

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 82

Date: May 14, 2024

File Nos.: HR-DP-2806-22 & HR-DP-2953-23

Between:

Matthew Currie

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Bear River First Nation

Respondent

Decision

Member: Catherine Fagan

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I. OVERVIEW

[1] Matthew Currie, the Complainant in this case, is a black Bear River First Nation member. He is of both Mi'kmaq and African-Canadian descent. He was self-represented during the entirety of his human rights complaint process. Bear River First Nation, the Respondent, is a band pursuant to the *Indian Act*, RSC, 1985, c. I-5 located in Bear River, Nova Scotia. In this case, Mr. Currie alleges he was adversely impacted when Bear River First Nation discriminated against him based on his race.

[2] The case primarily revolves around Bear River First Nation's issuance of a Protection of Property Notice (PPN) under the Nova Scotia *Protection of Property Act*, RSNS 1989, c. 363 (the "Protection of Property Act") in November 2018. This PPN, which is still in force as of the writing of this decision, prohibits Mr. Currie from entering or attending activities in the Band Office, Cultural Centre, Education Centre and the Gas Bar in Bear River First Nation. Mr. Currie alleges that Bear River First Nation's decision to issue the PPN was related to the fact that he is black. Mr. Currie also alleges that the way that Bear River First Nation administered the PPN is discriminatory based on his race, particularly in relation to an event that happened on April 8, 2020. Finally, Mr. Currie alleges that Bear River First Nation retaliated against him for having filed a complaint with the Canadian Human Rights Commission (the "Commission") when Bear River First Nation delayed and denied his request for social assistance, failed to protect Mr. Currie from the violent actions of his neighbour and excluded Mr. Currie from the September 2020 community moose hunt.

[3] Bear River First Nation denies all allegations. It claims that its decision to issue the PPN against Mr. Currie was necessary to protect staff and maintain a safe work environment. It argues that, despite the PPN, Mr. Currie can still receive Bear River First Nation services and programs in a modified manner.

II. DECISION

[4] Mr. Currie's complaint is substantiated in part.

[5] Mr. Currie has established a *prima facie* case that Bear River First Nation discriminated against him based on race when it issued an unnecessarily broad PPN preventing Mr. Currie from entering and attending activities in most public buildings in the community. Bear River First Nation also discriminated against Mr. Currie based on race in the way it administered the PPN on April 8, 2020.

[6] Mr. Currie has also established a *prima facie* case that Bear River First Nation retaliated against him for filing his complaint. This retaliation resides in the way in which the First Nation failed to take measures to protect Mr. Currie and his family from the violent actions of their neighbour and in its exclusion of Mr. Currie from the September 2020 community moose hunt.

[7] Bear River First Nation did not provide a legitimate justification, known as a *bona fide* justification, for the discriminatory and retaliatory conduct. Therefore, these claims are substantiated.

[8] There was insufficient evidence to establish a *prima facie* case of retaliation by Bear River First Nation in delaying and denying Mr. Currie's request for social assistance; therefore, this claim was unsuccessful.

[9] In terms of remedies, the Tribunal orders Bear River First Nation to remove any obstacles to Mr. Currie entering and attending activities in the Band Office, the Cultural Centre, the Education Centre and the Gas Bar. The Tribunal also orders Bear River First Nation to pay amounts as compensation for Mr. Currie's pain and suffering and for Bear River First Nation's reckless misconduct. Finally, the Tribunal orders Bear River First Nation to work with the Commission to develop a policy to support the issuing of PPNs and similar orders in a non-discriminatory way.

III. ISSUES

[10] The Tribunal must determine the following issues:

1. Did Bear River First Nation discriminate against Mr. Currie on the basis of race in the provision of services within the meaning of s. 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA):
 - a) when Bear River First Nation made the decision to issue a PPN under the Protection of Property Act; and
 - b) in the administration of the PPN?
2. Did Bear River First Nation retaliate against Mr. Currie within the meaning of s. 14.1 of the CHRA for having filed a complaint with the Commission when:
 - a) Bear River First Nation allegedly delayed and denied Mr. Currie's request for social assistance;
 - b) Bear River First Nation allegedly failed to protect Mr. Currie from the violent actions of his neighbour; and
 - c) Bear River First Nation allegedly decided to exclude Mr. Currie from the September 2020 community moose hunt.
3. If this Tribunal makes a finding of discrimination, what remedies should be ordered under s. 53 of the CHRA?

[11] Below, I analyze the above questions. In doing so, I only discuss the evidence that parties presented at the hearing that is relevant to determine the issues.

IV. RELEVANT FACTS

A. Facts leading to the issuance of the PPN

[12] On November 15, 2018, Bear River First Nation issued a PPN to Mr. Currie via a letter sent to him. The Bear River First Nation issued this PPN under the Protection of Property Act, which allows occupiers of property in Nova Scotia to issue notices to prohibit named individuals from entering certain premises or engaging in specific activities in those premises. Under this PPN, Mr. Currie is no longer allowed to enter and attend activities in the Band Office, the Cultural Centre, the Education Centre and the Gas Bar until further notice. The November 15, 2018, letter followed a resolution from Chief and Council

approving the PPN. A few days later, Mr. Currie sent an email to appeal the decision, but his appeal was denied.

[13] According to the November 15, 2018 letter, the Council issued the PPN because of two recent events: an October 29, 2018, incident at Canadian Tire with a band employee and an incident on November 18, 2018, at the Gas Bar with a Councillor. At the hearing, witnesses for both parties had very different versions of what happened on those two dates. Below, I outline what I consider most likely occurred during those incidents.

October 29, 2018

[14] On October 29, 2018, Mr. Currie and his partner, Ms. Kristie Carter, went to Canadian Tire with a band employee, Ms. Kait Harlow, to benefit from a service whereby Bear River First Nation purchases winter clothing for families in the community. According to the testimony of Mr. Currie and Ms. Carter, the interaction was simple: they met Ms. Harlow, purchased the winter clothing and then left. Both Mr. Currie and Ms. Carter testified that Mr. Currie was neither angry nor threatening during the interaction with Ms. Harlow. Ms. Harlow did not testify. There was, however, an unsigned handwritten note supposedly from Ms. Harlow that was provided at the hearing. The note states that there was a discussion between Ms. Harlow and Mr. Currie about the reimbursement process for the coats, during which Mr. Currie asked to use her credit card. According to the note, Ms. Harlow told Mr. Currie that it was her personal credit card, so he couldn't use it. The note also states that Ms. Carter asked Mr. Currie to wait in the car and apologized for his behaviour. Ms. Carter denied that she had asked Mr. Currie to leave the store, both during her testimony and in an email she had sent to the Council shortly after Bear River First Nation issued the PPN. The note does not state that Mr. Currie said or did anything that Ms. Harlow found intimidating or threatening, and she did not testify to explain her statement further.

[15] Given that Ms. Harlow made the effort to write the note, I find it likely that there were tense discussions between her and Mr. Currie about the reimbursement process for the clothing. However, nothing in the evidence, including the note and Ms. Carter's testimony,

leads me to conclude that Mr. Currie said or did anything to threaten or bully Ms. Harlow or that she felt threatened or unsafe during the interaction.

November 8, 2018

[16] On November 8, 2018, Mr. Currie was at the Gas Bar with some family members when Councillor Carol Ann Potter arrived. Mr. Currie and Councillor Potter testified that Mr. Currie approached the Councillor to ask her when the Council would approve a grant intended for his son to travel to receive a sports award. According to Mr. Currie, the deadline to confirm attendance at the award ceremony was fast approaching. Councillor Potter replied that it would be approved when it was approved, without providing any timeline. In the silent surveillance footage shown at the hearing, this initial interaction was perhaps 3-4 seconds. Councillor Potter moved on quickly and entered the store. When she came out a couple of minutes later, Mr. Currie was still there and approached her again to try and obtain a timeline for the Council's decision. As seen in the video, the two spoke for around 20 seconds. Mr. Currie and Councillor Potter agree that this discussion was again about when Mr. Currie might expect the Council's approval for the travel grant for Mr. Currie's son. Mr. Currie acknowledged that he was frustrated that Councillor Potter would not provide any assurance that the Council would make a decision in time for his son to attend the award ceremony, but he denied that he was angry or threatening. Councillor Potter testified, however, that Mr. Currie was angry and pointed at her in a threatening manner. After reviewing the video footage, I find Mr. Currie's version of events more persuasive. In the video of the event, Mr. Currie does not appear to be pointing at Councillor Potter, and his posture does not appear aggressive or angry. One hand was in his pocket, and the other hand was making everyday talking gestures. In fact, Mr. Currie's demeanour in the video seems relaxed.

