

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2023 CHRT 38  
**Date:** September 8, 2023  
**File No.:** T2407/6619

**Between:**

**Earl Ka-Nowpasikow**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Poundmaker Cree Nation**

**Respondent**

**Decision**

**Member:** Jennifer A. Orange

## Table of Contents

I.	Overview .....	1
II.	Decision .....	1
III.	Procedural Background .....	2
IV.	Issues.....	2
V.	Positions of the Parties .....	3
	A.    The Complainant's Positions .....	3
	B.    The Respondent's Positions .....	4
	C.    The Canadian Human Rights Commission's Positions .....	5
VI.	Legal Framework .....	6
	A.    Aboriginal Law and Indigenous Customary Law.....	6
	B.    Discrimination under the CHRA.....	9
	C.    Enforceability .....	11
VII.	Analysis.....	12
	A.    Does the Complainant qualify for protection from discrimination because he has a protected characteristic? .....	12
	Mr. Ka-Nowpasikow's Health and the PCN's Knowledge of his Disability.....	12
	B.    Did the Complainant suffer an adverse impact with respect to his housing through the denial of repairs to his house or the denial of a new home? .....	14
	The Condition of House 103 .....	14
	The Poor Conditions of Housing on the Reserve.....	16
	C.    Was the Complainant's personal characteristic a factor in the adverse treatment or disadvantage? .....	17
	(a) Was Mr. Ka-Nowpasikow's status as a member of the Tootosis family a factor in the adverse treatment or disadvantage? .....	17
	(b) Was Mr. Ka-Nowpasikow's status as a single man living with a disability a factor in the adverse treatment or disadvantage? .....	18
	D.    Has the Respondent provided a valid justification for its otherwise discriminatory actions? .....	19
	(a) Is the PCN's approach to the allocation of housing rationally connected to a legitimate purpose? .....	20

(b) Did the PCN honestly and in good faith believe its standard was necessary to accomplish the purpose? .....	22
(c) Was the standard reasonably necessary, in the sense that the standard could not be relaxed without causing undue hardship, considering health, safety or cost.....	23
E. If the PCN cannot establish a justification, what remedies should be awarded that flow from the discrimination?.....	26
Personal Remedies.....	26
Public Interest Remedies .....	29
VIII. Orders .....	30

## I. Overview

[1] Mr. Earl Ka-Nowpasikow, the Complainant, has been a member of the Respondent, the Poundmaker Cree Nation (PCN or the "Nation") since 1997. The PCN is located in Saskatchewan, near North Battleford. The PCN is a Treaty Six First Nation and a band within the meaning of the *Indian Act*, RSC 1985, c. I-5.

[2] Mr. Ka-Nowpasikow claims that he has been discriminated against by the PCN in the allocation of housing on the basis of his status as a member of the Tootosis family, his status as a single man living alone and his status as a person living with a disability contrary to s. 6 of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the Act or the CHRA).

[3] Mr. Ka-Nowpasikow has lived in House 103 on the reserve since 2003. Initially, he lived in the house with his wife, Sherri Dunstan. He continued to live there after he and Ms. Dunstan separated in 2010. House 103 is a Band owned house.

[4] He brings this complaint in an effort to get the PCN to provide him with better housing that will not exacerbate his disability and to compensate him for damages suffered.

[5] This complaint cannot be examined separately from the context of the dire situation of housing on the PCN reserve. The PCN has received the same base housing allocation from Indigenous Services Canada (ISC) for over 30 years without any increase for inflation or population changes. The evidence showed that the Nation does not have enough funding to ensure decent housing for all of its members. Most of the housing allocation is used for emergencies in winter, such as replacing or repairing broken furnaces, to ensure survival. The PCN must make difficult choices about how to allocate money for housing because of its limited resources.

## II. Decision

[6] The complaint is allowed in part. Mr. Ka-Nowpasikow has not established a *prima facie* case that he was discriminated against because he is a member of the Tootosis family.

[7] Mr. Ka-Nowpasikow has established a *prima facie* case of discrimination on the basis of the intersection of his status as a single man and a person living with a disability. The PCN has not proven a *bona fide* justification for the discrimination.

[8] Mr. Ka-Nowpasikow is entitled to remedies under the Act, and both personal and public interest remedies are appropriate. As Mr. Ka-Nowpasikow's housing situation may have changed since the hearing, the Tribunal retains jurisdiction to assist in the resolution of this aspect of the complaint.

### **III. Procedural Background**

[9] On January 9, 2018, Mr. Ka-Nowpasikow filed a complaint at the Canadian Human Rights Commission (CHRC) against the PCN alleging discrimination relating to the provision of housing on the PCN's reserve (the Complaint). On July 15, 2019, the CHRC referred the Complaint to the Tribunal for an inquiry. Member George E. Ulyatt presided at the hearing, which occurred virtually due to the COVID-19 pandemic over ten days between August 16, 2021, and September 14, 2021. Thirteen witnesses testified at the hearing, and evidence was provided on a range of matters. The CHRC participated fully at the hearing.

[10] The parties filed their written closing submissions in the spring of 2022.

[11] Sadly, Member Ulyatt passed away shortly thereafter.

[12] The parties agreed to have the matter decided by a new Tribunal member on the basis of the transcripts, hearing recording and record. This task was assigned to me.

### **IV. Issues**

[13] The issues for the Tribunal to decide are:

- A. Has the Complainant proven a *prima facie* case on a balance of probabilities that he was treated in an adverse differential manner in relation to the provision of housing on the basis of his:
  - a. status as a member of the Tootoosis family;
  - b. marital status as a single man without children living with him; and/or

- c. disability as a person with lung and back conditions?
- B. If yes, has the PCN established a bona fide non-discriminatory justification for its conduct and that accommodating the Complainant would impose undue hardship on the PCN?
- C. If the PCN cannot establish a justification, what remedies should be awarded that flow from the discrimination?
- D. Are any remedies ordered by the Tribunal enforceable against the PCN?

## **V. Positions of the Parties**

### **A. The Complainant's Positions**

[14] Mr. Ka-Nowpasikow alleges that the PCN has discriminated against him in the provision of housing on the basis of disability, family status and marital status contrary to the CHRA. He submits that he has made out a *prima facie* case of discrimination pursuant to the decision in *Ledoux v Gambler First Nation*, 2018 CHRT 26. He alleges that he requires significant repairs to his current home or a new home because of his disability for which he has not been accommodated, that the PCN has not provided him with better housing because of his family membership, and that the PCN has not prioritized his housing requests because he is a single man.

