Federal Court of Appeal | Cour d'appel fédérale

Date: 20211230

Docket: A-42-21

Citation: 2021 FCA 245

CORAM: **LASKIN J.A.**
RIVOALEN J.A.
MACTAVISH J.A.

BETWEEN:

NIKOTA BANGLOY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry on November 22, 2021.

Judgment delivered at Ottawa, Ontario, on December 30, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: LASKIN J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] Nikota Bangloy appeals the judgment of the Federal Court (2021 FC 60) (Federal Court Reasons) dismissing her application for judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal) rendered on November 1, 2019 (2019 CHRT 45) (the Tribunal Decision). The Tribunal Decision concerns complaints made by the appellant, on her own behalf

and on behalf of her two minor children, and by the appellant's mother, Joyce Beattie (the complainants) to the Canadian Human Rights Commission. The appellant claimed that the respondent was required to pay annuities and education funding owing to the complainants pursuant to their Treaty No. 11 rights. Specifically, she claimed the respondent followed discriminatory practices as defined in section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the Act) because of their race, national or ethnic origin, being prohibited grounds of discrimination in accordance with section 3 of the Act, those practices being:

1. The respondent's refusal to reimburse the appellant for the private school tuition costs she incurred for her children;

2. The respondent's refusal to provide information to the appellant regarding education funding for her children's private school tuition; and

3. The respondent's refusal to provide annuities to the complainants because their names were not registered on a band list maintained by the respondent.

[2] In addition, the appellant claimed that the respondent's practices described above and its refusal to enter the complainants' names on the Loucheux No. 6 Band List were retaliation pursuant to section 14.1 of the Act, because of a previous human rights complaint filed by Ms. Beattie against the respondent.

[3] The Federal Court's overview and background found at paragraphs 1 to 14 of the Federal Court Reasons affords us some of the key facts, and I will simply highlight some of those facts throughout these reasons.

[4] The appellant's ancestors were signatories to Treaty No. 11, and Joyce Beattie had been registered at one time as a member on the Fort Good Hope Band List, that band being a Treaty No. 11 band. Currently, the appellant and Ms. Beattie are entitled to be registered on a

different band list affiliated with Treaty No. 11, the Gwichya Gwich'in Band List, but have chosen not to do so. They are no longer registered on any specific Treaty No. 11 band list, but were registered by the respondent on the General Band List for the Northwest Territories.

[5] The appellant is an Aboriginal person as that term is defined under subsection 35(2) of the *Constitution Act, 1982*, being Schedule B to *the Canada Act 1982* (UK), 1982, c.11. She is registered as an Indian pursuant to section 6 the *Indian Act*, R.S.C., 1985, c. I-5 and asserts that she has Aboriginal rights guaranteed to her under the *Constitution Act, 1982* and Treaty rights flowing from Treaty No. 11.

[6] For many years, Ms. Beattie attempted to have her Treaty No. 11 rights and those of her children and grandchildren recognized by the Tribunal and the Federal Courts. While Ms. Beattie is not a party to this appeal, she participated in the Tribunal process at issue. Furthermore, she was a party before the Tribunal and the Federal Courts in previous proceedings in which some of her Aboriginal rights and those of her descendants were determined. These decisions provide important context to my reasons and therefore I will summarize some of that litigation history prior to reviewing the Tribunal Decision.

II. Background and Litigation History

A. *Treaty No. 11*

[7] Treaty No. 11 was signed in 1921 between various First Nations and the Canadian government. Article 6 of Treaty No. 11 defines the specific lands ceded by the First Nations,

covering a large part of the geographical area of what is now the Northwest Territories, and small portions of modern-day Yukon and Nunavut, comprising an area of approximately three hundred and seventy-two thousand squares miles. Article 7 of Treaty No. 11 specifies “AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Yukon Territory, the Northwest Territories or any other portion of the Dominion of Canada.”

[8] In the present appeal, the appellant relies on two commitments made by Canada in Treaty No. 11, those being:

1. The payment of certain education costs to First Nations inhabiting the lands of Treaty No. 11, described as: “FURTHER, His Majesty agrees to pay the salaries of teachers to instruct the children of said Indians in such manner as His Majesty’s Government may deem advisable”; and

2. The payment of annuities to members of First Nations inhabiting the lands of Treaty No. 11, described as: “HIS MAJESTY, also agrees that during the coming year, and annually thereafter, He will cause to be paid to the said Indians in cash …, and to every other Indian of whatever age five dollars, to be paid only to heads of families for the members thereof”.

