Federal Court of Appeal | Cour d'appel fédérale

Date: 20250128

Docket: A-95-23

Citation: 2025 FCA 24

[ENGLISH TRANSLATION]

CORAM: **LOCKE J.A.**
LEBLANC J.A.
ROUSSEL J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

GILBERT DOMINIQUE (on behalf of the members of the Pekuakamiulnuatsh First Nation) and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Heard at Québec, Quebec, on February 20, 2024.

Judgment delivered at Ottawa, Ontario, on January 28, 2025.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: LOCKE J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] The Attorney General of Canada (the Attorney General) is appealing from a judgment rendered by the Associate Chief Justice (as she then was) of the Federal Court on February 27, 2023 (2023 FC 267). In its judgment, the Federal Court dismissed the Attorney

General's application for judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal), cited as 2022 CHRT 4, allowing a discrimination complaint filed by the respondent Gilbert Dominique (the Complainant), on behalf of the members of the Pekuakamiulnuatsh First Nation (the First Nation), with the other respondent, the Canadian Human Rights Commission (the Commission).

[2] The context of this complaint is the funding of the operating costs for the self-administered police service that the First Nation chose to establish in 1996 in connection with the *First Nations Policing Policy* (the Policy) implemented by the federal government and to which was added, for the purposes of its operationalization, the First Nations Policing Program (the Program).

[3] More specifically, the complaint at issue is based on paragraph 5(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), which states that it is a discriminatory practice in the provision of services available to the general public to differentiate adversely in relation to any individual on a prohibited ground of discrimination under the Act.

[4] The Complainant submitted that is the case here because the funding provided to him for the First Nation's police service was insufficient and dependent on short-term agreements that the First Nation had no choice but to sign if it did not want to give up its police service. In his view, this resulted in a subpar level of service to the members of the community, a consequence he said is related to their race and national or ethnic origin.

[5] The Tribunal found that the situation reported by the Complainant was a discriminatory practice within the meaning of the Act, and thus allowed his complaint (the Tribunal Decision). As we have seen, the Federal Court refused to intervene, finding that the Tribunal Decision was reasonable. The Attorney General argues that the Federal Court erred in so finding and invites us to set aside the Tribunal Decision, render the decision that the Tribunal should have rendered—i.e. dismiss the Complainant's complaint—or, alternatively, refer the matter back to the Tribunal for reconsideration in light of the problems identified by the Court.

[6] For the reasons that follow, I am of the view that this appeal cannot succeed.

II. Background

[7] It is necessary to provide a little background information.

[8] The Policy and Program at the heart of this case were adopted in the early 1990s. This took place within the broader context of historically difficult relations between First Nations and law enforcement and policing authorities in Canada, as evidenced in a number of investigation reports on the topic, including the report commissioned by the federal government and issued by a cross-departmental task force in January 1990, the *Indian Policing Policy Review Task Force Report*.

[9] For all intents and purposes, this report gave rise to the Policy, which generally aims to provide First Nations across Canada with access to "police services that are professional,

effective, culturally appropriate, and accountable to the communities they serve." Ultimately, the purpose is "to contribute to the improvement of social order, public security and personal safety in First Nations communities, including that of women, children and other vulnerable groups" (Appeal Book at 4416 to 4418).

[10] The preferred approach to achieve this is to establish partnerships "based on trust, mutual respect and participation in decision-making", which pave the way for the negotiation and conclusion of tripartite agreements for the provision of cost-shared funding and related support and assistance between the federal government, the provincial or territorial government concerned and the First Nation looking to establish a self-administered police service that will meet its needs (Appeal Book at 4416 to 4419).

[11] More broadly, the Policy is meant to be "a practical means to support the federal policy on the implementation of the inherent right and the negotiation of self-government" for Indigenous people (Appeal Book at 4418). It rests on the following "principles":

(a) First Nations communities should have access to services that are responsive to their particular needs and that are equal in quality and level of service to those found in "communities with similar conditions in the region";

(b) The responsibilities and authorities of police officers serving in First Nations communities should be the same as those of other police officers in Canada;

(c) First Nations communities should be policed by such numbers of persons "of a similar cultural and linguistic background" as are necessary;

(d) First Nations communities should have access to "at least the same police service models that are available to communities with similar conditions in the region";

(e) First Nations should be involved "in the selection of a particular model of police service" that balances "the need for cost-effectiveness" and the particular policing needs of First Nations communities; and

(f) First Nations communities that have established their own police services adapted to their particular needs should implement institutional mechanisms to ensure "police management and accountability, [in addition to] police independence from partisan and inappropriate political influences."

(Appeal Book at 4420 and 4421.)

[12] Lastly, the Policy, broadly speaking, sets out the following: (i) the form that the funding will take; (ii) the policing models eligible for such funding; (iii) the criteria for assessing the First Nation's funding requirements; and (iv) a list of the costs eligible for such funding (administration; recruiting, training and education; salaries and benefits; and expenditures). Furthermore, the Policy stipulates that the federal government will pay 52% of the "government contribution toward the cost of First Nations policing services" while the province or territory will cover the difference, i.e. 48% of this contribution. In this regard, the Policy states that "First

Nations communities will, where possible, be encouraged to help pay for the cost of maintaining their police service, particularly for enhanced services" (Appeal Book at 4423 to 4425).

[13] The details of the Policy's implementation are set out in the Program.

[14] Moreover, the tripartite nature of the agreements concluded under the Policy (and the Program) acknowledges the jurisdiction of the provinces to provide policing services on their territory. In this case, the First Nation is located on the Mashteuiatsh reserve in Quebec. It has around 2,000 residents, although this number varies depending on the season.

