level of funding that results from applying the FNPP does not allow the Mashteuiatsh police to offer policing coverage of a level equal to that offered by other non-Indigenous police forces.

[261] The minimum level of service that is offered by these other non-Indigenous police forces is necessarily level 1 under the PA and its regulations. Despite repeated requests in this regard, the First Nation has never been able to have an Indigenous police force that provides this minimum level of service to its members. This is one of the reasons why deficits have been building up: the real cost of Mashteuiatsh Public Safety exceeds the funding from Canada and Quebec.

[262] The Respondent, on the other hand, argues that the Mashteuiatsh Police Service is not obliged to offer a level 1 police service as provided for in the PA, since the levels of service are not applicable to Indigenous police. It maintains that the services that must be offered to the members of the community are strictly those that are provided for in the tripartite agreements.

[263] Finally, according to the Respondent, since the SQ, as the provincial police force, must offer superior or supplementary services, the Mashteuiatsh police force can always count on the SQ, which has an obligation to assist it for the services that it cannot offer. It is the First Nation’s responsibility, as set out in the agreements, to financially support the enhanced levels of service that it offers in its community.

[264] In this regard, Mr. Dion testified that Indigenous police forces are not subject to the Police Services Regulation because, as provided for in the PA, the terms and conditions for Indigenous policing are specifically provided for in the agreements and include, among other things, the management of the police force, its independence, the management of equipment and infrastructure, government contributions, and eligible and ineligible expenses.

[265] Mr. Coleman also testified along the same lines as Mr. Dion. He explained that Indigenous policing is not subject to the PA's service levels and that the tripartite agreements contain a section that reflects the broad policy directions of the PA.

[266] At the same time, the testimony of Mr. Simon Vanier, who at the time of the Tribunal hearing was the director of Mashteuiatsh Public Safety and necessarily a police officer, corroborates the fact that Mashteuiatsh Public Safety interprets its mission and responsibilities as requiring it to offer a minimum or basic level of service that is in fact equivalent to level 1 police services. The evidence shows that Mashteuiatsh Public Safety is clearly attempting to provide the community's members with this minimum level of service, which creates an actual cost overrun in relation to the funding provided under the FNPP.

[267] The Tribunal notes that section 70 of the PA specifically provides that the levels of service apply to municipal police forces as well as the SQ. Indigenous police forces are therefore excluded from this provision.

[268] It is also true that the tripartite agreements do not specifically provide for a minimum level of service for policing services to be provided in the community. Nevertheless, as Mr. Coleman testified, the tripartite agreements reflect the broad policy directions of the PA.

[269] What then are the services that the Mashteuiatsh Indigenous Police must offer to the members of the community?

[270] The Tribunal finds that in the Mashteuiatsh tripartite agreements between 2009 and 2014, section 7 sets out the mission of the Indigenous services and the territory they cover. In the agreements subsequent to 2014, it is section 2.2 that provides for the mission and responsibilities of the Mashteuiatsh police force.

[271] While the section has changed, the Tribunal notes that there is little change in the provisions of the tripartite agreements; the same elements are essentially found in each. For the sake of convenience and conciseness, the Tribunal will simply reproduce in part section 2.2 of the 2014-2015 tripartite agreement:

> [TRANSLATION]
> **2.2 MISSION AND RESPONSIBILITIES OF THE POLICE FORCE**

2.2.1 The mission of the police force is described in section 93 of the *Police Act*.

2.2.2 For the purpose of providing police services within the territory described in paragraph 1.4.3 and in compliance with the principles set out in section 48, paragraph 2, of the *Police Act*, the police force shall be responsible for:

(a) providing a police presence to respond within a reasonable time to requests for assistance;

(b) ensuring the conduct of investigations, including but not limited to the protection of the scene of the offence, the identification of the complainant and witnesses, the taking of statements, the gathering of evidence, the arrest of the suspect, where necessary, the issuance of statements of offence, and follow-up court appearances;

(c) implementing crime prevention measures and programs.

2.2.3 In conducting police investigations and operations, the director of the police force and the police officers shall act freely and independently. In this regard, the Council, its employees or any body established by the Council shall not attempt to interfere with or instruct, directly or indirectly, the members of the police force or its director.

2.2.4 The parties recognize that effective policing requires mutual assistance and operational cooperation between the various police authorities exercising their powers in the territory of Quebec, in accordance with the applicable acts and regulations and their respective mandates.

2.2.5 This agreement is not intended to alter the mandate of the Royal Canadian Mounted Police (RCMP) or the Sûreté du Québec (SQ) under the applicable legislation.

[272] As for section 93 of the PA, which deals with Indigenous police forces, it provides as follows:

> A Native police force and its members are responsible for maintaining peace, order and public safety in the territory for which it is established, preventing and repressing crime and offences under the laws and regulations applicable in that territory and seeking out offenders.

[273] As for the other police forces (excluding Indigenous police), it is section 48 of the PA that sets out their mission. It states the following:

> The mission of police forces and of each police force member is to maintain peace, order and public security, to prevent and repress crime and, according to their respective jurisdiction as set out in sections 50, 69 and 89.1, offences under the law and municipal by-laws, and to apprehend offenders.
>
> In pursuing their mission, police forces and police force members shall ensure the safety of persons and property, safeguard rights and freedoms, respect and remain attentive to the needs of persons who are victims, and cooperate with the community in a manner consistent with cultural pluralism. Police forces shall target an adequate representation, among their members, of the communities they serve.