[9] No reserves are located within the lands of Treaty No. 11. When the Tribunal Decision was rendered, the appellant and her children did not reside on a reserve or within the geographical area described in Article 6 of Treaty No 11. In addition, they were not registered on any specific band list.

B. *Beattie v Canada [1998] 1 F.C. 104* [*Beattie 1998 FC*]

[10] In 1997, while residing in British Columbia, Ms. Beattie asked the Federal Court to determine whether the respondent was required to reimburse the expenses she incurred associated with her children (including the appellant) attending a private school and public school that were not located within area of Treaty No. 11. Ms. Beattie argued that she was entitled to receive these funds pursuant to the education provision set out in Treaty No. 11, described in paragraph 8(1) above. Although the respondent did pay to Ms. Beattie an amount of monies equal to the tuition fees set out in the British Columbia Master Tuition Agreement, this amount did not cover the full costs of the appellant's tuition and associated expenses.

[11] The Federal Court ruled that the education provisions of Treaty No. 11 did not apply to Ms. Beattie and her children because they were not residing within Treaty No. 11 area at that time and the children's schools were not within Treaty No. 11 area. It found at paragraph 42 that by virtue of subsection 35(1) of the *Constitution Act, 1982*, [the children] are constitutionally guaranteed to have access to free education. The Federal Court determined that the extent of the constitutional safeguard is as follows: (1) They are to have access to free education; (2) The free education, however, is confined to the area defined in Article 6 of the Treaty; (3) The free education provided in the schools established therein must be akin or equivalent to the education provided to non-native children in the public school system. The Federal Court concluded at paragraph 44 that Ms. Beattie's claim for the reimbursement of further education expenses must fail because the education provision in Treaty No. 11 did not extend beyond the boundaries of the Treaty area.

[12] This decision was not appealed.

C. *Beattie and CHRC v. Aboriginal Affairs and Northern Development (2014 CHRT 1)* [*Beattie 2014 CHRT*]

[13] In 2014, Ms. Beattie appeared before the Tribunal and claimed that because of her race, national or ethnic origin, she experienced discrimination from the respondent when it refused, for a period of 2½ years, to provide certain services to her. The Tribunal agreed. It found that the respondent's refusal to recognize Ms. Beattie's custom adoption, refusal to amend her registration category under section 6 of the *Indian Act* and refusal to remove her name from the Fort Good Hope Band List based upon its incorrect legal interpretations concerning the custom adoption constituted a denial of service within the Act.

[14] This Tribunal decision is informative as it provides some of Ms. Beattie's life history and the changes she experienced in her registration status under section 6 of the *Indian Act* resulting from the passage of the *Gender Equity in Indian Registration Act*, S.C. 2010, c.18 and the recognition of her custom adoption. The Tribunal also mentions that Ms. Beattie and her children are entitled to be registered on the band list of a different band affiliated with Treaty No. 11, being the Gwichya Gwich'in Band, formerly known as the Loucheux No. 6 Band. Ms. Beattie and her children choose not to register their names on that list.

[15] Most importantly, this Tribunal decision represents the previous human rights complaint referred to by the appellant in the present appeal.

D. *Beattie v. Canada [2001] 2 C.N.L.R. 26* [*Beattie 2001 FC*]

[16] In 2001, Ms. Beattie appeared before the Federal Court and claimed a right to agricultural assistance under Treaty No. 11, in her efforts to start a ginseng farm located in British Columbia. At paragraph 29 of its decision, the Federal Court defined the geographical area of Treaty No. 11 as, “The area extends roughly from the 60th parallel to the Arctic Ocean, more or less along the MacKenzie River and its Delta.” The Federal Court ruled at paragraph 33 that since the signatories at the time of Treaty No 11 were likely attached to their land, it was unlikely that the Treaty rights were meant to enable them to leave the Treaty area. Finally, the Federal Court found at paragraph 39 of its reasons that the Supreme Court of Canada’s decision in *Corbière v. Canada* ([1999] 2 S.C.R. 203) [*Corbière*] did not apply to Ms. Beattie. Unlike in *Corbière*, Ms. Beattie’s entitlement to agricultural assistance depended on the location of Ms. Beattie’s farm and not the location of her residence. The Federal Court found that the farm was located outside of the geographical area of Treaty No. 11, and that the location of a farm is not an immutable characteristic.