[15] The organization and provision of police services in the province are governed by the *Police Act*, CQLR c. P-13.1 (the QPA). The QPA provides for six levels of service based on the population of the agglomerations served, with level 1 representing the base level. According to the QPA, the Sûreté du Québec provides policing services in any municipality with fewer than 50,000 residents. In other words, these municipalities cannot be served by their own municipal police force in the same way that agglomerations with more than 50,000 residents can.

[16] Since the Policy was adopted, the QPA allows for Indigenous communities within the province wishing to establish their own police service to do so, through an agreement with the Quebec government. This service then becomes a police force within the meaning of this act.

[17] The vast majority of Indigenous communities across the province have their own police service. According to section 93 of the QPA, these police forces shall have jurisdiction to

prevent and repress both offences under by-laws applicable in the territory in which they are established and statutory offences applicable across Quebec. The Policy demonstrates the federal government's willingness to contribute—in this case jointly with the Quebec government—to the funding and implementation of such services in accordance with the objectives set out in the Policy.

[18] As noted above, the First Nation established its own self-administered police force in 1996. Prior to that, police services in the community of Mashteuiatsh were provided, depending on the time period, by the Royal Canadian Mounted Police, a so-called Amerindian police force ("peacekeepers"), or the Sûreté du Québec. When the agreements at issue were signed, these services were provided by the Sûreté du Québec.

[19] In concluding this overview, it is important to mention something that both the Tribunal and the Federal Court made reference to: at the same time as the complaint at the heart of these proceedings was filed, an action was brought before the Superior Court of Quebec on behalf of the Mashteuiatsh community, based on the same factual matrix, asserting the Crown's obligations to negotiate in good faith and to act with honour in its relations with First Nations. In this way, the community hoped to recover the monies it believed it should have received had it not been for the failure to comply with these obligations.

[20] This action was unsuccessful in the Superior Court (*Takuhikan c. Procureur général du Québec*, 2019 QCCS 5699 (*Takuhikan CSQ*)). However, the Quebec Court of Appeal reversed that judgment (*Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699 (*Takuhikan*

CAQ)), a decision recently upheld by the Supreme Court of Canada (*Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (*Takuhikan SCC*)).

[21] I note that the Attorney General of Canada did not appeal from the judgment of the Quebec Court of Appeal, opting instead to comply with it.

[22] Finally, it is important to note that, with the agreement of the parties, the Tribunal bifurcated its review of the Complaint, ruling strictly on whether or not there was discrimination and thereby deferring the debate on the remedies to be granted, should that prove necessary, to a subsequent hearing, once the issue of the merits of the Complaint had been definitively settled.

III. The Tribunal Decision

[23] The hearing before the Tribunal took place over the course of five days. Several witnesses were heard and voluminous documentation was presented to the Tribunal.

[24] The Tribunal analyzed the Complaint based on the three-part test set out in *Moore v. British Columbia (Education)*, 2012 SCC 61 (*Moore*). It explained the test as follows (Tribunal Decision at para. 21):

> (a) Is there a prohibited ground of discrimination under the Act?
>
> (b) 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 Act?

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

[25] After setting out its understanding of discrimination law and rejecting two preliminary arguments presented by the Attorney General that are not taken up before this Court, including that the decision in *Takuhikan CSQ* gave rise to estoppel as regards the Complaint based on the doctrine of *res judicata*, the Tribunal analyzed the three elements of the *Moore* test. It started by declaring itself satisfied that there was a prohibited ground of discrimination within the meaning of the Act, given the race and national or ethnic origin of the Complainant and the members of the First Nation (Tribunal Decision at para. 132).

[26] The Tribunal then turned to the second element of the *Moore* test. In so doing, it outlined the history of policing on reserves across the country in order, as it put it, "to better understand past (and present) issues that are necessarily related to this complaint" (Tribunal Decision at para. 139). It also reviewed the structure of police services in Quebec and traced the history of those provided in the community of Mashteuiatsh.

[27] It concluded that through the implementation of agreements concluded with the First Nation under the Policy and Program, the federal government provided to the First Nation—admittedly, a very small segment of the Canadian public—a "service . . . available to the general public" within the meaning of the Act, which, according to the Tribunal, is not limited to the simple funding of the service but also includes "other actions taken by the Respondent in administering the program, such as reporting, negotiating and providing related assistance" (Tribunal Decision at paras. 229 to 232).

[28] The Tribunal then considered whether the Complainant had experienced any adverse treatment in connection with the provision of this service and, if so, whether such adverse treatment was based, in whole or in part, on the race or national or ethnic origin of the Complainant and the members of the First Nation.

[29] First, it found that there had been adverse treatment, being of the opinion that the funding made available to the First Nation under the agreements did not allow it to provide the minimum services equivalent to those of the lowest level of service—level 1—provided for in the QPA. The Tribunal went on to argue that, given the very structure of the Program, it was not possible for the First Nation to provide services comparable to those offered by non-Indigenous police forces in comparable situations, even though the mission and responsibilities of its police service were identical to those of the other police forces (Tribunal Decision at paras. 266, 274 to 279).