[17] Councillor Potter also testified that, as she climbed into her car, Mr. Currie referred to a rumour regarding Councillor Potter partaking in certain criminal activities. According to Councillor Potter, Mr. Currie said that he would go to the Royal Canadian Mounted Police (RCMP) about the rumours. Mr. Currie denies he made this statement. Councillor Potter states that these comments devastated her. In response, she immediately called a lawyer

for Bear River First Nation, who advised her to call the RCMP to make a statement and to get a copy of the security footage of the interaction. Bear River First Nation did not provide the Tribunal with a copy of the statement Councillor Potter would have made to the RCMP. Nonetheless, I find that it is more likely than not that Mr. Currie commented on the rumour that Councillor Potter had engaged in criminal activity. However, based on the video of the interaction between Councillor Potter and Mr. Currie, in which Mr. Potter seems relaxed and non-threatening, I am not persuaded by Councillor Potter's testimony that Mr. Currie threatened to go to the RCMP.

[18] Councillor Potter testified that, since then, the Council has imposed various limitations on the types of interactions she can have with specific segments of the community for both their safety and hers. Although the evidence presented at the hearing was unclear, it seems there may have been wider rumours in the community of her criminal activity, and the rumour did not originate with Mr. Currie. The limitations that the Council imposed on Councillor Potter's interactions support this finding.

[19] The interaction between Mr. Currie and Councillor Potter was clearly tense, with heightened emotion on both sides. Mr. Currie likely mentioned the rumours of alleged criminal activity out of frustration. He was afraid his son would be unable to travel for the "once-in-a-lifetime opportunity," and Councillor Potter refused to provide a timeline for the Council's decision. Mr. Currie's allegation was serious, and, understandably, Councillor Potter was upset and angry with Mr. Currie for bringing it up. Still, Mr. Currie was not bullying or violent with Councillor Potter. He was not threatening to do something illegal or violent. Mr. Currie did nothing during this interaction to justify a view by Councillor Potter that her safety was jeopardized in Mr. Currie's presence nor to justify the Council's conclusion that Bear River First Nation staff were not safe around him and that he could not safely be in any public buildings.

Prior incidents

[20] According to the November 15, 2018, letter, the two incidents discussed above led to the issuance of the PPN. However, Bear River First Nation's witnesses also testified to two other incidents.

[21] The Band Administrator, Kerry Payson, testified to an incident on September 28, 2016, when Mr. Currie was allegedly rude and aggressive during a phone conversation with her and a band employee, Ms. Amber Hiltz. Mr. Currie admitted that he was upset during this call, which was about cutting off social assistance payments. Mr. Currie also noted that the Council was threatening to evict his family from their home because of overcrowding during this time. The call began between Mr. Currie and Ms. Hiltz. Ms. Hiltz did not testify, but Bear River First Nation provided a hand-written note she had supposedly written following the phone call. In the note, Ms. Hiltz wrote about her frustration in her dealings with Mr. Currie and his family and that he comes in "to cause trouble" and he "twists her words". However, without the ability for Ms. Hiltz to be cross-examined on this interaction, I give limited weight to this hand-written note.

[22] According to Ms. Payson and Councillor Potter, who was in the next room at the time of the phone call, the conversation between Mr. Currie and Ms. Hiltz was getting heated, so Ms. Payson took over the call. Ms. Payson testified that Mr. Currie called her malicious during the call. He also said that he would speak to the media about the services he was receiving and that he was recording the conversation. These comments upset Ms. Payson. Mr. Currie testified that he had started recording certain conversations with band employees around this time to ensure there was a clear record of how they were treating him. Ms. Payson admitted to hanging up on Mr. Currie because of the nature of the interaction. Following this event, Ms. Payson told staff to make written notes of difficult interactions with community members.

[23] Given that this event was two years before Bear River First Nation's decision to issue the PPN, I find it unlikely that this event played a significant role in its decision to issue the PPN, although Councillor Potter and Ms. Payson testified that the event formed part of their opinion of Mr. Currie as aggressive. Mr. Currie was frustrated during this call, which, he

admits, caused him to be rude to and angry with staff. However, I find that he did not say anything that would reasonably lead Ms. Hiltz, Ms. Payson or the Council to conclude that their physical safety was threatened in Mr. Currie's presence.

[24] There was also testimony of an incident on August 30, 2018 when Mr. Currie came to the Band Office to fill out forms. The incident allegedly involved the receptionist at the time, although the receptionist, who was a summer student, did not testify nor was there a written note from her describing the interaction. Instead, Ms. Payson testified to what she understood happened based on a conversation she had had with the receptionist. Ms. Dawn McEwan, a band employee, also testified to what she saw from her office not far from the reception area. Mr. Currie, Ms. Carter and Mr. Kerwyn Currie, their son, also testified to their version of events. Going forward, I will refer to Mr. Kerwyn Currie as Mr. Kerwyn to avoid confusion with his father.

[25] On this day, Mr. Currie, Ms. Carter and Mr. Kerwyn visited the Band Office because Mr. Kerwyn and Mr. Currie had forms to fill out. Evidence from both parties made it clear that neither Mr. Currie, Ms. Carter, nor Mr. Kerwyn spoke to the receptionist during this visit. However, while Mr. Currie was in the next room filling out forms, Ms. Carter and Mr. Kerwyn spoke about how rude it was that the receptionist did not acknowledge their arrival. Ms. Carter and Mr. Kerwyn acknowledged that this conversation may have been within earshot of the receptionist.

[26] Ms. McEwen testified that she saw Mr. Currie in the Band Office that day from her office. She confirmed that she did not see him speak to any staff person, including the receptionist. However, she thought that his posture was "intimidating". She did not explain what this meant.

[27] Following this event, the Chief of Bear River First Nation sent a letter to Mr. Currie informing him that it was reported that he had been inappropriate, intimidating and mean with staff and that, should similar incidents happen again, he would be unable to access Band buildings.

[28] The receptionist did not testify, so she could not be questioned on the events that occurred and her reaction to them. As such, I find Mr. Currie, Ms. Carter and Mr. Kerwyn's

version of events to be more persuasive than the hearsay evidence of Ms. Payson, which I give limited weight. I find it more likely than not that Mr. Currie entered the Band Office, filled out his forms and left without ever talking to the receptionist or acting inappropriately with staff. If the receptionist was upset following the Currie family's visit, it was likely due to the comments that Ms. Carter and Mr. Kerwyn made within earshot of her while Mr. Currie was in another room, and her reaction was unrelated to Mr. Currie's actions.

B. Facts surrounding the administration of the PPN on April 8, 2020

[29] Mr. Currie alleges that Bear River First Nation again discriminated against him in the way that it administered the PPN. In particular, he refers to an event that happened on April 8, 2020. Bear River First Nation also referred to this event to justify the continuance of the PPN against Mr. Currie.

[30] On April 7, 2020, Mr. Currie and Ms. Payson emailed back and forth. As seen from the emails, Mr. Currie was wondering when he would receive his social assistance. Ms. Payson informed him that the Band had not received his forms, so his social assistance would be interrupted. Mr. Currie then informed Ms. Payson that he had already provided pictures of the signed forms and forwarded her the application he had submitted as well as the reply email from an employee confirming that the application was received. The next morning, however, another staff person informed Mr. Currie by email that the Band required the original forms. The email mentioned that he was told that the originals were needed two weeks prior, although this email was not put into evidence.

[31] Mr. Currie then responded to the staff person and Ms. Payson by email to say that he was coming to the Band Office to sign his forms to ensure that his social assistance would not be interrupted. Because of the PPN, Mr. Currie would normally send any forms to the Band Office through Canada Post. However, on this occasion, Mr. Currie testified that he felt rushed because the deadline was that day and that he needed to buy food for his family. It should be noted that, around this time, the RCMP informed Mr. Currie that it had no documentation that the Bear River First Nation had issued a PPN to him. Because of this, Mr. Currie testified that he understood that the PPN was neither legal nor enforceable.

[32] Given Mr. Currie's sense of urgency and belief that the PPN was not valid, Mr. Currie decided to come to the Band Office and to let staff know he was coming beforehand to avoid surprises. In response, a staff person informed him that the PPN was still in effect, so they would leave the forms outside the front door of the Band Office with a pen. There were several resulting emails back and forth whereby Mr. Currie stated that he intended to come into the office to get his forms because he needed his social assistance cheque.

[33] It is relevant that this incident occurred during the early days of the COVID pandemic. As such, Ms. Payson testified that the offices were locked and not open to the public, regardless of whether there was a PPN in effect for the community member. However, this information was not mentioned to Mr. Currie in the emails exchanged on that day.

[34] After receiving these emails, Ms. Payson called the RCMP and informed it that Mr. Currie was coming and that the police needed to come to the Band Office as soon as possible. According to Ms. Payson's testimony, she made it clear to the police that it was urgent.

[35] Mr. Currie arrived at the Band Office with Mr. Kerwyn, Ms. Carter and another family member. They exited the car, and Mr. Currie began filming with his phone. Mr. Currie testified that he decided to film in order for the record to be clear that he was being non-violent and that he was simply there to pick up and sign his forms, which he believed would be on the front step. The video shows Mr. Kerwyn trying two doors to the Band Office, but they are locked. It is also evident from the video that Mr. Currie, Mr. Kerwyn and the other family member did not manage to find the envelope with the forms.