E. *Beattie v. Canada 2002 FCA 105* [*Beattie 2002 FCA*]

[17] In 2002, this Court upheld *Beattie 2001 FC* and the interpretation of “agricultural assistance” found in Treaty No. 11. At paragraph 3 of the reasons, the Treaty area is described as follows:

> The treaty carefully defines the tract of land to which it was to apply, being an area almost entirely in the Northwest Territories ("NWT") bounded on the south by the northern boundary of the Treaty 8 tract, (the 60th Parallel), on the west for the most part by the Yukon-NWT boundary, on the north by the Arctic Ocean extending as far eastward as the Coppermine River and on the east by a line following various bodies of water angling in a south easterly direction and ending around Great Slave Lake. This tract embraces the Mackenzie River and its delta.

[18] Further, at paragraph 16 of the reasons, this Court stated that the reference at Article 7 of Treaty No. 11 of the wording “to all other lands wherever situated in the Yukon Territory, the Northwest Territories or any other portion of the Dominion of Canada” is so vague as to be virtually meaningless.

[19] With this litigation background in mind, I will now turn to the Tribunal Decision under review.

III. Tribunal Decision: *Beattie and Bangloy v. INAC* (2019 CHRT 45) [*Bangloy 2019 CHRT*]

[20] Ms. Beattie and the appellant sought the continuation of annuity payments for the complainants and funding for the children’s education costs pursuant to Treaty No. 11. They argued that they were due annuity payments and education funding by virtue of their race, national or ethnic origin, which are grounds protected from discrimination under section 3 of the Act.

[21] In particular, the complainants alleged that the respondent’s use of band membership to administer Treaty annuities and its failure to pay the private school expenses for the children contrary to Treaty No. 11 constituted a discriminatory practice. The complainants argued that the respondent based its denial of these services and goods on the complainants’ race, national or ethnic origin contrary to section 5 of the Act. They also argued that the respondent’s denial of service was retaliation against them, contrary to section 14.1 of the Act, because of *Beattie 2014 CHRT*.

[22] The Tribunal Decision addressed preliminary questions raised by the respondent of issue estoppel and mootness. On the question of issue estoppel, the Tribunal agreed with the respondent and found that the Federal Court had previously addressed the question of the appellant's entitlement to education funding in *Beattie 1998 FC*. The Tribunal applied the three-part test set out in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R, 47 D.L.R. (3d) 544. 248, to decide whether issue estoppel arose, found that the three requirements of issue estoppel were met and concluded that the complainants' education funding complaint should be dismissed on the basis of issue estoppel and abuse of process. It also found that it would not be unfair to apply issue estoppel to the proceedings. Accordingly, it did not find the need to discuss the complainants' arguments about why in their view the provisions of Treaty No. 11 support their request for reimbursement of the children's educational costs (Tribunal Decision, at paras. 73-85).

[23] On the question of mootness, the respondent argued that the payment of annuities was no longer a live issue because, on the eve of the hearing, it had agreed to pay the annuities owed to the complainants. On this question, the Tribunal did not accept the respondent's argument. It found that the respondent's potential liability and the appropriate remedy regarding the denial of annuity payments remained live issues (Tribunal Decision, at paras. 52-57).

[24] The Tribunal turned to the complainant's argument that they experienced discrimination, based on their race, national or ethnic origin contrary to section 5 of the Act. The Tribunal considered two potentially discriminatory actions by the respondent: failing to provide the appellant with information about how to receive Treaty No. 11 education funding, and refusing

to pay Treaty No. 11 annuities to the complainants because they were not registered on any specific band list.

[25] First, the Tribunal found that the complainants all qualified for protection on the grounds of race, ethnicity, and national origin. Then, the Tribunal found that providing information about education benefits under Treaty No. 11 is a service provided by the respondent that was denied to the complainants. Notwithstanding these two findings, the Tribunal determined that the complainants did not prove, on a balance of probabilities, that this denial of service was connected to their protected characteristics under the Act. The Tribunal also found no evidence that band membership was required in order to be eligible to receive information regarding education funding under Treaty No. 11. (Tribunal Decision, at paras. 95, 96, 106, 107, 109, 111, 112).