[30] According to the Tribunal, all parties were well aware that the costs related to the First Nation's minimum policing needs were higher than the amounts that were provided for in the agreements (Tribunal Decision at para. 251). The Tribunal went on to say that this led to recurring deficits for the First Nation, deficits that were exacerbated by an arbitration award rendered in 2014 ordering it to adjust the salary of the police officers in its employment—which, until then, had been lower than that paid to officers in other police forces in Quebec—to match the provincial standard (Tribunal Decision at paras. 242 to 244). According to the Tribunal, the First Nation was forced to absorb these deficits from a self-sustaining fund that it had created itself and that was used, first and foremost, as economic leverage for the community (Tribunal Decision at para. 253).

[31] The Tribunal then considered whether this adverse treatment in the provision of policing services to the First Nation was due, in whole or in part, to the race or ethnic or national origin of its members and, therefore, whether it constituted a discriminatory practice within the meaning of the Act. To this end, the Tribunal expressed the view that it needed to take judicial notice of both the systemic discrimination and racism that First Nations have experienced—and continue to face—and their historically difficult relations with the police (Tribunal Decision at paras. 307 and 308).

[32] It further considered that, for the purposes of examining this issue, the concept of substantive equality did not require it to conduct, as the Attorney General invited it to, a comparative analysis between groups with the same or similar characteristics. The Tribunal went on to say that it only needed to assess the "real effects, on the ground" of the implementation of funding agreements under the Policy and Program by taking into account the "social, political, economic and historical contexts of First Nations in policing" (Tribunal Decision at paras. 318, 320, 324-326).

[33] The Tribunal thus found that the very structure of the agreements concluded under the Policy and Program "reinforce[d] First Nations' dependency on the Crown" because, somewhat contrary to what was promised in the Policy, the First Nation was then faced with the following dilemma: either (i) give up the idea of having its own police service and, therefore, accept a police service provided entirely by the Sûreté du Québec and not adapted to its culture or its needs; or (ii) maintain its own police force, knowing that, because of the very structure of the agreements, it would not be funded to the extent that the community needed it to be (Tribunal

Decision at paras. 328 to 331). In this latter regard, the Tribunal understood from the evidence in the record that the implementation of the Policy and Program depended on budget envelopes that, despite occasional assistance through one-time contributions and despite improvements in the situation since 2018, often did not allow for discussions on the real needs of the First Nation's police service, which virtually eliminated any chance of increased and sustainable financial support (Tribunal Decision at paras. 341 to 345).

[34] In short, for the Tribunal, despite the Policy's laudable goals, its implementation through the Program "perpetuate[d] systemic discrimination against the Complainant, the Pekuakamiulnuatsh and First Nations" (Tribunal Decision at para. 349), a situation that was exacerbated by the short duration of the funding agreements, which, the Tribunal added, was yet another manifestation of the "poor implementation of the [Program] and the lack of funding" (Tribunal Decision at para. 363).

[35] In the end, the Tribunal rejected what it understood to be a defence by the Attorney General under subsection 16(1) of the Act. According to this provision, it is not a discriminatory practice within the meaning of the Act to carry out a program designed to prevent disadvantages suffered by any group of individuals when those disadvantages would be based on the prohibited grounds of discrimination. According to the Attorney General, that was the case with the Policy and Program.

[36] However, according to the Tribunal, the sole purpose of subsection 16(1) of the Act is to "protect the adoption or implementation of special programs from challenges by groups of

individuals who are not covered by the program." In short, the sole objective of this provision is to protect this type of program against allegations of so-called "reverse discrimination" (Tribunal Decision at paras. 377-378). This would mean that it was being used by the Attorney General in a way that was never intended. The Tribunal therefore concluded that accepting the Attorney General's argument would distort the purpose of subsection 16(1) of the Act (Tribunal Decision at para. 388).

IV. The Federal Court's Judgment

[37] After outlining the dispute before it and summarizing the Tribunal Decision, the Federal Court started by discussing the applicable standard of review in detail and rejecting the Attorney General's arguments urging it to assess all of the issues raised in the judicial review against the standard of correctness. The Attorney General did not repeat this argument before us, since he is now of the opinion that the applicable standard is reasonableness.

[38] The Federal Court then disposed of the Attorney General's argument that the Tribunal did not have jurisdiction to decide the Complaint because, for all intents and purposes, that required it to rule on the discriminatory effects of the QPA, which is a provincial statute. Once again, the Attorney General did not repeat this argument before us, or at least not in this form.

[39] The Federal Court continued its analysis by considering the impact of *Takuhikan CAQ* on the analysis of the reasonableness of the Tribunal Decision, which it acknowledged as having "a higher degree of persuasiveness" (Federal Court Decision at paras. 69-71). On the merits, the

Federal Court was satisfied that the Tribunal had committed no error warranting its intervention in finding that the Complainant and the members of the First Nation had been victims of discrimination in the implementation of the Policy.

V. Issue and Standard of Review

[40] It is well established that when this Court hears an appeal from a decision of the Federal Court disposing of an application for judicial review, it must consider whether the Federal Court chose the appropriate standard of review and, if so, whether it applied it correctly. It is also well established that this "approach accords no deference to the reviewing judge's application of the standard of review", which means that this Court is effectively called upon to "perfor[m] a *de novo* review of the administrative decision" (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45 to 47 (*Agraira*); *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 36; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para. 15).

[41] The parties are now all of the view—and I agree with them—that the Federal Court selected the appropriate standard of review, that of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 23 to 25 (*Vavilov*)). However, they disagree on the way that the Federal Court applied that standard to the issues before it.

[42] This is the only issue before this Court: whether the Federal Court, in concluding as it did, correctly applied the reasonableness standard. As I just mentioned, to resolve this issue, we must examine the Tribunal Decision ourselves in light of the Attorney General's allegations against it.