[15] Mr. Ka-Nowpasikow alleges that he has been requesting assistance in improving his housing situation for many years. Despite repeated requests for repairs and support for the building of a new house, the PCN either did not respond or responded dismissively.

[16] Mr. Ka-Nowpasikow alleges that the PCN discriminated against him because his family does not support the current Chief. Furthermore, because he is a man and lives alone, the PCN will not support his requests for improved housing. He says that these two factors make out a *prima facie* case for discrimination on the basis of family and marital status.

[17] Mr. Ka-Nowpasikow also alleges that the PCN knew that he had a disability that was exacerbated by the condition of his house. Despite the provision of a medical notes, the Nation disregarded his requests to move him to a new home repair his home or support him

in building a new home that would ensure that his health was protected. He submits that these actions amount to discrimination on the basis of his disability.

[18] Mr. Ka-Nowpasikow submits that the appropriate remedy is the provision of adequate housing and damages to compensate him for pain and suffering as well as special damages for the PCN's wilful or reckless discrimination.

## **B. The Respondent's Positions**

[19] In its closing submissions, the PCN submitted that it does not dispute Mr. Ka-Nowpasikow's personal characteristics. It acknowledges that he is a member of the Tootosis family, that he is a single man living alone and that he has a disability.

[20] The PCN submits that housing resources are allocated according to its customary law.

[21] The PCN denies that it discriminated against Mr. Ka-Nowpasikow in that it has not treated him adversely in the context of life on the reserve. The PCN acknowledges the poor condition of Mr. Ka-Nowpasikow's house but states that many of the houses on its reserve are in poor condition. The PCN submits that members do not receive assistance to build houses or conduct renovations or repairs unless there are extreme circumstances. The Nation's limited housing budget goes almost entirely to emergencies, and providing Mr. Ka-Nowpasikow the funding to build the new house he wanted would have caused undue hardship to the Nation.

[22] It is within the context of the budget and customary law that housing allocations are prioritized, in particular for single women, children and elders. Therefore, the Nation submits that any distinction made on the basis of marital status because Mr. Ka-Nowpasikow is a single man is justified by this context.

[23] The PCN denies discriminating against Mr. Ka-Nowpasikow on the basis of his family status as a member of the Tootosis family. It submits that it has provided improved housing for several members of his family.

[24] The PCN denies that it knew about Mr. Ka-Nowpasikow's disability until the filing of this Complaint in January 2018. In its closing submissions, the PCN stated that when it became aware of Mr. Ka-Nowpasikow's disability, it made plans to assist him that were disrupted by the COVID-19 pandemic and funding struggles.

[25] The PCN further submits that if the Tribunal finds that a *prima facie* case of discrimination is made out, the PCN had a *bona fide* justification in protecting its members.

[26] The PCN states that the Tribunal should find that the PCN did not discriminate against Mr. Ka-Nowpasikow and that the Complaint should be dismissed.

[27] The PCN submits that any ruling of this Tribunal against the PCN is not enforceable because it holds its own authority for its governance under customary law.

### **C. The Canadian Human Rights Commission's Positions**

[28] The CHRC does not take a position on whether the PCN discriminated against Mr. Ka-Nowpasikow on the basis of family status because of his membership in the Tootoosis family or on the basis of his marital status because he is a single man.

[29] The CHRC's position is that the PCN's failure to complete his new house, allocate him a different house or renovate his current house has had an adverse differential impact on him on the basis of disability.

[30] The CHRC further submits that as Mr. Ka-Nowpasikow occupies a home that belongs to the PCN with the Nation's knowledge and consent and as the PCN is responsible for housing allocations on the lands it governs, the PCN is responsible for taking steps to meet the disability-related needs of its members to the point of undue hardship.

[31] The CHRC states that the PCN has not provided evidence to support an argument of undue hardship. Although the evidence shows that the PCN's annual base housing funding is \$296,970 and that its housing portfolio is in deficit, it did not lead evidence concerning the cost of repairs to address Mr. Ka-Nowpasikow's housing concerns. The CHRC submits that in the absence of specific, concrete evidence, the PCN has not established undue hardship on the basis of cost.



[32] The CHRC does not take a position on the personal remedies available to Mr. Ka-Nowpasikow.

[33] The CHRC submits that if the Tribunal determines that remedies are appropriate, the appropriate public interest remedies would be that:

1. The PCN cease and desist from continuing to commit each discriminatory practice identified by the Tribunal, and
2. The PCN take measures to redress the discriminatory practices and/or prevent the same or similar practices from occurring in the future, in consultation with the CHRC on the general purposes of the measures. Such measures might include:
  - i. The creation or review, in consultation with the CHRC, of policies relevant to the construction, repair and allocation of housing on the lands governed by the PCN; and/or
  - ii. The provision of training to staff at the PCN who are responsible for administering and applying housing policies.

[34] The CHRC asks that the Tribunal remain seized of this matter and retain jurisdiction to receive evidence and/or make such further orders as may be required, until the parties confirm that remedies ordered by the Tribunal have been implemented.

## **VI. Legal Framework**

### **A. Aboriginal Law and Indigenous Customary Law**

[35] As mentioned above, the PCN relies on its customary law in justifying its housing resource allocations. The PCN submits that its customary law remains undisrupted and codified in Treaty Six.

[36] Mr. Ka-Nowpasikow submits that the provisions of the *Indian Act* take precedence over the PCN's assertion of customary law regarding housing allocations.

[37] It is therefore necessary to review the applicable Aboriginal Law and Indigenous Customary Law frameworks.

[38] Section 35 of *The Constitution Act, 1982* (Schedule B to the Canada Act 1982 (UK), 1982, c 11) recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.”

[39] Under the *Indian Act*, the title to reserve land is vested in the Crown, which holds it for the use and benefit of the First Nation. The Government of Canada provides funding and other assistance to First Nations to improve First Nations on-reserve housing. The First Nation is responsible for allocating and managing its supply of on-reserve housing.