[274] It is surprising that the Respondent made a great distinction between the level of service that must be rendered by a police officer, for example of the SQ, according to the PA and the services that must be rendered by a police officer of Mashteuiatsh Public Safety.

[275] When the Tribunal compared the missions and responsibilities of each of these police forces, the evidence reveals that those of the Mashteuiatsh police are essentially the same as those of the other police forces in Quebec.

[276] Not only are they bound by the same guiding principles set out in subsection 48(2) of the PA, but they also share the same role: the Indigenous police force is responsible for maintaining peace, order and public security within its jurisdiction; preventing and suppressing crime and offences under the laws and regulations applicable in the jurisdiction; and apprehending offenders.

[277] The Tribunal notes that section 93 of the PA, which is specific to Indigenous services, is not very different from section 48 of the PA, which applies to non-Indigenous police forces in Quebec.

[278] Although this is not explicitly provided for in the tripartite agreements, and the Tribunal understands very well the issue of the separation of powers between the federal government and the provincial government in matters of the administration of justice, it is still reasonable for Mashteuiatsh Public Safety, because of this similarity in language and the silence of the tripartite agreements on the modalities for delivering police services, to assume and to want to offer to the members of the community a level of service comparable to what is offered to other citizens of Quebec.

[279] This comparable minimum service received by all citizens in the province of Quebec as provided by the PA is that of a level 1 police service. And if it is limited to the funding under the FNPP, Mashteuiatsh simply cannot offer its members these minimum services.

[280] As for the services that cannot be offered to the members of Mashteuiatsh, the testimony of Mr. Vanier is particularly relevant. He detailed the deficiencies and shortcomings of the police services.

[281] Mr. Vanier confirmed that the police officers working at Mashteuiatsh Public Safety have exactly the same powers and duties as all other police officers working in Quebec. They have the same training, go to the same school, and do the same work, which includes, among other things, patrolling, enforcing the *Highway Safety Code*, setting up roadblocks, responding to emergencies, meeting with community members, and organizing prevention and awareness-raising activities.

[282] However, the Mashteuiatsh police services face particular challenges because of the lack of funding. For example, Mashteuiatsh Public Safety cannot offer all-terrain vehicle patrols or water patrols. It cannot benefit from an internal resource that would allow it to train itself on the use of essential tools for patrolling, such as photo radar, speed guns, conducted energy weapons, or breathalyzers.

[283] These work tools each require periodic training, and having an in-house resource person who has the training and can train other officers reduces the expense. Otherwise, each officer must be trained individually at the École nationale de police [Quebec's police academy], or a trainer from that academy must be brought in to train the officers, which costs money.

[284] Not only was there a lack of training, but certain work tools were obsolete and had to be replaced, for example the photo radar. Without personnel who could handle the photo radar, no prevention could be done, especially in the school zone of Mashteuiatsh. It was also not possible to issue a statement of offence to enforce the *Highway Safety Code* for the same reasons.

[285] Similarly, none of the employees were trained to use the breathalyzer. The breathalyzer was also outdated and needed to be replaced. Mr. Vanier explained that if a suspect was pulled over and alcohol was involved, his officers had to go to Roberval to have the individual blow into the breathalyzer. If the breathalyzer in Roberval did not work, they would have to go to Saint-Félicien. Since the test must be done within a certain period of time, this could affect the charges that could have been laid.

[286] Police vehicles are not equipped with computers to validate vehicle registrations or determine if there is a warrant out for an individual. The police officers must therefore communicate with another police intelligence centre in Chicoutimi to have access to this information. The Mashteuiatsh police also do not have the same police management software that allows them to follow up on convictions, investigations, forms and reports to be filed, among other things.

[287] Mr. Vanier also explained that the salaries of his police officers are lower than those of other police officers working in Quebec. It was not possible for him to offer the same salary since salaries are necessarily dependent on available funding. Staff retention was difficult at the level of both the police officers and the management of Mashteuiatsh Public Safety. Management of the service changed three times between 2006 and 2015 because of the excessive workload. He added that the police officers know that they can earn higher salaries if they choose the SQ or another police force.

[288] This is one of the reasons for the salary adjustment ordered by the 2014 arbitration award, which reduced this difference in the salaries paid to the police officers. That said, the retroactive pay, which totalled in the neighbourhood of $850,000, created its share of financial difficulties and increased the financial deficit of Mashteuiatsh in 2015. Ms. Tremblay testified that various options were considered to reduce costs and the deficit, including abolishing the principle of having two police officers at all times.

[289] Since the positions provided for in the collective agreement could not be eliminated, it was the position of operations manager that was abolished in 2015, reducing the staff from 11 to 10 officers. However, the manager’s workload had to be delegated, and his position was merged with that of the director. Mr. Vanier then explained that as director, at the time

of the hearing, he personally provided constant supervision to his officers, meaning he was on call 24 hours a day, 7 days a week, all year round. He estimated that he was on call for a period of four years.

[290] In 2019, and with increases in financial contributions from the federal government for additional staffing, the position of operations manager was finally filled. The Mashteuiatsh Police Service had requested 12 officers, but only 11 were authorized.

[291] Mr. Vanier estimated that 12 police officers were needed to fill important needs, including the need for a second investigator so that investigations can be done with two officers, as required by the training. He also knows that the SQ conducts its investigations and interviews witnesses with two officers. He added that there was a significant investigative caseload, which could have been shared with a new officer, as could custody and supervision.

[292] A lack of training prevented an investigator from the Mashteuiatsh police service from investigating a sexual crime. The SQ was called in to assist in the investigation. The victims did not understand why the SQ was conducting the investigation; they froze up and even wanted to withdraw their complaint.