[43] The Attorney General essentially argues that the Tribunal erred in three ways:

(i) For one, by conducting its analysis through a [TRANSLATION] "lens" that effectively imposes on the federal government the obligation to promptly and completely resolve all of the problems that the Policy was intended to eliminate, an approach that the Attorney General argues is contrary to the teachings of the Supreme Court on equality rights and, in particular, the well-established principle of [TRANSLATION] "incrementalism" in this field;

(ii) For another, by ignoring a number of important contextual factors, including the ameliorative effect of the Policy and Program for the First Nation and the comparative evidence of the First Nation's situation with respect to the provision of police services; and

(iii) Lastly, by downplaying the province's role in the development of policing services for Indigenous communities, which ultimately resulted in basing the assessment of whether or not the federal action was discriminatory not on the action itself, but on the province's choice to place a given service at a given level of service.

[44] As we will see, these allegations overlap in certain respects.

VI. Analysis

[45] Given that this Court must "ste[p] into the shoes" of the Federal Court such that "[its] focus is, in effect, on the [Tribunal's] decision" (*Agraira* at para. 46), it is useful at the outset to recall some of the principles that should guide a reviewing court's action in a judicial review, which aims "to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para. 82).

[46] As noted above, reasonableness is a deferential standard. This characteristic is fundamentally based on "the legislature's institutional design choice to delegate certain matters to [administrative] decision makers" (*Vavilov* at para. 26). As a consequence of this choice, reviewing courts must avoid "'undue interference' with the administrative decision maker's discharge of its functions" (*Vavilov* at para. 30).

[47] What this means, in practical terms, is that a reviewing court must refrain from deciding itself the issues that were before the administrative decision maker. In other words, a court "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (*Vavilov* at para. 83).

[48] Rather, the role of the reviewing court is to focus on the decision "actually made by the decision maker". In so doing, it must examine the reasons underlying the decision with "respectful attention", with the aim of ensuring that these reasons, which need not be assessed "against a standard of perfection", reflect an "internally coherent and rational chain of analysis" and that the resulting decision is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras. 83-85, 91). Its effort must therefore focus on both the outcome of the decision and the reasoning that led to it (*Vavilov* at para. 87).

[49] Reasonableness provides for a robust review of administrative decision makers' decisions, but because it goes to "the constitutional role of judicial review" (*Vavilov* at para. 82), the reviewing court will only intervene if there are flaws or shortcomings that are "sufficiently central or significant to render the [impugned] decision unreasonable." This will be the case where the flaw or shortcoming is such "that [the decision] cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para. 100).

[50] It is with these principles in mind that I undertake my review of the arguments advanced by the Attorney General against the reasonableness of the Tribunal Decision. I begin this review by also noting that the following elements of the *Moore* test are not in dispute in this case, namely (i) that the Complainant and the members of the First Nation have a characteristic protected by the Act, i.e. race and ethnic or national origin, and (ii) that, through the Policy and Program, the federal government is providing to the First Nation a service that is customarily available to the general public within the meaning of paragraph 5(b) of the Act.

[51] The issue therefore turns on how the Tribunal, using the *Moore* test, dealt with the issue of whether the Complainant and the First Nation experienced adverse treatment in the provision of this service and, if so, whether there was a link between this adverse treatment and the prohibited ground of discrimination at issue.

[52] As we have seen, the Attorney General advances three main arguments against the Tribunal in this regard: (i) the analytical framework applied to the allegation of *prima facie* discrimination was flawed; (ii) the Tribunal failed to take into account various contextual factors in this analysis, including, primarily, the ameliorative effect of the Policy and Program and the comparative evidence; and (iii) the province's role in the development of policing services for Indigenous communities in the province was downplayed.

A. *The "lens" through which the Tribunal conducted its analysis of the allegation of* prima facie *discrimination*

[53] Here, the Attorney General argues that the Tribunal considered the allegation of *prima facie* discrimination through the wrong lens, which effectively imposed on the federal government the obligation to promptly and completely resolve all of the problems that the Policy was intended to address (Memorandum of the Attorney General at para. 67). The Attorney General argues that such an approach is contrary to the Supreme Court of Canada's teachings that governments are permitted to address social inequalities incrementally, a principle, he points out, that is "deeply grounded in Charter jurisprudence" (Memorandum of the Attorney General at para. 71, citing mainly *R. v. Sharma*, 2022 SCC 39 at para. 65 (*Sharma*)).

[54] In connection with this first ground of appeal, the Attorney General states that, contrary to what the Tribunal said, he submitted no defence under subsection 16(1) of the Act, which, he acknowledges, applies only to cases of reverse discrimination. Rather, he claims that what he argued was that, in analyzing the allegation of *prima facie* discrimination, the Tribunal should have taken into account the principles of ameliorative programs underlying the concept of substantive equality, something it allegedly failed to do.

[55] According to the Attorney General, these principles are meant to protect the efforts made by the state to develop and adopt measures aimed at helping disadvantaged groups while affording it some leeway in this regard, which efforts invite [TRANSLATION] "considerable deference" from the courts (Memorandum of the Attorney General at paras. 75-76).

[56] In short, the approach advocated by the Tribunal ultimately amounted to imposing on the state a general positive obligation to address social inequalities, an approach that the Attorney General goes on to say undermines the principle of the separation of powers, because it opens the door to the courts being pulled "into the complex legislative domain of policy and resource allocation" (Memorandum of the Attorney General at para. 110, citing *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 28).