[26] Second, the Tribunal accepted that, by not receiving any annuity payments between 2014 and 2018, the complainants experienced adverse differentiation in the provision of services. However, the Tribunal did not find that this denial of service was linked to one of the protected grounds under section 5 of the Act. The Tribunal decided that the requirement to be on a band list is not akin to the protected grounds of race, national or ethnic origin, because other Aboriginal people who are on band lists can access their Treaty annuities. As a result, the Tribunal found that the appellant had not met the burden of proof to establish that the respondent had engaged in a discriminatory practice when it denied the complainants the service of providing information about Treaty No. 11 education benefits or the payment of annuities (Tribunal Decision, at paras. 119, 123-125).

[27] The Tribunal then turned to the argument that the respondent had engaged in a discriminatory practice when it retaliated against the complainants for filing a previous human rights complaint in *Beattie 2014 CHRT*, contrary to section 14.1 of the Act. It set out the law and cited the appropriate authorities it was required to consider when facing a question of retaliation under the Act (Tribunal Decision, at paras. 127-132).

[28] The Tribunal found the respondent did not take retaliatory actions with respect to providing information about Treaty No. 11 education benefits or refusing to reimburse the appellant for expenses incurred for her children's education (Tribunal Decision, at paras. 139, 149, 151, 152).

[29] It also found that there was no retaliation by the respondent when it refused to pay Treaty annuities for the appellant's children back to their respective births because this had been the respondent's policy since 2011 (Tribunal Decision, at para. 181). In addition, the Tribunal dismissed a claim that the respondent retaliated by not adding the complainants to the Loucheux No. 6 Band List. It found that this band list no longer exists under this name, as the band is now known as the Gwichya Gwich'in Band. The complainants were entitled to membership but chose not to be registered on the Gwichya Gwich'in Band List (Tribunal Decision, at paras. 185-186).

[30] However, the Tribunal did find that retaliation occurred when the respondent refused to pay Treaty No. 11 annuities to the complainants. The Tribunal found that the complainants' perception of retaliation following *Beattie 2014 CHRT* was reasonable, and that the respondent

did not provide sufficient evidence to refute the *prima facie* finding of retaliation or to establish a defence to the allegation (Tribunal Decision, at paras. 174-176).

IV. Federal Court Decision

[31] On judicial review before the Federal Court, the Judge properly framed the issues before him at paragraph 7 of the Federal Court Reasons. At paragraphs 26 and 27 of the Federal Court Reasons, the Judge relied on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraphs 16 and 100 [*Vavilov*] and found that the standard of review of reasonableness applied to the Tribunal Decision. The question addressed by the Federal Court in respect of each of the conclusions reached by the Tribunal was whether its analysis and conclusions provide sufficient justification, intelligibility, and transparency. The Federal Court appropriately found that the burden fell on Ms. Bangloy to establish that the Tribunal Decision was unreasonable. At paragraph 42 of the Federal Court Reasons, after a thorough analysis, the Judge concluded that the Tribunal Decision was reasonable.

V. Standard of Review

[32] As this appeal is from a judgment on a judicial review application, in accordance with the Supreme Court of Canada's decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45 and 46, this Court is required to step into the shoes of the Federal Court. We must determine whether the Federal Court selected the appropriate standard of review and, if so, applied it correctly. Recently, the Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*,

2021 SCC 42, declined the invitation to reconsider *Agraira*, and confirmed that its principles continue to apply.

[33] Here, the Federal Court selected the appropriate standard of review, namely, the reasonableness of the Tribunal Decision. It is settled law that the reasonableness standard applies to *both* the Tribunal's interpretation of the Act and to the application of that statute to the facts before it: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 at paras. 27-29 [*Canadian Human Rights Commission v. Canada*].

[34] The Tribunal Decision is the focal point of my review. In deferential review, we must respect the specialized expertise of the administrative decision maker and, as a general rule, refrain from deciding the issues ourselves. The task of this Court is not to conduct our own analysis and ask what decision we would have made, or attempt to ascertain the "range" of possible conclusions open to the decision maker (*Vavilov*, at paras. 75 and 83).