[293] Relying on the testimonies of Mr. Dion and Ms. Séguin, among other evidence, the Respondent pleaded that there is nothing unusual about the staffing, equipment and infrastructure problems. The Mashteuiatsh police service, like any other non-Indigenous police force, wishes to obtain better funding in order to improve their material and human resources. In other words, Mashteuiatsh is not the only one to have these grievances.

[294] The second part of the Respondent’s reasoning is based on the fact that the SQ has the obligation to supplement, to offer its support, to the Mashteuiatsh police service. Therefore, if a service cannot be offered, and Ms. Séguin gave the examples of the all-terrain vehicle service and water surveillance, the SQ is there to offer these services, which is currently the case with respect to Mashteuiatsh.

[295] In this regard, Ms. Séguin testified that the SQ is able to adapt its services to the Indigenous reality when it must collaborate with an Indigenous police force or when it responds to incidents on Indigenous territory.

[296] The Tribunal understood from the evidence, through the testimonies of Mr. Moar, Mr. Vanier and Ms. Tremblay, as well as Ms. Bonneau, that it is truly important for the First Nation to have an Indigenous police service. In other words, it is essential to have a police service “by and for” the members of the Nation, considering the Indigenous context and relations with the police.

[297] Moreover, Mr. Vanier and Mr. Moar, even though they have much respect for the work done by the SQ police officers, gave testimony that differed from that of Ms. Séguin. Without going into details, Mr. Moar in fact gave a history of the police services in Mashteuiatsh, the residential schools, the presence and services of the RCMP, the Amerindian police and the SQ on the territory of Mashteuiatsh.

[298] Mr. Vanier testified to the community members’ fear of dealing with SQ officers, such as victims who freeze up or want to drop their complaint.

[299] Although the Respondent asked the Tribunal to reduce the weight of certain documentary evidence, an argument that the Tribunal has already weighed, a number of important writings that have been introduced into evidence tell of a difficult history between the police and First Nations.

[300] Although these various reports, including the Viens Report, do not constitute proof of discrimination in this case, they do highlight the problems and difficulties that Indigenous people face with respect to police services.

[301] This historical background, this context exists and must be considered by the Tribunal. It speaks to systemic discrimination against Indigenous people and racism against them, but also to other notable social facts affecting them, including their overrepresentation in the criminal justice system, high crime rates, poverty, and housing shortages and overcrowding, to name just a few.

[302] On this point, the report of the Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada*, 1996, which was entered into evidence (Exhibit P-31), is particularly relevant. The Royal Commission stated at page 42:

> Cast as a structural problem of social and economic marginality, the argument is that Aboriginal people are disproportionately impoverished and belong to a social underclass, and that their over-representation in the criminal justice system is a particular example of the established correlation between social and economic deprivation and criminality.
>
> We observed in our special report on suicide that Aboriginal people are at the bottom of almost every available index of socio-economic well-being, whether they measure educational levels, employment opportunities, housing conditions, per capita incomes or any of the other conditions that give non-Aboriginal Canadians one of the highest standards of living in the world. There is no doubt in our minds that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people.
>
> We are also persuaded that some of the debilitating conditions facing Aboriginal communities daily are aggravated by the distinctive nature of Aboriginal societies. . . . [T]here is evidential support for a correlation between over-crowded housing conditions and interpersonal conflict and violence, which often takes place between close family members residing together. . . .
>
> Socio-economic deprivation not only has explanatory power in relation to high rates of Aboriginal crime, but it also contributes directly to the systemic discrimination that swells the ranks of Aboriginal people in prison.
>
> [Footnotes omitted.]

[303] Moreover, many of these social issues, challenges and difficulties that exist within First Nations are also known to the Government of Canada, and by extension, to Public Safety Canada.

[304] This is indeed what emerges from a memo from Ms. Maryse Picard (Exhibit P-79), a representative of the Government of Canada who participated in the negotiation of the tripartite agreements with Mashteuiatsh, and Mr. Coleman, representing the province of Quebec (Examination on Discovery of Dannye Bonneau's dated May 23, 2018, at page 20).

[305] In her memo, Ms. Picard describes certain criteria that should be taken into consideration to determine and justify the unit cost per police officer. Accordingly, the unit cost that should be reached for Mashteuiatsh was $100,000 per police officer.

[306] The Tribunal has adopted some of the criteria considered by Ms. Picard, namely:

- the crime rate and type of crime (i.e., drugs, suicides, impaired driving, assault, etc.);
- the police officers' workload;
- the level of social disorder, including drugs, drug dealing, alcohol, assault, impaired driving, suicides, improper handling of a firearm, etc., and the fact that the majority of the population (in 2004) was underage (60 percent); and
- geographic location, given that the geographic location of the community of Mashteuiatsh makes it the meeting point for several Indigenous groups and that its resort site doubles its population during the summer period.

[307] Moreover, the Respondent's argument completely ignores the consistent and abundant case law holding that the existence of prejudice against visible minorities, which includes First Nations, is a well-known and indisputable social fact of which the Tribunal must necessarily take judicial notice.

[308] This necessarily includes systemic discrimination against Indigenous people, racism against them, and known clashes between police and this visible minority (*R. v. S. (R.D.),* 1997 CanLII 324 (SCC), at paras. 46–47; *R. v. Spence*, 2005 SCC 71; *Williams*; *Ipeelee*, at paras. 59 and 60; *Commission des droits de la personne et des droits de la jeunesse (Debellefeuille) v. Ville de Longueuil*, 2019 QCTDP 11 (CanLII), at para. 26; *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) v. Ville de Gatineau*, 2019 QCTDP 8 (CanLII), at para. 19).