[57] I cannot, for the following reasons, agree with the Attorney General's allegations on this point, when considered in light of the standard of review applicable in this case.

[58] First, it should be noted that the Attorney General does not take issue with the general two-step analytical approach required to examine a discrimination complaint filed under the Act (Memorandum of the Attorney General at para. 62). The first step places the onus on the complainant to show—on a *prima facie* basis, or on the face of it—that he or she was the victim of a discriminatory practice. It is at this stage that the three-part *Moore* test comes into play (Memorandum of the Attorney General at para. 63), reiterated in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at paragraphs 34 to 37 (*Bombardier*) and more recently in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at paragraph 24—see, in the specific context of the Act, *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at paragraph 76 (*Johnstone*). As the Attorney General correctly points out, at this stage of the analysis, the Tribunal should consider all of the evidence submitted to it, including the evidence adduced by the party against whom the complaint is directed (Memorandum of the Attorney General at para. 64).

[59] Once this first step has been successfully completed, it is up to the party against whom the complaint is brought—in this case, the Government of Canada—to justify its conduct on the basis of exemptions provided for in the Act. If it fails, the complaint will have been successfully established (Memorandum of the Attorney General at para. 65).

[60] That was the analytical framework that the Tribunal applied in the case at bar, although it was careful to add that the intentional or unintentional—or direct or indirect—nature of the alleged discriminatory practice was not relevant to the analysis (Tribunal Decision at paras. 23 to 32), which is entirely consistent with the applicable human rights case law (*Bombardier* at

paras. 32, 40; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 91; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1139).

[61] At the heart of the Attorney General's position on the analytical approach taken by the Tribunal in this case is the role of the case law developed under section 15 of the Charter with respect to the examination of a complaint made under a human rights statute (Memorandum of the Attorney General at para. 66). It sets out the interrelated principles that the Attorney General says the Tribunal was bound to in this case, namely incrementalism, the absence of a positive obligation on governments to remedy social inequalities or enact remedial legislation, and the deference that courts must show to legislative choices "as to just how quickly it should proceed in moving forward towards the ideal of equality" (*Sharma* at paras. 62-65).

[62] It is correct to say, as the Attorney General does, that the case law relating to section 15 of the Charter is relevant in human rights matters. In *Canada (Attorney General) v. Canada Human Rights Commission*, 2013 FCA 75 (*CHRC FCA*), this Court said that it "informs the content of the equality jurisprudence under human rights legislation and *vice versa*" (*CHRC FCA* at para. 19). In this sense, the case law in these two areas is mutually influential.

[63] I note that in that case, unlike here, the Attorney General criticized the Federal Court for not limiting its analysis to case law dealing specifically with the Act. In a context quite similar to ours (the funding of child welfare services) also involving paragraph 5(b) of the Act, the Federal Court was called upon to decide whether the Tribunal had erred in summarily dismissing the complaint before it on the basis that it was impossible for it to process the complaint without a

proper comparator group. The Federal Court found that the Tribunal had reached an unreasonable conclusion on this issue based on "a rigid and formulaic interpretation of the provision—one that is inconsistent with the search for substantive equality mandated by the Canadian Human Rights Act and Canada's equality jurisprudence" (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 9 (*CHRC FC*); *CHRC FCA* at para. 8).

[64] What is important to remember in this regard is that, despite their obvious kinship, section 15 and human rights legislation do not use exactly the same legal tests in determining what is or is not discriminatory. As the Federal Court noted in *CHRC FC*, although this evolution did not take place in isolation, "the analytical frameworks under section 15(1) of the Charter and under federal and provincial human rights statutes have evolved separately and have taken distinct forms" (*CHRC FC* at para. 287).

[65] The differences between the two regimes were noted very early on by the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (*Andrews*). They are due in particular to the following:

(a) Discrimination under subsection 15(1) of the Charter is limited to discrimination caused by the law, whereas discrimination under human rights legislation applies to conduct and behaviour, even private conduct and behaviour;

(b) The enumerated grounds of discrimination in subsection 15(1) of the Charter are neither exclusive nor exhaustive, unlike those set out in human rights legislation; and

(c) The exemptions or defences set out in human rights legislation, if established, "generally have the effect of completely removing the conduct complained of from the reach of the Act", whereas infringements of a right guaranteed by section 15 of the Charter may be justified by the state under section 1 of the Charter. In other words, contrary to the way the Charter operates, acts of discrimination prohibited by human rights legislation—and the defences and exemptions that can be made against them—are "absolute"; there is therefore no "middle ground", contrary to what the Charter regime contemplates when the state successfully discharges its burden of proof under section 1.

(*Andrews* at 175-176.)

[66] More fundamentally, this difference stems from the fact that the Charter and human rights legislation have distinct purposes: the Charter is a constitutional instrument, whereas human rights laws are not, even if they should be interpreted as almost constitutional in nature (*Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 547 (*Simpsons-Sears*); *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 8 (*Robichaud*)). It has been said that these laws aim to identify discrimination, whether intentional or not, and eliminate it, and that in this way they are essentially remedial, in the sense that they are not aimed at punishing conduct but at providing relief for the victims as well as remedies that are "effective, consistent with the 'almost constitutional' nature of the rights protected" (*Robichaud* at para. 13; *Simpsons-Sears* at 547).

[67] Finally, I note the warning of the Supreme Court majority in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, an employment discrimination case that gave rise to a complaint under the Act. In this decision, the majority found that the Charter, absent a Charter challenge, "cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have" (*Mossop* at 582).