[40] Section 1 of *An Act to Amend the Canadian Human Rights Act*, S.C. 2008, c. 30, repealed s. 67 of the CHRA. Section 67 previously protected any decision made pursuant to the *Indian Act* from review under the CHRA. I infer from the repeal of s. 67 that decisions made by First Nations pursuant to the *Indian Act* are now subject to the CHRA.

[41] The PCN submitted that it allocates housing according to its customary law and that, to the extent that the Nation’s conduct may be reviewable, the Tribunal’s analysis engages s. 1.2 of *An Act to Amend the Canadian Human Rights Act*, which states:

In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

[42] The CHRC submitted that s. 1.2 does not state that the existence of First Nations legal traditions or customary laws operate as a complete defence to an allegation of discrimination but that they provide a lens with which to read the CHRA, including a contextualized analysis of the grounds of discrimination, practices and any defences.

[43] The CHRC also submitted that the *United Nations Declaration on the Rights of Indigenous Persons Act*, S.C. 2021, c.14, incorporates the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) (A/RES/61/295, adopted by the General Assembly on September 13, 2007; adopted by Canada in 2016) into domestic law and provides a roadmap for ensuring that the laws passed by Parliament are consistent with its terms.

[44] Of particular relevance to this case are the following articles of UNDRIP:

Article 1 Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2 Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 21 (1) Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

Article 22 (1) Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

Article 23 Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24 (2) Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

[45] Since the enactment of section 1 of *An Act to Amend the Canadian Human Rights Act*, part of this Tribunal's role is to determine whether the decision and actions made by First Nations under the authority of the *Indian Act* have violated the CHRA. In doing so, the Tribunal must give "due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests" (s. 1.2 of *An Act to Amend the Canadian Human Rights Act*). The balancing of individual rights and interests against the collective rights and interests is supported by the articles of *UNDRIP* and the *UNDRIP Act*.

## **B. Discrimination under the CHRA**

[46] The purpose of the CHRA is "to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so" due to discrimination (s. 2 CHRA; *Bird v Paul First Nation*, 2022 CHRT 17).

[47] Section 6 of the CHRA addresses discrimination in the allocation of housing. It states:

**6** It is a discriminatory practice in the provision of commercial premises or residential accommodation

(a) to deny occupancy of such premises or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

[48] The parties agree that the PCN is responsible for the provision of accommodation on the reserve. The Tribunal has found that decisions by First Nations regarding the allocation of housing on the reserve, including decisions about whether or how to modify or repair a home in response to disability-related needs, are subject to review under s. 6 of the CHRA. (*Ledoux v Gambler First Nation*, 2018 CHRT 26).

[49] The prohibited grounds of discrimination are set out in s. 3 of the CHRA and include marital status, family status and disability.

[50] The standard of proof for each of the legal issues in this case is the civil standard of the balance of probabilities. This standard requires the Tribunal to “scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred” (*F.H. v McDougall*, 2008 SCC 53 at para 49).

[51] The Complainant bears the onus of establishing a *prima facie* case of discrimination. A *prima facie* case is one that “...covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the [Respondent]” (*Ontario Human Rights Commission and O’Malley v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 (“*Simpsons-Sears*”), at 558).

[52] In order to prove a *prima facie* case of discrimination, Mr. Ka-Nowpasikow must prove that:

1. he has one or more characteristics protected from discrimination under the CHRA;
2. he was subject to adverse treatment or disadvantage, in this case the denial of repairs to housing or new housing; and
3. his protected characteristics were a factor in the adverse treatment or disadvantage.

(*Simpsons-Sears* at 558)

[53] While Mr. Ka-Nowpasikow must show a connection between a prohibited ground of discrimination and the alleged discrimination, the ground of discrimination only needs to be a factor in the adverse treatment. It does not have to be the only factor in the alleged discrimination (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 (*Bombardier*) at para 52).

[54] Mr. Ka-Nowpasikow does not have to prove that the PCN intended any discriminatory effect (*Hughes v Elections Canada*, 2010 CHRT 4 at paras 45-48; *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at 1137-1139).

[55] If Mr. Ka-Nowpasikow establishes a *prima facie* infringement of s. 6 of the CHRA, the onus will shift to the PCN to prove, on a balance of probabilities, that there is a *bona fide* justification for the discrimination within the meaning of s. 15(1)(g) and that accommodating the needs of Mr. Ka-Nowpasikow would impose undue hardship on the Nation, considering health, safety and cost in accordance with s. 15(2) of the CHRA (*British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868).

[56] Section 15(1)(g) states:

**15(1)** It is not a discriminatory practice if ...

**(g)** in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

[57] Section 15(2) states:

... for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

### **C. Enforceability**

[58] The PCN takes the position that any ruling by the Tribunal regarding housing allocation should not be enforceable against it as it holds its own authority for governance. I disagree.

[59] The PCN has authority over the allocation of housing on the reserve under the *Indian Act*. Since the repeal of s. 67 of the CHRA in 2008, decisions made under the authority of the *Indian Act* are subject to the CHRA, so it logically follows that a decision made by this Tribunal regarding whether the PCN has discriminated against one of its members in the allocation of housing is subject to the CHRA, including any remedies ordered by this Tribunal pursuant to the Act.

[60] I note that since s. 67 was repealed in 2008, this Tribunal has made orders against First Nations under the CHRA, including in *Ledoux v Gambler First Nation* and *Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20 and *Bird v Paul First Nation*.

## VII. Analysis

[61] In order to determine whether the PCN has discriminated against Mr. Ka-Nowpasikow, I will first analyze whether Mr. Ka-Nowpasikow has established a *prima facie* case of discrimination according to the three steps set out above.

### A. Does the Complainant qualify for protection from discrimination because he has a protected characteristic?

[62] Yes, I find that the Complainant is a member of the Tootoosis family, a single man and has a disability and therefore qualifies for protection from discrimination. Mr. Ka-Nowpasikow has established through his testimony that he is a member of the Tootoosis family and has been living as a single man since 2010. He has also established through his testimony and medical notes that he is living with lung and back conditions that meet the definition of a disability under the CHRA. These characteristics are accepted by the parties. He has therefore met the first part of the *prima facie* test. While in some ways these characteristics can be discussed separately, there are intersections between his status as a single man and as a person living with a disability that impact Mr. Ka-Nowpasikow's lived experiences and the analysis of his Complaint.