[36] They returned to the car, at which point the RCMP arrived. There is no video of the interaction between Mr. Currie and the RCMP. However, Mr. Currie and Mr. Kerwyn testified that the officer opened the driver-side door where Mr. Currie was sitting and drew his gun. It seems the officer first tried to drag him from the car and then forced him to turn off the engine and stay in the car. Mr. Currie testified that, when the gun was drawn, he was terrified that he was going to die, like many other unarmed black men who have died in police shootings. Mr. Currie testified that the RCMP conducted a subsequent investigation into the

officer and that there was a finding that he used excessive force and illegally detained Mr. Currie. However, Mr. Currie did not provide documents or further details on this.

[37] During this interaction, Mr. Currie's partner also called the RCMP. Shortly thereafter, another police officer arrived who managed to de-escalate the situation. This second officer then went inside, got the forms and gave them to Mr. Currie. No staff members were outside or present for any of these events, nor did they witness them from inside the Band Office.

[38] Later that day, Bear River First Nation sent Mr. Currie a letter regarding the event, stating that, because of what happened that day, the PPN would remain in full effect until further notice.

C. Facts related to the retaliation allegations

[39] A review of the facts leading to the retaliation allegations is included below, within the legal analysis of the test for retaliation.

V. ANALYSIS

[40] This case concerns the application of s. 5 (discrimination in the provision of services) and s. 14.1 (retaliation) of the CHRA.

[41] Section 5 of the CHRA reads as follows:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

[42] Section 14.1 reads as follows:

14.1. It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[43] I will examine the application of each of these provisions in turn.

A. Did Bear River First Nation discriminate against Mr. Currie on the basis of race in the provision of services within the meaning of s. 5 of the CHRA?

Legal test for discrimination

[44] In discrimination matters, the burden is on the complainant to present evidence that is sufficiently complete to meet the burden of proof, referred to as establishing a *prima facie* case of discrimination (*Polhill v. Keeseekoowenin First Nation*, 2019 CHRT 42 (CanLII) at para 52 [*Polhill*]). In other words, Mr. Currie must establish, on a balance of probabilities, a case of discrimination which covers the allegations made and, if believed, is complete and sufficient to justify a verdict in Mr. Currie's favour in the absence of an answer from Bear River First Nation (*Ontario Human Rights Commission v. Simpson-Sears*, 1985 CanLII 18 (SCC) at para 28). A balance of probabilities means that the allegation is more likely than not to be true.

[45] Under s. 5 of the CHRA, Mr. Currie must prove three elements to make his *prima facie* case of discrimination:

- a) There is a prohibited ground of discrimination;
- b) Bear River First Nation denied him a service or differentiated adversely against him in the provision of a service or services customarily available to the general public; and
- c) The prohibited ground of discrimination was a factor in the adverse impact or denial of the service.

[46] Abundant case law on the notion of a *prima facie* case of discrimination informs the application of s. 5 of the CHRA, including *Moore v. British Columbia (Education)*, 2012 CSC 61 (CanLII) at para 33; *Quebec (Commission des droits de la personne et de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, [2015] SCR 789 at paras 35-37 [*Bombardier*]; *Polhill* at para 54; *Dominique (on behalf of the members of the PekuakamiInuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4 (CanLII) at para 21 and 29 [*Dominique*].

[47] Bear River First Nation, in turn, may present its evidence to refute those three criteria.

[48] The prohibited ground of discrimination does not need to be the sole factor in the decision leading to the adverse impacts. Direct proof of discrimination is not necessary, nor is it necessary to demonstrate an intention to discriminate (*Bombardier* at paras 40 and 41).

[49] The Tribunal has repeatedly stated that discrimination is not usually open or intentional, particularly in cases of racial discrimination (e.g., *Dominique* at para 28 and *Turner v. Canada Border Services Agency*, 2020 CHRT 1 (CanLII) at para 48 [*Turner*]). Therefore, the Tribunal must analyze all the circumstances of the complaint to determine whether there is a subtle scent of discrimination (*Turner* at para 48; *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) [*Basi*]). Circumstantial evidence may help the Tribunal draw inferences. This would be the case “when the evidence presented in support of the allegations of discrimination makes such inferences more probable than other possible inferences or hypotheses” (*Polhill* at para 57 and *Turner*, para 48 and 54).

[50] As such, the Tribunal may conclude, on a balance of probabilities, that the evidence that Mr. Currie presented was, or was not, complete and sufficient regarding the three criteria. If the evidence is not complete and sufficient, the Tribunal dismisses the complaint.

[51] If this Tribunal concludes that the evidence that the Complainant presented is complete and sufficient, the burden then shifts to Bear River First Nation, who may attempt to justify its impugned decision or conduct by presenting a defence under s. 15 of the CHRA. Any defence is, again, analyzed on a balance of probabilities. After analyzing the elements together, the Tribunal can then determine whether discrimination occurred.

[52] It is in the context of this analysis that I will address the evidence presented at the hearing.

There is a prohibited ground of discrimination under the CHRA

[53] As Mr. Currie is a black man, there is a prohibited ground of discrimination under the CHRA, namely race. Bear River First Nation did not contest this fact. Therefore, the Tribunal accepts that this criterion is met without further analysis.

Bear River First Nation denied Mr. Currie services and differentiated adversely against him in the provision of services customarily available to the general public

There were services provided, and the services were customarily available to the general public

[54] To satisfy the second element required to make his *prima facie* case of discrimination, Mr. Currie must establish that the actions complained of were done in the provision of a service or services customarily available to the general public within the meaning of s. 5 of the CHRA (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 2 at para 30 [*FNCFCSC Merit Decision*]).

[55] The first step is to determine what the service or services are, based on the facts before the Tribunal (*Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) at paras 55 and 68 [*Gould*]). “Service”, in this context, refers to a “benefit” or “assistance” being held out or offered to the public (*Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para 31). In making this determination, this Tribunal considers the particular actions that are said to have given rise to the alleged discrimination (*FNCFCSC Merit Decision* at paras 30 and 31). It may also consider whether the benefit or assistance is the essential nature of the activity (*Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para 42).

[56] The parties did not make any representations on whether the issuance of the PPN itself is a service or whether it was done in the provision of services. The issue was, therefore, not tested. However, based on the factual evidence presented at the hearing, I am prepared to accept that the particular actions that are said to have given rise to the alleged discrimination were done in the provision of services. More specifically, in imposing the PPN against Mr. Currie and in administering it, Bear River First Nation altered which of its services were available to Mr. Currie (e.g., access to tax-free gas or convenience store products and access to cultural and other programming) or how services were available to him (e.g., social or income assistance).

[57] The second step in relation to the provision of services under s. 5 of the CHRA requires a determination of whether the services were “customarily available to the general

public". The Tribunal must decide what constitutes the "public" being offered the services. This public need not be the entire public. Clients of a particular service could be a large or small segment of the general public (*FNCFCSC Merit Decision* at para 31). In this case, I find the public to whom the services at issue are being offered are the members of Bear River First Nation.

[58] This Tribunal has previously recognized that a First Nation was providing a service customarily available to the public when it administers an income assistance program (*Pohill* at para 112; *MacNutt v. Shubenacadie Indian Band Council*, D.T. 14/95, October 11, 1995).

[59] Given the above, I find that Bear River First Nation's imposition and administration of the PPN were done in the provision of the following services within the meaning of s. 5 of the CHRA:

- a) administering social/income assistance;
- b) providing cultural, social and educational programming; and
- c) providing local access to tax-free gas and convenience store products.

Denial of services

[60] Section 5 of the CHRA prohibits a service provider from denying a service, or denying access to a service, on a prohibited ground of discrimination, such as race.

[61] Mr. Currie argues that Bear River First Nation has denied him access to multiple services, such as various cultural and community programming and access to tax-free gas and other tax-free products at the Gas Bar. Bear River First Nation refutes that it denied any services. In its November 15, 2018, letter, Bear River First Nation wrote that "the Band is not refusing to provide you any services. These services will continue and you can contact the above person for questions or information regarding your services."

[62] Bear River First Nation acknowledges that Mr. Currie is not allowed to enter the Gas Bar premises, whether to purchase tax-free gas or any other product. It takes the position that this is not a denial of services because Mr. Currie could drive an hour to the nearest reserve to access tax-free gas. I find, however, that Bear River First Nation asking a band

member to drive an hour to another community to access tax-free gas is not a modification of a service but a denial of services.

[63] Given the prohibition to attend the Band Office, the Cultural Centre and the Education Centre, Mr. Currie testified that he could not attend many community, cultural and holiday events and programming. Not being able to participate in these events and programs made Mr. Currie feel alienated from his culture and his community. This also impacted his children, who often refuse to attend events where their father is not allowed. Notably, Mr. Currie was not able to attend Mr. Kerwyn's high school graduation located at the Band Office, which impacted Mr. Currie and Mr. Kerwyn deeply. Apart from the broad comment that it did not deny any services to Mr. Currie, Bear River First Nation provided no evidence of how Mr. Currie is able to participate in the programming or events available at the Cultural Centre or the Education Centre and did not explain why this is not a denial of services.

[64] Given the above, I find that Bear River First Nation denied Mr. Currie, through its imposition and administration of the expansive PPN, access to services as follows:

- a) It denied him access to various community events and cultural programming at the Cultural Centre and Education Centre;
- b) It denied him access to Mr. Kerwyn's graduation; and
- c) It denied him access to tax-free gas and other tax-free products at the community Gas Bar.