[309] For all of the foregoing reasons, the Tribunal finds that the Respondent is, in fact, starting from the wrong premises in making some of its arguments. Some of these arguments are as follows:

- The FNPP is only a contribution program, and the federal government offers money only to improve the police services put in place by Mashteuiatsh.

- The government is not obligated to contribute fully to Indigenous police services under the FNPP or to provide or fund policing services in the territories of the First Nations of Quebec.

- The SQ, the provincial police force of Quebec, is still there to offer the police services that Mashteuiatsh Public Safety cannot offer.

- SQ services are free of charge, and no other citizen in Quebec is offered free police services.

- The SQ is able to offer services that are adapted to Indigenous realities.

- All police forces have grievances in terms of equipment, infrastructure and human resources, and they all want to receive more funds to increase and improve these conditions, Mashteuiatsh Public Safety being no exception.

- The ratio of police officers per capita in Mashteuiatsh is clearly higher than the ratio in surrounding communities such as Chambord, Roberval or Saint-Prime, to name a few, and the number of hours actually worked by the police officers of Mashteuiatsh exceeds the number of police officers provided for in the tripartite agreements.

[310] Contrary to the Respondent's argument that the FNPP is merely a funding or contribution program and that the Canadian government has no obligation to fully fund Indigenous police services, the Tribunal notes that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (*Eldridge* at para. 73). In other words, when the Canadian government decides to provide the benefits that come from applying the Policy and FNPP, which includes not only funding but also other benefits associated with the implementation of the program, then it must do so in a non-discriminatory manner (*Children's Aid Society 2016*, at para. 403).

[311] Other arguments also require some comment by the Tribunal. The Respondent, in its final arguments, seemed to be inviting the Tribunal to conduct a comparative analysis of several different elements to demonstrate that the Complainant was not, in fact, disadvantaged in the provision of the service.

[312] The Respondent argued, among other things, that the current police services of Mashteuiatsh, which are offered by an Indigenous police force, reflect a favourable evolution of services compared with the police services that the First Nation would have received in the past.

[313] The Respondent also argued that Mashteuiatsh, which is a small community of approximately 2,000 inhabitants, could establish an Indigenous police force, which is not possible for other small municipalities in Quebec. It added that the ratio of the number of police officers in the community is much higher than it is in other Quebec communities, even other Indigenous communities. Finally, it argued that the community does not have to pay for the superior or supplementary services of the SQ, while other municipalities are billed for these police services.

[314] Using these comparative elements, the Respondent argued the concepts of formal equality and substantive equality, claiming that Indigenous Police Forces are in fact an exception and that the Indigenous reality has therefore been taken into consideration; First Nations are not confined in a statutory (or legislative) straitjacket to which other municipalities in Quebec are nonetheless subject. Furthermore, the Respondent added that if we compare the evolution of police services in the community of Mashteuiatsh, of the creation of its Indigenous police force, since the implementation of the FNPP, the evolution is clearly favourable.

[315] First, the Tribunal finds that in its discrimination analysis, it is not necessary to conduct any comparative analysis between groups with the same or similar characteristics. In other words, it is not necessary for the Tribunal to identify comparator groups and compare the group at issue in the complaint with other groups or subgroups.

[316] The Supreme Court has already stated its great reluctance to use comparator groups in the substantive equality analysis, in *Withler v. Canada (Attorney General),* 2011 SCC 12 (CanLII) [*Withler*]. In fact, it wrote the following at paragraph 2:

> A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the “proper” comparator group.

[317] Similarly, the Federal Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) confirmed the Federal Court’s analysis of the use of comparator groups in discrimination analysis under the CHRA. It wrote the following at paragraph 18:

> In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).
>
> In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply": *Withler*, *supra* at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative role was given to the existence of a comparator group – similar to what the Tribunal did here.

[318] The Tribunal finds that it is difficult, if not impossible in practice, to compare First Nations with each other or with other groups in Canada because of their unique position in Canada. The Federal Court recognized this exceptional and incomparable status of First Nations in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (CanLII), at paragraph 332, where it stated:

> [332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure.

[319] Still on the subject of comparator groups, it wrote the following in paragraphs 337 and 340 of its decision:

> [337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.
>
> . . .

> [340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.
>
> [Emphasis added.]

[320] Therefore, the Tribunal does not intend to identify comparator groups in this case as there is no need to do so. The Tribunal is in a position to draw its own conclusions on whether there is discrimination without embarking on a comparative analysis through various comparators as the Respondent would like.

[321] The Tribunal adds that the Respondent also appears to be distorting the notion of substantive equality. This concept is recognized by Canadian courts and tribunals and 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 (CanLII), at para. 91).

[322] In *Withler*, the Supreme Court wrote the following at paragraph 39 in relation to the concept of substantive equality:

> Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> [Emphasis added.]

[323] And more recently, in *Ontario (Attorney General) v. G.* 2020 SCC 38, at paragraph 47, the Supreme Court added:

> [47] Emerging from the foundation laid in *Andrews*, substantive equality, concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach "that looks at the full context, including the situation of the claimant group and . . . the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40), or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences" (*Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at para. 53, per L'Heureux-Dubé J.): it must not be applied "with one's eyes shut" (McIntyre, at p. 103).
>
> [Emphasis added.]

