Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 55
Date: November 28, 2023
File Nos.: T2697/7321; T2698/7421; T2699/7521; T2716/9221; T2717/9321

Between:

Gordon Lock, Deborah Senger, Harold Lock, Carol Raymond and Neil Peters

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Peters First Nation

Respondent

Decision

Member: Catherine Fagan

Table of Contents

I. Overview

[1] The Complainants in this case, Gordon Lock, Deborah Senger, Harold Lock, Carol Raymond and Neil Peters, allege that Peters First Nation, the Respondent, discriminated against them when processing their membership requests on the grounds of race, national or ethnic origin, marital status and family status contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA).

[2] Common to all these complaints is the allegation of denial of membership, access to membership or the removal of membership in the Peters First Nation on discriminatory grounds. Due to the discriminatory provisions of the *Indian Act,* R.S.C. 1985 c.I-5 (the "Indian Act") prior to 1985, all the Complainants previously lost their Indian status or right to status and, with it, their rights to membership in Peters First Nation, either because their parents were enfranchised, their mother married a non-Indian, or they themselves married a non-Indian. They all gained or regained their Indian status and related membership rights as a result of *An Act to Amend the Indian Act,* SC 1985, c 27 (Bill C-31). Peters First Nation has refused to recognize the Complainants as members. There is nothing in the Peters First Nation Membership Code (the "Membership Code") that would appear to deny the Complainants entitlement to membership. Peters First Nation, however, has offered a wide range of reasons as to why the Complainants are not and cannot be members. Accordingly, these complaints are analysed through the lens of Peters First Nation's processing of the Complainants' membership applications.

[3] Prior to 1985, the Indian Act institutionalized sex-based discrimination by only recognizing that status could be passed paternally. Women who married non-Indian men would lose their status and so would their children. The Indian Act at the time also included various enfranchisement provisions that allowed status Indians to cease being Indians in exchange for various incentives. These provisions were part of the long-held strategy of the federal government to reduce the number of status Indians in the hopes that, overtime, Canada would be rid of its "Indian problem".

[4] These provisions were widely regarded as discriminatory, and, after the enactment of section 15 of the *Canadian Charter of Rights and Freedoms*, Bill C-31 was introduced

and passed to amend the Indian Act to (at least partially) remedy the discriminatory impacts of these provisions.

[5] Bill C-31 eliminated the enfranchisement provisions and allowed Indians who had lost their status due to enfranchisement, as well as women and their children who had lost their status because of marriage to a non-Indian, to be reinstated as status Indians.

[6] In *Andrews et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 21 at paragraphs 1 to 6, this Tribunal provides an overview of the historical context of the enfranchisement provisions as well as the harmful and traumatizing impacts they had on those affected as well as their families and communities.

[7] Peters First Nation is a band pursuant to the Indian Act, and its members identify as Sto:lo. It has three reserves all located in the vicinity of Hope, British Columbia. Peters First Nation currently has approximately 73 listed members, somewhere between 35 and 43 of whom live on reserve. Indigenous Services Canada recognizes approximately 175 status Indians affiliated with Peters First Nation. Being recognized by Canada as an affiliate with Peters First Nation does not equate to recognized membership because, as explained below, membership is controlled directly by Peters First Nation.

[8] This case is one of a series of legal fights by individuals claiming that they have been illegally denied membership in Peters First Nation. To date, it has resulted in at least three separate judicial reviews, two appeals to the Federal Court of Appeal and one application for leave to appeal to the Supreme Court of Canada *(Peters v. Peters First Nation Band,* 2018 FC 544 (CanLII); *Peters First Nation v. Peters*, 2019 FCA 197; *Engstrom v. Peters First Nation*, 2020 FC 286; *Peters First Nation v. Engstrom*, 2021 FCA 243; *Peters v. Peters First Nation*, 2023 FC 399; *Peters v. Peters First Nation,* August 25, 2023 (re costs)).

[9] Like the present complaints, these cases concern individuals who were denied membership on the basis of age and other discretionary criteria not mentioned in the Membership Code. Peters First Nation has repeatedly lost these applications and appeals, and the Federal Court has repeatedly found that the Council has acted in bad faith in processing membership requests. There is also another complaint before this Tribunal

against Peters First Nation that also concerns allegations of discrimination in the processing of membership applications. That complaint is not yet at the hearing phase.

[10] Given the frequency of certain family names within Peters First Nation, I will respectfully use first names for the remainder of this decision to avoid confusion.

II. Summary of Decision

[11] The Tribunal finds the complaints of Gordon, Deborah, Neil and Carol are substantiated.

[12] The Complainants are not directly challenging the Membership Code. Instead, they are challenging the discretionary and discriminatory way membership requests are being processed, which is a service within section 5 of the CHRA.

[13] Carol and Neil submitted multiple membership applications. In processing these requests, Peters First Nation added in criteria, requirements, complexities and barriers not found in its Membership Code. Neither Gordon nor Deborah submitted paper membership applications. However, Peters First Nation told them not to apply and required them to complete an unnecessarily complex application process, both of which were done in the provision of a service.

[14] The Tribunal does not decide whether removing Harold and Deborah from the membership list in 1987 was discriminatory, as the events were too old to fall within the scope of the complaints. Given the absence of other potentially adverse treatment for Harold within the scope of his complaint, Harold's case was not successful.

[15] Peters First Nation admitted that it considered Carol's and Neil's age when processing and denying their membership applications. Age was also a reason Deborah and Gordon were told not to apply by Peters First Nation.

[16] Family status was a factor in how Peters First Nation processed Gordon's, Deborah's, Carol's and Neil's applications. For Carol, her parents' divorce was a factor. For Neil, his parents' enfranchisement was a factor. For Deborah and Gordon, their father's lack

of Indian status was a factor. These reasons all constitute discrimination based on family status.

[17] Peters First Nation did not provide sufficient evidence that it has a customary law or legal tradition to restrict membership applications to those 17 years of age or younger within the meaning of section 1.2 of the *Act to Amend the Canadian Human Rights Act*, SC 2008, c 30. Section 1.2 is an interpretive provision that requires the Tribunal to give due regard to a First Nation's legal traditions and customary laws when interpreting and applying the provisions of the CHRA.

[18] Peters First Nation did not demonstrate a *bona fide* justification for its discriminatory conduct. Peters First Nation argued that its discriminatory conduct was tied to protecting its cultural values and community cohesiveness. However, its conduct was not in good faith, and it failed to show that excluding the Complainants from the membership list protected the community and its cultural values.

[19] The Tribunal orders Peters First Nation to stop discriminating in processing membership requests for the Complainants and all other present and future applicants. It also orders that the Complainants' membership requests be reconsidered within 30 days. Gordon, Deborah, Carol and Neil are each awarded $12,500 for the pain and suffering they experienced as a result of the discrimination and $20,000 as compensation for Peters First Nation's willful and reckless discrimination, which was so egregious that the highest amount permitted under the CHRA is justified.

[20] On a balance of probabilities, the evidence shows that the Complainants would have been members but for the discrimination. Therefore, Peters First Nation is ordered to pay Gordon, Deborah, Carol and Neil certain amounts that other members received during this period.

III. Issues

1. Have the Complainants established a prima facie case that Peters First Nation discriminated against them in the provision of membership-related services contrary to section 5 of the CHRA? This question requires answering the following questions:

    a. Do Peters First Nation's actions in relation to membership requests constitute a service?
    b. Have the Complainants been treated adversely in the processing of membership requests or been denied the processing of their membership requests?
    c. If yes, have the Complainants demonstrated on a balance of probabilities that their age, race, national or ethnic origin, marital status or family status were a factor in the processing of their membership requests?

2. If the prima facie case is established, has Peters First Nation proven a bona fide justification for its conduct pursuant to section 15(1) or section 15(2) of the CHRA? More specifically, has Peters First Nation demonstrated that:

    a. the specific objective (community cohesion and maintaining cultural values) is rationally connected to a general objective of the Council;
    b. Peters First Nation adopted the discretionary standards for the processing of membership requests in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
    c. the standards are reasonably necessary to accomplish its purpose or goal, in the sense that Peters First Nation cannot accommodate persons with the characteristics of the Complainants without incurring undue hardship.

3. Related to this analysis is whether the age requirement imposed on the membership applications of the Complainants is a customary law or legal tradition of Peters First Nation as per section 1.2 of the *Act to Amend the Canadian Human Rights Act*. If so, how does this determination impact the analysis of the above issues?

4. If this Tribunal makes a finding of discrimination, what remedies should be ordered under section 53 of the CHRA? The determination of remedies requires answering the following questions:

    a. Should Peters First Nation be ordered to cease its discriminatory conduct in its processing of membership applications?
    b. Should Peters First Nation be ordered to cease discriminating against each of the Complainants?
    c. Should Peters First Nation be ordered to reprocess each of the Complainants' membership applications?
    d. Should Peters First Nation be ordered to make available membership opportunities and privileges to the Complainants that have been denied,

including compensation for the Trans Mountain Pipeline and the Seabird Island Band land settlement disbursements?

e. Should each of the Complainants be entitled to compensation for pain and suffering?
f. Should each of the Complainants be entitled to compensation for the willful and reckless discrimination of Peters First Nation?

IV. Peters First Nation Membership Code

[21] Before addressing the core issues in the case, it is useful to provide an overview of the current Membership Code and the context around its implementation.

[22] In 1985, Bill C-31 added a new section 10 to the Indian Act. The new section 10 allowed First Nations to control their membership lists for the first time since the enactment of the Indian Act, subject to certain requirements set out in section 10. Given the relevance of this section to these proceedings, I have included sections 10(1) to (5) below:

> 10 (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.
>
> (2) A band may, pursuant to the consent of a majority of the electors of the band,
>
> > (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
> >
> > (b) provide for a mechanism for reviewing decisions on membership.
>
> (3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.
>
> (4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

> (5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.
>
> […]
>
> [emphasis added]

[23] Sections 10(4) and (5) prevent First Nations from applying their membership rules retroactively for the purpose of denying individuals the right to membership when they are already on the membership list or are entitled to be on the membership list. In addition, section 10(10) requires that any additions or deletions to the membership list be in accordance with the First Nation's membership rules that were approved by the community.

[24] Following the addition of section 10 to the Indian Act, Peters First Nation members and the Council began discussing taking control over their membership list. Following these discussions, Peters First Nation gave notice to the Minister that it was assuming control of its membership and adopted interim membership rules on June 25, 1987. On September 18, 1987, the Minister confirmed that Peters First Nation assumed control over its membership pursuant to section 10(7) of the Indian Act effective June 25, 1987. The Minister's correspondence also noted that Peters First Nation's membership rules could not deprive a person of membership if they had acquired that right before it assumed control over membership.

[25] Before Peters First Nation took control over its membership list, once a person gained or regained Indian status, Canada would automatically register them as a member of Peters First Nation, if Peters was the First Nation they were connected with.

[26] Peters First Nation adopted a final membership code entitled the "Peters Indian Band Membership Code" on March 9, 1990. For clarity, at the time the Membership Code came into force, Peters First Nation was referred to as the Peters Indian Band. There are no substantive differences between the interim membership rules and the final Membership Code. This Membership Code has not been amended and remains in effect today.

[27] Part III of the Membership Code prescribes the following membership criteria:

> "1. Membership in the Peters Indian Band shall consist of the following persons
>
> > a) Everyone whose name appeared on the Band List on April 17, 1985;
> >
> > b) Everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 2 of the *Indian Act*, as amended, by the date the Membership Code is adopted by the Band;
> >
> > c) Everyone who became entitled to have his or her name registered on the Peters Indian Band List in accordance with Section 6 paragraph 1 (f) of the *Indian Act*, as emended (sic), by the date the Membership Code is adopted by the Band;
> >
> > d) Everyone who is granted Band Membership Status pursuant to part IV and V of this Membership Code;
> >
> > e) Everyone who is a natural child of a parent whose name is registered on the Band List."

[28] Part IV of the Membership Code outlines the procedure to apply for membership. Sections 3 and 4 of Part IV require the Council to deal with all applications as expeditiously as possible, and, in any event, all applications must be decided within 30 days.

[29] Part V of the Membership Code outlines an appeal process following a decision to deny membership. An applicant who has been denied membership can appeal to the electors of Peters First Nation and the electors must make a decision within 60 days.

[30] Part VI of the Membership Code prescribes how membership status may be lost. The Council can challenge the membership status of a member pursuant to the terms of the Membership Code. If such a challenge is made, the member must be notified in writing, and the member can apply for a review of that challenge to the electors of Peters First Nation.

[31] In the early 1990s, Peters First Nation decided to stop accepting applications for membership from Bill C-31 applicants. As noted in a 1993 Council document on Bill C-31, the Council was aware such a policy was contrary to the Membership Code:

> In June 1985, through Bill C-31, the amendment to the Indian Act resulted in certain individuals being eligible to regain their Indian status or to become first time registrants [...]
>
> Presently there are at least 25 prospective individuals who have historical family affiliation with this band and are requesting membership and demanding the benefits of those enjoyed by current on-reserve members. These demands for membership and benefits are putting a strain on available resources. Presently the council in order to balance the current on-reserve land holding and the expectations of those wishing residence, have reluctantly adopted not to accept applications for membership contrary to the Band's current Membership Code.
>
> [emphasis added]

[32] Witnesses for Peters First Nation were uncertain or vague about whether this policy of not accepting applications from Bill C-31 applicants continues.