#### **Mr. Ka-Nowpasikow's Health and the PCN's Knowledge of his Disability**

[63] Mr. Ka-Nowpasikow is living with several health conditions. He said that the poor condition of the house is hurting his health and that because of his health he is unable to repair his house on his own. Mr. Ka-Nowpasikow testified that he has restrictions due to his lung conditions. He cannot run or work, and his breathing gets short. He also testified that he has had a back condition that has prevented him from working since approximately 2015.

[64] A key issue in this case is the timing of when the PCN became aware that Mr. Ka-Nowpasikow had a disability that prevented him from repairing House 103 and that the condition of the house was having an adverse impact on his health.

[65] In his Statement of Particulars, Mr. Ka-Nowpasikow alleged that he suffers from a disability and has not been able to work since 2017. He testified at the hearing that he delivered a note to the PCN's band office from his family doctor, Dr. Moolla, dated October 12, 2017, which states "This man requires a new home free of mould for medical reasons." Unlike other housing applications that Mr. Ka-Nowpasikow claims to have delivered to the band office, some of which were corroborated by the testimony of his then wife, Sherri Dunstan, this document was not date stamped, and he did not provide a date when he delivered the medical note. I find Mr. Ka-Nowpasikow's evidence on the delivery of the note less reliable in this regard. The PCN claims that it never received this note and several witnesses, such as Brandon Favel, testified to this effect.

[66] From the testimony of Mr. Ka-Nowpasikow, the medical note introduced into evidence and the testimony of the witnesses for the PCN, I cannot find that the Complainant has established on a balance of probabilities that the PCN received Dr. Moolla's note of October 12, 2017, before he filed his Complaint with the CHRC on January 9, 2018. However, based on the filing of the Complaint and Chief Antoine's testimony that from January 2018 he knew about Mr. Ka-Nowpasikow's health condition and desire for new housing, I find that from on or about January 9, 2018, the PCN was aware of Mr. Ka-Nowpasikow's desire for new housing and that he claimed to have a disability for which he had medical documentation.

[67] Mr. Ka-Nowpasikow also provided a more recent medical note from his new family doctor, Dr. Khurana, dated June 30, 2021, which provided more information. It said that Mr. Ka-Nowpasikow has a history of back ache, chronic obstructive pulmonary disease, pneumonia, chronic cough and shortness of breath. It is not contentious that the PCN was provided with this note on July 30, 2021, in advance of the hearing.

[68] At the hearing, several of the PCN's witnesses gave evidence that they were not aware of Mr. Ka-Nowpasikow's disability until the Complaint was filed in 2018 or that they



presently believe that he does not have a disability because he appears to be an able-bodied man. In its closing submissions, however, the PCN confirmed that it accepts that Mr. Ka-Nowpasikow is a person living with a disability.

[69] Considering the testimony of Mr. Ka-Nowpasikow and Dr. Khurana's medical note, I find that Mr. Ka-Nowpasikow's health conditions constitute a disability as defined under s. 25 of the CHRA. I find that the PCN knew that Mr. Ka-Nowpasikow has a disability. I infer from his lung conditions and back condition that his disability has impeded his ability to work on repairing his house since at least the date that the Complaint was filed on January 9, 2018.

**B. Did the Complainant suffer an adverse impact with respect to his housing through the denial of repairs to his house or the denial of a new home?**

[70] Yes, I find that Mr. Ka-Nowpasikow suffered an adverse impact because he lived in a home in disrepair and that the PCN refused to repair it or provide him with a new home.

**The Condition of House 103**

[71] In 2003, Mr. Ka-Nowpasikow moved into House 103, the house in issue, with Ms. Dunstan. He says that the house was abandoned at the time. There was contradictory evidence about how the house was allocated and for how long, but all agreed that Mr. Ka-Nowpasikow and Ms. Dunstan were given permission to live there, at least temporarily, by a member of the Tootosis family, as per Band custom. Mr. Ka-Nowpasikow and Ms. Dunstan separated in 2010, and he continued to live in the house.

[72] The evidence demonstrated that the condition of House 103 was poor and despite some repairs made to the house over the years, it remains poor. Mr. Ka-Nowpasikow says that the house is infested with mice and infected with mould and has unrepaired damage and defects. Several witnesses testified to the poor condition of the house, including Eugene Poundmaker, Glenda Andrew, Neil Andrew (Mr. Ka-Nowpasikow's friend, sister and brother, respectively) and the Respondent's witness Ms. Dunstan. Photos of the house

demonstrated its disrepair. Elder Eric Tootoosis testified that this house, like some other houses on the reserve, “does not deserve to be occupied by a human being”.

[73] The PCN relies on the Battle River Treaty Six Health Centre Inspection Report, dated November 22, 2019, after the Complaint was filed, for its statement that the inspector “did not think” that the blackish/brownish areas visible in some areas of the insulation was mould. However, the inspector did find, among other things:

- i. Evidence of water damage;
- ii. Damage to floor tiles that may contain asbestos;
- iii. That the gas had been cut off to the house, so there was no central heating;
- iv. That there was a fire risk to the house;
- v. That the house needed electrical repairs;
- vi. That there were signs of a pest infestation in the basement;
- vii. That there were no eavestroughs or downspouts installed on the house;
- viii. That the ceiling had cracks;
- ix. That the ceiling had water stains or signs of water infiltration in the living room, kitchen, bedroom and bathroom closet;
- x. That the toilet was leaking and could only be flushed by putting one’s hand in the toilet tank; and
- xi. That there was no hot water in the home.

[74] The inspection report made a number of recommendations and a copy was sent to the PCN Chief Dwayne Antoine, Housing Manager, Tanya Antoine and Health Portfolio Holder, Brandon Favel. Although the inspection report did not confirm mould, it did identify a number of issues that can reasonably be inferred to be particularly harmful to an individual suffering from lung conditions, such as damages to tiles that may contain asbestos, water infiltration, a pest infestation and the urgent issue of a lack of central heating.

[75] The PCN has not visited the inside of the house or completed any of the inspection report’s recommendations.

[76] Mr. Ka-Nowpasikow alleges in his Statement of Particulars that the house's condition caused his lung conditions. The PCN denies this. Regardless of the cause of his lung conditions, I find that, based on Mr. Ka-Nowpasikow's testimony regarding the condition of House 103, the photos of House 103 introduced into evidence and the Inspection Report that it is more likely than not that the extremely poor condition of this house is exacerbating Mr. Ka-Nowpasikow's lung conditions.