[35] While the litigation history described in the background section of these reasons provides essential context, it is important to clarify that the only question I must answer is whether the Tribunal Decision is reasonable. The Tribunal described its role as determining whether the complaints before it concerned the breach of human rights protected under the Act. I would agree. It was not the Tribunal's role, nor is it ours, to consider whether the respondent infringed upon the appellant's Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982*, or under Treaty No. 11. The appellant's written and oral submissions invite us to undertake a correctness review of these Aboriginal rights, but that is not our role here. We are not dealing

with constitutional questions requiring answers on the correctness standard of review. We are reviewing an administrative tribunal's decision and reasons within the context of statutory human rights.

[36] For the reasons that follow, I would dismiss the appeal, without costs. In my view, the Tribunal Decision is reasonable.

VI. Appellant's Position and Analysis

A. *Treaty No. 11 Education Funding – Was the Tribunal Decision reasonable in finding that the Denial of Services and Goods was not a discriminatory practice contrary to subsection 5(a) of the Act, based on the prohibited grounds of race, national or ethnic origin, contrary to subsection 3(1) of the Act?*

[37] Before the Tribunal, the appellant alleged that the respondent's failure to provide information about education funding and its refusal to reimburse her for the payment of her children's education tuition pursuant to Treaty No. 11 was a denial of service and goods based on race, national or ethnic origin contrary to section 5 of the Act.

[38] Before this Court, the appellant's main argument is that the Tribunal Decision provides an unreasonable interpretation of the geographical extent of Canada's Treaty No. 11 education obligations. The appellant submits that the Tribunal misinterpreted the scope of the geographical area in which her Treaty No. 11 rights apply, and relies on the wording of Article 7 of Treaty No. 11 as applying "to all other lands wherever situated in the Yukon Territory, the Northwest Territories or any other portion of the Dominion of Canada." She argues that at paragraph 37 in *Beattie 1998 FC,* the Federal Court specifically included this area. Thus,

according to the appellant, even if she resides in Alberta and her children attend school in Alberta, she should be entitled to receive education funding under Treaty No. 11, because Alberta is located on another portion of the Dominion of Canada. The appellant submits that the Tribunal clearly erred when it defied the Federal Court's findings in *Beattie 1998 FC* and it should not have dismissed the complaints regarding education funding.

[39] The respondent argues that it was reasonable for the Tribunal Decision to find that issue estoppel and abuse of process applied to the question of the respondent's obligations to provide education funding information or to reimburse the appellant for her children's education costs. Accordingly, it was reasonable for the Tribunal to conclude that the question of the appellant's rights to education funding under Treaty No. 11 had already been determined in *Beattie 1998 FC*.

Analysis

[40] Turning to the appellant's arguments, I find that it was reasonable for the Tribunal Decision to dismiss the appellant's education funding complaints on the basis of issue estoppel and abuse of process.

[41] The Tribunal Decision correctly identified the appropriate legal tests that apply to questions of issue estoppel and abuse of process. It thoroughly analysed those legal factors, applied them to the facts and issues before it, and compared them to the issues raised and determined in *Beattie 1998 FC*. The Tribunal Decision's conclusions were reasonable.

[42] Further, this Court has previously addressed the argument regarding the rights flowing from Treaty No. 11 extending beyond the geographical area described in Article 6 in *Beattie 2002 FCA* at paragraph 16 of its reasons. This Court found that the wording in Article 7 of Treaty No. 11 "to all other lands wherever situated" as being so vague that it is virtually meaningless. I take this to mean that the rights and benefits afforded under Treaty No. 11 apply only to the lands covering a large part of the geographical area of what is now the Northwest Territories, and small portions of modern-day Yukon and Nunavut, comprising an area of approximately three hundred and seventy-two thousand squares miles, as found in *Beattie 2001 FC,* and affirmed by this Court in *Beattie 2002 FCA.*