V. Circumstances of Each Complainant

A. Gordon Lock, Deborah Senger and Harold Lock

[33] Gordon, Deborah and Harold are siblings. Their mother was a member of Peters First Nation, as were both of their mother's parents. Their mother lived on the Peters First Nation reserve all through her childhood.

[34] Their mother's first marriage was to a non-Indian. There were three children from this marriage: Harold, Gordon and Linda Locke. Linda is the only sibling recognized by Peters First Nation as a member.

[35] Their mother's second marriage was also to a non-Indian. There were three children from this marriage as well: Deborah, Donald Senger, and William Senger. None of the Sengers are recognized by Peters First Nation as members.

[36] As a result of their mother's first marriage, she was enfranchised and lost her status and membership, as did her children. After Bill C-31, Gordon, Deborah and Harold received their Indian status, as did their mother.

[37] Growing up, Deborah, Gordon and Harold all testified that they spent their summers and special holidays on the Peters First Nation reserve. They would stay with their grandmother, visit their extended family and play with their cousins. They all spoke of the importance of their grandmother in their lives. She taught them basket weaving, tying nets, sewing, crocheting, digging roots and preparing salmon. She also told them stories and taught them life lessons, including respect for nature and the importance of saying a prayer before harvesting a tree. Gordon testified how he felt that his grandmother was one of the only people in his whole life who really accepted him.

[38] In their adult years, all three spent less time on Peters First Nation's reserve, particularly after their grandmother passed away, and had few close relatives on reserve. They all discussed how, particularly in recent years, they visited less and were made to feel unwelcome. Deborah, Gordon and Harold also noted how the escalating disputes in the community made it difficult to be there, even if they were not physically prevented from entering the community.

(i) Gordon Lock

[39] Gordon was born in 1956. He is currently not employed due to illness but previously worked as an elder in correctional services where he provided counselling and taught traditional Indigenous cultural practices.

[40] Shortly after the adoption of Bill C-31 in April 1985, Gordon regained status. Although the date is not clear, I accept that Gordon gained Indian status prior to Peters First Nation taking control of its membership list in 1987.

[41] After Gordon's status was reinstated, he assumed he was a member. He found out within a few years, however, that he had to apply separately for membership. In the late 1980s and early 1990s, he had several conversations and phone calls with various Chiefs

and Councillors about how he wanted to gain membership. During these discussions, the Chief or Councillor told him he would not get membership and did not belong to the Band.

[42] Gordon's latest inquiry about membership was in or about 2014 when he spoke with Councillor Victoria Peters over the phone. Councillor Victoria Peters told him that they were not taking membership applications, that he had never been on the membership list, and that his Bill C-31 status had no bearing on his eligibility for membership with Peters First Nation.

[43] Given his discussions with Chief and Council over the years, Gordon assumed his membership application would be unsuccessful. Therefore, Gordon has never submitted an application for membership with the Peters First Nation.

[44] However, despite being told not to apply, Gordon and his sister Deborah attempted to complete the formal application process in 2021. But the application form they were required to fill out proved too onerous for them to complete and required them to provide difficult to acquire documentation, such as death certificates for their long-deceased grandparents.

[45] Gordon, like his siblings, discussed the emotional hardship of being excluded from membership. He described feeling broken-hearted about his loss of connection with his home. He described how important membership to Peters First Nation is to his identity and his sense of belonging. The denial of membership has impaired him in a lot of ways. He explained that he longs for acceptance from his community. The lack of acceptance has prevented him from "going inside himself... to move beyond this grief, move beyond this loneliness, and move beyond this not fitting in."

(ii) Deborah Senger

[46] Deborah was born in 1964. Deborah is currently on disability due to progressive multiple sclerosis. She previously worked with Indigenous children with disabilities.

[47] Deborah, as well as her brother Harold, were on the Peters First Nation membership list maintained by Canada in 1987, at the time that Peters First Nation took control of its

membership, having been added pursuant to section 11(2) of the Indian Act. The parties are unsure why Deborah and Harold's brother, Gordon, was also not on this list.

[48] In November 1987, however, Chief Frank Peters sought to remove Deborah and Harold from the membership list. As set out in the letter he wrote to Indian Affairs at the time, the removal was requested because Deborah and Harold have parents who are members of other Bands or are children of white males.

[49] It seems that the Canadian government did not reply to the request. Nonetheless, Peters First Nation unilaterally removed Deborah and Harold from its membership list around this same time. Neither Deborah nor Harold was informed they were removed from the list at the time, and the removal procedure in the Membership Code was not followed.

[50] A few years later, in the late 1980s or early 1990s, Deborah contacted Chief Frank Peters to inquire about becoming a member. The Chief's wife was with him at the time, and she told Deborah that Deborah would not get membership and told her "never come back here."

[51] When Annette Peters was Chief, Deborah again contacted her to inquire about membership with the Band. Again, the Chief told her that she would not get membership. It is unclear in the evidence when this was exactly, but it was sometime in the 2000s.

[52] Given her discussions with Chief and Council over the years, Deborah assumed her membership application would be unsuccessful. Nonetheless, in 2021, both Deborah and Gordon began the process of formally applying for membership. But the application form they were required to fill out was too onerous. For example, Deborah testified that she was required to provide the death certificates of her grandparents, which were difficult to obtain. The application was eventually abandoned.

[53] As a result, Deborah has never submitted an application for membership with the Peters First Nation.

[54] Deborah described the impact that the loss and denial of membership had on her as follows:

> I'm registered B-C31 which means I'm just an Indian, which means nothing. I feel like I don't have a home or community… I've also worked with Aboriginal people and I tell them I'm Bill C-31 and they say you don't have a home, and I said no… I don't have a physical connection to the reserve and that has a huge effect on me… I feel like I'm less than.

(iii) Harold Lock

[55] Harold was born in 1948. He is retired and previously worked as an industrial mechanic, millwright and in the skilled trades.

[56] Harold stayed very active in Peters First Nation well into his adult years. He was very close with one of his uncles and would help every year during the hay season and would pick berries. He also lived with Chief Frank Peters and his wife for a year and a half during his 20s.

[57] Harold, like Deborah, was on the Peters First Nation membership list maintained by INAC in 1987 when Peters First Nation took over control of membership. His name was also removed from the membership list in 1987 by Peters First Nation after Chief Frank Peters sent a letter to Indian Affairs asking that his name be removed because he was a child of a white male. He was not told his name had been removed and the process to remove a person's membership, as set out in the Membership Code, was not followed.

[58] Like his brother Gordon, Harold assumed he was a member once his Indian status was reinstated. At one point, he received a fish net license that he understood was reserved for members. This strengthened his belief that he was a member. He only found out he was not on the membership list shortly before his complaint was filed with the Canadian Human Rights Commission (the "Commission").

[59] Harold testified about how important being connected to the Band is to his identity and culture and how important it is to have a connection to the land. He testified that: "I always say the Fraser River runs through my veins and the mountains hug me and I have a wonderful spiritual connection to my grandmother, grandfather and uncles who suffered

because of residential schools.” In regard to the personal impacts of having his membership removed, Harold testified that to have people tell him he is not a member hurts and is making him a liar. He talked about being motivated to help community members heal from the “residue” of the residential school system.

[60] Although he went frequently to Peters First Nation as a child, his visits became less frequent as he got older. He talked about how it became more uncomfortable to be on the reserve as he was made to feel unwelcome. He has not been back on the reserve for around six to seven years. The last time we went was for a funeral of a family member.

[61] Harold has never submitted an application for membership with the Peters First Nation.

B. Carol Raymond

[62] Carol was born in 1943 and is now retired. Her parents were both Peters First Nation members and were on the Peters First Nation membership list. Carol’s father was born and raised on the Peters First Nation reserve. Her mother became a Band member when she married Carol’s father. Carol’s paternal grandmother and her paternal great-grandparents were also members.

[63] Carol and her four siblings were all members from birth.

[64] Carol testified that she grew up closely connected with Peters First Nation and that she would visit the reserve regularly as a child to see her grandmother. In her late twenties or so, Carol visited Chief Frank Peters, who was a family member. During this visit, the Chief’s wife told him that there was no place for her on Peters First Nation. She stopped going with any frequency after that.

[65] She testified that, in 1953, when her parents divorced, she was erroneously and temporarily enfranchised along with all her siblings. Later, in 1961, Carol married a non-Indian, so she again lost her Indian status as a result of that marriage.

[66] After Bill C-31 passed in 1985, Carol, along with a number of other former Peters First Nation members and their families, applied for Indian status. She was successful in having her Indian status reinstated, as was her mother.

[67] Carol's mother was on the membership list when Canada transferred the list over to the Peters First Nation in 1987. Carol's name, however, was not on the list.

[68] Carol has made four formal applications to Peters First Nation for membership:

A) The first application was sent on October 12, 2012, in which a group of over 60 people applied for membership (the "Collective Application"). The Council rejected this application, arguing that Peters First Nation does not accept omnibus applications. In the rejection letter, Peters First Nation also made it clear that Peters First Nation considered enfranchisement history as a criterion for membership.

B) For her second application, Carol applied as an individual on June 19, 2013. Along with the application form, she provided her birth certificate, an explanation of her family history, her status card, and the membership list from 1949 showing herself, her parents and her grandmother as Peters First Nation members. Carol was informed her application was rejected but was given no explanation for this rejection.

C) Carol made her third application on October 14, 2016. At that time, she also resent her 2013 application. It was hand delivered directly to the Chief. She was interviewed as a part of this application by Chief Norma Webb and Councillor Victoria Peters. Leanne Peters attended the interview as administrator of Peters First Nation. Carol remembers being asked a series of questions, including whether she had a criminal record and whether she wanted land. Around a year and a half later, on June 29, 2018, Carol received a rejection letter from Peters First Nation. The letter says that she was removed from the membership list in 1952 due to the divorce of her parents. It also said that she was ineligible for membership because 1) only children under 18 could apply for membership, and 2) in 1987, when Peters First Nation took control of its membership, neither of her parents were members. It should be noted that the evidence shows that her mother's name was, in fact, on the membership list at the time that Peters First Nation took control of membership.

D) Carol made her fourth application on or about January 25, 2021. Peters First Nation informed her that it could not consider her application until a Federal Court of Appeal case was decided. Chief Webb testified that the same letter was sent out to a number of other applicants. The Federal Court of Appeal decision referred to in the letter was made on December 20, 2021. However, there has been no further response from Peters First Nation regarding her membership application.

[69] Chief Webb testified that Peters First Nation has yet to process Carol's applications or any other outstanding applications because, at least in part, she disagrees with the Federal Court of Appeal decision. Councillor Victoria Peters noted that the Council would review the application, but it was unclear when that would be.

[70] Carol testified about how the denials of membership affected her. She described that, after having some hope every time she applies that she would be accepted, she gets angry, frustrated and emotional each time she gets denied. She described how the hurt is so much more because it came from family. She keeps applying, nonetheless, because she wants to keep fighting for who she is and does not want to give up on her identity because someone else decided that she does not belong. She described how important it is for her, an Indigenous person who lost that part of her identity due to the discriminatory enfranchisement provisions of the old Indian Act, to be accepted and part of her community. For over 50 years, she has not felt accepted by a lot of her Indigenous relatives because she was married to a white person and because she was not a member of her community. She described how important it was for her to "be who I am" and to be accepted for who she is:

> "For a white person it's hard to understand, when you're like me. I was born an Indian and at a certain age, when I married, I lost that. It was like you're married now, married to a white person, so you're not an Indian anymore. So for 53 years of marriage this is who I was – my husband's wife, mother of my children. But for my own self, I wasn't accepted by a lot of my Native family or Indian family or whatever you want to call them because I was married to a white person. And its like I just want to get back me. Find out who I am. You know, this is who I am. This is where I came from. This is where I belong to. Both my mom and dad were Native. And all of a sudden to be rejected. But not just by, you know, the discrimination by the whites. Again with the natives. […]. So that's where my identity comes from, wanting me. Wanting to be who I am."

[71] Carol acknowledged that there is much of her family that she does not know or is not close with. She stated her desire to get to know them better.

C. Neil Peters

[72] Neil was born in 1948. He is a sheet metal worker. Neil's father was a Peters First Nation member from birth. His mother became a member when she married his father. His paternal grandparents were also both members from birth.

[73] He recalled receiving his polio shots on the reserve, spending summers there, playing with others on the reserve and swimming. As he got older, he recalls going to the reserve often to help harvest the hay and work on the farms.

[74] In 1956, his parents were enfranchised. Although it is not clear why his parents chose to enfranchise, Neil testified that at least part of the reason was that his parents did not want him to go to residential school.

[75] After Bill C-31 amendments in 1985, Neil's family applied to have their Indian status reinstated. He received his status card in 1988. It seems that neither Neil nor his parents were on the membership list at the time Peters First Nation took over membership in 1987. He was not aware he had to apply separately for membership with Peters First Nation.

[76] In the 1970s or 1980s, a Council member from Peters First Nation told him that he was a member of Peters First Nation and dissuaded him from applying to become a member of another Band. In 1989, Neil Peters applied for and received funding for a sheet metal project as a member of Peters First Nation. To receive the grant, the Chief had to endorse his application as a member of Peters First Nation.