[68] What I take from that is that although the case law related to section 15 of the Charter and that related to human rights legislation might be mutually influential, section 15 case law cannot be indiscriminately applied to discrimination cases initiated under human rights legislation, i.e. without regard for the specific purpose and structure of these statutes. In particular, it is far from clear that the principles derived from the case law relating to section 15 of the Charter that the Attorney General raises here (absence of a positive obligation to eliminate social inequalities, incrementalism, and deference to choices made to this end), which mainly focus on the relationship between Parliament and the courts, can be transposed to this case, nor is, at the very least, the extent to which they can be.

[69] The Attorney General was not very explicit on this point and it is therefore difficult to conclude, in light of the foregoing, that the Tribunal was bound by these principles as legal constraints on its analysis.

[70] In any event, assuming that they do apply, in my view, these principles are of little use to the Attorney General in the particular circumstances of this case, since the Tribunal considered the Government of Canada's conduct in light of its own commitment—made in the context of

the historically difficult relations between First Nations and Canada's law enforcement and policing authorities—to contribute to ensuring that First Nations are able to have professional, effective and culturally appropriate police services. In this sense, it can be said that with this specific commitment, the Government of Canada had already established how quickly it would respond to problems arising from this historical context.

[71] The issue to be resolved in connection with the Complaint was therefore not whether the Government of Canada had done enough to address these issues and if, as the case may be, it should have done more, but whether the implementation of its commitment to the First Nation under the Policy had been discriminatory within the meaning of the Act. This was well understood by the Tribunal, such that there is no need for this Court to intervene with respect to the choice of analytical framework used by the Tribunal to conduct its examination of the allegation of *prima facie* discrimination. In other words, that choice, in these circumstances, bears the hallmarks of reasonableness.

[72] As for the role of the budget envelopes in the implementation of the Policy, which the Attorney General associates with the complex role conferred on Parliament in the allocation of resources, I will simply reiterate the limitations of such an argument by referring to the words of the Supreme Court in *Moore*. In that case, the elimination of a range of services for students with special needs for budgetary reasons in the context of a financial crisis was found to be discriminatory. There had been no assessment of the impact of these budget cuts on those students, leading the Supreme Court to say that it "will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*Moore* at paras. 46-50).

[73] I take this to mean that the leeway afforded Parliament and the government in the allocation of resources is not limitless. In this case, according to the Tribunal, all parties were aware that the costs related to the First Nation's minimum needs for police services were higher than the amounts that were provided for in the agreements and, thus, in the budget envelopes. In the Tribunal's view, these envelopes provided no leeway to further support the First Nation's police service (Tribunal Decision at para. 342).

[74] Some might say that it was accordingly less costly to maintain the status quo with regard to the allocation of resources. In my opinion, the Tribunal could reasonably conclude, in the circumstances of this case, that this was not an impediment to the Complaint.

B. *Consideration of the ameliorative effect of the Policy and Program and of the comparative evidence*

i. The "ameliorative effect of the Policy" argument

[75] The Attorney General criticizes the Tribunal for not having given due weight to the ameliorative effect of the Policy and Program for the First Nation (Memorandum of the Attorney General at paras. 80 to 82).

[76] In connection with this ground of appeal, the Attorney General states that, contrary to what the Tribunal said, he is not making this argument as a defence under subsection 16(1) of the Act, which, he acknowledges, only applies to cases of reverse discrimination. Rather, he says that what he is arguing is that, in analyzing the allegation of *prima facie* discrimination, the

Tribunal should have taken into account the principles of ameliorative programs [TRANSLATION] "supporting the principle of substantive equality", which the Tribunal allegedly failed to do. According to the Attorney General, these principles are meant to protect the efforts made by the state to develop and adopt measures to help groups that are disadvantaged based on a prohibited ground of discrimination, by affording it some leeway in this regard, with which the courts must refrain from interfering (Memorandum of the Attorney General at paras. 75-76).

[77] The respondents maintain that the Attorney General backtracked before this Court, since he did, in fact, raise the defence provided for in subsection 16(1) of the Act, which he now recognizes does not apply in this case. I note that in the Statement of Particulars he filed with the Tribunal, the Attorney General argued that the Program [TRANSLATION] "may be regarded" as a program within the meaning of that provision (Appeal Book at 11425).

[78] In the alternative, the respondents submit that there is no legal basis for citing the ameliorative effect of the Policy and Program in the first step of the two-step examination of a complaint filed under the Act, i.e. the step where the complainant must establish that he or she has been the victim of *prima facie* discriminatory conduct, and that doing so distorts the *Moore* analytical framework.

[79] In my opinion, it was reasonable for the Tribunal to address the argument of the ameliorative effect of the Policy and Program within the context of subsection 16(1) of the Act, i.e. as a defence against a finding of *prima facie* discrimination rather than as an argument aimed at countering the allegation of *prima facie* discrimination underlying the Complaint. It was open

to the Tribunal to do so in light of the submissions made to it in writing (Appeal Book, Respondent's Statement of Particulars at 11425) and at the hearing (Appeal Book, Oral Argument Transcript at 12307 and 12308). It was also open to it to do so because of the rather shaky legal basis for the proposition that the ameliorative effect of a program should be an element of the first step of the two-step test for establishing the merits of a discrimination complaint under the Act or any other human rights legislation.