[324] In our case, the substantive equality analysis requires that the Tribunal assess the real effects, on the ground, of how the Respondent has implemented the FNPP with respect to Indigenous policing services offered to the members of the Mashteuiatsh community.

[325] Substantive equality requires that the social, political, economic and historical contexts of First Nations be taken into account in policing. In her memo of April 16, 2004 (P-79), Ms. Picard clearly stated the inherent difficulties and specificities of the problems experienced by First Nations and in particular by the community of Mashteuiatsh, such as the higher crime rate, the type of crime, the level of social disorder and the workload of the police officers, to name just a few.

[326] The Tribunal notes that the issue is not whether there is less discrimination now as a result of the FNPP than before. Rather, the question is whether there is discrimination, period (*Moore* at para. 60). The evidence shows that the implementation of the FNPP is perpetuating existing discrimination, not eliminating it entirely. The goal of substantive equality is not achieved and cannot be achieved by the FNPP because of its very structure. This is highlighted by the gap between the objectives of the policy to develop professional and responsive policing services for First Nations and the actual impact of the implementation of the program.

[327] The Tribunal finds that the Commission's submissions and the manner in which it has presented the substance of the case and, in particular, the link between the adverse

effect and the prohibited ground of discrimination simply and clearly present the real issue in this complaint.

[328] In the Commission's view, the structure of the FNPP necessarily results in a denial of service, as it is impossible for the Complainant to receive basic policing services, as basic services are effectively ruled out under the funding formula. The funding becomes arbitrary and inadequate. This situation reinforces First Nations' dependency on the Crown, the federal government.

[329] In the Tribunal's view, this is indeed where the subtle odours of discrimination manifest themselves; the Complainant and the Pekuakamiulnuatsh find themselves having to make a choice, to make a decision which, in the circumstances, is necessarily a lose-lose situation. According to the evidence presented, since they are Indigenous, they are the only ones who have to make this choice, which is not available to any other public.

[330] What is discriminatory in the circumstances is the inherent disadvantage in this choice that the Complainant and the Pekuakamiulnuatsh must make. They are necessarily at a disadvantage and do not enjoy the same equality of opportunity as others (section 2 of the CHRA).

[331] Simply put, the adverse treatment based on race and national or ethnic origin arises from the fact that the Complainant and the Pekuakamiulnuatsh must either

- accept a police service 100 percent funded by the province of Quebec, under which the services offered by the SQ will not necessarily be adapted to the needs, habits and customs of the First Nation; or
- rely on applying the FNPP to have their own Indigenous police force that provides a service adapted to the needs, customs and traditions of the community; however, they must then expect that their police services will not be funded to the extent that they need to be because of the structure of the FNPP, such that if they wish to provide the community with culturally appropriate basic police services, they will incur deficits.

[332] The very essence of the FNPP, the product of the implementation of the Policy, is to enhance the public safety and personal security of First Nations people through the

provision of policing services that are tailored to their specific needs and meet acceptable quantitative and qualitative standards.

[333] This is why the Complainant and the Pekuakamiulnuatsh decided to choose the FNPP. In doing so, the First Nation becomes burdened with systemic deficits. The other option, which is to let the SQ provide services in the community, is not really an option for them, since it does not take into account their needs, habits and customs. It therefore contravenes the principle of substantive equality.

[334] Furthermore, while the Complainant and the Pekuakamiulnuatsh are not technically "forced" to sign such an agreement, the evidence in the record, including the testimonies of Ms. Bonneau, Mr. Bourdage and Mr. Moar referred to above, show that they have to deal with the FNPP in order to have their own Indigenous police services. Even though they know the program is underfunded and will create a deficit, they must participate and sign an agreement; otherwise, there is no funding, and the Indigenous police service must close.

[335] This is exactly what Justice Viens refers to on page 274 of the Viens Report, when he writes, with regard to the testimony of Ms. Marie-Josée Thomas, Associate Secretary General of the Secrétariat aux Affaires autochtones of the Government of Quebec:

> [She] pleaded good faith, while citing budgetary constraints and the Government's administrative burden as obstacles to the ideal progress of negotiations on police agreements:
>
> > I am aware that the perception of Indigenous peoples can contribute to [...] that we are forcing them to sign these agreements, otherwise, they [w]ould not have any service. Generally speaking, in the Québec government, negotiations are not conducted in that tone and I do not believe that they are conducted in that tone out of malice or bad faith on the part of the Ministère. They are conducted in an economic context that imposes a certain "standard" on us, so to speak, even if that is not pleasant to hear. […] there may be clumsy persons. But there are no mean intentions. **Indigenous peoples are going to tell me, "they really [d]on't have a choice, if they [don't] sign, they [d]on't have a police force." I have to concede to them**.
> >
> > [Emphasis added, footnotes omitted.]

[336] The Tribunal, while recognizing that the Viens Report does not have the authoritative status of a court of law judicial or a quasi-judicial tribunal, notes that it may refer to the Viens Report for contextual purposes insofar as it is relevant to the evidence filed in this case.

[337] This lack of real choice further underlines the Pekuakamiulnuatsh's dependency on the federal government and the denial of services they face. It is at the heart of the First Nation's concerns.

[338] Justice Viens identifies the same situation at page 273 of the Viens Report:

> The lack of sustainable agreements, renewed every three years or sometimes even annually, has particularly been deplored. However, it is the sense of dependence and lack of genuine negotiations that top the list of recriminations.
>
> [Footnotes omitted.]