[77] Considering the above, Neil grew up assuming he was a member of Peters First Nation.

[78] In 2011, Neil Peters found out that he was not on the Peters First Nation membership list when he tried to vote in the election for Chief and Council. He was denied the right to vote because he was not on the membership list. Neil then applied for membership in 2012 as part of the Collective Application. In refusing that application, the Council noted that his parents were enfranchised, which enfranchised their children at the same time.

[79] In 2013, Neil attempted to bid to purchase his uncle's property on reserve. He was told he was not eligible to bid or own land on reserve, as he was not a member.

[80] Neil applied again for membership as an individual on June 27, 2013. He provided his birth certificate, a family tree, his Indian status card and the 1949 membership list showing that his grandfather, father and mother were included as members. Neil requested that his application be considered on an expedited basis. However, he received no response from this application.

[81] Neil submitted a third application on October 13, 2016. Along with the application form, he included his father's Indian status card, his own status card, his family tree, the Membership Code and the 1949 membership list.

[82] Neil was interviewed regarding his background and his application in January 2017 by Chief Webb, Councillor Victoria Peters and Band Administrator Leanne Peters. A month later, Peters First Nation provided an update to Neil regarding his application, saying that it was still under consideration. The delay was explained in the hearing by Chief Webb and Leanne Peters. They both testified that Peters First Nation was still gathering additional information needed to complete the application review.

[83] Over a year later, Neil received a letter notifying him that his application was denied. Peters First Nation relied on three grounds to deny him membership:

A) He was not under the age of 18 at the time of his application;

B) He was enfranchised on March 22, 1956; and

C) In 1987, when Peters First Nation took control of its Membership Code, neither of his parents were members.

[84] Neil was unaware of any age restriction for membership applications until that letter because it had never been mentioned to him.

[85] On July 29, 2018, Neil appealed the decision of Peters First Nation. His appeal was submitted through Lisa Genaille, as his agent. A few weeks later, Peters First Nation denied the appeal without convening a membership meeting that would have allowed the membership to vote on the issue, a right provided for in the Membership Code. The grounds

for the denial, as explained to him, were that Neil did not meet any of the membership criteria in the Membership Code and that the appeal could not be made through an agent.

[86] At the hearing, Neil explained why it was important for him to apply and be accepted as a member of Peters First Nation. He stated that it was important for him to be connected with the community he had childhood connections with. He also stated that he was motivated to help Peters First Nation collectively succeed and to improve things by bringing his skills and work to the community. He talked about feeling frustrated and "defeated all the time" due to the rejections and how being rejected by family hurts inside. He testified that one of the hardest parts for him was that he was led to believe all his life he was a member. Being a member was a source of pride for Neil, and being told he was not a member made him feel rejected and shamed.

VI. Analysis

A. Removal of membership in 1987 outside the scope of the complaints

[87] Although Peters First Nation did not contest the scope of the complaints as presented by the Complainants at the hearing and in their Statement of Particulars, I determine that the scope is necessary to address given the extraordinary request to make findings of discriminatory conduct going as far back as 1987.

[88] As stated in *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157 at para. 39, this Tribunal cannot take jurisdiction it does not have:

> [39] […] this Court must always ensure that it has the subject-matter jurisdiction to determine matters placed before it […] This is the case even if the parties do not raise any jurisdictional concerns […].

[89] This principle also applies to the temporal scope of the complaints (*Murray v. Immigration and Refugee Board*, 2018 CHRT 32).

[90] In the CHRA context, the Tribunal's jurisdiction is based on the complaints referred to it by the Commission (*Gaucher v. Canadian Armed Forces,* 2005 CHRT 1 at para. 9).

[91] At the hearing the Complainants alleged that the removal of Deborah's and Harold's names from the membership list in 1987 were discriminatory acts. However, neither Harold's nor Deborah's original complaints to the Commission allege discriminatory conduct related to their removal from the membership list in 1987. This is a significant addition and expansion to the complaints, and, by extension, to what was referred to the Tribunal by the Commission.

[92] It would be exceptional for this Tribunal to make findings related to allegations of discrimination from 35 years ago (30 years before the complaints were filed). Absent some positive and clear indication from the Commission that those earlier actions were referred to the Tribunal, I am not persuaded that the Commission intended to do so. Without a referral from the Commission, the Tribunal does not have the jurisdiction to make findings of discrimination for alleged conduct going back so far.

[93] Although the events from 1987 are important to understand the context of the complaints and the actions of the parties, making findings and issuing remedies under the CHRA in relation to those events would exceed the Tribunal's jurisdiction (*Murray v. Immigration and Refugee Board*, 2018 CHRT 32 at para. 57).

[94] Of course, the complaint form is not a pleading, and parties can appropriately add details and sufficiently related allegations during the Tribunal process. There must, however, be a reasonable nexus between the complaint and the arguments at the hearing such that the hearing does not morph into essentially a new complaint (*AA v. Canadian Armed Forces*, 2019 CHRT 33 at para. 59).

[95] The actions of 1987 go too far back to meet this nexus test. Given the absence of a challenge by Peters First Nation to the scope of the complaints presented by the Complainants, I accept that the rest of the allegations are sufficiently related in time and substance to the initial complaints such that they fall within the scope of what was referred by the Commission. Absent the flagrant scope issue that arises with the request for findings related to allegations from 1987, it is not for the Tribunal to second-guess the scope of Statements of Particulars where they are plausibly linked to the complaints filed with the Tribunal.

B. Has the Respondent established that the age requirement for membership applications is a customary law or legal tradition of the Peters First Nation as per section 1.2 of the *Act to Amend the Canadian Human Rights Act*?

[96] Before discussing whether the alleged discriminatory conduct is a provision of services within the meaning of the CHRA, it is appropriate to discuss the interpretive provision of section 1.2 of the *Act to Amend the Canadian Human Rights Ac*t, SC 2008, c 30 because it directly relates to submissions of Peters First Nation as to whether the allegations relate to services. Section 1.2 reads as follows:

> 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.
>
> [emphasis added]

[97] This provision recognizes the pluri-jural nature of our country. The provision provides space for the abundant Indigenous legal traditions that exist and are exercised by Indigenous Nations in Canada, whether written or not, when interpreting cases before this Tribunal where First Nation governments are involved.

[98] As such, when considering the *prima facie* cases and any defences put forward in this case, we must consider whether there are any legal traditions or customary laws of Peters First Nation that should form part of the analysis. This analysis requires Tribunal members, as decision-makers, to expand our understanding of what law is. We must move beyond Western or Eurocentric understandings of law as largely a collection of written laws, regulations and legal precedent. In this regard, Professor Val Napoleon of the University of Victoria's Indigenous Law Research Unit provides a useful explanation:

> At its most basic level, law is collaborative problem-solving and decision-making through public institutions with legal processes of reason and deliberation. Indigenous laws and legal orders are comprehensive in scope and depth, and require legitimacy and coherence just as Canadian law does. The legitimacy and efficacy of any stable legal system requires the collective capacity to decide the substance of law as well as its: (1) ascertainment

> (agreement of what law is); (2) change (how law is changed and why), and (3) application of law (when law is broken and appropriate legal response). And to draw on the words of Indigenous tribal judge, Matthew Fletcher, Indigenous law must be accessed, understood and applied. (Napolean, Val, *What is Indigenous Law*. 2016)

[99] As a non-Indigenous federal institution, this Tribunal must tread carefully when dealing with evidence of Indigenous legal custom and traditions. We must approach with humility, accepting that it will not always be easy to recognize Indigenous laws, customs and traditions when using the Western lens largely taught in Canada's law schools. We must also consider the centuries of colonization and attempts to weaken the legal traditions of our country's Indigenous Nations, which has resulted in the fracturing and weakening of many legal systems. Yet, as a human rights tribunal, we must move forward as we are tasked with making findings and providing redress for those facing wrongful discrimination and harm, including in cases such as the one before us where individuals are claiming discrimination and harm at the hands of their own First Nation's governing body.

[100] The Federal Court has provided some guidance for this Tribunal when assessing whether there is sufficient evidence of a legal custom or legal tradition. The establishment of customary practice, the Federal Court tells us, requires evidence that the practice is firmly established, generalized and followed consistently and conscientiously by the majority of the community (*Engstrom v. Peters First Nation*, 2020 FC 286 (CanLII) at para 15; *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, at para 36; *Gadwa v Kehewin First Nation*, 2016 FC 597).

[101] As stated in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, at paragraph 32: "a majority of a band's members must recognize the custom, not just Chief and Council. The band members must not only agree as a community to the new custom, but the community must also know they have agreed."

[102] In *Bigstone v Big Eagle* (1992), 52 FTR 109, FCJ No 16, the Federal Court wrote: "Unless otherwise defined in respect of a particular band, 'custom' must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus."

[103] Peters First Nation argues that the tests set out by the Federal Court to recognize custom should not apply when analyzing the impact of a potential customary law or legal tradition pursuant to section 1.2. It argues that the Federal Court cases that denied that there is a custom to limit membership to applicants under 18 years of age focused on the term "custom" and how that has been interpreted by the courts. The Federal Court, it argues, did not have the benefit of the interpretation of the words "legal traditions" as set forth in section 1.2.

[104] I do not agree. The use of the word "custom", "customary law" or "legal tradition", at least in the context of this case, amounts to something very similar. These terms are different ways to describe the unwritten rules and ways of being and doing that stem from that community's worldview and legal systems. A custom or customary law may refer to something more specific than a legal tradition, but for the purposes of this case I am not convinced there is a meaningful difference. The test set forth by the Federal Court to determine whether there is sufficient evidence of the existence of a "custom" or "tradition" is, therefore, applicable when this Tribunal is assessing evidence of whether there is a "customary law" or "legal tradition" when carrying out an analysis under section 1.2.

[105] The only word of caution I would add is that the findings of this Tribunal under section 1.2 should not be seen as final determinations as to the content of a Nation's legal traditions. Given that this Tribunal and its members are not, and could not be, experts in the legal traditions of specific Indigenous Nations, findings pursuant to section 1.2. are solely in relation to the sufficiency of the evidence put before us for the purposes of section 1.2 and meeting the test of discrimination under the CHRA.

[106] In this case, Peters First Nation is asserting that it was entitled to consider the age restriction for potential new members because it is a customary law to do so. It is clear there is no age criteria for membership in the *written* provisions of the Membership Code. This was admitted to by Chief Webb and Councillor Victoria Peters during the hearing and was also the finding of the Federal Court and Federal Court of Appeal. I would note, however, that Leanne Peters argued that the age restriction comes from the written provisions of the Membership Code because the word "child" in the Membership Code refers to those 17 and under, despite the opposite findings of the Federal Court and the Federal Court of Appeal.

[107] Peters First Nation seems to argue that its customary law adds *unwritten* criteria into the Membership Code. If this argument is accepted, it would potentially mean that the complaints before me amount to challenges of Peters First Nation's legislation and thus would not be proper complaints before the CHRT. I find this argument untenable for several reasons.

[108] First, by adopting its Membership Code, Peters First Nation was exercising self-governance. The community made a conscious decision to remove the ability for the federal government to determine criteria for membership, subject to certain criteria in section 10 of the Indian Act, so they could govern themselves in this regard. The Council thus prepared the Membership Code and presented it to its members, and its electors approved it. Since the Membership Code does not contemplate other sources of law that would allow derogating from the rights it grants, Peters First Nation must live by its own legislative choices and follow its own laws. Part III of the Membership Code does not allow for any discretion in how membership requests are processed. It uses mandatory language: "Membership in the Peters Indian Band shall consist of the following persons […]" [emphasis added].

[109] The clear language of the Membership Code that was reviewed and approved by the members is evidence, in and of itself, that there is no age restriction on membership within Peters First Nation's own laws or legal traditions. If the community had broadly accepted the age restriction or if it accepted that the Council has the discretion to read in unwritten criteria into the Membership Code, or if it wanted to create that discretion for the Council, it could have reflected that in the Membership Code.

[110] If the Council is not happy with the Membership Code, then it needs to return to the community to propose amendments and have them approved. Instead, the Council has been developing its own shifting criteria to support its desired outcomes. The Federal Court also noted the Council's constantly shifting justifications in *Peters v. Peters First Nation Band*, 2018 FC 544 at paragraph 54, as well as in *Peters v. Peters First Nation*, 2023 FC 399 at paragraph 88, where the Court wrote:

> [T]he Band Council acted in bad faith by constantly moving the yardstick in determining the simple and straightforward matter of membership pursuant to the Membership Code. Similar findings were made in Engstrom FC (at para 17) and in Engstrom FCA (at para 34). The Band Council's conduct has not changed in spite of these two decisions.

Not only has these shifting criteria resulted in discriminatory actions against the Complainants, but they also show a lack of respect by the Council for its own laws and its own membership who approved the Membership Code.