Adverse differentiation in the provision of services

[65] Section 5 of the CHRA also prohibits a service provider to "differentiate adversely" in relation to a person in the provision of a service on a prohibited ground of discrimination, such as race. The Federal Court, in *Royal Canadian Mounted Police v. Tahmourpour*, 2009 FC 1009 at para 44, provides guidance on what it means to differentiate adversely. It describes "adverse differentiation" as a "distinction between persons or groups of persons that is harmful or hurtful to a person or a group of persons."

[66] I find that Mr. Currie was indeed differentiated in how Bear River First Nation offered certain services to him. Bear River First Nation acknowledged that it modified services for Mr. Currie, both in letters addressed to Mr. Currie and during the hearing. However, it denies

that any modifications to services resulted in an adverse impact. More specifically, Ms. Payson testified that even though Mr. Currie could not come into the Band Office (as well as other public buildings), he could communicate by phone or email with (and only with) her, and she would ensure services were maintained. As well, anything that Mr. Currie is to receive from the First Nation, such as documents, cheques or goods (for instance, wild meat or seafood) are delivered to his house or sent via mail. Any documents that Mr. Currie needs to provide to the Band Office in order to obtain or continue a service are to be sent via Canada Post or by email in some cases.

[67] Despite attempts by Bear River First Nation to provide certain services in a modified manner, I find that that Mr. Currie was adversely impacted by the differentiation.

[68] Mr. Currie testified at length about how essential the Band Office and Chief and Council are to the lives of all individuals with Indian status living on reserve. He explained how almost all services, whether related to social support, financial support, health or education, run through the Band Office in some way and, in many cases, rely on support resolutions from the Chief and Council.

[69] Mr. Currie explained how being unable to access the Band Office and communicate with staff freely has made his life very difficult. He testified that having to send every document back and forth via Canada Post has also caused significant confusion, complications and delays, some of which have resulted in social supports being delayed or interrupted. I am persuaded by Mr. Currie's testimony, corroborated by Ms. Carter's and Mr. Kerwyn's testimony, that he indeed suffered significantly because of the modifications of services that Bear River First Nation imposed.

[70] Given the above, I find that Mr. Currie was adversely differentiated in the provision of various services offered by Bear River First Nation through the Bear River First Nation's imposition and administration of the expansive PPN.

Mr. Currie experienced adverse differentiation in how Bear River First Nation provided services on April 8, 2020

[71] Because Bear River First Nation urgently summoned the police to the parking lot of the Band Office on April 8, 2020, in response to Mr. Currie and his family coming to the locked Band Office, I find that Mr. Currie also suffered adverse differentiated treatment. More specifically, when attempting to obtain the forms he needed to receive a service—the processing and administering of his social assistance—Mr. Currie had the police called on him, a gun pointed at him and was detained in front of his family. He was terrified of dying. His partner and son were terrified he was going to be shot.

Mr. Currie's race was a factor in the adverse differentiation or denial of services or access to services caused by Bear River First Nation's imposition of the PPN

[72] For the third element required to establish his *prima facie* case of discrimination under s. 5 of the CHRA, Mr. Currie needs to prove that race was a factor in Bear River First Nation's imposition and administration of the PPN that led to the denial of services and adverse differentiation in the provision of services.

[73] As mentioned above, there may be many different reasons for a respondent's acts. Therefore, the prohibited ground does not need to be the *only* factor in the denial of services or adverse differentiation. It is for Mr. Currie to show that race was a factor (*Bombardier* at paras 51 and 52).

[74] Mr. Currie also need not demonstrate that Bear River First Nation *intended* to or was motivated to discriminate against him (*British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para 88; *Starr v. BMO Financial Group*, 2023 CHRT 54 (CanLII) at para 54 [*Starr*]). In fact, when it comes to racial discrimination, it is quite often unconscious (*Starr* at paras 53-54; *Young Worker v. Heirloom and another*, 2023 BCHRT 137 at para 47 [*Young Worker*]; and *Davis v. Canada Border Services Agency*, 2014 CHRT 34 (CanLII) at paras 197-199 [*Davis*]).

[75] The hearing for this complaint was highly emotional on both sides. The evidence shows that animosity and a lack of trust between Mr. Currie and Bear River First Nation staff

and the Council have been building for many years and have only worsened since the issuance of the PPN.

[76] Bear River First Nation takes the position that the issuance of the PPN was necessary to protect its staff and had nothing to do with Mr. Currie's race. It argues that Mr. Currie was aggressive, bullying, intimidating and repeatedly engaged in inappropriate conduct, including physical and verbal behaviour, to the point where the Council legitimately felt their staff were at risk. Bear River First Nation also points out that Mr. Currie's race was never mentioned in any discussions regarding the issuance or administration of the PPN.

[77] At the hearing, Bear River First Nation witnesses testified to four events which, it says, justified Council's perception that the PPN was necessary because its staff were unsafe or at risk in the presence of Mr. Currie. I reviewed the details of these events above. However, I will briefly discuss each event as they relate to whether race was more likely than not a factor in the perception by Bear River First Nation Council and staff that they were unsafe around Mr. Currie and the subsequent issuance of the PPN.

[78] The first event occurred during a phone call on September 28, 2016, between Mr. Currie and two staff. Based on testimony during the hearing, Mr. Currie was frustrated and angry on call because of the services he was receiving and, as a result, the staff were upset. Ms. Payson indicated that Mr. Currie called her "malicious" and that he would call the media about the inadequate services. However, although Ms. Payson testified that Mr. Currie was rude, she did not testify to anything that would lead one to conclude that staff were unsafe to be in the presence of Mr. Currie.

[79] Similarly, I find that Mr. Currie did not engage in aggressive, bullying or intimidating activity on August 30, 2018, when he entered the Band Office to fill out forms with Ms. Carter and Mr. Kerwyn. Ms. Payson testified that the receptionist was upset but admitted that Mr. Currie likely did not speak to the receptionist. Ms. McEwen testified that she saw Mr. Currie in the reception area but did not see Mr. Currie speak to the receptionist. She did, however, say that his posture looked "intimidating". The receptionist did not testify. Mr. Currie, Ms. Carter and Mr. Kerwyn all testified that Mr. Currie never spoke to the receptionist but immediately went into another room, filled out his forms and left shortly thereafter.

Importantly, Ms. Carter and Mr. Kerwyn confirmed that Ms. Carter and Mr. Kerwyn spoke about the receptionist's apparent rude behaviour to them within the receptionist's earshot. Ms. Payson also testified that the receptionist mentioned that she heard Ms. Carter and Mr. Kerwyn making such comments. I find that, more likely than not, the receptionist was upset at these comments, and not anything Mr. Currie did or said.

[80] The third and fourth events are those raised by Bear River First Nation in its letter of November 15, 2018, to justify the decision to issue the PPN.

[81] The third event occurred on October 29, 2018, at Canadian Tire when Mr. Currie, Ms. Carter and Ms. Hiltz were purchasing winter clothes through a program offered by Bear River First Nation. Ms. Hiltz did not testify. However, in an unsigned note that Ms. Hiltz supposedly wrote and provided to Bear River First Nation, Ms. Hiltz explained her version of what happened. Despite Bear River First Nation's submissions, nothing in this note indicated that Mr. Currie was bullying her or that Ms. Hiltz felt unsafe.

[82] The fourth event occurred between Mr. Currie and Councillor Potter at the Gas Bar on November 18, 2018. As further described above, I find that Mr. Currie was frustrated and angry with Councillor Potter's refusal to assure him that the Council would approve Mr. Kerwyn's grant in time for him to attend an award ceremony. However, I do not find that Mr. Currie made any verbal or physical threats.

[83] Bear River First Nation also provided various emails in which Mr. Currie was upset and demanded various services. These emails show Mr. Currie's anger at the services he was receiving, and they are, at times, rude. However, these emails are neither threatening, nor would they objectively lead staff to conclude they would be unsafe in Mr. Currie's presence.

[84] Overall, I find that the testimony of the various events and communications between Mr. Currie and various staff did not match the submissions of Bear River First Nation on the nature of Mr. Currie's behaviour and the supposed threat he poses to the safety of the staff. There was no evidence that Mr. Currie ever touched a staff person or made threats of violence or illegal acts. Nobody testified that their physical safety was ever threatened around Mr. Currie or that Mr. Currie has any history of violence.

[85] Still, at times, such as on September 28, 2016 and in various email communications, Mr. Currie was angry and rude. If some intervention by the Band Council may have been appropriate to ensure that staff felt comfortable when interacting with Mr. Currie, in my opinion, the PPN went far beyond what would have been necessary to achieve that aim. Indeed, the ban set out in the PPN is extensive, preventing Mr. Currie from accessing the majority of public buildings, limiting his access to multiple programs and events at the Cultural Centre and Education Centre and complicating his access to social support services.