[43] It was therefore reasonable for the Tribunal to reject this argument and to find that the complaint for denial of education funding under Treaty No. 11 was barred by issue estoppel and abuse of process (Tribunal Decision, at paras. 64-85). The Tribunal reasonably found that the purpose of the Federal Court proceeding in *Beattie 1998 FC* was to determine whether the respondent was required by Treaty No. 11 to pay educational costs, including private school tuition, incurred by the complainants outside of the Treaty area. The Tribunal properly underscored that the purpose of the human rights complaints before it was to determine whether the respondent had discriminated against the complainants, pursuant to Treaty No. 11, because it did not pay the children's private school tuition incurred outside of Treaty No. 11 area (Tribunal Decision, at para. 82). The Tribunal found that there were no significant differences in the purpose, processes or stakes involved between the two proceedings, and found that it was not unfair to apply the doctrines of issues estoppel and abuse of process to prevent this complaint

from proceeding further. It dismissed the education funding complaint (Tribunal Decision, at paras. 84-85).

[44] The Tribunal's analysis and the conclusions it reached were justified, intelligible and transparent and it was reasonable for it to dismiss the education funding component of the appellant's complaint on this basis.

B. *Treaty No. 11 Education Funding – Was the Tribunal Decision reasonable in finding that the Denial of Services was not retaliation against the complainants contrary to section 14.1 of the Act*?

[45] As she did before the Tribunal, the appellant advanced two claims of retaliation related to education benefits under Treaty No. 11: the respondent retaliated against her by failing to provide information on how to receive Treaty education benefits and the respondent retaliated when it failed to reimburse her children's education costs.

Analysis

[46] The Tribunal dismissed both claims, finding that there was no evidence linking the alleged adverse treatment to retaliation following the *Beattie 2014 CHRT* decision. In my view, it was reasonable for the Tribunal to conclude that any failure to respond to requests for information on how to receive Treaty education benefits and the refusal to pay education costs were not linked to the prior complaint in *Beattie 2014 CHRT,* but rather were actions (or inactions) on the part of the respondent that resulted from its interpretation of the responsibilities it owed the complainants in light of *Beattie 1998 FC.*

[47] I see no reviewable error.

C. *Treaty No. 11 Annuity Complaints – Was the Tribunal Decision reasonable in finding that the Denial of Goods (Payment of Annuities) was not contrary to subsection 5(a) of the Act, based on the prohibited grounds of race, national or ethnic origin, contrary to subsection 3(1) of the Act?*

[48] Before the Tribunal, the appellant argued that the respondent's use of band membership to administer Treaty No. 11 annuities was a discriminatory practice on the prohibited grounds of race, national or ethnic origin contrary to section 5 of the Act. The Tribunal dismissed this complaint, finding that the appellant had failed to establish a *prima facie* case of discrimination.

[49] Before this Court, the appellant first frames her argument that the respondent's use of band membership to administer Treaty No. 11 annuities to deny her the payment of annuities was a discriminatory practice contrary to subsection 5(a) of the Act. As she did before the Tribunal, she relies on the text of the annuity provision in Treaty No. 11 and argues "it clearly affords a payment of five dollars a year to every Treaty No. 11 Indian". Further, it was common ground that the respondent had not paid the annuities owing to the appellant or her children until shortly before the eve of the Tribunal hearing in December 2018, when the respondent changed its position in writing. It offered to settle this issue by paying the outstanding annuities, having now determined that the claimants fell under an exception to the respondent's Treaty annuity policy. The appellant argues that it is her racial or ethnic origin, and not band membership, which entitle her to be a member of a Treaty No. 11 band or to receive annuities under Treaty No. 11. She argues that band membership has never had any relevance to the obligations owed by Canada under Treaty No. 11.

Analysis

[50] The Tribunal reasonably analysed the question of discrimination on the prohibited grounds of race, national or ethnic origin. It identified the correct test set out by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 at paragraph 33, and proceeded to determine whether the appellant was able to demonstrate a *prima facie* case of discrimination. The Tribunal assessed the evidence before it and found that the appellant had established that she had a characteristic protected from discrimination under the Act, subsection 3(1) (race, national or ethnic origin) and that she experienced an adverse treatment (failure to receive annuities payments). However, the Tribunal was not satisfied that the protected characteristic was a factor in the adverse treatment. Therefore, it found that a *prima facie* case of discrimination was not established (Tribunal Decision, at paras. 123-125). In my view, it was reasonable for the Tribunal to reach this conclusion based on the record before it.