[111] Secondly, considering the evidence presented at the hearing, Peters First Nation has not met the test to demonstrate that there is a customary law or legal tradition to deny membership applications based on age. The only testimony claiming that the age restriction is common knowledge came from the Council members and a senior administrator of Peters First Nation. Given that it is the Council that processes applications and make the decisions to accept or deny membership, this evidence is self-serving. In this, I agree with the Federal Court in *Engstrom v. Peters First Nation*, 2020 FC 286 (CanLII) at paragraph 15:

> Much stronger evidence than that presented by the self-interested members of the Council would be required to prove the existence of such a customary practice. Indeed, if an age limitation to membership was as notorious as those affiants now suggest, the supporting evidence ought to have come from disinterested band members and, most notably, from respected and neutral elders. In this case, no such evidence was presented.

[112] Similar to *Engstrom,* one of the Complainants' witnesses countered the claim of Peters First Nation that no applications have been accepted by applicants over 18 years of age. The witness, Andrew Genaille, laid out the details and the surrounding circumstances of two brothers who were accepted for membership in their twenties. According to Mr. Genaille, the brothers had never been on the membership list. Over the years, several attempts were made by their family members and, when they became adults, by themselves to obtain membership. They were finally accepted when they were older than 18 years of age.

[113] Chief Webb and Councillor Victoria Peters denied the facts as laid out by the Complainants. They allege that the brothers had been on the membership list since they were babies, but their names had been accidentally deleted, and their names were put back

on when the Council realized the error. However, the accounts of both witnesses lacked details, and their long hesitations on these questions compared to other evidence they provided made the witnesses seem uncertain of their own evidence. As a result, I find the more detailed and clear evidence from Mr. Genaille more credible and reliable.

[114] Leanne Peters also gave evidence about the acceptance of Linda Lock onto the membership list. Linda is the sister of Deborah, Harold and Gordon. Deborah confirmed that Linda also had to go through an application process after getting her Indian status. When asked why Linda was accepted as a member and not her siblings, Leanne Peters stated that she thought Linda was admitted because Linda was going to receive funding from Peters First Nation to go to law school so that she could work with the Council afterwards. Given this evidence and the age when individuals apply to law school, it seems likely that Linda was also over the age of 18 when accepted as a member.

[115] In light of the above, I am convinced that, in recent years, certain individuals have indeed been accepted as members to Peters First Nation for the first time after reaching the age of 18. This finding weakens the argument that there is a clear and consistently practiced custom to restrict applications to those 17 and younger.

[116] As a third point, it is quite normal that most applications for membership would be made before an individual turns 18 years of age. Or, I should say, this *would* be the natural process for community members and their children who have *not* lost status because of the Indian Act prior to 1985. Most parents would apply for their children as soon as possible when they are babies to ensure they can take advantage of all the benefits of membership. This timeline would be even more natural for a First Nation like Peters where there are significant payouts to members every year. A normal and natural timeline for applications does not create a custom to deny those that cannot follow that normal process.

[117] None of the witnesses for Peters First Nation could point to any other evidence of a custom of an age restriction for membership, beyond vague references to “that’s always how it has been.” In fact, when Chief Webb was asked of any evidence that the age restriction was custom or common knowledge, she said, “I’m drawing a blank.” Vague references are not enough, particularly when, regardless of custom, most applicants would

be babies. Further, the claimed custom's clear divergence from the mandatory and non-discretionary language of the Membership Code heightens the importance of credible evidence to support its existence.

[118] Peters First Nation indirectly acknowledged there is no age restriction in the Council document from the 1990s produced at the hearing which states that not accepting C-31 as members would be against their Membership Code. This document states that the Council decided to stop, at least temporarily, accepting C-31 applications "contrary to the Band's current Membership Code."

[119] Given the above, I find there is insufficient evidence to find that there is a customary law or legal tradition to limit membership applications to those 17 years or younger.

[120] I would have made the above finding independent of the similar findings of the Federal Court and the Federal Court of Appeal in regard to the non-existence of a custom to deny membership application for applicants 18 years or older. However, the findings of these courts further support the findings of this Tribunal. In *Engstrom v. Peters First Nation*, 2020 FC 286 (CanLII) at para. 16, the Federal Court found that:

> The fact that all of the intervening applications were made and approved before the applicants turned 18 does not establish a custom, practice or understanding that anyone older was ineligible for membership […] [W]hat the Court is left with are conclusory statements about the existence of a customary practice from members of the Council, countered by other evidence denying that such a practice or understanding was in place after 1990. On this record, the Council has abjectly failed to establish an expanded discretion to apply age or maternal consent eligibility limitations to these applications.

C. Do Peters First Nation's actions in relation to membership requests constitute a service?

[121] The Tribunal finds that Peters First Nation's processing of the Complainants' membership requests falls within the meaning of a "service" in section 5 of the CHRA.

[122] Section 5 provides:

> 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.
>
> [emphasis added]

[123] This Tribunal has described a "service" as something of benefit that is held out to members of the public for whom the service was meant to benefit in the context of a public relationship. A public authority provides "services" where its activities meet a need or want that people have in society, or where it assists them with the accomplishment of a goal or objective (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* [2018] 2 SCR 230).

[124] In this case, I find that the public is comprised of applicants for membership, including both those who have sought membership by submitting paper applications and those who have clearly expressed their desire for membership verbally to a member of the Council. Much of what a Chief and Council does would not be characterized as the provision of services. As the governing body for a First Nation, it adopts laws, policies, resolutions and budgets and provides the leadership and strategic direction for the First Nation. These would not likely be considered services. However, in certain contexts and for certain purposes, the Council can also act as a service provider. In the context of these proceedings, the Council provides services when it acts as the Membership Committee and processes membership applications.

[125] Peters First Nation denies that the processing of membership applications is a service. Instead, it argues that the Complainants are directly challenging the membership criteria in the Membership Code, which is not permissible under section 5 (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2018 SCC 31 (CanLII) *(Matson & Andrews)*). More specifically, it argues that the allegation of age-based discrimination is a direct challenge to the Membership Code because the age restriction is

a customary tradition that forms part of the Membership Code, even though it is unwritten. For reasons set out above, however, I find that Peters First Nation has not demonstrated the existence of such a legal custom.

[126] The Complainants submit that they are not directly challenging the criteria in the Membership Code but the *way* it is being applied. In fact, the Complainants strenuously argue that the terms of the Membership Code need to be respected. They argue that the complaints relate to the discretionary manner in which Peters First Nation chooses to *apply* the Membership Code, which they allege is discriminatory. Following this logic, the service provided by the Council and staff is the *processing* of membership applications under the Membership Code to determine whether the applicants comply with the requirements of the Membership Code. I agree with this framing and find that there is no disguised attack on the Membership Code because there are no Membership Code provisions being challenged.

[127] The following illustrates some of the ways the Council exercises discretion when it processes membership requests:

a. adding criteria for membership which are not in the Membership Code nor part of customary law, such as age limits, the history of enfranchisement and whether the applicant's father was non-Indian;

b. deciding *not* to process membership applications, despite requirements in the Membership Code;

c. delaying the processing time, contrary to compulsory timelines in the Membership Code;

d. deciding not to process a bulk application, despite no prohibitions to such applications in the Membership Code;

e. creating an onerous application process that solicits irrelevant information and requires hard to obtain documents like death certificates of the applicant's grandparents and requiring intrusive interviews to discuss information irrelevant to the criteria for membership; and

f. telling the Complainants not to apply.

[128] In *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13, this Tribunal clarified the difference between the *entitlement to registration* under the Indian Act*,* which cannot be qualified as a service, and the *processing* of applications for registration, which is a service:

> [58] The Respondent does not offer to the public the benefit of e*ntitlement to registration* under section 6 of the *Indian Act*, or the corresponding tangible and intangible benefits that may go along with entitlement to registration. It is the *Indian Act* itself that offers the benefit of entitlement to registration and it is Parliament who has applied the entitlement provisions of the *Indian Act* to the public, not the Respondent. What the Respondent may offer as a benefit/service to the public is the processing of applications for registration to determine whether a person should be added to the Indian Register, *in accordance with the Indian Act*. This involves the Indian Registrar receiving applications for registration, reviewing the information in the application to determine whether it is complete and accurate; and, assessing the application to determine whether or not the applicant satisfies the entitlement provisions of section 6 of the *Indian Act*. […]
>
> [emphasis added]

This is analogous to the distinction in these proceedings between the *entitlement to membership* under the Membership Code (not a service) and the *processing* of membership applications (a service).

[129] Processing memberships can also be analogous to the processing of applications in the immigration and citizenship context. In *Attaran v Citizenship and Immigration Canada*, 2023 CHRT 27, this Tribunal found that processing applications in a general sense is a service provided to the public. *Forward v. Citizenship and Immigration Canada*, 2008 CHRT 5 is also pertinent. This case, at paragraphs 35-43, indicates that the processing of citizenship applications can be a service but cautioned that such a framing cannot be used to support a direct attack on eligibility rules.

[130] Given the above, I find this case distinguishable from cases such as *West v Cold Lake First Nations,* 2021 CHRT 1 and *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2018 SCC 31 ("*Matson* and *Andrews"*), which involved direct challenges to a clear and unambiguous enactment.

[131] It is worth explaining how being told *not* to apply is also considered a service that falls within the overall category of processing membership applications. Peters First Nation's Council acts as the Membership Committee. It processes and makes all determinations of membership applications. The Federal Court of Appeals suggests in *Re Singh(C.A.),* 1988 CanLII 8967 (FCA), [1989] 1 FC 430 that "Immigration Canada provides a service when it advises immigrants about how to become a Canadian resident." By analogy, a member of the Council providing advice on membership requests would also be the provision of services within their role on the Membership Committee. This finding includes advice by a Council member telling someone not to bother applying because they will not be given membership.

[132] In summary, the Tribunal agrees with the Complainants that the processing of membership applications can be considered a service as understood by section 5 of the CHRA. More specifically, processing membership requests represents necessary work performed by the Council on behalf of and for the benefit of the public, comprised of applicants for membership.

D. Were the Complainants adversely impacted and subject to a disadvantage in the processing of their membership requests?

[133] Disadvantage means imposing burdens, obligations or disadvantages on an individual or group not imposed on others, or withholding or limiting access to opportunities, benefits and advantages available to other members of society (*Royal Canadian Mounted Police v. Tahmourpour*, 2009 FC 1009 at para 44).

[134] The adverse treatment and disadvantage at issue in these proceedings arise from the way the membership requests were processed.

(i) Gordon Lock

[135] Gordon never sent in a paper membership application to Peters First Nation. He nonetheless suffered adverse treatment by being told by Councillor Victoria Peters in 2014 that he should not apply because 1) Peters First Nation was not accepting membership, 2)

he had never been on the membership list, and 3) his Bill C-31 status had no bearing on his eligibility for membership. Gordon was not informed of the application process set out in the Membership Code, and Councillor Victoria Peters did not verify whether he met the membership criteria of the Membership Code. I note that Gordon made several other verbal requests for membership starting in the 1980s, but, for the purposes of the present complaint, I focus on his latest request in 2014.

[136] Given that the Council acts as the Membership Committee that decides on applications, it was reasonable for Gordon to assume that he was being denied membership and that filling out a membership application would have been futile. The denials of other membership applications from Bill C-31 applicants further supported this assumption.

[137] A further adverse treatment for Gordon was the onerous application process he faced in 2021 when he and Deborah decided to submit a paper application despite the instructions of Councillor Victoria Peters not to apply. The requirements of the application process were difficult to fulfill and required that they provide documents that were difficult to obtain and were not required to demonstrate compliance with the Membership Code. Because of the unnecessary difficulty of the application process, Gordon did not manage to complete and submit the application.

[138] Gordon's situation is similar to the circumstances in *Jacobs v Mohawk Council of Kahnawake* 1998 CanLII 3994 (CHRT). In *Jacobs*, the Tribunal ruled that the applicant was adversely treated, even though, as in Gordon's case, he had not submitted an application for certain benefits offered by the Council. At page 22 in *Jacobs*, the Tribunal found that:

> Even though specific applications may not have actually been made, we are satisfied that direct discriminatory practices are nonetheless occurring because it is clear to us that the route to such rights, benefits and privileges has been effectively blocked.

[139] Similarly, the Federal Court, in the case of *Sawridge Band v. Canada*, 2003 FCT 347, found that focusing on the absence of a submitted application is a red herring when it is clear the individuals “wanted and sought to become members of the Band”:

> [12] […] the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[140] This finding was upheld at the Federal Court of Appeal in *Sawridge Band v. Canada*, 2004 FCA 16. The Federal Court of Appeal held that “[f]or these persons entitled to membership, a simple request to be included in the Band’s membership list is all that is required.”

[141] Similarly, in our case, those who regained their status due to Bill C-31 and their rights to membership due to the Membership Code should not need to go through a complex application process which is unduly burdensome and a barrier to membership. If a request or application is needed, it should be limited to a requirement to provide the information needed by the Membership Committee to determine if the requirements for membership listed in Part III of the Membership Code are met.

[142] *Bain v. River Poker Tour*, 2015 HRTO 734 is an analogous case. The case involved a poker tournament which was to be held at a restaurant inaccessible to the applicant in his wheelchair. On the facts of that case, it was sufficient that the applicant indicated his desire to attend. He was not required to physically attempt to enter the restaurant to be denied a service.