[86] It is normal and expected that, as a service provider, Bear River First Nation will have to interact with community members from time to time who will be dissatisfied with the service it provides. Because of this, I agree with Bear River First Nation that it is important that it protect its staff and ensure that there are repercussions if those receiving services cannot communicate with basic courtesy and respect, even when frustrated or dissatisfied. However, the repercussions to service recipients should be proportionate and should be the least restrictive in order to protect staff. This is especially true when the services being provided are essential or when there are no alternative service providers, which is the case for the services at issue that Bear River First Nation is providing to Mr. Currie. The Bear River First Nation's disproportionate responses to Mr. Currie's are circumstantial evidence that may allow the Tribunal to infer that, more likely than not, race was a factor in the decision to issue the PPN.

[87] Both parties provided testimony on other PPNs that Bear River First Nation issued and occasions where Bear River First Nation sent warning letters to individuals informing them that a PPN may be issued if their behaviour did not change. According to a letter dated July 28, 2021 from Bear River First Nation to the Commission and oral testimony from Ms. Payson, Bear River First Nation has only issued one other PPN to a community member. Mr. Currie testified that this individual had an extensive criminal record, including arson and attempted murder of family members. Bear River First Nation did not refute this, and Ms. Payson testified that this community member had "busted up a trailer". The July 28, 2021 letter also stated that three other community members have received warning letters cautioning them that they may be issued a PPN. According to Mr. Currie and Ms. Payson,

all three warning letters were related to violent and criminal behaviour—one involving child trafficking.

[88] According to the evidence, Bear River First Nation issued the prior PPN and warning letters in response to violent and/or criminal behaviour. Mr. Currie's behaviour, while rude and angry at times, was never violent or threatening and never presented a threat to the safety of staff or other community members. Mr. Currie has never been accused of violent or criminal behaviour. The comparison between Mr. Currie's behaviour leading to the PPN and other instances leading to a PPN (or a warning of a PPN) underlines and strengthens the finding that the issuance of the expansive PPN to Mr. Currie was disproportionate to his behaviour and what would be needed to ensure staff felt comfortable when interacting with him. Again, the disproportionate response to Mr. Currie's actions compared to other PPNs or PPN warning letters is relevant in that it may allow the Tribunal to infer that, more likely than not, race was a factor in the decision to issue the PPN.

[89] To understand the exaggerated reaction of the staff and Council to Mr. Currie's actions, we must understand the context of anti-black racism in Canadian society.

[90] When determining if, more likely than not, race was a factor in an act, the evidence must be understood within its broader social context (*Young Worker* at para 47; *Starr* at para 52). I agree with the British Columbia Human Rights Tribunal in *Young Worker* that a Human Rights Tribunal "must understand what [the] persistent patterns of inequality are and how they occur, including any beliefs, biases, and prejudices that may be at play" (at para 47).

[91] This Tribunal wrote in *Turner* at para 49 that "[r]acial stereotyping bred by social conditioning and encouraged by popular culture and the media, can affect decision-making." Canadian law has recognized again and again that anti-black racism "seep[s] into our collective psyche whether consciously or subconsciously" (*Young Worker* at para 53; see also *Bombardier* at para 1).

[92] Negative black stereotypes are present across Canadian society, subconsciously impacting decision-making among many people and institutions (*Turner* at paras 49-50). As part of Canadian society, First Nation governments and staff are not immune from such

social conditioning, and anti-black stereotypes can subconsciously impact how they treat their own Afro-Indigenous community members.

[93] Human Rights Tribunals and other courts across Canada have recognized that racialization affects Black men in particular, through stereotypes of them as physical, violent and more likely to be criminal (*Turner* at para 49; *Bageya v. Dyadem International*, 2010 HRTO 1589 at para 131, *Sinclair v. London (City)*, 2008 HRTO 48 at para 17; *Young Worker* at paras 52-58). Again, this is often without the conscious involvement of those making the decisions (*Starr* at para 54; *Young Worker* at para 53).

[94] Because discrimination is often not practiced openly, direct evidence is rarely available and, in particular, discrimination on the basis of race is frequently subtle (*Basi*; *Young Worker* at para 47 and 53; *Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)*, 2006 BCHRT 60 (CanLII) at para 28). The Tribunal often refers to this as the “subtle scent of discrimination” (*Turner* at para 48). Similarly, in the current case, Bear River First Nation made no explicit race-based comments. As such, this Tribunal must make its findings of discrimination based on all the circumstantial evidence and by inference.

[95] While certain reactions, acts or decisions may be ambiguous or explained away when viewed by themselves, viewed as part of a larger picture and with an appropriate understanding of how racial discrimination takes place, they lead to an inference that discrimination was a factor in the treatment of Mr. Currie.

[96] I do not believe that the Bear River First Nation staff thought that their reactions to their interactions with Mr. Currie were related to his race. I also do not believe that the Council considered that its decision to issue a PPN to Mr. Currie was related to his race. Nonetheless, I find that, more likely than not, when viewed as a whole, there was an unconscious bias at play when Bear River First Nation issued and administered the PPN. More specifically, the Council was impacted by the unconscious bias, which is unfortunately still prevalent in our society, that black men are dangerous, particularly when upset. While Mr. Currie was trying to express his frustration regarding services that Bear River First Nation was providing him, it came across as threatening and dangerous, even though no threats or acts of violence were ever made, nor did he have a history of such acts.

[97] In certain circumstances, Mr. Currie did not even speak, yet staff perceived him as threatening, such as in August 2018. I find that there was more likely than not unconscious bias at play in the staff's reaction.

[98] There were similar overreactions in response to certain emails from Mr. Currie to the Band Administrator. In one example, Mr. Currie was frantic as he wanted to get his water turned back on because it had been cut off in his kitchen during a repair. In the email, he asked for his water to be put back on and for certain immediate support for his family until the water was turned on. Certain parts of the email were bolded and in a larger font. The Band Administrator felt that, despite the urgency of the topic of the email, his communication was inappropriate and aggressive because of the bold text.

[99] In summary, I find that it is more probable than not that race was a factor in Bear River First Nation's decision to issue the expansive PPN based on all the circumstantial evidence, including:

- a) the PPN was too broad and out of proportion, given that Mr. Currie never did anything to reasonably make staff feel threatened or unsafe;
- b) Bear River First Nation's descriptions of the incidents with Mr. Currie do not match the evidence of those interactions presented at the hearing; and
- c) the other PPN and other warning letters issued to other community members were in response to violent incidents and violent individuals, whereas Mr. Currie has never been violent or threatened violence.

Mr. Currie's race was a factor in the adverse differentiation caused by Bear River First Nation's administration of the PPN on April 8, 2020

[100] On April 8, 2020, Mr. Currie clearly wanted to enter the Band Office to complete his forms. If he had entered the Band Office, it likely would have contravened the PPN, assuming the Protection of Property Act applies on federal reserve land. However, that is not the question before the Tribunal. What is at issue is whether race was a factor in how Bear River First Nation administered the PPN by urgently calling the police that day. For the reasons below, I find that, more likely than not, race was a factor.

[101] Mr. Currie emailed Bear River First Nation staff beforehand to inform them that he was coming to the Band Office. Although Mr. Currie did not threaten the staff, he was

obviously distressed that his social assistance was to be interrupted. Ms. Payson testified that she and other staff were upset and alarmed that Mr. Currie intended to enter the Band Office.

[102] Because of COVID, all the doors to the Band Office were locked. Given this, although the staff were alarmed, it is unclear why Ms. Payson felt that she or the staff were unsafe—Mr. Currie did not have access to the building, and no staff members were outside. Nonetheless, Bear River First Nation informed the police that the situation was urgent, which in all probability gave the impression to the police that the situation was potentially dangerous. As such, it is not unexpected that the officer would arrive expecting and ready to engage in conflict. Urgently calling the police to the scene was disproportionate and not a reasonable response to Mr. Currie informing staff by email that he wanted to come to a locked Band Office to get his forms so that his social assistance would not be interrupted.

[103] In making this urgent call, Bear River First Nation was treating Mr. Currie like a violent criminal, even though he had no history of engaging in or threatening criminal or violent behaviour. The overreaction leads me to infer that, more likely than not, once again, unconscious bias and stereotypes of black men as violent came into play in Bear River First Nation's response. Although this goes beyond what is necessary to determine the issues, I note that a more proportionate response would have been to keep the doors locked, as suggested in an email by a staff person, and to leave the forms outside in an envelope.

Finding on *prima facie* case

[104] For the reasons laid out above, I find that Mr. Currie successfully demonstrated a *prima facie* case that Bear River First Nation discriminated against him on the basis of his race in imposing and administering the PPN.

***Bona fide* justification**

[105] Bear River First Nation did not present a defence based on a *bona fide* justification under s. 15 of the CHRA for the discriminatory behaviour. As such, Mr. Currie's complaint under s. 5 of the CHRA is substantiated.

B. Did Bear River First Nation retaliate against Mr. Currie for filing a complaint with the Canadian Human Rights Commission?

[106] Mr. Currie alleges that Bear River First Nation retaliated against him because of his human rights complaint when it:

- a) delayed and denied Mr. Currie's request for social assistance in 2023;
- b) failed to protect Mr. Currie from the violent actions of his neighbour in 2020; and
- c) decided to exclude Mr. Currie from the 2020 community moose hunt.