[339] The FNPP provides that a funding needs assessment will be conducted, in consultation with the three parties (the federal government, the provincial/territorial government and the First Nation), including the number of police officers required in view of the demographics of the population, the size and nature of the territory, and the workload of the police officers (based on crime statistics and crime prevention). It is also expected that the costs of policing services provided to the community will also be determined on the basis of the costs of existing services in surrounding communities with similar conditions.

[340] While these criteria are present and are intended to assess the specific needs of First Nations, the evidence shows that the FNPP is largely dependent on a funding envelope. This is clear from the testimony heard by the Tribunal. Mr. Bourdage's testimony to this effect is unequivocal. And this funding envelope has been neglected by the federal government for years, culminating in a forced cap on funding. Small increases have subsequently been provided, yet the evidence shows that the need is still great.

[341] Once it is decided that program funding will be frozen, for example between 2008 and 2013, there is no discussion of the **real** needs of Indigenous communities. The answer will be the same: there is no more money in the envelope.

[342] Mr. Bourdage clearly stated that, for several years, there was no financial leeway to further support the Mashteuiatsh police service. This is also corroborated by the testimony of Ms. Bonneau, who mentioned that, for several years, the contributions were capped at $1,200,000. The representatives of Public Safety Canada and Quebec have no choice but to say that this is the financial envelope available for the year, period.

[343] The Tribunal recognizes that some assistance was indeed provided by the Government of Quebec, notably through officer loans and additional one-time financial contributions, but also by Public Safety Canada, which offered some additional one-time funding.

[344] But once again, the evidence reveals that this assistance is ad hoc, in a situation where the police services of Mashteuiatsh were having serious financial difficulties and even decided to close. The threat of closure was thus a shock wave that required a reaction from the two other levels of government. But the Tribunal considers it interesting to note that Mr. Bourdage described certain aid offered by the federal government as a “Band-Aid” designed to [TRANSLATION] “stop the bleeding”.

[345] That being said, it must be recognized that the evidence shows that the situation has been more positive from 2018 onwards because significant amounts of money have been injected into the FNPP, particularly to make up for all those years of scaling back.

[346] Mr. Bourdage explained that $144 million has been invested to upgrade existing tripartite agreements. This was meant to be a catch-up, to fill the gap that was created between 2008 and 2018.

[347] The additional funding was intended to provide better salaries for Indigenous police officers, create better working conditions, improve staff retention, acquire equipment and train staff. In addition, in 2018, it was decided that funding for the FNPP would be made permanent and indexed annually by 2.75 percent. Finally, additional funding was made available for 110 new police officers, 76 of which were planned for self-managed Indigenous police forces such as Mashteuiatsh.

[348] That being said, the Tribunal finds that while the foundations and broad principles of the FNPP, a program created by the federal government and implemented by the Respondent, and which, it should be recalled, was essentially a response to the 1990 Policing Report, are laudable and some of its elements are still favourable, the evidence reveals that the FNPP, in its application, does not fully correct the situation.

[349] As previously mentioned, once the federal government decides to become involved and take action, it cannot do so in a discriminatory manner. Unfortunately, the FNPP, in its implementation, perpetuates systemic discrimination against the Complainant, the Pekuakamiulnuatsh and First Nations.

(b) Duration of agreements

[350] The Tribunal does not intend to dwell at length on this argument, as it considers it to be intimately related to the issue of the implementation of the FNPP and the funding provided.

[351] The Complainant argued that, since 2006, tripartite agreements have generally been for one year. These short-term agreements do not allow the First Nation to guarantee the maintenance of its Indigenous policing services year after year. The resulting lack of continuity is a major obstacle to the organizational management of police services in terms of work management, recruitment and retention of staff, training, and equipment purchases.

[352] The Respondent, on the other hand, argued that, for several years, longer agreements were signed. Indeed, this is the case for certain agreements, for example the 1996–1999 agreement and the 1999–2004 agreement. The evidence also shows that the agreement concluded in 2018 is for a period of five years.

[353] The Respondent added that it did not impose an annual agreement and that it was the First Nation that had expressed a desire to enter into annual agreements.

[354] The evidence indeed reveals that Mashteuiatsh decided to extend the tripartite agreements, historically, year after year. That said, Ms. Bonneau’s explanations are interesting in this regard; her testimony is also corroborated not only by Mr. Vanier, but also

by Mr. Moar, who explained the reasoning of the First Nation on this subject. I will come back to this later.

[355] As explained in the previous section, the short duration of the agreements caused several difficulties for the First Nation, particularly in terms of planning and sound administrative management of Mashteuiatsh Public Safety.

[356] It was difficult to plan for the replacement of certain equipment, to adequately train police officers, and to hire and recruit staff. The precariousness of the police service made the recruitment of Indigenous police officers difficult, since many of them chose to work for the SQ or the RCMP because of the job security. It was simply impossible to offer them long-term contracts because the agreements had to be extended every year.

[357] The lack of sustainability in the police service prevented long-term planning, which Mr. Vanier stated would allow services to evolve according to the needs of community members. When agreements are signed annually, this projection can only be done on a day-to-day basis; no long-term vision is possible.

[358] Both Ms. Bonneau and Mr. Vanier, who experienced this situation personally as a police officer in Mashteuiatsh, also testified that this situation led to anxiety, demotivation and insecurity in the police service.

[359] The Tribunal refers back to Ms. Bonneau's examination on discovery, when the Respondent asked her to explain how the one-year duration could sustain the First Nation's hopes.