[143] Gordon being told not to apply and being told that he was not eligible for membership by those with decision-making authority was authoritative. The onerous application process created unnecessary burdens that were not necessary considering the requirements of the Membership Code. These factors created such significant barriers that it is equivalent to being denied membership following the submission of a paper application. Once a clear

interest in accessing a service has been expressed, such as Gordon requesting to be added to the membership list, it should not be necessary to follow up with an onerous application if there is a certainty that it will be denied. To do so would be contrary to the general principle that individuals should limit their damages.

(ii) Deborah Senger

[144] The Tribunal finds that Deborah, like Gordon, was subject to adverse treatment by Peters First Nation due to the onerous application process she faced in 2021 when she tried to complete and submit a paper application despite being told she would not get membership in the past. Deborah did not manage to submit the application, however, because the requirements of the application process were difficult to fulfill and required that she provide documents, such as the death certificates of her long-passed grandparents, which were hard to obtain and not necessary to demonstrate compliance with the Membership Code.

[145] Deborah also suffered adverse treatment in the 2000s (the evidence is not clear on which year this occurred) when she made a verbal request for membership to the Chief, and the Chief: 1) told her not to apply, 2) failed to inform her of the application process set out in the Membership Code and 3) failed to inform her whether she met the membership criteria of the Membership Code. The legal analysis applied to Gordon as to why this is an adverse impact in the provision of a service also applies here.

(iii) Carol Raymond

[146] Carol made four formal applications to Peters First Nation for membership in 2012, 2013, 2016 and 2021. The first three applications were rejected for a series of shifting reasons or without providing any reasons at all. Carol has yet to receive a response on her fourth application and has been left waiting for over two years. The details of how these applications were processed are provided at paragraphs 68 and 69.

[147] Carol suffered adverse treatment in the processing of all four of her applications, due to:

a. the addition of criteria that are not in the Membership Code, such as age limits, the history of enfranchisement and whether the applicant's father was non-Indian;

b. the decision not to process her 2021 membership applications despite timelines established in the Membership Code;

c. the delay in the processing for her first three applications, contrary to compulsory timelines in the Membership Code;

d. the decision not to fully process her 2012 application within the Collective Application, despite no prohibitions to such applications in the Membership Code; and

e. the imposition of an onerous application process for her four applications that solicited irrelevant information and, for her 2016 application, required her to complete an intrusive interview to discuss information irrelevant to the criteria for membership.

(iv) Neil Peters

[148] Neil Peters applied for membership in 2012, 2013 and 2016. All three applications were denied for shifting reasons, and in 2018 his request for an appeal was denied. The details of how these applications were processed are set out in paragraphs 78-85.

[149] In the processing of Neil's three applications, he suffered adverse treatment due to:

a. the addition of criteria in the processing of his three membership applications, which are not in the Membership Code, such as age limits, the history of enfranchisement and whether the applicant's father was non-Indian;

b. the delay in the processing of his three applications, contrary to compulsory timelines in the Membership Code;

c. the decision not to fully process his 2012 application within the Collective Application, even though these applications were not prohibited by the Membership Code;

d. the refusal in 2018 to submit the outcome of his 2016 application to an appeal, as was his right pursuant to the Membership Code;

e. the imposition of an onerous application process that solicited irrelevant information for his three applications and required him to undergo an intrusive interview for his 2016 application and to discuss information irrelevant to the criteria for membership.

(v) Harold Lock

[150] Like his sister Deborah, Harold's name was unilaterally removed from the membership list in 1987 without his knowledge. However, as explained, the issue of whether the 1987 removal constitutes a discriminatory practice was not raised in Harold's complaint and is outside the scope of what was referred to this Tribunal.

[151] Like his brother Gordon, Harold assumed he was a member once his status was reinstated. It was only in the few years leading to his complaint before the Commission did he understand that his membership had been unilaterally revoked in 1987. According to the testimony at the hearing, Harold did not submit a written application to become a member and did not ask members of the Council or staff if he could become a member or how he could apply.

[152] In this context and given the scope of this complaint, I find that Harold did not suffer adverse treatment within the scope of his complaint before this Tribunal. As such, Harold's complaint cannot succeed.

[153] This finding does not refute any discrimination that may have been a factor in the removal of his membership in 1987. This finding does also not deny the traumatic and harmful impacts of the Indian Act and federal assimilationist policies on Harold. Indeed, because of the former Indian Act, Harold lost his right to Indian status and, with it, the right to be a member of his home community until the adoption of Bill C-31. This created a fissure between him and his home community, his extended family and his people's traditional territory. Harold's close emotional and spiritual connection with his home community and territory as well as his strong desire to rebuild relationships with his community came through very strongly in his testimony. Despite the finding of this Tribunal regarding Harold's complaint, the systemic orders made below will apply to future membership applications, including an application that Harold could submit to Peters First Nation. In this way, there will hopefully be a path forward for Harold to become a member and to start to rebuild and heal from the impacts of Canada's colonial history in his own life.

[154] Given the finding that Harold's complaint is not substantiated, when I refer to the Complainants for the rest of this decision, I refer to Carol, Gordon, Neil and Deborah.

E. Were disability, race, rational or ethnic origin, age, marital status or family status factors in the decisions to deny membership and related benefits?

(i) Age

[155] I find that age was a factor in processing Neil's and Carol's membership applications and was a reason Deborah and Gordon were told not to apply. Age was expressly acknowledged by all the witnesses of Peters First Nation (Chief Webb, Councillor Victoria Peters and Band Administrator Leanne Peters) as one of the factors it relied upon in processing their written membership applications. They also acknowledged that the age criteria would also have been used to process any written membership applications that Deborah and Gordon submitted. Given this, I infer that at least one of the reasons that Deborah and Gordon were told not to apply was their age. I also infer that age would have been used as a criterion in processing Deborah's and Gordon's application had they been successful in completing the application forms they began in 2021.

[156] Peters First Nation argues that they were simply applying the Membership Code because the age restriction was their customary law. As explained above, the Tribunal does not accept that the age requirement was customary law.

(ii) Family Status

[157] I find that family status was a factor in how Peters First Nation processed the membership requests of Carol, Neil, Deborah and Gordon.

[158] This Tribunal has stated on several occasions that family status is to be given a broad meaning (*Kamalatisit v. Sandy Lake First Nation*, 2019 CHRT 20, paras. 61-62). Particularly relevant to this case, this Tribunal held in *Jacobs* that "family status" includes situations where a woman is discriminated against due to certain characteristics or attributes of her husband:

> In our view, the term "family status" as set out in Section 3(l) of the CHRAct is broad enough to include situations such as this where a woman is discriminated against due to certain characteristics or attributes of her

> husband. (*Jacobs v. Mohawk Council of Kahnawake*, 1998 CanLII 3994 (CHRT) at p. 22).

[159] In *Tanner,* this Tribunal found that the ground of family status "encompasses complaints based on the particular identity of a family member" (*Tanner v. Gambler First Nation*, 2015 CHRT 19, para. 39).

[160] The Supreme Court of Canada, in the context of the Ontario Human Rights Act, also found that family status should be given a broad enough interpretation to encompass circumstances where the discrimination results from the particular identity of a complainant's spouse or family member (*B. v. Ontario (Human Rights Commission),* [2002] 3 SCR 403:

> [46] […] We have concluded that the words of the Code support the view that the enumerated grounds of marital and family status are broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's spouse or family member. Although the jurisprudence on the scope of marital status in the context of human rights legislation is uneven at best, the weight of judicial consideration also favours an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected.

[161] In other words, family status prohibits discrimination based on relationships arising from marriage, consanguinity, adoption, ancestry and other factors. It also prohibits discrimination on the basis of the characteristics, attributes or identity of one's family member, including one's spouse, siblings and parents.

[162] Family status was a factor in the processing of Neil's applications because he was adversely differentiated due to an attribute of his parents—their enfranchisement. Neil was expressly told by Peters First Nation that one of the reasons he was denied membership was because his parents were enfranchised. Chief Webb also acknowledged in her testimony that they were looking at the enfranchisement of Neil as a further reason to deny his membership. As explained in *Andrews et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 21 at para. 3, the enfranchisement or loss of a person's Indian status because of the provisions of the old Indian Act had a profound and long-term impact on them and their family members. I find that this impact is so important that it becomes an attribute and part of the identify of that person, as understood by this Tribunal in *Tanner*. I therefore find that

discrimination on the grounds of his parents' enfranchisement/loss of Indian status falls within the ground of family status.

[163] Regarding Carol, Peters First Nation expressly admitted that they considered her parents' divorce and the fact that her father was white in the processing of her applications. This is an explicit statement that Peters First Nation was making a decision based on the attributes of her parents. These were discretionary considerations that are not criteria in the Membership Code and constitute discrimination based on family status.

[164] Deborah and Gordon were treated differently in their repeated requests for membership because their father was not Indian. For example, when Gordon asked if he could become a member, he was repeatedly told by the Chief and various Councillors that he did not belong and that Bill C-31 had nothing to do with him becoming a member. Deborah was told by the Chief's wife in the presence of the Chief that she would never get membership and should never come back. I accept the inference that the rationale was the same—that she did not belong because her entitlement came through Bill C-31.

[165] Peters First Nation treated Deborah and Gordon worse than other applicants because of their father's ethnicity or race. This differential treatment based on their father's identity is discrimination based on family status because it is a decision about them that is based on a trait of one of their parents. It seems that, after gaining Indian status because of Bill C-31, Deborah and Gordon were entitled to membership under the Membership Code because of their mother's status. However, their requests for membership were obstructed because of their father's identity. Put another way, prior to 1985, when a status Indian woman married a man who did not have status, she lost her status. This was the case for Deborah and Gordon's mother, and so, until 1985, Deborah and Gordon were not entitled to membership because of the identify of their father. Accordingly, considering their history of not having status despite its lack of relevance under the Membership Code is making a distinction based on their father's identity and thus based on family status.

[166] While Peters First Nation generally denies that family status was a factor in processing the membership applications, the only concrete argument it makes is that there could be no family status discrimination because Linda, the sister of Deborah and Gordon,

was accepted as a member of Peters First Nation. I do not accept this argument because 1) it does not respond to the actual argument that the stated reasons are explicitly tied to family status and 2) the fact that Peters First Nation accepted one member of the family does not negate the barriers put in place for other members of the family. Peters First Nation has not provided any other arguments to refute the assertion that disadvantaging based on an attribute of one's parents—namely, their enfranchisement or Indian status—is discrimination on the basis of family status.

(iii) Disability

[167] Carol's and Gordon's initial complaint included disability as one of the grounds of discrimination in the processing of their membership requests. However, discriminatory conduct on the grounds of disability was not alleged or argued at the hearing and so I do not make a finding on this ground.

(iv) Race, National or Ethnic Origin and Marital Status

[168] Carol and Neil allege race, national or ethnic origin as a factor in Peters First Nation's processing of their membership applications. Carol also alleges marital status was a factor in the processing of her membership applications.

[169] When analyzing whether a prohibited ground was a factor in an adverse treatment, it is sufficient if only *one* of the protected characteristics was a factor, even if several are alleged. Further, that factor need not necessarily be the *only* factor in the decision (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center*), 2015 SCC 39 (CanLII), para. 52). Given my finding that family status and age were discriminatory factors in the adverse treatment of the Complainants, I find it unnecessary to determine whether race or ethnic origin or marital status were factors in the adverse treatment or disadvantage.

F. Have the Complainants established that they were *prima facie* discriminated against by Peters First Nation in the provision of membership-related services?

[170] Given my analysis above, I find that Carol, Neil, Deborah and Gordon have established a *prima facie* case of discrimination against Peters First Nation. More specifically, age and family status were factors in Peters First Nation's discretionary processing and consideration of the Complainants' requests (either verbally or in writing) for inclusion on the membership list.

G. Has Peters First Nation established a *bona fide* justification for its discriminatory conduct?

[171] Having determined that four of the Complainants have demonstrated a *prima facie* case of discrimination, the analysis now turns to Peters First Nation's defenses. In response to the *prima facie* case, a respondent can avoid an adverse finding by presenting evidence to show its actions were not discriminatory or by establishing a statutory defense that justifies the discrimination. In this case, pursuant to section 15(1)(g) and section 15(2) of the CHRA, Peters First Nation advances that the need to protect the community's social cohesion and cultural values is a *bona fide* justification for considering age and family status when processing membership applications.

[172] Section 15(2) of the CHRA limits the considerations under the *bona fide* justification to health, safety and cost:

> **(2)** For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and 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.
>
> [emphases my own]

[173] However, neither the Complainants nor the Commission argued that protecting the community's social cohesion and cultural values falls outside the scope of section 15(2).

There is some case law that takes a broader reading of section 15(2) such as *Petrovic v. TST Overland Express*, 2021 CHRT 26 (see paras 126 to 128). As such, I am prepared to proceed on the assumption that protecting the community's social cohesion and cultural values falls within section 15(2).

[174] To establish a *bona fide* justification for its discriminatory processing of membership requests, Peters First Nation must establish that:

a. the specific objective (community cohesion and maintaining cultural values) is rationally connected to a general function or objective of the Council;

b. the impugned criteria used for the processing of membership requests were adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

c. the criteria and approaches used by Peters First Nation to process membership requests are reasonably necessary to accomplish its purpose or goal, in the sense that Peters First Nation cannot accommodate new members who are over 18, were disenfranchised, have parents who were disenfranchised or have fathers who were non-Indian without incurring undue hardship.