[107] Section 14.1 of the CHRA provides that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint.

[108] To be successful in an allegation of retaliation, a complainant must make a *prima facie* case of retaliation, in much the same way as the *prima facie* case of discrimination analyzed above. As such, the complainant must provide evidence which, if believed, is complete and sufficient to justify a finding that the respondent retaliated against them (*Millbrook First Nation v. Tabor*, 2016 FC 894 at paras 26 and 62 [*Millbrook*]). To establish a *prima facie* case of retaliation, complainants are required to show that:

- a) they have made a complaint under the CHRA;
- b) they experienced adverse treatment following the filing of their complaint from the person against whom the complaint was filed or any person acting on behalf of such person; and
- c) the human rights complaint was a factor in the adverse treatment.

(*Millbrook* at para 26 and 62.)

[109] It is not necessary to demonstrate intent to discriminate in order to make a *prima facie* test of retaliation (*Tanner v. Gambler First Nation*, 2015 CHRT 19 at para 138 [*Tanner*]). As is the case for other discriminatory practices, it is sufficient to show that the human rights complaint was a factor in the decision, and not necessarily the only factor, whether based on a reasonable perception thereof or otherwise (*Millbrook* at paras 27 and 62-64).

[110] For reasons set out below, I find that two of the three retaliation allegations are substantiated. It is undeniable that Mr. Currie made a complaint under the CHRA (of which

these proceedings result). My analysis will, therefore, focus on the second and third elements of the *prima facie* case.

Response to requests for social assistance

Mr. Currie did not experience any adverse treatment in relation to the requests for social assistance

[111] On August 11, 2022, Mr. Currie emailed Ms. Payson requesting immediate social assistance. This happened to be during the Band Office's annual summer two-week closure. Ms. Payson informed Mr. Currie that it would be dealt with after staff returned to the office, which it was.

[112] In October 2023, Mr. Currie was again applying for social assistance. This time the request was made just before the Thanksgiving long weekend. He completed the paperwork and sent it via Canada Post, as required because of the PPN. Mr. Currie was hoping that staff would process the application before the long weekend, but staff informed him by email that some of the paperwork was still incomplete, which he contested. Nonetheless, he managed to submit the proper paperwork to staff before the beginning of the long weekend. However, staff only processed it after the long weekend.

[113] The email interactions show that Mr. Currie was upset at the delays and I accept that there were indeed short delays between Mr. Currie's providing the paperwork to Bear River First Nation and his receiving his social assistance cheques. However, I find the delays were not unreasonable given the summer closure of the Band Office and the long weekend. As such, I conclude that Mr. Currie did not experience adverse treatment, within the meaning of s. 14.1 of the CHRA, because of Bear River First Nation's response to his two requests for social assistance. For this reason, I find that Mr. Currie did not establish a *prima facie* case of retaliation in relation to Bear River First Nation's response to his requests for social assistance.

Response of Bear River First Nation to violent actions of Mr. Currie's neighbour

[114] On June 17, 2020, Mr. Currie's neighbour, Mr. Anthony Baker, came onto Mr. Currie's property while Mr. Currie's two sons and partner were home. According to the testimony of Mr. Kerwyn and Ms. Carter, Mr. Baker began yelling, using the "N-word", screaming for Mr. Currie to come out and yelling that he hated "Ns" and that he would kill them and their dogs. Mr. Baker was on his ATV, ripping up their yard, and went through the woods towards their dogs. Ms. Carter called Mr. Currie as well as the RCMP to come right away.

[115] When the RCMP arrived, Mr. Baker was arrested. Mr. Baker was eventually charged, and he signed an undertaking to stay away from Mr. Currie's house and family.

[116] A few months after the initial event, Mr. Baker again came onto the property and again spewed hateful, racist comments. He was again arrested.

[117] Mr. Currie, Mr. Kerwyn and Ms. Carter testified that they found these incidents terrifying and that it has had a profound impact on them ever since. The entire family is constantly fearful that Mr. Baker will show up wherever they are in the community. Ms. Carter testified that her kids were afraid to leave their home following the event, and it has been a constant torment.

Mr. Currie experienced adverse treatment in relation to Bear River First Nation's response to violent actions of his neighbour

[118] After the second time Mr. Baker come onto Mr. Currie's property, Mr. Kerwyn emailed the Band Council and the Band Administrator, Ms. Payson, asking that they take action to protect his family from Mr. Baker, a non-band member. Mr. Currie, Ms. Carter and Mr. Kerwyn all testified that they wanted a PPN issued against Mr. Baker to protect them because the undertaking Mr. Baker signed was insufficient to protect the family when they were outside their home.

[119] The day after Mr. Kerwyn sent the email, Ms. Payson responded, saying she would look into it immediately. However, there was no response after that. A year later, Mr. Kerwyn

again emailed asking for a follow-up and asking for protection from Mr. Baker. Ms. Payson responded to the email saying that the RCMP was dealing with it.

[120] Councillor Potter testified that she feels the undertaking that Mr. Baker signed was sufficient to protect Mr. Currie and his family. She also pointed to a decision to send a band employee to tell Mr. Baker's son that his father needed to behave. However, the employee that was sent was related to Mr. Baker's son. No one from the Band Council or staff spoke or wrote directly to Mr. Baker.

[121] Although the undertaking Mr. Baker signed prevents him from going on Mr. Currie's property or near the family members individually, there are no restrictions on where Mr. Baker can go in the community. Therefore, without further protections from the Council, the family has been living in fear that he will be wherever they go. Mr. Kerwyn testified that wherever he or his little brother go in the community, they first look to see if Mr. Baker is there. If he is, they immediately leave. According to Mr. Kerwyn, this has happened on multiple occasions, including cultural events, such as harvesting and Christmas celebrations, and was still ongoing at the time of the hearing.

[122] For these reasons, I find that Mr. Currie, as well as his family, experienced adverse treatment, within the meaning of s. 14.1 of the CHRA, because of Bear River First Nation's response, or lack thereof, to the violent actions of their neighbour.

Mr. Currie's human rights complaint was a factor in the adverse treatment

[123] Mr. Currie testified to his feeling that Bear River First Nation's lack of response to Mr. Baker's attacks and their family's request for protection was in retaliation and punishment for his human rights complaint.

[124] Mr. Currie said he felt that he was constantly being punished, while Bear River First Nation was protecting Mr. Baker, a non-member who is married to Ms. Payson's cousin. Related to this impression, Mr. Currie testified that, sometime before 2018, Mr. Baker went into the Band Office and threatened everyone and that the staff had him removed. No PPN or warning letter was issued in response. Ms. Payson said she was unaware of this incident.

[125] I find that Mr. Currie reasonably perceived that the lack of response from the Council and staff to the actions of Mr. Baker was in retaliation for his human rights complaint. Councillor Potter testified that she considered the role of the Band Council is to make governance decisions in the best interest of all band members. While the Council acted quickly in response to any incident between staff and Mr. Currie, they refused to provide similar protection to an entire family that had been subjected to multiple racist and criminal acts.

[126] Councillor Potter testified that she could not remember that Mr. Baker had returned to the Currie property a second time, even though Mr. Kerwyn informed her of the event by email, implying a lack of care for that family compared to other families or staff. While Ms. Payson was distressed during her testimony because she said that she couldn't protect the receptionist in August 2018 (when—the evidence showed—Mr. Currie did not speak to the receptionist), she showed no similar concern or need to respond to the racist attacks against the Currie family and the family's fear when going around the community.

[127] I am satisfied that Mr. Currie's complaint was a factor in the adverse treatment he experienced.

[128] For these reasons, I find that Mr. Currie has established a *prima facie* case of retaliation in relation to Bear River First Nation's response to the violent actions of Mr. Currie's neighbour. This retaliation allegation is therefore substantiated.

Exclusion of Mr. Currie from the community moose hunt

Mr. Currie experienced adverse treatment in relation to the community moose hunt

[129] In early September 2020, a community moose hunt was announced. Those who wished to attend were told to confirm their attendance with the Band Administrator. In response, Mr. Currie emailed Ms. Payson to inform her that he would like to attend. Mr. Currie testified that, because of his health, he isn't always well enough to hunt. However, at this particular time, Mr. Currie was feeling well enough and was excited to attend. Ms. Payson responded that he would be added to the list of attendees.

[130] Around ten days later, however, Mr. Currie received a letter saying that the Council would no longer support his involvement in the community moose hunt. The letter, as well as testimony of Ms. Payson and Councillor Potter, confirmed that this decision was largely due to the April 20, 2020, incident described above. Councillor Potter testified that the Council wanted to ensure that the community moose hunt was carried out in a respectful way because during the hunt there would be a ceremony to honour the life of a respected community member who had passed. Ms. Payson admitted that there had been no request from the family of the deceased community member to exclude Mr. Currie from the hunt.