[360] In response, Ms. Bonneau explained that they were holding out hope that the following year they would [TRANSLATION] "possibly get something good" (Examination on Discovery dated May 23, 2018, at page 58). The Court understands that Ms. Bonneau was referring to the possibility of receiving better funding.

[361] The Tribunal notes that the short duration of the agreements is intrinsically linked to the question of the funding offered under the FNPP. In other words, the evidence shows that Mashteuiatsh signed short-term agreements in order to leave the door open for

discussions and negotiations with the federal and provincial governments and, perhaps, to receive more funding than they had in the previous year.

[362] The evidence presented to the Tribunal leads it to conclude that the extension of agreements from year to year was in fact a response by the community to the inadequacies in the FNPP's implementation and funding. The community was attempting to maintain some control over the FNPP. But this was all in vain, since this decision did not have the desired effect. It has had the perverse effect of threatening the very sustainability of the community's police service.

[363] The Tribunal therefore finds that the short duration of the agreements is a result of the poor implementation of the FNPP and the lack of funding. As such, it refers back to its analysis of adverse treatment in the previous section.

C. Respondent's defence (subsection 16(1) of the CHRA)

[364] Now that the Tribunal has concluded that the Complainant has been able to meet his burden of proof, meaning that he was able to make a *prima facie* case of discrimination, it can analyze the defences raised by the Respondent and determine whether it has discharged its own burden of proof.

[365] In this case, Public Safety Canada did not raise a defence under paragraph 15(1)(g) and subsection 15(2) of the CHRA. However, it did raise the defence under subsection 16(1) of the CHRA, arguing that the FNPP is a special program.

[366] In this regard, it argued that the FNPP, which is a voluntary contribution program, is intended to reduce the disadvantages that a group of individuals may suffer. It relies in particular on the jurisprudence developed by various courts and tribunals with respect to subsection 15(2) of the Canadian Charter, the objective of which, in its view, is similar to that of subsection 16(1) of the CHRA.

[367] It relied on the leading cases on this subject, including *Lovelace v. Ontario*, 1997 CanLII 2265 (ON CA) and *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 SCR 464.

[368] It also referred to *Miller v. Mohawk Council of Kahnawake*, 2018 QCCS 1784, in which the Honourable Justice Davis of the Superior Court of Québec provides a comprehensive overview of the case law dealing with subsection 15(2) of the Canadian Charter, including *Kapp* and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* [*Cunningham*], 2001 SCC 37, and clearly articulates the Supreme Court's analysis of the issue.

[369] According to the Respondent, the FNPP qualifies as a special program as described in subsection 16(1) of the CHRA because it has an ameliorative or remedial purpose and is directed at a disadvantaged group characterized by a prohibited ground of discrimination. It also pointed out that the program does not have to eliminate all forms of discrimination and that the ameliorative process can be gradual.

[370] The Complainant was relatively silent on the Respondent's defence and referred to the Commission's reasoning on this point. The Commission argued, among other things, that it is not sufficient to rely on the fact that a program enhances or provides assistance if the program does not address the cause of the disadvantage, or the correlation or rational connection between the cause and the measures put in place by the program itself.

[371] The Commission used an argument by *reductio ad absurdum* to demonstrate that the Respondent's reasoning, if applied by the Tribunal as proposed, would lead to ridiculous outcomes. It argued that while the program's ameliorative objective may be gradual, it was created in the 1990s and continues to this day to have discriminatory effects on First Nations. As such, how long will the Complainant have to wait?

[372] The Commission added that if this ameliorative objective is interpreted as proposed by the Respondent, then subsection 16(1) of the CHRA would become an absolute defence. To paraphrase: If I decided to fund a program at $0 and later decided to fund the program at $1, then the program would fall outside the scope of the CHRA. In other words, as soon as the program is in any way remedial or makes any kind of improvement, it falls outside the scope of CHRA review.

[373] In the Commission's view, the FNPP was discriminatory and remains discriminatory to this day; it is not enough for the Respondent to say that it is less discriminatory now than it was then.

[374] That being said, the Tribunal does not find the Respondent's argument persuasive. Indeed, if this reasoning were to be followed, it would mean that any program that has an ameliorative aspect aimed at eliminating, diminishing or preventing disadvantages suffered or likely to be suffered by a group of individuals on the basis, directly or indirectly, of a prohibited ground of discrimination by improving their opportunities for employment or advancement, or by facilitating their access to goods, services, facilities or accommodation, could **never** be scrutinized or reviewed under the CHRA.

[375] As the Commission stated, subsection 16(1) of the CHRA would then become an absolute defence. The Tribunal is satisfied that this was not the intention of Parliament, in light of a purposive interpretation (interpreting the statute in terms of its purpose, object or aim) of the CHRA. We should bear in mind here, as the Supreme Court did, the modern principle of statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (See E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87, as cited by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837, at para. 21. See also *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, at para. 30).

[376] Subsection 16(1) of the CHRA reads as follows:

> It is not a discriminatory practice for a person **to adopt or carry out** a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.
>
> [Emphasis added.]

[377] Subsection 16(1) of the CHRA is therefore specifically intended to protect the adoption or implementation of special programs. The Tribunal found that the defence in this subsection is therefore intended to protect individuals or entities that adopt or implement such programs from certain challenges. In other words, subsection 16(1) of the CHRA does not protect against all challenges, but rather is intended to protect the adoption or implementation of special programs from challenges **by groups of individuals who are not covered** by the program. The objective is to protect the program from challenge by those who might then claim that the program discriminates against them by excluding them from the program and improving the situation of other groups of individuals.