(*BC (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868)

(i) Is the specific objective (community cohesion and maintaining cultural values) rationally connected to a general function or objective of the Council?

[175] The first step for Peters First Nation to establish a *bona fide* justification for its discriminatory conduct is to establish that the specific objective or purpose behind the impugned standards is rationally connected to a general function or objective of the Council (*BC (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 24-28).

[176] In this case, Peters First Nation’s stated that the specific objective for the discriminatory conduct was the protection of cultural values and community cohesiveness. Although Peters First Nation did not clearly state the general function or objective of the Council that this specific objective would be rationally connected to, I infer, based on their submissions, that the general function or objective is the governance of Peters First Nation.

I accept that the specific goal of maintaining cultural values and community cohesiveness is rationally connected to the function or objective of Chief and Council to govern Peters First Nation. Therefore, I move onto the second step in this analysis.

(ii) Were the standards used to process membership requests adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?

[177] The second step to determine whether there is a *bona fide* justification for Peters First Nation's discriminatory conduct is to establish whether Peters First Nation adopted the impugned criteria and approaches to processing membership applications in good faith, in the belief that the criteria were necessary for the fulfillment of their purpose of preserving cultural values and community cohesiveness.

[178] For the reasons set out below, I find that Peters First Nation does not satisfy this requirement and, as such, has not established a *bona fide* justification for its discriminatory conduct against the Complainants.

[179] I saw no compelling evidence that Peters First Nation was acting in good faith. Peters First Nation asserts that granting the Complainants membership would disrupt the community's social cohesion and cultural values. It argues that the discriminatory criteria it imposed on the processing of applications and requests are needed to protect the social cohesiveness and cultural values of its community. It argues that if Peters First Nation were to "open the floodgates" to membership, it would have a devastating impact upon current members because those members who live on reserve have to deal with unique reserve-based issues on a daily basis. I find this assertion without merit.

[180] The evidence given by Peters First Nation contradicted or weakened its submission that the discretionary criteria for the processing of membership applications are needed to protect the needs of those living on the reserve. For example, when Leanne Peters was asked if the Council feared expanding its membership, she said no. She then went on to explain that there is no land available to issue new Certificates of Possession (the most common form of granting land rights to members on reserve). This is not a persuasive reason to limit membership, however, because membership does not result in a right to land

or a house and because, as the evidence confirms, most members already live off reserve and do not hold Certificates of Possession.

[181] The witnesses of Peters First Nation were able to make only vague allusions to the fact that they need to “stay small” and refuse “C-31ers” in order to maintain social cohesion. There was no evidence or explanation provided as to how having the Complainants as members would negatively affect their cohesion as a community. This claim is purely speculative. I acknowledge that residents of small communities tend to know each other. However, it is unclear how any cohesion that currently exists would be negatively impacted by growing or by welcoming and getting to know their extended family members who were impacted by the old provisions of the Indian Act.

[182] Apart from these vague allusions, there was no other evidence given that accepting new members has caused hardship to on-reserve members in the past or that the acceptance of more off-reserve members would cause such damage. Chief Webb estimated that there are around eight pending applications for membership with Peters First Nation (although she noted she was unsure of the exact number). Even if this number is only approximate, it does not represent the "floodgates" that Peters First Nation fears. There may certainly be more “C-31” applications in the years to come given that there are a number of individuals considered by Canada as affiliated with Peters First Nation who are not currently members. But there was no indication what future application numbers would be or how the inclusion of future applicants could impact the current social cohesiveness of other members, specifically those members living on reserve.

[183] Peters First Nation submitted that the Federal Court of Appeal agrees with its position that the limitations on membership were part of a good-faith effort to maintain social cohesiveness. I do not accept this reading of the judgment. In *Peters First Nation v. Engstrom*, 2021 FCA 243, the Federal Court stated at paragraphs 33-34:

> Counsel for the Band argues that the question of band membership, particularly in a small band like the Peters First Nation, is critical to maintaining social cohesion, cultural traditions and values. Membership, it is argued, is essential to identity.

> I do not question this argument or the legitimacy of any of these considerations, and in the ordinary course the Federal Court would return questions of Band membership to a Band for redetermination. However, in the circumstances of this case, these arguments also weigh in favour of an order directing the respondents to be granted membership. Given the importance of Band membership to an individual's sense of identity, culture and values, rules governing membership must survive reasonableness review and the requirements of procedural fairness.

The Federal Court of Appeal is stating in these paragraphs that membership in a First Nation is critical to a person's identity and that maintaining cultural cohesion, cultural tradition and values are legitimate goals. However, the Court does not find that there is a rational connection between these goals and the discriminatory factors used to process membership requests.

[184] In fact, in *Peters v. Peters First Nation*, 2023 FC 399, the Federal Court questions the validity of the argument that the objective of promoting harmony and the common good in the community is a legitimate reason to limit its membership:

> [86] I also find that the Band Council's additional criteria of whether the Applicant's membership would promote "harmony and the common good" has no basis in the Membership Code. Even if such discretion was provided for in the Membership Code, it would be impossible for anyone to determine whether the Applicant's membership would promote harmony and the common good. The Applicant has been unable to participate in community initiatives in any way due to the imposition of arbitrary criteria throughout his various applications.

[185] Not only do I find there is no compelling evidence of good faith behind the discriminatory conduct of Peters First Nation, but I also find that there is evidence of bad faith. I make this finding considering:

a. the hurtful and dismissive ways that Peters First Nation spoke to the Complainants when they asked about membership (i.e., being told they did not belong or not to come back);

b. the shifting reasons for the denials with each request and application, from age, the enfranchisement of the applicant or their parents, the applications provided in bulk, ongoing court proceedings, ongoing research by the Council into the applicants, the divorce of the applicants and more;

c. the long delays in Peters First Nation's responses to the applications, if there was any response at all; and

d. the refusal to follow the substantive and procedural provisions of the Membership Code, such as timelines, appeal processes and mandatory membership criteria.

[186] The Federal Court and the Federal Court of Appeal, in very similar circumstances over similar periods, also found that Peters First Nation acted in bad faith in relation to the processing of membership applications. For example, in *Engstrom v Peters First Nation*, the Court found the Nation "acted unlawfully, unfairly and in bad faith" in rejecting membership applications (*Engstrom v Peters First Nation*, 2020 FC 286 (CanLII), at paras 14 and 17). The Federal Court of Appeal upheld this decision and found that "there has been ample evidence of bad faith on the part of Band Council" related to the processing of membership applications over a period of nearly six years (*Peters First Nation et al v Engstrom et al*., 2021 FCA 243 (CanLII) at para 34).

[187] In the Federal Court's latest decision related to the processing of Peters First Nation membership applications, Justice Favel wrote:

> [85] Having reviewed the record, I agree with the Applicant that the Band Council has demonstrated bad faith by attempting to impose a non-existent age restriction. The Band Council's conduct in relying on such an age restriction in light of both Engstrom FC and Engstrom FCA is one such example of bad faith. Despite those decisions directly addressing the Band Council's position, it has refused to reconsider its 2020 Decision even after the Applicant's repeated requests to do so.
>
> […]
>
> [88] In summary, the Band Council acted in bad faith by constantly moving the yardstick in determining the simple and straightforward matter of membership pursuant to the Membership Code. Similar findings were made in Engstrom FC (at para 17) and in Engstrom FCA (at para 34). The Band Council's conduct has not changed in spite of these two decisions.
>
> *Peters v. Peters First Nation*, 2023 FC 399 (CanLII)

(iii) Are the standards used to process membership requests necessary to accomplish its purpose or goal, and can the Complainants not be accommodated without undue hardship?

[188] Given my finding that Peters First Nation did not establish that it adopted the standards used to process membership requests in good faith, I do not need to make a finding as to whether these standards were reasonably necessary to accomplish its purpose or goal.

[189] Nonetheless, I will make a few remarks regarding this criterion. There was no evidence that the criteria and approaches used to process membership requests are reasonably necessary to achieve the purpose of social cohesion and maintaining cultural values. It seems that a much more effective and, may I say, kind approach to meeting this goal would be to accept and embrace those who meet the requirements of the Membership Code and who were ousted because of the discriminatory provisions of the Indian Act. The Complainants have deep roots to Peters First Nation and feel a sense of belonging. They are, in fact, related to the members of the Council and many of them spent time together as children. Taking the time to get to know these individuals, inviting them to community events or hosting meals for new members could perhaps, if done in good faith, limit or erase any discomfort or difficulty caused by accepting new members who are not well known to the majority of the membership.

[190] During the hearing and in its written submissions, Peters First Nation stated several times that it “has no culture.” They explained that they were referring to their absence of traditional ceremonies and practices and the loss of their language. This is a sad statement and certainly the result of the legacies of residential schools and other assimilationist policies of the federal government. However, this also means that their cultural traditions and cultural values would not likely be negatively impacted by the inclusion of new members. In fact, there are reasons to believe the opposite could be true.

[191] Several Complainants talked about the work they have done to learn their cultural traditions and language. Harold, Deborah and Gordon spoke at length of all the traditional knowledge they learned from their grandmother. Gordon spent many years teaching Indigenous cultural practices, and Deborah spent much of her career working with

Indigenous youth. This knowledge could help revitalize Peters First Nation's culture and language so weakened by colonization. Like the Complainants, the community as a whole has suffered immensely from colonization, whether through residential schools or the sundry other impacts of assimilationist and racist policies and treatment. Instead of resulting in a loss of a sense of community cohesion and strong cultural values, it is possible that bringing back the lost members into their community would, in the long run, strengthen their identity, bring back some of what was lost through colonization and heal some of the trauma of the past.

[192] In order to meet this step of the *bona fide* justification test, the criteria used in the processing of membership applications must be reasonably necessary to accomplish its purpose or goal, in the sense that Peters First Nation cannot accommodate the Complainants, and other similar applicants, without incurring *undue hardship*. There was no evidence of any attempt to accommodate the Complainants. It seems there was not even a *consideration* of how accommodation could occur, let alone accommodation without undue hardship. This absence is particularly egregious considering the severe consequences of the discriminatory conduct for the Complainants.

H. Remedies under section 53 of the CHRA

[193] Having found the complaints of Gordon, Carol, Neil and Deborah to be substantiated, I now turn to remedies. The Complainants have requested the following:

a. an order that Peters First Nation cease its discrimination against the Complainants and to re-decide their membership status in a non-discriminatory manner and in accordance with the Indian Act and the Membership Code (section 53(2)(a) CHRA);

b. an order that Peters First Nation cease employing discriminatory policies in relation to age and family status (including enfranchisement status) regarding the processing of all future membership applications (section 53(2)(a) CHRA);

c. an order that Peters First Nation make available to each Complainant, on the first reasonable occasion, the rights, opportunities or privileges that the Complainants have been unlawfully denied, including the lump-sum distributions from the Trans Mountain Pipeline in 2016 ($30,000) and the Seabird Island Band land settlement in 2020 or 2021 ($212,000) (section 53(2)(b) CHRA);

d. an order that Peters First Nation compensate each Complainant $20,000 for the pain and suffering they have experienced as a result of the discrimination (section 53(2)(e) CHRA);

e. an order that Peters First Nation pay each Complainant special compensation in the amount of $20,000 as Peters First Nation has engaged in willful or reckless discrimination (section 53(3) CHRA); and

f. a declaration that the Tribunal retain supervisory jurisdiction over the implementation of the remedies.

[194] The Commission requests similar orders. It also requests the following additional orders:

a. a finding that, when Peters First Nation removed Deborah and Harold from the membership list, it committed a discriminatory practice contrary to section 5 of the CHRA;

b. an order that Peters First Nation adopt, review or revise policies and practices with respect to processing membership applications, in consultation with the Commission within one year; and

c. a declaration that the Tribunal retains its jurisdiction and remains seized of the matter until the parties confirm that the remedies have been implemented in order to receive evidence, hear additional arguments or make additional orders, in the event the parties disagree regarding the interpretation or implementation of any relief ordered.

[195] Peters First Nation opposes all requested remedies of the Complainants and the Commission and asks that the complaints be dismissed.

[196] The remedial authority of the Tribunal is set out in section 53 of the CHRA. Consistent with the quasi-constitutional nature of the CHRA, the Tribunal's remedial powers are to be interpreted in a purposive fashion that promotes the overall objectives of the CHRA. In line with these objectives, the aim of making orders under section 53 is not to punish the Peters First Nation, but rather to meaningfully vindicate any losses suffered by the victim of discrimination and to eliminate and prevent 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).

[197] The task of fashioning effective remedies is an intricate one, demanding innovation and flexibility on the part of the Tribunal (*Canada (Attorney General) v Grover*, 1994 CanLII

18487 (FC) at para 39). As such, I consider the requested remedies with a view to vindicating any losses of the Complainants and to eliminate and prevent, as much as possible, future discrimination at the hands of Peters First Nation.

(i) Should Peters First Nation be ordered to cease discriminating against each of the Complainants?

[198] To begin, I find it appropriate and necessary to make the requested order pursuant to section 53(2)(a) of the CHRA that Peters First Nation cease discriminating against each of the Complainants. Such a remedy is necessary to vindicate the rights of the Complainants and to promote the provision of membership-related services in Peters First Nation free of discrimination, as protected in the CHRA.