### **The Poor Conditions of Housing on the Reserve**

[77] The PCN submits, and it was the evidence of numerous witnesses, that the annual funding it receives from ISC is insufficient to meet the housing needs of the Nation. Most of the housing money is used for emergencies, such as for heating and plumbing in the winter. The PCN must make difficult decisions regarding housing allocations. It claims that it does so in accordance with Band customary law, which prioritizes the protection of those in need, particularly single women, children and elders.

[78] Rhonda Dawiskiba, an ISC representative, gave evidence that there is a housing shortage on the Nation. She testified that the funding allocation for housing for the PCN has been capped at \$296,970 since 1996, without increases for inflation or population changes. She said that funding to address rodents and mould in one home would come out of this fund but testified that the funding is most commonly used for furnaces, hot water tanks and shingles.

[79] Marvin Pete, the Director of Operations for the PCN, testified that the PCN's housing portfolio is in deficit and that it often uses funds from other portfolios to cover costs.

[80] Brandon Favel, the PCN's councillor in charge of the housing portfolio, testified that the PCN spends most of its housing budget on emergencies, such as plumbing and heating.

[81] Chief Antoine testified that housing conditions on the reserve are poor. He said that mould is a problem for many houses on the reserve and that the Nation provided a free workshop on mould remediation. Many members handle mould problems themselves.

[82] In the context of life on the reserve, where there is very limited funding from ISC for housing, the PCN expects its members to take care of their own houses to the best of their abilities. A number of the PCN's witnesses testified that the Nation expects single, able-bodied men to repair their houses themselves.

[83] In this case, the PCN, as represented by its Chief and members of its council and administration, either made assumptions about Mr. Ka-Nowpasikow's disability status because his health condition was not visible or did not give regard to the information Mr. Ka-Nowpasikow included in his Complaint and his 2018 Housing Application. For example, Chief Antoine and Brandon Favel testified that they did not know that Mr. Ka-Nowpasikow had a disability and that they still did not believe that he has one because of his appearance.

[84] The PCN submits that, within the context of life on its reserve, Mr. Ka-Nowpasikow was treated like everyone else. There is limited housing, limited funds for improving housing, and people are expected to take the initiative to solve their problems by themselves. The PCN's denial of repairs or a new home had an adverse impact on Mr. Ka-Nowpasikow compared to others living on the reserve because he was physically unable to address the seriously poor condition of House 103, and its condition exacerbated his health conditions.

**C. Was the Complainant's personal characteristic a factor in the adverse treatment or disadvantage?**

**(a) Was Mr. Ka-Nowpasikow's status as a member of the Tootosis family a factor in the adverse treatment or disadvantage?**

[85] No, I find that the evidence has not substantiated Mr. Ka-Nowpasikow's claim that his membership in the Tootosis family was a factor in the adverse treatment. There is insufficient evidence to meet the *prima facie* test.

[86] Mr. Ka-Nowpasikow's alleges that he was not given a new house or support to renovate or build a house because he is a member of the Tootosis family that does not politically support the current Chief.

[87] The PCN denies that Mr. Ka-Nowpasikow was treated differently because he was a member of the Tootosis family. The PCN claims that it has provided upgraded housing to some members of Mr. Ka-Nowpasikow's family, so the allegation based on family membership is unfounded.

[88] The evidence showed that while some members of the Tootosis family had not received improved housing, others had. For example, on cross-examination, Mr. Ka-Nowpasikow testified that his mother and three of his siblings had received a house under the current Chief's administration. He further testified that while he, one brother and sister have been treated negatively by the PCN, his other family members have not. Mr. Ka-Nowpasikow said that he assumes that some people are being treated preferentially by the Chief and council for political gain.

[89] The evidence regarding the treatment of members of the Tootosis family is not consistent. Furthermore, without further evidence, Mr. Ka-Nowpasikow's assumption regarding the reasons for this treatment is speculative and not strong enough to prove a *prima facie* case of discrimination under the Act.

**(b) Was Mr. Ka-Nowpasikow's status as a single man living with a disability a factor in the adverse treatment or disadvantage?**

[90] Yes, I find that Mr. Ka-Nowpasikow's status as a single man living with a disability was a factor in the adverse treatment or disadvantage in his housing situation.

[91] The PCN has provided evidence that single men living alone are not prioritized for housing improvements on the reserve because in a situation of scarce resources they are expected to take care of housing repairs themselves.

[92] I have found that Mr. Ka-Nowpasikow is a person living with a disability and that the PCN knew about his disability from the time he filed his Complaint in January 2018. I have also found that because of his lung conditions, Mr. Ka-Nowpasikow was unable to meet the expectations that the PCN has for single men. Furthermore, the poor condition of House 103 exacerbates his lung condition.

[93] The confluence of the PCN's expectations of single men living alone, the PCN's lack of response to Mr. Ka-Nowpasikow's requests for new or improved housing, Mr. Ka-Nowpasikow's health conditions and living in a house in disrepair have created a situation of disadvantage with respect to Mr. Ka-Nowpasikow's housing. He is unable to meet the PCN's expectation that he repair his house by himself because of his disability. As a result, he has continued to live in a house in disrepair that is exacerbating his disability. I therefore find that Mr. Ka-Nowpasikow has established a *prima facie* case of discrimination on these protected characteristics. The PCN now has the opportunity to provide a justification.

**D. Has the Respondent provided a valid justification for its otherwise discriminatory actions?**

[94] No, the PCN has not provided a valid justification for its discriminatory actions.

[95] The onus is on the PCN to prove, on a balance of probabilities, that there is a *bona fide* justification for the discrimination within the meaning of ss. 15(1)(g) and 15(2) of the CHRA (*Meiorin (British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ["*BC Motor Vehicles*"].

[96] In order to demonstrate a *bona fide* justification, the respondent will generally be required to show that:

- (a) its approach is rationally connected to a legitimate purpose;
- (b) it honestly and in good faith believed its standard was necessary to accomplish the purpose; and
- (c) the standard was reasonably necessary, in the sense that the standard could not be relaxed without causing undue hardship, considering health, safety or cost. In assessing the third element, it must be remembered that some hardship is acceptable (*BC Motor Vehicles*).