[51] The Tribunal Decision at paragraph 123 confirms that the only reason the complainants were denied their annuities was because they chose not to be registered on a specific band list, not because of their race, national or ethnic origin. Therefore, the Tribunal did not find that their treatment by the respondent was contrary to section 5 of the Act.

[52] I am reminded that my task is not to ask what decision I would have made, or attempt to ascertain the "range" of possible conclusions open to the decision-maker (*Vavilov*, at para. 83). In my view, it was reasonable for the Tribunal to conclude that it was the complainants' choice

of not being on a specific band list, not their race, national or ethnic origin, that resulted in the denial of annuity benefits. The Tribunal Decision at paragraphs 123 to 125 found the allegation of discrimination under section 5 of the Act was not established because of this choice.

[53] I agree that it was reasonable for the Tribunal to reach this conclusion based on this record. The appellant is eligible to be registered on the Gwichya Gwich'in Band List, but chooses not to do so. That remains her choice.

D. *Treaty No. 11 Annuity Complaints – Was the Tribunal Decision reasonable in not accepting all of the appellant's arguments that the denial of the payment of annuities which started in 2014 was retaliation contrary to section 14.1 of the Act, based on the prohibited grounds of race, national or ethnic origin, contrary to subsection 3(1) of the Act*?

[54] I will now turn to the appellant's arguments that the respondent's denial of the payment of annuities in 2014 until the eve of the Tribunal hearing in 2018 was a form of retaliation against the complainants contrary to section 14.1 of the Act.

[55] The appellant points out that on the eve of the Tribunal hearing in 2013, which resulted in *Beattie 2014 CHRT*, the respondent changed its position and paid Treaty annuities owing to the complainants up to the start of the hearing. However, upon the release of *Beattie 2014 CHRT*, the respondent ceased making any further annuity payments to the complainants, now taking the position that they needed to be registered on a specific band list in order to qualify. There is no dispute that in the Tribunal Decision before us, the respondent, as it did in *Beattie 2014 CHRT*, reversed its position on the payment of annuities at the eve of the Tribunal hearing in 2018. It paid Treaty annuities owing to the complainants from January 2015 until November 2018.

[56] Thus, the appellant believes it was unreasonable for the Tribunal to rule that the cessation of annuity payments was not retaliation for *Beattie 2014 CHRT*. It was unreasonable for the Tribunal to rely on the fact that the respondent was simply following its policy of requiring specific band membership, as had been done in the past when the complainants were registered on the Fort Good Hope Band List.

[57] Prior to analysing this question, I will set out the last complaint of retaliation contrary to section 14.1 of the Act raised by the appellant, and will then examine and respond to both complaints together.

E. *Was the Tribunal Decision reasonable in finding that the refusal to register the complainants on the Loucheux No. 6 Band List was not retaliation contrary to section 14.1 of the Act, based on the prohibited grounds of race, national or ethnic origin, contrary to subsection 3(1) of the Act*?

[58] The Tribunal also dismissed a separate complaint regarding the refusal to register the complainants' names on the Loucheux No. 6 Band List. The appellant argued that it was unreasonable for the Tribunal to dismiss their complaint that the respondent's denial of their request to be registered on the Loucheux No. 6 Band List was retaliation contrary to section 14.1 of the Act.

Analysis for Questions D and E.

[59] In my view, the Tribunal conducted a thorough and detailed investigation of the evidence and the parties' submissions. It considered all of the evidence and made reasonable findings of fact. The Tribunal Decision, at paragraphs 127 and 128, accurately set out the test to establish

retaliation, noting that the onus is on the complainants to establish on a balance of probabilities that: (1) they filed a previous complaint; (2) they experienced adverse treatment following the filing of their complaint; and (3) the previous complaint was a factor in the adverse treatment.

[60] The Tribunal dismissed the claim of retaliation related to the respondent denying the complainants' request to have their names added to the Loucheux No. 6 Band List. In my view it was reasonable for the Tribunal to decide that refusing to add the complainants' names to the Loucheux No. 6 Band List, which no longer exists and is now known by its contemporary name of Gwichya Gwich'in Band, as was clarified at paragraphs 10, 43 and 109 of *Beattie 2014 CHRT*, was not a form of retaliation under section 14.1 of the Act (Tribunal Decision, at paras. 182-186).