[80] This is so for two reasons. The first relates to the fact that nothing in either the Act or any of the case law under human rights legislation states that the analytical framework specific to this first step of the test—the *Moore* framework—allows for the ameliorative effect of a social protection program to be taken into account, even if the alleged perpetrator of the discriminatory conduct is permitted to present evidence at that step of the analysis, as acknowledged by the Tribunal. In my opinion, the right to adduce evidence to counter an allegation of *prima facie* discrimination should not be confused with the legal test that must be met to establish the existence of a *prima facie* discriminatory practice.

[81] The second reason is that agreeing with the Attorney General's view would, for all intents and purposes, render subsection 16(1) of the Act redundant, since the ameliorative effect of the program at issue would allow for the complaint to be disposed of in the first step of the test and, therefore, without even having to resort to the defence based on the same effect. As noted above, there are certain limitations to this defence that, in theory, could not be used against the alleged perpetrator of the discriminatory practice at this stage of the analysis. It seems to me that Parliament could not have intended such a blurring of lines.

[82] In any event, it is questionable whether the ameliorative effect argument, even when considered for the purposes of determining whether there is *prima facie* discrimination, could have moved the Tribunal's thinking in the direction sought by the Attorney General. In my view, it could not have done so.

[83] It may seem counterintuitive that a government policy intended to correct historical disadvantages associated with a disadvantaged group could be discriminatory. However, the ameliorative effect argument has its limitations, in the sense that it does not adequately suit cases where, as here, it is the implementation of the policy (e.g. through funding practices that hinder the achievement of its objectives) and not the policy itself that is alleged to be problematic.

[84] Pushed to its limit, this argument would allow for tolerance of discriminatory conduct on the basis that the disadvantaged group is now better off than it was before the policy was adopted, even if the policy's implementation gives rise to equality rights concerns. It seems to me that this would result in indirect condonation of the approach whereby there can be no discrimination if the harm or adverse treatment at issue is now, all in all, minimal, an approach rejected by the Supreme Court as being at odds with the very purpose of human rights legislation, which aims to ensure that there is no discrimination—of any level—without any consequences (*Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at 543).

[85] Finally, to the extent that the ameliorative effect of the Policy is argued in support of the principle of incrementalism, I reiterate what I said earlier, i.e. that this principle is of little

assistance to the Attorney General in the particular circumstances of this case, since the Tribunal was called upon to determine not whether the Policy adequately addressed the problems that it sought to correct, but whether its implementation, intended to lead to the achievement of its objectives, violated paragraph 5(b) of the Act.

ii. Comparative evidence

[86] According to the Attorney General, the Tribunal could not rely solely on the history of difficult relations between Canadian governments and First Nations to make a finding of discrimination; it also had to take into account the First Nation's substantive situation with regard to its police service (Memorandum of the Attorney General at paras. 88 to 91).

[87] The Attorney General further submits that this required a comparative analysis of the situation of the First Nation's police service with that of groups with the same or similar characteristics, something that the Tribunal erroneously refused to do on the grounds that First Nations occupy a unique position within Canada's constitutional structure, making any comparison difficult, if not impossible to carry out.

[88] The Attorney General contends that the Tribunal thus conducted a decontextualized analysis of the Complaint by ignoring, for example, the relatively similar nature of the First Nation's grievances regarding its police service (insufficient funding, inadequate equipment, etc.) compared to those of other police forces across Quebec (Memorandum of the Attorney General at paras. 84 and 85), or the fact that none of the communities adjacent to Mashteuiatsh

has its own police service, that all of these communities have to pay for this service, and that they receive no financial contribution for this purpose from governments (Memorandum of the Attorney General at paras. 95 to 99).

[89] I note first that, as the Attorney General also acknowledges (Memorandum of the Attorney General at para. 102), the Tribunal did in fact compare the situation of the First Nation's police service against that of non-Indigenous agglomerations of fewer than 50,000 residents in Quebec receiving the minimal level of police services under the QPA, i.e. level 1. It concluded that the First Nation's police service did not have the means to provide this level of service.

[90] What the Tribunal did not consider itself required to do was to conduct, as the Attorney General invited it to, a comparative analysis of groups having the same or similar characteristics. Relying on *Withler v. Canada (Attorney General)*, 2011 SCC 12 (*Withler*), which states that, in the search for substantive equality, an approach based on mirror comparator groups "can be detrimental to the analysis", and on this Court's decision in *CHRC FCA*, where the Court noted "the reduced role of comparator groups in the equality analysis" (*CHRC FCA* at para. 18), the Tribunal expressed the view that it was sufficient for it to assess the "real effects, on the ground" of the implementation of the Program/Policy funding agreements by taking into account "the social, political, economic and historical contexts of First Nations" in policing (Tribunal Decision at paras. 316-320, 324-326).

[91] The Attorney General submits that according to the 2022 decision in *Sharma*, the Tribunal's analysis "necessarily entail[ed] drawing a *comparison* between the claimant group and other groups or the general population" (*Sharma* at para. 31). However, the Supreme Court further reiterated that it no longer requires a "mirror comparator group" for this purpose (*Sharma* at para. 41). It also took care to specify that it did not intend to alter the two-step test for subsection 15(1) of the Charter, as set out in *Withler*, among others (*Sharma* at paras. 33-38).

[92] In *CHRC FCA*, this Court cited *Withler* in recalling that discrimination is a "fact-based inquiry. Among other things, it requires 'going behind the facade of similarities and differences', and taking 'full account of social, political, economic and historical factors concerning the group'". It also noted, again quoting *Withler*, that "'the probative value of comparative evidence . . . will depend on the circumstances'" (*CHRC FCA* at para. 22).