[97] The PCN must demonstrate that it took reasonable steps to accommodate Mr. Ka-Nowpasikow without suffering undue hardship. The onus is on the respondent, as it is in

possession of the necessary information to show undue hardship. A complainant, will rarely, if ever, be in a position to show its absence (*Simpson-Sears* at para. 28).

[98] Where a respondent refutes the allegation of discrimination, this explanation must be reasonable, it cannot be an excuse used to conceal discrimination (*Moffat v. Davey Cartage Co (1973) Ltd.*, 2015 CHRT 5 at para. 38).

**(a) Is the PCN's approach to the allocation of housing rationally connected to a legitimate purpose?**

[99] No, the PCN's approach to the allocation of housing is not rationally connected to the legitimate purpose of allocating housing to people in need in a situation of limited resources.

[100] The PCN argues that it as a very limited housing budget with many houses in poor condition and within this context it must make difficult decisions. It further submits that the PCN uses its customary law to allocate housing on the reserve, this customary law prioritizes certain vulnerable people over single men, and this law should be respected as providing a *bona fide* justification for its decisions regarding housing allocations and repairs, including for emergency repairs to preserve life, such as for heating. I accept that I should consider customary law in determining whether the PCN has established a *bona fide* justification.

[101] I, along with the Tribunal in *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 120, acknowledge that poor housing is a problem facing many First Nation communities and the PCN in particular.

[102] The PCN provided evidence through Elders Patrick Tootoosis and Eric Tootoosis that housing is allocated according to the Nation's customary law, which prioritizes housing according to need. Single women, families with children and elders are prioritized for housing. I find that providing adequate housing according to need within the confines of very limited resources is a legitimate purpose.

[103] Both Elders testified that customary law requires individuals to look after their housing on the reserve as best they can. Chief Antoine agreed with these statements and testified

that, through the PCN customary law, housing was allocated to single women and people with children first as well as to elders. The evidence regarding customary law prioritizing single women, children and elders was consistent.

[104] The Nation admitted that Mr. Ka-Nowpasikow, as a man living alone, may have experienced a disadvantage as a result of not living with children. However, this treatment would be justified and in accordance with the duties of the Nation's Chief to protect its members.

[105] The evidence regarding the PCN's customary law and its practices was not consistent with regard to its treatment of persons living with disability. Brandon Favel testified that the PCN's customary law regarding housing prioritized people with special needs. Chief Antoine testified that people with disabilities were placed to live with family members. He said that custom required that if you could not take care of yourself, your family would take you.

[106] Patrick Tootosis testified that people with disabilities were placed to live with family members or sent to a care home in Cut Knife. He also said that people who are sick must help themselves the best they can. He did not accept that people who are sick should ask for help.

[107] Some of the PCN's witnesses seemed to limit the recognition of people with disabilities in ways that do not encompass the full ranges of conditions, abilities and experiences of persons living with disabilities. Not every individual has a visible disability. Many persons living with disabilities are able, and prefer, to live alone.

[108] Based on the inconsistency and incomplete nature of the evidence, I find that the PCN has not established how customary law applies to providing housing to persons living with a disability (*Francis v Mohawk Council of Kanesatake*, [2003] 4 FC 1133).

[109] The Elders and Chief explained the process of housing allocation and repairs on the reserve more generally. Patrick Tootosis testified that the customary practice was to apply for housing and then come to a Band meeting where housing would be allocated based on



need. People were expected to help themselves and take care of the houses they were given.

[110] They further testified that some houses are allocated by families to other family members or friends, in accordance with customary practices. The evidence of Sherri Dunstan is that this is how she and Mr. Ka-Nowpasikow were originally allocated House 103, although this allocation is now challenged by Dwight Tootoosis.

[111] Eric Tootoosis testified that if your house needs repairs, you approach the Councillor in charge or the Director of Housing and you are put on a list. You then invite the Band to see the house and get put on a list of priorities.

[112] Brandon Favel, however, testified that the housing portfolio receives many housing applications and that he does not see them all. He agreed that it would be helpful for the PCN to have a housing policy.

[113] Although the PCN has established that prioritizing people in need for housing or repairs according to its customary law is a legitimate purpose, I am not satisfied that its approach in practice is rationally connected to that purpose. The evidence of customary law did not sufficiently explain how people living with disabilities, including those living alone, would be provided with adequate housing in this context of limited resources. The evidence of the current process for receiving new housing and repairs to current housing leaves some persons living with a disability without adequate recourse.

**(b) Did the PCN honestly and in good faith believe its standard was necessary to accomplish the purpose?**

[114] Yes, the evidence of the Elders, Chief Antoine and Brandon Favel proved that the PCN honestly and in good faith believed that it must prioritize single women, people with children and elders in order to provide housing to those in need.

**(c) Was the standard reasonably necessary, in the sense that the standard could not be relaxed without causing undue hardship, considering health, safety or cost.**

[115] No, the PCN has not established that providing improvements to Mr. Ka-Nowpasikow's housing situation to accommodate his health conditions would cause undue hardship considering cost. It has established that completing the construction of the house on Mr. Ka-Nowpasikow's foundation project would cause undue hardship in terms of cost.

[116] Mr. Ka-Nowpasikow testified to having dropped off new housing applications to the Band office in 2005, 2007, 2008 and 2009, long before the filing of the Complaint that contained information about his disability. He said that he did not receive any responses from the PCN.

[117] Ms. Dunstan recalled Mr. Ka-Nowpasikow contacting the Chief and Council to ask for renovations on House 103 and that Kyle Favel and Burton Baptiste did come to do some repairs in 2009 and 2010.

[118] In 2011, Mr. Ka-Nowpasikow began work, with the assistance of a friend, on a new housing project for himself. He testified that after the foundation was built the project remains unfinished as he does not have the funds to complete it.

[119] Mr. Ka-Nowpasikow said that in 2016 he submitted a project proposal to the PCN for the completion of the new house, and it was denied or ignored. Brandon Favel recalled receiving an envelope from Mr. Ka-Nowpasikow and having a conversation about the project wherein Brandon Favel said there was no money to complete it.