[61] The Tribunal substantiated one of the appellant's claims under section 14.1 of the Act. The Tribunal notes at paragraph 204 of the Tribunal Decision that the respondent eventually did agree to pay the complainants' annuities but the period from January 2015 until November 2018 during which the annuity payments were delayed constituted retaliatory discrimination. The Tribunal awarded damages to the appellant and Ms. Beattie for pain and suffering and special compensation to Ms. Beattie, the appellant and her children for the respondent's reckless retaliation (Tribunal Decision, paras. 215-220).

[62] In my view, the Tribunal conducted a reasonable assessment of all of the retaliation complaints before it, substantiating one of them, which the respondent did not dispute before this Court. The Tribunal assessed and evaluated the evidence before it and, absent exceptional

circumstances, a reviewing court may not interfere with its factual findings (*Vavilov*, at para. 125). I do not see here how the Tribunal has fundamentally misapprehended or failed to account for the evidence before it.

[63] The appellant is asking us to review those findings of fact, but I see no exceptional circumstances permitting us to do so. I see no reviewable error.

F. *Section 1.1 of An Act to Amend the Canadian Human Rights Act*

[64] The appellant frames her final argument as an overall constitutional or legal argument rather than a complaint of discriminatory practices under sections 5 or 14.1 of the Act. The appellant submits that the Tribunal Decision was contrary to section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30. She argues that this section ensures that discrimination complaints and decisions "shall not be construed so as to abrogate or derogate from the protection provided for existing Aboriginal or Treaty rights of the Aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*."

[65] The appellant relies on section 1.1 of this Act to argue that Parliament cannot abrogate or derogate from the constitutional guarantees to Aboriginal peoples, including Treaty rights. According to the appellant, the Tribunal committed an error of law when it found it was reasonable for the respondent to rely on its policies of requiring band membership to justify its decision to deny the payment of annuities. Thus, she submits that it was incorrect for the Tribunal to find that the respondent's actions were not retaliatory by relying on the respondent's

general policies and practices. The appellant concludes by saying that the Tribunal failed to affirm constitutionally guaranteed Treaty rights, and the Tribunal Decision should therefore be overturned.

Analysis

[66] I do not agree with the appellant's arguments in which she relies on section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30 and submits that the interpretation of this section raises constitutional questions requiring a standard of review of correctness.

[67] The Federal Court selected reasonableness as the standard of review for all the issues before it. I agree. None of the exceptions to reasonableness review recognized in *Vavilov* apply here.

[68] The role of the Tribunal is to determine whether the complaint before it concerned the breach of human rights protected under the Act, and not constitutional questions of whether the respondent infringed the appellant's Aboriginal rights provided under subsection 35(1) of the *Constitution Act, 1982*. The Tribunal properly characterized the complaint as part of its fact finding role, and interpreted its home statute to define the central question before it; was the appellant deprived of a benefit or service because of discrimination based on race, national or ethnic origin, or the subject of retaliation due to a prior complaint to the Tribunal (Tribunal Decision, at paras. 86-91 and 113-115)?

[69] It is settled law that the reasonableness standard applies to *both* the Tribunal's interpretation of the Act and to the application of that statute to the facts before it: *(Canadian Human Rights Commission v. Canada* at paras. 27-29).

[70] The Tribunal's description of its role and articulation of the questions it had to answer were reasonable. The Federal Court's application of the reasonableness standard to those questions was appropriate. There is no error in law.

VII. Conclusion

[71] Despite Ms. Bangloy's able submissions, she has not met the legal burden required to show that the Tribunal Decision was unreasonable. The Tribunal Decision substantiated one claim of retaliation against the respondent relating to its administration of Treaty annuities, concluding that the complainants could perceive the delay in receiving annuities as related to their filing a previous complaint. It was reasonable for the Tribunal to dismiss the other complaints of discriminatory practices based on the evidence before it. Its application of the legal tests for issue estoppel, abuse of process and mootness were reasonable. Its determination of discrimination and retaliation under the Act were rational and logical, in light of the relevant factual and legal constraints at play. The appellant had the opportunity to present her case fully and fairly, and the Tribunal Decision addressed all of the central issues and concerns raised by her and Ms. Beattie.

[72] For these reasons, I would dismiss the appeal, without costs.

"Marianne Rivoalen"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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