[93] With respect, I see no fundamental flaws in the way the Tribunal assessed the comparative evidence in the record. It compared the basic police services—level 1 policing—available to other residents of Quebec. It found that despite the fact that the mission and responsibilities of the First Nation's own police service and the training required of its police officers were the same as those of other police forces in the province, the First Nation could not provide the same level of service to its residents, as a result of the structural underfunding associated with shortcomings in the implementation of the Policy, which aims to ensure that First Nations can establish culturally appropriate police services. It then assessed this in light of the past—and in some cases, ongoing—difficult relations between First Nations and the police services imposed on them over the years. To that end, it was also open to the Tribunal to

consider that First Nations people are among the most disadvantaged and marginalized members of Canadian society (*R. v. Ipeelee*, 2012 SCC 13 at para. 60), and that they occupy a unique position within Canada's constitutional structure (*CHRC FC* at paras. 334-335).

[94] The Tribunal assessed the Attorney General's comparative evidence but did not give it any weight, or at least, it did not give it the weight that the Attorney General would have liked. Ultimately, the Attorney General is asking us to reassess the comparative evidence in the hope that we will reach different conclusions. However, as I have already mentioned, according to *Vavilov*, that is not our role (*Vavilov* at para. 83).

[95] Again, we need not ask ourselves whether we would have reached the same conclusion as the Tribunal or what we would have decided if we had been in its place. Rather, we must ask whether its assessment of the comparative evidence bears the hallmarks of reasonableness. In my view, it does.

C. *The Province's Role in the Development of Police Services*

[96] Finally, the Attorney General submits that the Tribunal downplayed the role of the province [TRANSLATION] "in developing police services for Indigenous communities", thus skewing its assessment of the discriminatory nature of the federal action, which, according to the approach taken by the Tribunal, [TRANSLATION] "will ultimately depend on the provincial legislature choosing to place a given service at a given service level" (Memorandum of the Attorney General at paras. 103-109).

[97] As previously indicated, the problem identified by the Tribunal is one of structural underfunding, which means that the First Nation is unable to provide its population with the lowest level of policing services available to other citizens of Quebec. In these circumstances, and without trivializing the fact that, constitutionally, the provision of policing services in Canada is first and foremost a provincial responsibility—a fact recognized by the Policy and, indeed, by the Tribunal—I find it difficult to see how it can be said that the assessment of the discriminatory nature of the federal action, in light of the objectives of the Policy, is thus dependent on [TRANSLATION] "the provincial legislature choosing to place a given service at a given service level".

[98] The Policy, and the fact that it provides for the creation of self-administered Indigenous police forces responsive to the particular needs of the community, remain a matter of partnerships "based on trust, mutual respect and participation in decision-making." These partnerships allow for the negotiation and conclusion of tripartite agreements between the federal government, the provincial or territorial government concerned and the First Nation looking to create such a police force. Again, the creation of such police forces in Quebec also depends, under the QPA, on agreements with the Quebec government. In fact, the Tribunal accepted from the evidence that the Government of Canada works directly with the First Nation and the Quebec government to achieve the Policy's objectives (Tribunal Decision at para. 225). For the purposes of the Policy, the service levels set out in the QPA serve as indicators and nothing more.

[99] In my opinion, as was the case with the argument that the Complaint was in fact a collateral attack on the QPA and therefore outside the Tribunal's jurisdiction—an argument that

was rejected by the Tribunal itself and by the Federal Court—the Attorney General is raising a false problem here.

VII. Conclusion

[100] In light of the preceding, I agree with the Federal Court that the Tribunal Decision bears the hallmarks of reasonableness.

[101] However, this should not be interpreted as an endorsement of the Federal Court's treatment of the Quebec Court of Appeal's decision in *Takuhikan CAQ*, which the Federal Court found "very persuasive" and which it used "for the purposes of [its] analysis" (Federal Court Decision at para. 73).

[102] As persuasive as that decision was, it concerned—as I had occasion to say at the outset of these reasons—a related case that the Tribunal had actually found, in very detailed reasons, to be irrelevant to what it had to decide because that case raised different issues. In other words, the Tribunal expressly excluded from the constraints imposed on it the judgment on the merits in that case, which, as noted, was favourable to the federal Crown.

[103] In my view, the Federal Court's analysis should have been guided by the Tribunal's decision—which it did not challenge—to exclude from its own analysis any considerations regarding this related case. In not doing so, the Federal Court undertook its own review, so to speak, of the issues that were before the Tribunal, based on an element that, in these very

particular circumstances, could be qualified as extraneous to the case, i.e. one that was unrelated to the guidelines or constraints that the Tribunal had established to frame its evaluation of the issues to be decided. In my opinion, it was not allowed to do this (*Vavilov* at para. 83).

[104] In fact, these same considerations apply to this Court with respect to the Supreme Court's recent judgment in *Takuhikan SCC*.

[105] For all of these reasons, I propose that the appeal be dismissed with costs to the Complainant. In keeping with its policy, the Commission does not seek costs.

[106] Since the Complainant is seeking costs [TRANSLATION] "in a lump sum fixed in accordance with Rule 400(1) [of the *Federal Courts Rules*]", I would grant the Complainant and the Attorney General a period of 10 days from the date of these reasons to endeavour to reach an agreement regarding such an amount and to notify the Court of the amount they agree upon or that their discussions have failed, as the case may be.

"René LeBlanc"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Sylvie E. Roussel J.A."

Certified true translation
Melissa Paquette, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LOCKE J.A. ROUSSEL J.A.
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