[131] I find that Mr. Currie experienced adverse treatment in relation to his exclusion from the community moose hunt. Mr. Currie and his sons were disappointed and saddened by the letter and could not understand why they could not attend their own community's moose hunt. One of his son's said to him "What did I do wrong?" Mr. Currie was particularly upset that he could not attend the important cultural event because he was seldom well enough to hunt. Bear River First Nation argued that Mr. Currie could have gone hunting on his own that day because he has a treaty right to hunt. However, by Council refusing to support his involvement in the community hunt that it organized, Mr. Currie reasonably felt that he could not attend this important cultural and community event.

Mr. Currie's human rights complaint was a factor in his exclusion from the community moose hunt

[132] Mr. Currie testified that he felt the Council's decision to not support his involvement in the hunt was in retaliation for his human rights complaint. I find this to be a reasonable perception. There had never been any reported incidents between Mr. Currie and non-staff community members. All incidents raised at the hearing were with staff or Council in relation to the provision of specific services. There was no reasonable reason to believe Mr. Currie would negatively interrupt the hunt or ceremony.

[133] I am satisfied that Mr. Currie's complaint was a factor in the adverse treatment he experienced because of Bear River First Nation's withdrawal of its support for Mr. Currie's attendance at the community moose hunt.

[134] For all these reasons, I find that Mr. Currie has established a *prima facie* case of retaliation in relation to Bear River First Nation's withdrawal of its support for Mr. Currie's attendance at the community hunt. This retaliation complaint is therefore substantiated.

VI. REMEDIES

[135] Having found the complaint of Mr. Currie to be substantiated in part, I now turn to remedies.

[136] The remedial authority of the Tribunal is set out in s. 53 of the CHRA. The Tribunal has a quasi-constitutional nature. The Tribunal's remedial powers must be interpreted purposively to promote the CHRA's objectives. The aim of making orders under s. 53 is not to punish Bear River First Nation, but to meaningfully vindicate any losses that the victim of discrimination suffered and to eliminate and prevent future discrimination (*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 10 (CanLII) at para 14; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC) at para 13; *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC) at p. 1134).

[137] With these purposes and objectives in mind, I review Mr. Currie's requested remedies.

A. Cease Discrimination

[138] To begin, I find it appropriate to order Bear River First Nation, pursuant to s. 53(2)(a) of the CHRA, to cease discriminating against Mr. Currie. Such a remedy is necessary to vindicate Mr. Currie's rights and promote the provision of services by Bear River First Nation free of racial discrimination. This means that any future issuance or administration of a PPN or any other type of prohibitive order against Mr. Currie must be done in a non-discriminatory manner by both the Council and the staff that administer such orders.

B. Access to Public Buildings

[139] Mr. Currie has requested that the Tribunal overturn the current PPN, given that race was a factor in its issuance. However, making an order to overturn a notice, such as the PPN, made under provincial legislation goes beyond the jurisdiction of this Tribunal recognized in the CHRA (*Shmuir v. Carnival Cruise Lines*, 2009 CHRT 39 at paras 9 and 11).

[140] Nonetheless, s. 53(2)(b) provides the Tribunal broad discretion to make orders to “make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.” Given this authority granted to the Tribunal and given the objective of CHRA remedies to eliminate and prevent future discrimination as much as possible, I am ordering Bear River First Nation to remove any obstacles to Mr. Currie benefitting from any of those opportunities that have been denied Mr. Currie as a result of Bear River First Nation’s discriminatory practices. More specifically, this would mean removing any obstacles to Mr. Currie accessing the Band Office, the Gas Bar, the Cultural Centre and the Education Centre.

C. Monetary losses in relation to the prohibition to attend the Gas Bar

[141] Section 53(2)(d) of the CHRA allows the Tribunal to order a respondent to compensate a victim for “all additional costs of obtaining alternative goods.” Relevant to this provision is Mr. Currie’s request that Bear River First Nation compensate him for the extra costs he assumed because he was not allowed to access tax-free gas and goods at the Gas Bar because of the discriminatory PPN. Bear River First Nation argued that he could travel one hour to the nearest reserve if he wanted tax-free gas or he could have family members fill up his car. I find this unreasonable. To properly vindicate Mr. Currie’s rights, Bear River First Nation should be required to compensate Mr. Currie for the extra costs he incurred because of the discriminatory decision to not allow him to attend the Gas Bar.

[142] Mr. Currie provided photos of his gas receipts to demonstrate the extra costs he incurred in taxes. Unfortunately, the quality of the photos did not allow me to see the details

of the receipts to determine the amount of taxes that Mr. Currie paid. To provide Mr. Currie a fair opportunity to be compensated for these losses, following the end of the hearing, the Tribunal provided Mr. Currie an opportunity to resubmit copies of the same receipts in a more legible format. In response, Mr. Currie submitted four receipts to the Tribunal. Unfortunately, those receipts were not among those he had originally submitted to the Respondent and the Tribunal, and it would be unfair to the Respondent to consider the newly submitted receipts. Therefore, the Tribunal is unable to award any remedy to compensate Mr. Currie for monetary losses he incurred because of his lack of access to the Gas Bar.

D. Lost wages

[143] Mr. Currie also requests compensation for lost wages resulting from the discriminatory behaviour. The Tribunal can compensate a victim of discrimination for some or all of the wages that the victim was deprived of as a result of the discriminatory practice (s. 53(2)(c) of the CHRA).

[144] Unfortunately, Mr. Currie did not provide sufficient evidence on lost wages at the hearing to be able to reasonably calculate how much income Mr. Currie would have received but for the discrimination and, therefore, what his actual loss was. A compensation order for lost wages requires a sufficient factual record to be able to calculate loss. This would be through evidence demonstrating how much Mr. Currie earned during the relevant period, what he *would* have earned but for the discrimination, and what efforts he has made to mitigate the loss.

[145] Mr. Currie testified to certain job opportunities he was ineligible for because they would have required Mr. Currie to enter facilities included in the PPN and the approximate hourly wage of those jobs. He also provided evidence of a job application he submitted. However, there was no evidence of the actual income Mr. Currie earned during this period. It is essential for Mr. Currie to provide the Tribunal some evidence on income earned during the relevant period in order to compare it to the amount Mr. Currie *could* have earned but for the discrimination. Therefore, without a sufficient factual record, it is impossible for the Tribunal to calculate the income loss that Mr. Currie suffered.

E. Pain and suffering

[146] The Tribunal may make an award for the respondent to “compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice” (s. 53(2)(e) of the CHRA). The maximum amount of \$20,000 is reserved for the very worst cases or the most egregious of circumstances (*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 at para 115; *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36 at para 213).

[147] In *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 (CanLII) at para 105 [*Christoforou*], this Tribunal found the following two criteria a useful framework to apply to an analysis under s. 53(2)(e) of the CHRA to evaluate the appropriate compensation for injury to dignity, feelings and self-respect:

- a) The objective seriousness of the conduct; and
- b) The effect on the particular applicant who experienced discrimination.

[148] Mr. Currie testified to the impacts the PPN has had on his mental, physical and emotional health. He stated “If you saw where I was in 2018, prior to the PPN, I was much healthier. My value of life was very different.” Mr. Currie now relies on at least nine medications a day. He estimates that his quality of life is not a quarter of what it was due to his pain and suffering resulting from the discriminatory behaviour.

[149] Mr. Currie explained how his whole family has suffered in the wake of Bear River First Nation’s discrimination. Mr. Currie and his family have felt a loss in connection to their community and their culture resulting from the prohibition to attend cultural events at the Cultural Centre. Mr. Currie and his family feel that they are seen as lesser community members because they are black and unwelcome. Mr. Currie also spoke of the constant fear he and his family feel that Mr. Baker will be at community events. Mr. Currie’s children suffer from seeing how the Bear River First Nation has treated their father, and they fear that it will treat them the same way. Mr. Currie testified that these are long-lasting impacts that will stay with him and his family for years to come, impacting their feeling of belonging and connection to their community and culture.

[150] Some specific community events that Mr. Currie has not been allowed to attend for the past five years include:

- a) School graduations. Most importantly, he was not able to attend his son's high school graduation;
- b) The annual Christmas events. His children went to the community's Christmas celebrations with their grandmother for the first couple years that the PPN was in force. They now refuse to go because their dad can't go;
- c) Elder appreciation events held to honour elders;
- d) Various cultural courses; and
- e) Harvest festival events.

[151] There were also several job opportunities that Mr. Currie could not apply for or get because they required him to be able to access certain public buildings.

[152] As described above, Mr. Currie was required to communicate all service requests through the Ms. Payson and to send all documents back and forth through Canada Post. This has caused confusion, frustration, delays and, in some cases (as described above), interruption to his social assistance payments.

[153] Mr. Currie relies completely on Bear River First Nation, the Council and staff for many of his needs, including financial needs. Many or most provincial programs and services are not directly available to those living on reserve. He discussed the frustration and suffering he has experienced because he has nowhere else to go to access many of these essential services.

[154] Bear River First Nation is a very small community with only a little over 100 people living on the reserve. The broad PPN effectively banned Mr. Currie from accessing most or all public buildings and infrastructure, except for the Health Centre. It should be noted that the PPN in force for Mr. Currie is fundamentally different than most PPNs that would be issued outside of reserve land, such as a PPN barring entry to a gas station or specific public buildings in a large town. Mr. Currie has nowhere else to go within his own First Nation. This has deepened the impacts of the PPN on Mr. Currie, as has the long period of time that it has been in force (over five years).