[120] Mr. Ka-Nowpasikow testified that, in May 2018, he submitted another application for new housing to the PCN's office stating that House 103 is "deteriorated, neglected, mould problem, mice urine odour. Condemned!! No rain gutter's" and "Medical verification, inhalation of mould, mice urine odour." This application, introduced into evidence, specifically requests the "completion of foundation project southend, with all amenities, power, gas hook-ups, road, gravel, power, well water, septic, plumbing work, ground work, cement." This application is dated May 17, 2018, after this Complaint was filed and the PCN

had notice of his disability. Brandon Favel was uncertain as to whether he had seen this application.

[121] Brandon Favel testified that the Band Office receives numerous housing applications daily and that not all housing applications reach the housing portfolio staff or himself.

[122] The PCN members testified that the housing site where Mr. Ka-Nowpasikow has built the foundation for his new house is not on a currently serviced road and it would be extremely costly to support the construction of this house and all of the required amenities. Chief Antoine testified that it would cost approximately \$250,000 to complete all of this work. Brandon Favel testified that it would cost the PCN its annual housing budget to complete all of this work, which would lead to deaths on the reserve in the winter because other critical work could not be addressed.

[123] Ms. Dawiskiba from ISC testified that there are programs that provide proposal-based funding and the PCN requested and received extra funding for housing in 2016/17, 2019/20 and 2020/21. The PCN received an additional \$350,000 in 2019/20 and \$200,000 in 2020-21 based on immediate housing needs. She stated that ISC does not provide additional funds for housing for enabling accessibility for people with disabilities but that there are other federal departments that have funding for this and that the PCN could apply for these funds.

[124] I found above that, as of January 2018, the PCN had notice that Mr. Ka-Nowpasikow had a disability and needed improved housing. Yet, there is no evidence that since 2018 the PCN has taken any action to provide improved housing for Mr. Ka-Nowpasikow. It is not clear from the evidence who initiated the 2019 inspection of the house, but, since it received that inspection report, the PCN has not completed any repairs to House 103, including ensuring that there was central heating. A lack of safe heating in winter is the type of urgent issue that, according to multiple PCN witnesses, the Nation spends most of its housing budget addressing.

[125] The PCN has not evaluated the cost of repairing House 103 or of providing Mr. Ka-Nowpasikow with a new home that is closer to existing amenities. Brandon Favel, the Nation's councillor in charge of the housing portfolio, testified that he had not even seen the

House 103 inspection report or Mr. Ka-Nowpasikow's new housing application from 2018 until the week before he testified at the hearing and that he did not know that Mr. Ka-Nowpasikow had a disability until approximately two weeks before his testimony. He said that he did not apply for special Residential Rehabilitation Assistance Program for Persons with Disabilities funding for Mr. Ka-Nowpasikow because he did not know that he had a disability.

[126] Chief Antoine testified that the Band considered making repairs to House 103 but that the COVID-19 pandemic prevented them from doing so and that they did not make the repairs. I note that there were two years between the filing of this Complaint and when the pandemic hit.

[127] Because the PCN has not provided evidence of the cost of improvements to Mr. Ka-Nowpasikow's housing or that it has taken steps to improve it, I find that the PCN has not met the undue hardship test.

[128] I do accept that finishing Ka-Nowpasikow's new house on his foundation project would cause the PCN undue hardship in the context of the current ISC funding arrangement for the PCN's housing. The evidence provided by Chief Antoine and Brandon Favel, regarding the cost of completing all of the amenities that this house would require, was consistent and reasonable.

[129] In summary, I find that Mr. Ka-Nowpasikow established a *prima facie* case for discrimination in the provision of housing due to his status as a single man with a disability. The PCN has not established a *bona fide* justification for this discrimination because its approach to providing housing to persons with disabilities is not rationally connected to providing housing to people in need in the context of scarce resources and has not established that providing Mr. Ka-Nowpasikow with improved housing would cause it undue hardship in terms of cost.

**E. If the PCN cannot establish a justification, what remedies should be awarded that flow from the discrimination?**

[130] Mr. Ka-Nowpasikow should be awarded compensation for pain and suffering and for the PCN's reckless acts of discrimination. Public interest remedies are also appropriate. Mr. Ka-Nowpasikow's current housing situation may be outstanding and, if so, will need to be addressed.

[131] Mr. Ka-Nowpasikow testified that the discriminatory treatment had deeply affected him. He is having ongoing issues with his lungs that are related to the condition of his house, and he feels worse when he is inside the house.

[132] He further testified that he feels ostracized and ignored in the community and that he feels like he does not exist. As he described it, his sense of belonging suffered because of the poor condition of his house and the PCN's lack of response to his requests. He said that this hurts him particularly badly because he is a residential school survivor. I find this evidence credible and reliable, particularly in light of his medical notes, the poor condition of the house and the PCN's lack of response to the issues raised in the Complaint and Mr. Ka-Nowpasikow's 2018 housing application.

**Personal Remedies**

**(a) Compensation**

[133] Section 53(2)(e) of the CHRA enables the Tribunal to award compensation to a victim of discrimination "for any pain and suffering that the victim experienced as a result of the discriminatory practice", up to an amount of \$20,000. The Tribunal tends to reserve the maximum amount of \$20,000 for the worst cases or most egregious of circumstances (*Christoforou v John Grant Haulage*, 2021 CHRT 15 at para 98; *Bird v Paul First Nation* at para 93).

[134] The aim of a remedial order under s. 53(2) is not to punish the respondent but to eliminate, to the extent possible, the discriminatory effects of the practice (*Robichaud v Canada (Treasury Board)*, 1981 CanLII 73 (SCC), [1987] 2 SCR 84 at para 13). There must

be evidence that a complainant experienced pain and suffering, and there must be a causal link between this and the discriminatory practice (*Bird v Paul First Nation* at para 94).

[135] The Complainant's counsel did not provide the Tribunal with case law justifying his request for \$20,000 in compensation for pain and suffering and \$20,000 for compensation for wilful or reckless discrimination. I will determine the compensation amounts based on the general principles of the Act and recent case law.

[136] In light of the physical and emotional pain and suffering experienced by Mr. Ka-Nowpasikow, I find it appropriate in the circumstances to award him \$10,000 for pain and suffering pursuant to s. 53(2)(e) of the Act. Unlike the more extreme situation in *Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20, where the Tribunal awarded the Complainant \$20,000 for pain and suffering, the PCN did not order Mr. Ka-Nowpasikow to leave the Nation.