[199] In the context of the current proceedings, ceasing discriminatory behaviour would mean stopping the discriminatory processing of membership applications. This would include things such as:

a. not telling the Complainants not to apply or dissuading them from applying;

b. not requiring an overly onerous application process;

c. not adding other barriers in the application process that are not found in the Membership Code; and

d. not considering prohibited characteristics in the application process.

(ii) Should Peters First Nation be ordered to reprocess each of the Complainants' membership applications?

[200] I agree that, as argued by the Complainants and the Commission, it is appropriate to order Peters First Nation to reprocess and re-decide the applications of Gordon, Deborah, Neil and Carol in a non-discriminatory manner.

[201] This order is made pursuant to section 53(2)(b) of the CHRA, which allows the Tribunal to order that a respondent "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." In this case, such an order would

make available to the Complainants a non-discriminatory processing of their membership requests, a right that was denied them because of the discriminatory conduct of Peters First Nation.

[202] As stated above, remedies should be crafted with the goal of promoting the rights protected by the CHRA and meaningfully vindicating any loss suffered by the victims of discrimination. If I did not order Peters First Nation to reprocess the requests of the Complainants for membership, there would be little vindication or healing moving forward. There is also uncertainty whether their membership requests will be dealt with without significant delays, not face other hurdles or even be processed at all. This uncertainty is increased because of the bad faith shown by Peters First Nation in processing membership requests in the context of the current complaints as well as in similar situations that led to the judicial reviews at the Federal Court, as discussed above. I am convinced that a clear order is needed to ensure that, moving forward, the Complainants' membership applications will be dealt with free from discrimination. Given the issue of repeated long delays in this case, in order to avoid further delays, I find it appropriate to include a time limit on this order of 30 days, which coincides with the timelines to process membership applications in the Membership Code.

[203] Given that Deborah and Gordon have not submitted paper membership applications, it may be difficult to properly process their requests in light of this judgment. Therefore, to ensure this order is effective, Deborah and Gordon would need to submit paper applications to Peters First Nation as soon as possible. This will ensure that the Membership Committee has the proper personal information for the inclusion of Deborah and Gordon on the membership list, as the case may be. To respect this judgment, the application process, including the requested documentation, should be no more onerous than necessary to verify whether the applicants meet the requirements of Part III of the Membership Code and to include their name on the membership list, if they meet the criteria for membership. The 60 day time limit to process Deborah's and Gordon' applications will start as of the date their application is submitted to the Membership Committee.

[204] In its closing submissions, Peters First Nation requested clarification from this Tribunal on "what the Council, acting in their capacity as the Membership Committee, should

consider when reviewing applications for membership" should the complaints be substantiated. The Federal Court and Federal Court of Appeal have already provided this sort of direction for Peters First Nation in many of its judgments (see, at **Schedule A**, a sampling of paragraphs from these judgments that provide instruction and guidance to Peters First Nation on how their membership applications should be processed). Given the guidance from the Federal Court and the Federal Court of Appeal, I do not find it necessary to provide guidance beyond what is already in this decision.

[205] As a final point, Peters First Nation noted, rightfully so, that this Tribunal does not have the authority to order membership to the Complainants. *Jacobs v Mohawk Council of Kahnawake,* 1998 CanLII 3994 (CHRT) clarified that this Tribunal cannot specifically order membership as a remedy. Through this order, the Tribunal is not ordering membership itself, even if the result of reprocessing the membership requests in a non-discriminatory manner seems self-evident. In the normal course of things, this recognition of membership would be done by Peters First Nation itself.

(iii) Should Peters First Nation be ordered to cease its discriminatory policies and criteria related to age and family status in all current and future membership applications?

[206] The Complainants and the Commission request an order that Peters First Nation cease employing discriminatory policies and criteria regarding the processing of *all* present and future membership applications. They argue this order is necessary to ensure this judgment is fully implemented and to prevent future discrimination of applicants.

[207] Section 53(2)(a) of the CHRA gives the Tribunal broad discretion in the making of remedial orders, in keeping with the broad purposes and goals of human rights legislation:

> **53(2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> > **(a)** that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general

> purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> > **(i)** the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> >
> > **(ii)** making an application for approval and implementing a plan under section 17;
>
> [emphasis added]

[208] This provision is designed to address systemic discrimination (*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2021 CHRT 41 (CanLII) at para 18).

[209] I agree that a systemic remedy of the sort requested is necessary to eliminate and prevent future discrimination in light of the behaviour of Peters First Nation as laid out in this judgment and in the numerous related Federal Court and Federal Court of Appeal decisions. For example, in one of the most recent judgments of the Federal Court, the Court reproached Peters First Nation for its reluctance or refusal to abide by the instructions of the Court (in *Peters v. Peters First Nation*, 2023 FC 399 (CanLII):

> [74] I find that the Decision [of Peters First Nation to deny membership] is not internally coherent, does not include a rational chain of analysis, and is not justified based on the facts and law (*Vavilov* at para 85). The Band Council not only failed to engage with the Applicant's submissions and the provisions of the Membership Code, but also failed to abide by the guidance of the Federal Court of Appeal in *Peters FCA* (at paras 57-62).
>
> …
>
> [85] Having reviewed the record, I agree with the Applicant that the Band Council has demonstrated bad faith by attempting to impose a non-existent age restriction. The Band Council's conduct in relying on such an age restriction in light of both *Engstrom FC* and *Engstrom FCA* is one such example of bad faith. Despite those decisions directly addressing the Band Council's position, it has refused reconsider its 2020 Decision even after the Applicant's repeated requests to do so.
>
> …
>
> [88] In summary, the Band Council acted in bad faith by constantly moving the yardstick in determining the simple and straightforward matter of membership pursuant to the Membership Code. Similar findings were made in *Engstrom*

> *FC* (at para 17) and in Engstrom *FCA* (at para 34). The Band Council's conduct has not changed in spite of these two decisions.
>
> [emphasis added]

[210] As such, I agree it is necessary to order Peters First Nation to cease its discriminatory conduct in the processing of all current and future membership applications.

(iv) Should Peters First Nation be ordered to work with the Commission to review and revise its policies respecting membership?

[211] The Commission is requesting an order requiring Peters First Nation to work with it to adopt, review or revise policies and practices that would respect this judgment and the principles of non-discrimination. Such an order is permissible under the CHRA pursuant to section 53(2)(a) which 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."

[212] Little detail was provided by the Commission as to why this remedy is merited and what it would actually involve. It is unclear exactly which policies the Commission would review, given that Peters First Nation stated that it does not have any policies or procedures to support the implementation of their Membership Code.

[213] Chief Webb mentioned that the Council is considering trying for a second time to amend its Membership Code. However, a Membership Code is a key legislative document of a First Nation and is not a policy that the Commission would normally review and comment on. In addition, given that the current complaints relate to the processing of the membership requests and are not challenges to the Membership Code itself, a review of the Membership Code by the Commission would not be appropriate to order.

[214] The only supporting document to the Membership Code that was frequently mentioned during the hearing was the application form. As discussed, the current application form and its processing imposed on applicants are unnecessarily onerous and require documents and information that are extraneous to the requirements of the Membership Code. Therefore, it should be helpful for the Commission to support Peters First Nation in

reviewing changes to its application form and related processing. Clarifying the application process and ensuring that it is non-discriminatory should go a long way to make the entire processing of future membership applications non-discriminatory. I find the Commission's request in regard to the application form is, therefore, reasonable. The Commission requests one year to complete this work, which is also reasonable.

(v) Should Peters First Nation be ordered to make available membership opportunities and privileges to the Complainants that have been denied, including compensation for the Trans Mountain Pipeline and the Seabird Island Band land settlement?

[215] Pursuant to s. 53(2)(b) of the CHRA, each of the Complainants seeks an order that Peters First Nation make available to them, on the first reasonable occasion, the rights, opportunities or privileges that the Complainants have been denied. This request includes the lump-sum distribution from the Trans Mountain Pipeline agreement with Kinder Morgan, which was made sometime around 2016 in the amount of $30,000 and the Seabird Island Band land settlement distributions, which were made sometime in 2020 and 2021 and totalled approximately $212,000.

[216] Peters First Nation argues that such an order would be an illegal retroactive application of the law. I am not persuaded by this argument. The CHRA regime is very different than a judicial review at the Federal Court, which looks at whether a membership decision was unreasonable, and there is no awarding of damages, pursuant to section 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7.

[217] For this Tribunal, section 53(2)(b) of the CHRA specifically allows the Tribunal to order that a respondent "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." I would also point out that these types of "retroactive" remedies are frequent under the analogous section 53(2)(c) addressing lost wages.

[218] The purpose of such remedies is to put a complainant back in the position they would have been in had the discrimination not occurred. The aim is not to punish Peters First Nation but to eliminate, to the extent possible, the discriminatory effects of the practice (*Earl*

Ka-Nowpasikow v Poundmaker Cree Nation, 2023 CHRT 38 at para 134 citing *Robichaud v Canada (Treasury Board),* [1987] 2 SCR 84 at para 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General),* 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50). The analysis required for such an order is below.

(a) Would the Complainants likely have been granted membership but for the discrimination?

[219] On a balance of probabilities, I find that the Complainants would have been granted membership had it not been for the discriminatory conduct. More specifically, given the clear and compulsory language of the Membership Code, and given the facts presented at the hearing, if the Council had not imposed the discriminatory criteria and approaches to processing applications, the Council (acting as the Membership Committee) would have found that the Complainants met one or more of the membership criteria set out in Part III of the Membership Code when processing their requests.

[220] As a reminder, Part III of the Membership Code sets out the following as the sole criteria to be entitled to membership:

> "1. Membership in the Peters Indian Band shall consist of the following persons
>
> > a) Everyone whose name appeared on the Band List on April 17, 1985;
> >
> > b) Everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 2 of the *Indian Act*, as amended, by the date the Membership Code is adopted by the Band;
> >
> > c) Everyone who became entitled to have his or her name registered on the Peters Indian Band List in accordance with Section 6 paragraph 1 (f) of the *Indian Act*, as emended (sic), by the date the Membership Code is adopted by the Band;

> d) Everyone who is granted Band Membership Status pursuant to part IV and V of this Membership Code;
>
> e) Everyone who is a natural child of a parent whose name is registered on the Band List."

[221] Below, I review Part III of the Membership Code and apply it to the evidence presented at the hearing to determine whether it appears each Complainant would have met one or more of these criteria for membership, on a balance of probabilities.

Deborah

[222] Deborah appears to meet the criterion for membership set out in Part III section 1b), which recognizes entitlement to membership for those who became entitled to have their name registered on the membership list in accordance with section 6 paragraph 2 of the Indian Act by June 25, 1987, the day the interim Membership Code came into effect.

[223] Section 6 paragraph 2 of the Indian Act states, in simple terms, that if one of your parents had or was entitled to status under section 6(1), you are also entitled to Indian status. This seems to be the case for Deborah given that she had one parent who had Indian status and one parent who was non-Indian. I note that this is also the case for Harold.

Gordon

[224] Like Deborah, it also appears that Gordon would meet the criteria for membership set out in Part III section 1b) because Gordon had one parent who had Indian status and one parent who was non-Indian.

Neil

[225] Neil seems to be entitled to membership pursuant to Part III, section 1c), which recognizes the entitlement to membership for those who were entitled to have their name registered on the membership list in accordance with section 6 paragraph 1(f) of the Indian Act by June 25, 1987.

[226] Section 6 paragraph 1(f) of the Indian Act states, in simple terms, that if both of your parents have, had or were entitled to status, you are entitled to Indian status. This seems to be the case for Neil, as both of his parents had Indian status.

Carol

[227] It appears that, like Neil, Carol would meet the criteria for membership set out in Part III section 1b), as both of Carol's parents had Indian status.

[228] It also appears that Carol would meet the criteria for membership set out in Part III, section 1e), which entitles children who have or had a parent whose name is on the membership list to membership. This seems to be the case for Carol because her mother's name was on the membership list when she was alive following the coming into force of the Membership Code.

(b) Timeline of disbursements compared to discriminatory conduct

[229] Given the numerous dates when discriminatory conduct occurred for each of the Complainants as well as the dates when the various disbursements were made to members, it is necessary to clarify timelines in order to determine the appropriate monetary remedies for each Complainant.

[230] The Complainants ask for the rights, opportunities or privileges that they were denied because of the discriminatory conduct to be made available to them. Beyond the approximate dates and amounts provided for the Trans Mountain and Seabird Island disbursements, the Complainants do not specify amounts they feel they should be entitled to. As admitted by all the witnesses of Peters First Nation, there were many annual disbursements to members in recent years, beyond the two lump-sum distributions. For example, Peters First Nation confirmed the following types of monetary benefits are regularly paid out to members:

a. Christmas bonuses;
b. Thanksgiving bonuses;
c. money to cover housekeeping expenses;
d. money to cover school lunches;
e. money to cover costs associated with school graduations;
f. money to pay for entrance to a local water park; and

g. top ups for health care and education costs not covered by Canada.