[155] For Mr. Currie, the PPN significantly impacts his sense of identity, his connection to his culture, his sense of belonging within his own First Nation and his feeling of being

supported by his own government. It also significantly impacts his ability to access programs, take on jobs within the community and purchase tax-free gas. The PPN has also impacted his mental health, his physical health and his sense of wellbeing. It also has had significant impacts on his children. And all of this for over five years.

[156] Considering all the above, I find the objective conduct of Bear River First Nation to be very serious, and the effect of the discrimination on Mr. Currie has been enormous. Taking the above into account, I believe an award of \$15,000 is appropriate for the pain and suffering Mr. Currie endured as a result of Bear River First Nation's discrimination.

[157] Similarly, the circumstances surrounding the retaliation complaint further contributed to Mr. Currie's suffering. In particular, the lack of response following the serious racist attacks against Mr. Currie and his family has resulted in Mr. Currie and his family being fearful when they go around the community, making them feel rejected and that the Council does not care about their wellbeing and safety because of their race. I award \$1,000 as compensation for the pain and suffering the Complainant endured as a result of each instance of retaliation by Bear River First Nation.

F. Wilful and Reckless Conduct

[158] Section 53(3) of the CHRA allows the Tribunal to make an award for the respondent to "pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly." Section 53(3) is a punitive provision meant to provide a deterrent and discourage deliberate, wilful or reckless discrimination. The maximum award is reserved for the very worst cases (*Tanner* at paras 171-172).

[159] Recklessness denotes acts that disregard or show indifference to the consequences, such that the conduct is done wantonly or needlessly. A finding of recklessness does not require proof of intention to discriminate (*Christoforou* at para 107).

[160] A finding of wilfulness, on the other hand, requires an *intention* to discriminate and to infringe a person's rights under the CHRA (*Christoforou* at para 107).

[161] I do not find that Bear River First Nation engaged in wilful misconduct. Although Bear River First Nation's reactions to Mr. Currie's conduct were disproportionate and the PPN was too broad to achieve its stated purpose, I do not find that there was a conscious intent to discriminate based on race. As discussed above, this is a case of unconscious bias resulting in the perception that Mr. Currie was overly aggressive and dangerous, despite the lack of evidence to support such positions.

[162] I do, however, find that the discrimination was reckless.

[163] As mentioned above, at times, including in various email communications, Mr. Currie was upset and frustrated with the services he was receiving, which impacted staff. As such, a response or follow-up from Bear River First Nation to Mr. Currie to promote courteous and improved relations with staff may have been appropriate. However, nothing in the evidence showed that other interventions were tried before moving to the almost total ban to enter public buildings.

[164] Some alternatives that the Council could have considered to deal with Mr. Currie's behaviour include:

- a) The PPN could have been limited in time;
- b) The PPN could have been limited to the Band Office,
- c) The order could have been limited to requiring Mr. Currie to only communicate with the Band Administrator regarding services;
- d) An order could have been made to require a family member of Mr. Currie to always accompany him when entering the Band Office;
- e) An order could have been made to require that all in-person interactions be recorded to ensure everyone is on their best behaviour; or
- f) Council could have suggested mediation or another culturally relevant approach to dispute resolution to improve relations.

[165] Mr. Currie is part of the Bear River First Nation community and has nowhere else to go. Interactions between him and staff and the Council will necessarily continue for the years and decades to come. An approach that focuses on dispute resolution and improved relationships would best serve everyone—Mr. Currie and his family, Band Council and staff, and even other members of the small First Nation, who also suffer when there is significant conflict in the community.

[166] Despite several other options that the Council could have considered, Bear River First Nation tried no other approach except a complete prohibition to all public buildings where there are band staff, with the exception of the Health Centre. This is reckless behaviour, which had and continues to have enormous negative impacts on Mr. Currie and his family. It also did nothing to improve relationships between Mr. Currie and staff—frustration and animosity seem to have only increased on both sides.

[167] The PPN has now been in place for over five years. This is an extremely long time to prohibit a community member from entering so much of the essential band infrastructure. Since the April 2020 incident, there have been no further incidents that Bear River First Nation testified to, apart from some frustrated email communications. In December 2020, Bear River First Nation was mistakenly informed that Mr. Currie attended the Gas Bar. Bear River First Nation followed up with a letter informing Mr. Currie that he had violated the PPN and threatened to go to the RCMP if it happened again. The letter also stated that the PPN would not be lifted until he could demonstrate compliance. The Bear River First Nation then found out that there had been a mistake, and it was, in fact, Mr. Currie's brother that attended the Gas Bar. Once Bear River First Nation was informed of the error, there was no letter of apology or decision to change the conditions of the PPN. To this day, the PPN is still in place. Not only is the broad nature of the PPN disproportionate, the long period of time it has been in place is also disproportionate and extreme.

[168] Taking all the above into consideration, I award \$8,000 in special compensation to Mr. Currie.

[169] For the retaliation complaint related to the response to Mr. Baker's actions, I find the inaction of the Council in the face of a serious threat is particularly egregious. Although Mr. Baker signed an undertaking to not go near the Currie house or members of the Currie family, he was allowed to go to all community events and public buildings. Members of the Currie family reached out to the Council multiple times asking for support to protect them from Mr. Baker. The Council either provided no response or a response indicating that it would do nothing. The Council states that a PPN is needed to protect staff from Mr. Currie. But the Council has not shown similar concern in the face of serious racist attacks against

the Currie family. Accordingly, I award \$5,000 as special compensation for this retaliation allegation.

G. Public Interest Remedies

[170] Section 53(2)(a) of the CHRA allows this Tribunal to order the respondent to “take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same.”

[171] Bear River First Nation noted during the hearing that they have no policy to guide the issuance or administration of PPNs or related measures and options. I believe a well-thought-out policy in this regard would support the Council in the future on when and how to issue a PPN and to ensure it is proportionate, reasoned and non-discriminatory. The policy could cover things such as when a PPN can be issued, what is a reasonable tiered approach depending on the circumstances, how long a PPN can be in force, the right for the individual to be heard before the PPN is issued, a clear avenue for appeal and other topics. The Commission is able to provide support to ensure policies, such as the one discussed here, are non-discriminatory and support non-discriminatory decision-making. As such, I find it appropriate to order Bear River First Nation to work with the Commission to craft a policy to support the non-discriminatory issuance and administration of PPNs and similar measures and orders in the future.

VII. ORDER

[172] Given that the Tribunal finds the complaint partially substantiated, the Tribunal makes the following orders and declarations:

- a) DECLARES that Bear River First Nation discriminated against Mr. Currie on the prohibited ground of race in the provision of services, pursuant to s. 5 of the CHRA, through the imposition and administration of the PPN;
- b) DECLARES that by refusing to support Mr. Currie’s attendance at the community moose hunt in September 2020, Bear River First Nation retaliated against Mr. Currie, pursuant to s. 14.1 of the CHRA;

- c) DECLARES that by refusing to take any action to protect Mr. Currie following the racist attacks of his neighbour, Bear River First Nation retaliated against Mr. Currie, pursuant to s. 14.1 of the CHRA;
- d) ORDERS that Bear River First Nation cease its discrimination against Mr. Currie, pursuant to s. 53(2)(a) of the CHRA;
- e) ORDERS Bear River First Nation to remove any obstacles to Mr. Currie entering and attending activities in the Band Office, the Cultural Centre, the Educational Centre and the Gas Bar, pursuant to s. 53(2)(b) of the CHRA;
- f) ORDERS Bear River First Nation to pay Mr. Currie, within 60 days, \$15,000 in compensation for the pain and suffering he experienced as a result of the discrimination, pursuant to s. 53(2)(e) of the CHRA;
- g) ORDERS Bear River First Nation to pay Mr. Currie, within 60 days, \$2,000 in compensation for the pain and suffering he experienced as a result of the retaliations by Bear River First Nation, pursuant to s. 53(2)(e) of the CHRA;
- h) ORDERS Bear River First Nation to pay Mr. Currie, within 60 days, \$8,000 as compensation for its reckless discrimination against him pursuant to s. 53(3) of the CHRA;
- i) ORDERS Bear River First Nation to pay Mr. Currie, within 60 days, \$5,000 as compensation for the reckless retaliation by Bear River First Nation against him, pursuant to s. 53(3) of the CHRA;
- j) ORDERS Bear River First Nation, within one year, to put into place a policy to guide the issuance and enforcement of PPNs and related orders in consultation with the Commission, pursuant to s. 53(2)(a) of the CHRA.

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
May 14, 2024

Canadian Human Rights Tribunal

Parties of Record

File Nos.: HR-DP-2806-22 & HR-DP-2953-23

Style of Cause: Matthew Currie v. Bear River First Nation

Decision of the Tribunal Dated: May 14, 2024

Date and Place of Hearing: January 16 to 19, 2024

By videoconference

Appearances:

Matthew Currie, Self-represented

Ian Pickard and Nikita Samson, for the Respondent