[137] Mr. Ka-Nowpasikow has also requested compensation for the PCN's wilful or reckless discrimination. As stated by the Tribunal in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39:

In order to be wilful or reckless "...some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para. 119).

[138] I do not find that the Mr. Ka-Nowpasikow has established that the Respondent's actions were wilful in that it deliberately decided not to provide improvements to House 103. However, I do find that the manner in which it neglected to respond to his disability-based needs was devoid of caution with regard to the consequences of that behaviour and was therefore reckless pursuant to s. 53(3).

[139] After the PCN received notice of the Complaint, which included the claim that Mr. Ka-Nowpasikow had a disability, Brandon Favel, the Band Councillor in charge of the housing portfolio, was not informed of the situation. Furthermore, after the inspection report was completed in November 2019 showing the poor condition of House 103, the PCN took no

steps to improve it. Although the PCN is dealing with serious resource constraints and the Band Office receives housing complaints daily, people living with disabilities like Mr. Ka-Nowpasikow require the attention of the Nation. Ensuring safe housing for the community includes a duty to meet the needs of a person living with a disability.

[140] I am cognizant of the fact that the pandemic began in March 2020 and for some time thereafter it would not have been possible to address many of the issues that faced the PCN. However, there were still two years in which the PCN should have taken steps to assess and improve Mr. Ka-Nowpasikow's housing conditions. Taking all of these circumstances into account, I award a further \$5000 to Mr. Ka-Nowpasikow pursuant to s. 53(3).

[141] Simple interest shall be payable on the awards at the average annual rate established by the Bank of Canada. The interest will run from the date of the filing of the Complaint until the date of payment of the compensation awards (s. 53(4) of the CHRA and Rule 46 of the Tribunal's *Rules of Procedure*).

**(b) Mr. Ka-Nowpasikow's Housing Situation**

[142] Mr. Ka-Nowpasikow's housing situation and the funding available to the PCN may have changed since this hearing was started two years ago.

[143] In its closing submissions, the PCN stated that in October 2021 it allocated a nicer house with fewer health risks to Mr. Ka-Nowpasikow. In his reply submissions, Mr. Ka-Nowpasikow asserts that the PCN served him with an eviction notice on October 29, 2021. He left House 103 and moved to live with a younger brother in a house that is also a damaged property.

[144] These submissions do not form evidence and the circumstances may have changed further. The Tribunal asks the parties to work towards an acceptable solution to find housing that accommodates Mr. Ka-Nowpasikow's disability so that his health conditions are not exacerbated, keeping in mind the findings in this decision. If the parties cannot resolve this issue directly, please contact the Tribunal within 90 days of this decision to schedule a case

management conference call. The Tribunal will work with the parties to discuss how to address this remedial portion of the hearing, including the next steps.

[145] I am prepared to conduct a mediation-adjudication of this issue, with the parties' consent.

### **Public Interest Remedies**

[146] Public interest remedies are appropriate in this case, pursuant to s. 53(2)(a). The CHRC has asked that the Tribunal order the PCN to create a housing policy, and both Chief Antoine and Brandon Favel agreed that a housing policy is necessary.

[147] I note that Article 23 of UNDRIP states that Indigenous Peoples have the right to determine their own strategies for developing housing. Article 22(1) requires states to pay particular attention "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration."

[148] I recognize that serious resource constraints face the PCN and that the CHRC is in a position to offer support in policy development and training.

[149] Considering the importance of developing a housing policy that respects the PCN's customary law and the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in accordance with *UNDRIP* and the CHRA, I order that:

1. In consultation with the CHRC, the PCN develop its own housing policy relevant to the construction, repairs and allocation of housing on the lands governed by the PCN. In line with Article 22(1) of UNDRIP, this policy should pay particular attention to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities;
2. in consultation with the CHRC, the PCN provide training to its council members and staff on the operation of the housing policy, including how to accommodate persons living with different kinds of disabilities; and
3. the PCN publicize the housing policy to its members and ensure that it is widely available for members to review.



## VIII. Orders

[150] As Mr. Ka-Nowpasikow's Complaint is substantiated, in part, the Tribunal orders that:

1. within 90 days of this decision, the Respondent pay the Complainant \$10,000 for pain and suffering pursuant to s. 53(2)(e) of the Act;
2. within 90 days of this decision, the Respondent pay the Complainant \$5000 for engaging in a discriminatory practice recklessly pursuant to s. 53(3);
3. the Respondent pay the Complainant simple interest on the awards at the average annual rate established by the Bank of Canada. The interest will run from the date of the filing of the Complaint until the date of payment of the compensation awards (s. 53(4) of the CHRA and Rule 46 of the Tribunal's Rules of Procedure);
4. the parties work together to find an acceptable solution for the Complainant's housing and contact the Tribunal within 90 days of this decision if they are unable to do so;
5. in consultation with the CHRC, the PCN develop its own housing policy relevant to the construction, repairs and allocation of housing on the lands governed by the PCN. In line with Article 22(1) of UNDRIP, this policy should pay particular attention to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities;
6. in consultation with the CHRC, the PCN provide training to its council members and staff on the operation of the housing policy, including how to accommodate persons living with different kinds of disabilities; and
7. the PCN publicize the housing policy to its members and ensure that it is widely available for members to review.

[151] The Tribunal retains jurisdiction to address the current housing situation of Mr. Ka-Nowpasikow, if necessary. The parties are to advise the Tribunal within 90 days of this order if they require the Tribunal's assistance in resolving this issue. If the Tribunal does not hear from the parties after 90 days, its jurisdiction will end, and the file will be closed.

*Signed by*

Jennifer A. Orange  
Tribunal Member

Ottawa, Ontario  
September 8, 2023

# **Canadian Human Rights Tribunal**

## **Parties of Record**

**Tribunal File:** T2407/6619

**Style of Cause:** Earl Ka-Nowpasikow v. Poundmaker Cree Nation

**Decision of the Tribunal Dated:** September 8, 2023

**Date and Place of Hearing:** August 16, 19, 23, 24 and 27, 2021

September 7 to 9, 13 and 14, 2021

By videoconference

### **Appearances:**

Eldon B. Lindgren, K.C., for the Complainant

Brittany Tovee, for the Canadian Human Rights Commission

Deanne K. Kasokeo, for the Respondent