[378] This is the very idea behind the concept of reverse discrimination. Reverse discrimination is a principle recognized in the jurisprudence of the Supreme Court (see for example *R. v. Chouhan*, 2021 SCC 26 (CanLII), at para. 164; *Cunningham*, cited above; *Centrale des syndicats du Québec v. Québec (Attorney General)* [*Centrale des syndicats du Québec*] 2018 SCC 18 (CanLII)).

[379] The Supreme Court reminds us that this is also the specific purpose of section 15(2) of the Canadian Charter, namely, to protect laws, programs or activities designed to ameliorate the situation of disadvantaged individuals or groups from such challenges (reverse discrimination).

[380] In *Cunningham*, at paragraph 38, the Supreme Court wrote the following on this subject:

> The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted

> programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.

[381] And more recently, in *Centrale des syndicats du Québec*, which relies on *Cunningham* and *Kapp*, among other judgments, the Supreme Court wrote the following at paragraph 38:

> The purpose of s. 15(2) is to "save ameliorative programs from the charge of 'reverse discrimination'" (*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 (CanLII), [2011] 2 S.C.R. 670, at para. 41; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483). Reverse discrimination involves a claim from someone outside the scope of intended beneficiaries who alleges that ameliorating those beneficiaries discriminates against him.

[382] Still in the same paragraph, the Supreme Court goes on to state:

> **It stands the purpose on its head to suggest that s. 15(2) can be used to deprive the program's intended beneficiaries of the right to challenge the program's compliance with s. 15(1)**. And it would be equally inconsistent with the purpose to suggest that legislation that has a discriminatory impact on a scheme's intended beneficiaries, can "serve" or be "necessary to" any ameliorative purpose in the sense intended by this Court in *Cunningham*.
>
> [Emphasis added.]

[383] In fact, the Tribunal finds that this is exactly what the Respondent is attempting to do in this case; the Respondent is using subsection 16(1) of the CHRA to deprive the Complainant, who is a recipient of the FNPP, of the ability to challenge the program as discriminatory within the meaning of the CHRA. This is not the purpose of this section, and what the Respondent is arguing is contrary to the very essence of the CHRA.

[384] The Tribunal is of the opinion that a simple and obvious example of the proper application of subsection 16(1) of the CHRA was provided by the Federal Court in *Horn v. Canada* [*Horn*], 2005 FC 726. Although the Federal Court was considering an application for judicial review of the Commission's decision not to refer a complaint to the Tribunal, the Court in that case was correct in its assessment of the scope of subsection 16(1) of the CHRA. This is a good example of the type of situation covered by such a defence.

[385] In *Horn*, the complainant, aged 42, was a full-time student. He filed a complaint with the Commission alleging that he was unable to find work because all the available jobs were subsidized by Human Resources Development Canada (HRDC), which, in implementing its Summer Career Placement (SCP) program, employed only students between the ages of 15 and 30. The complainant was therefore excluded from the SCP.

[386] The Commission decided to dismiss the complaint, finding, among other things, that the SCP program was part of the Youth Employment Strategy (YES) program. This program was specifically targeted at people between the ages of 15 and 30 and was considered a special program within the meaning of subsection 16(1) of the CHRA.

[387] The Federal Court judge found that the SCP, which was part of a broader wage subsidy program, the YES, was intended to improve the employment prospects of youth and to reduce and eliminate the employment disadvantages they suffered. The evidence supported the fact that the unemployment rate among young people aged 15 to 30 was disproportionately high and that a significant factor in this disproportionality was their lack of experience. The program was therefore designed to correct this situation and thus met the definition of a special program within the meaning of subsection 16(1) of the CHRA. It did not discriminate against Mr. Horn, who was not part of the group targeted by the program.

[388] This is not a situation where subsection 16(1) of the CHRA applies. The Respondent is attempting to distort the purpose of this provision. Accepting the Respondent’s argument would deny the Complainant the right to challenge the program as discriminatory within the meaning of the CHRA. The Tribunal therefore rejects the Respondent’s defence.

VIII. Decision

[389] For all of the foregoing reasons, the Court answers the three questions at issue in this case in the affirmative:

1) There is a prohibited ground of discrimination protected by the CHRA.
2) There is adverse treatment (adverse effect) in the provision of a service generally available to the public under paragraph 5(b) of the CHRA.

3) The prohibited ground of discrimination was one of the factors in the manifestation of the adverse effect.

[390] Accordingly, the Tribunal finds that Public Safety Canada discriminated against Mr. Dominique, who is acting on behalf of the Pekuakamiulnuatsh, in the provision of a service on the basis of his race, national or ethnic origin, within the meaning of paragraph 5(b) of the CHRA.

[391] The Tribunal finds the complaint to be substantiated (subsection 53(2) of the CHRA).

IX. Continuation of the proceeding – remedies

[392] As the Tribunal noted earlier, the sole purpose of this decision is to determine whether the complaint is substantiated, that is, to establish whether there was any discrimination.

[393] Following the Tribunal's decision, the Tribunal will convene the parties at a later date to determine the next steps to be taken and hear them on the issue of remedies.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
January 31, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2251/0618

Style of Cause: Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada

Decision of the Tribunal Dated: January 31, 2022

Date and Place of Hearing: December 15, 16, 21 and 23, 2020

By videoconference

Appearances:

Benoît Amyot and Laurie Blackburn, for the Complainant

Daniel Poulin, Julie Hudson and Sarah Chênevert-Beaudoin, for the Canadian Human Rights Commission

Pavol Janura and Vincent Veilleux, for the Respondent