[231] Details regarding the more frequent monetary benefits were not in evidence, but it is clear that in the last eight to ten years alone, several hundred thousand dollars has been paid out to each member on the membership list of Peters First Nation. However, with the exception of the larger lump-sum amounts, the exact amounts and dates of these payments are uncertain and not provided in the evidence. Therefore, any figure the Tribunal were to derive for the numerous annual distributions would be speculative. Given this, the analysis for this particular remedy will be limited to the payment of the amounts provided to members through the Trans Mountain Pipeline disbursement of $30,000 made in 2016 and the Seabird Island Band land settlement disbursements totalling $212,000 made in 2020 and 2021.

[232] As set out below, by the time these disbursements were made, Gordan, Deborah, Neil and Carol would have, on a balance of probabilities, benefited from those disbursements but for the discriminatory conduct:

a. **Gordon**: Peters First Nation's discriminatory conduct against Gordon occurred in 2014, when he was told by Councillor Victoria Peters not to apply for membership and in 2021 when he was made to complete an unnecessarily onerous application process to have his entitlement to membership recognized.

b. **Deborah**: Peters First Nation's discriminatory conduct against Deborah occurred sometime in the 2000s, when the Chief told her not to apply for membership and again in 2021 when she was made to complete an unnecessarily onerous membership application process.

c. **Neil**: Peters First Nation's discriminatory conduct against Neil occurred in 2012, 2013 and 2016 in the processing of his membership applications and in 2018 when he was denied the right to the appeal process, as set out in the Membership Code.

d. **Carol**: Peters First Nation's discriminatory conduct against Carol occurred in 2012, 2013, 2016 and 2021 in the processing of her membership applications.

[233] Considering the timelines of the discriminatory conduct and the dates of the disbursements in 2016, 2020 and 2021, I find that Deborah, Gordon, Neil and Carol were discriminated against *before* the Trans Mountain Pipeline disbursement and the Seabird Island Band land settlement disbursements were made and, but for the discrimination, they

would have been granted membership and would have benefited from the monetary distributions.

[234] More specific to Gordon and Deborah, who did not submit paper applications, this finding still holds. In light of their repeated verbal requests over the years and given their actual attempt to complete a paper application in 2021, I infer that if they had not been adversely treated in their verbal requests and if they had been informed of the requirements and process set out in the Membership Code, they would have submitted a paper application and been accepted as members.

[235] The loss of the Trans Mountain Pipeline disbursement and the Seabird Island Band land settlement disbursements put the Complainants at a significant financial disadvantage compared to recognized members.

[236] Given the above, I find there is a clear link between the discrimination and the loss claimed (*Christoforou v. John Grant Haulage Ltd*., 2021 CHRT 15 (CanLII) at paras 37-38) and the requested order is reasonable and made on a principled basis. Providing Peters First Nation 60 days to make the ordered payments is reasonable and should give them sufficient time to organize the payments.

(vi) Should each of the Complainants be entitled to compensation for pain and suffering?

[237] Section 53(2)(e) of the CHRA allows the Tribunal to 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." The Tribunal tends to reserve the maximum amount of $20,000 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). The purpose of these awards is compensatory and not punitive.

[238] The Complainants seek the maximum amount of $20,000 as compensation for the pain and suffering they experienced because of the discrimination. In my view, an award $12,500 for pain and suffering is appropriate in the circumstances.

[239] The Complainants testified to the impacts that the discriminatory conduct had on them, causing significant emotional pain, stress, shame, anxiety and sadness. More particularly, the Complainants, all of whom would have likely obtained membership but for the discriminatory conduct, suffered the following impacts due to the discriminatory processing of their membership requests:

a. the loss of personal and cultural identity, by not having a home community that accepts them;

b. the loss of connection to extended family who are members, particularly members who live on the reserve;

c. the loss of a sense of community and belonging;

d. the loss of financial benefits, including health care and education benefits beyond those covered by Canada;

e. the loss of numerous annual and disbursement payouts, as detailed above;

f. the loss of their voting rights and the rights to run for the Council; and

g. the loss of the ability of their children and grandchildren to become members.

[240] As stated, without recognized membership, the Complainants were denied the ability to be involved in their community in significant ways, such as by voting or running for the Council. Peters First Nation argued that the Complainants did not try to vote or run for the Council and, as such, they cannot claim that the denial of a right to vote or run for the Council made subjected them to a disadvantage. I do not find this a persuasive argument. People will generally not try to vote or put their name forward for election if they know they are not allowed and risk being belittled and shunned. In the case of Neil, he did, in fact, try to vote in 2011 and was denied. I am persuaded that the denial of such rights is significant and meaningful.

[241] As set out in the testimony of the Complainants, the Complainants were also explicitly and indirectly made to feel unwelcome in many ways throughout their adult lives because they were not members. This treatment flows from the discriminatory processing of the applications because of the earlier finding that they would have been members but for the discriminatory treatment. This sense of rejection and disconnection from culture, place and

community is perhaps the most significant disadvantage and the one that seemed to cause the most suffering in the Complainants.

[242] The Federal Court of Appeal in *Peters First Nation v. Engstrom*, 2021 FCA 243 at paragraph 33 recognized the importance of membership in a First Nation to "an individual's sense of identity, culture and values." Similarly, during these proceedings, each of the Complainants testified in a convincing and emotional manner as to the adverse impacts and harm that the continued denial and recognition of them as members have had on them and their identity.

[243] Most of the Complainants and witnesses of Peters First Nation acknowledged that they are all related—cousins, aunts, nephews and nieces. Many of them played together as children, visited and stayed with each other as adults. I accept the evidence of the Complainants that being rejected and mistreated by family members makes the pain even more poignant.

[244] I am convinced that the expressions of the Complainants' pain and suffering are genuine and not sentiments made up to support the case, as alleged by Peters First Nation. I am also not persuaded the complaints were inappropriately instigated, as argued by Peters First Nation, because of the support and information provided by Andrew Genaille on the protections set out in the CHRA and on the process to file complaints with the Commission.

[245] In *Tanner*, a case about a band member being denied the right to run for the Council because of a discriminatory rule, an award of $12,500 was made for pain and suffering and a further $2,500 for pain and suffering for retaliation. The evidence in that case was the Band's conduct made the complainant "feel alienated, sad, isolated and embarrassed. Pain she continues to feel to this day" (*Tanner v. Gambler First Nation*, 2015 CHRT 19 at para 168). I am convinced that the pain suffered by the Complainants as the result of the discrimination is at least equivalent to that suffered in *Tanner*.

[246] The Human Rights Tribunal of Ontario primarily applies two criteria in evaluating appropriate compensation for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination (See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) at

para 52; *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at para 35). This Tribunal in *Christoforou v. John Grant Haulage Ltd*., 2021 CHRT 15 (CanLII) found this a useful framework to apply to an analysis under section 53(2)(e) of the CHRA (para 105).

[247] In applying this framework, I find that an award near the higher end of the scale is warranted and appropriate. The importance of membership in a First Nation to an individual's sense of identity, culture and values is hard to overstate. The impact on the Complainants was severe, as described above. I find that an award of $12,500 per Complainant is justified in this case.

(vii) Should each of the Complainants be entitled to compensation for willful and reckless discrimination?

[248] Pursuant to s. 53(3) of the CHRA, the Complainants seek an order that Peters First Nation pay them each an additional $20,000 as compensation for Peters First Nation's willful or reckless discrimination. Section 53(3) 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."

[249] Section 53(3) is a punitive provision meant to provide a deterrent and discourage deliberate, willful or reckless discrimination. The maximum award is reserved for the very worst cases (*Tanner v. Gambler First Nation,* 2015 CHRT 19, paras. 171-172).

[250] A finding of wilfulness requires an *intention* to discriminate and to infringe a person's rights under the CHRA (*Christoforou v. John Grant Haulage Ltd*., 2021 CHRT 15 (CanLII) at paragraph 107).

[251] Recklessness usually 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 v. John Grant Haulage Ltd*., 2021 CHRT 15 (CanLII) at para 107).

[252] I agree with the Complainants that this is one of those very worst cases of reckless indifference by Peters First Nation to the point that their discriminatory conduct was done wantonly and needlessly. I also agree with the Complainants that there is evidence of intention, making the discrimination willful.

[253] The unreasonable delays, lack of responses to membership applications and the continual shifting of reasons for denying membership despite the clear language of the Membership Code show a reckless disregard for the rights, pain and suffering of the Complainants.

[254] Beyond reckless, Peters First Nation also demonstrated willful discrimination. Peters First Nation is aware that the age requirement is not in the Membership Code. It is clear from a plain and reasonable reading of the Membership Code. And, since 2018, Peters First Nation has been repeatedly told by the Federal Courts that the age requirement is nonexistent and should not be applied and that their behaviour regarding the processing of applications is unlawful, abusive and shows bad faith (*Peters v. Peters First Nation*, 2023 FC 399, para. 85 and *Peters v. Peters First Nation*, August 25, 2023, T-996-21 (re costs), para. 6). Yet Peters First Nation candidly and blatantly continues to disregard such findings and continues to apply the impugned criteria while knowing it has no legal authority to do so.

[255] Peters First Nation confirmed during the hearing that it does not agree with the Federal Court's and Federal Court of Appeal's orders, and the witnesses were cagey and unclear as to whether they would change their approach to processing membership requests in the face of an order of this Tribunal. Chief Webb stated they would continue to process applications the way they always have. When Leanne Peters was asked about the Federal Court of Appeal decision that confirmed that there was no age restriction in the Membership Code and that it was not a custom to require applicants to be 17 or under, she said she did not agree and that the Council would continue to apply the criteria that it believed were relevant. She stated that, moving forward, the Council would continue to look over everything in the application and that the Council gets to decide. Councillor Victoria Peters, when asked if Peters First Nation would continue to apply the Membership Code,

stated: “Yes. I will continue to go by the Membership Code as we have done all these years.” These statements are evidence of not only reckless discrimination, but willful discrimination.

[256] The highest award of $20,000 should be made to each Complainant as compensation for the willful and reckless discriminatory conduct of Peters First Nation.

(c) Rights of the parties pursuant to the United Nations Declaration on the Rights of Indigenous People

[257] Within this analysis of the amount of appropriate compensation for the willful and reckless discrimination of Peters First Nation against the Indigenous Complainants, it is appropriate to discuss the relevancy of the *United Nations Declaration on the Rights of Indigenous Persons* (UNDRIP).

[258] UNDRIP is a universal international human rights instrument signed by the vast majority of countries, including Canada. By signing UNDRIP, Canada, and the other signatory countries, recognize that its provisions reflect the current state of international law and are the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world. As such, both the intent and specific provisions of UNDRIP should be considered and respected as much as possible when interpreting the provisions of the CHRA. This principle has been strengthened since Canada adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14*,* which officially incorporates UNDRIP into Canadian law, and states that Canada must implement UNDRIP and ensure its laws fully respect UNDRIP.

[259] UNDRIP emphasizes that Indigenous peoples have collective rights to self-determination and control over matters relating to governance and membership. This collective right was brought up by Peters First Nation. But this is just part of the story. UNDRIP equally states that Indigenous individuals have a right to belong to their Indigenous community or Nation according to the customs of the community. Like all humans, Indigenous individuals have all the human rights and fundamental freedoms recognized in the *Charter of the United Nations*, the *Universal Declaration of Human Rights* and international human rights law. As such, UNDRIP stresses that individuals cannot be

discriminated against in exercising this right to belong to their community. UNDRIP specifically address discrimination in regard to membership at articles 2 and 9:

> 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 9
>
> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
>
> [emphasis added]

[260] The criteria used by the Council to process the membership requests of the Complainants were not the legal custom of Peters First Nation. The reckless and willful discrimination of Peters First Nation against the Complainants, resulting in their exclusion from membership, impacted the Complainants' fundamental rights protected by UNDRIP. The reckless and willful way that Peters First Nation dealt with the Complainants' fundamental rights, as Indigenous individuals, is relevant to the consideration of the amount of damages that should be awarded and supports the finding that the highest compensation is appropriate in the circumstances.

(viii) Should this Tribunal retain its jurisdiction until the parties confirm that the remedies have been implemented?

[261] The Complainants and the Commission ask the Tribunal to remain seized of this matter until the parties confirm the remedies ordered have been implemented. The Tribunal's ability to retain jurisdiction is part of the broad discretion that section 53 of the CHRA provides to fashion effective remedies. More specifically, it allows the Tribunal to retain jurisdiction pending the implementation of final orders to cease the discrimination. (*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada*

(representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 6 at para 121).

[262] The Complainants and the Commission make this request for many of the same reasons they argue the maximum amount of compensation should be awarded for willful and reckless behaviour. Without such supervision, they argue, any remedy ordered is likely to be illusory.

[263] While I agree that Peters First Nation has shown that they are resistant to any change in their approach to processing membership requests, even when directed by a court, I do not agree this is a proper situation in which the Tribunal should retain jurisdiction. I find that retaining jurisdiction in this case would be an inappropriate expansion of why this Tribunal has retained jurisdiction in previous cases. The most usual reason for the retention of jurisdiction is so that the Tribunal can continue to decide something that is uncertain or in cases where the liability and remedies are bifurcated.

[264] For example, in *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 (CanLII), the pension information was not initially available and so the Tribunal retained jurisdiction until the parties provided additional submissions on remedies and the Tribunal could render a decision on remedies. In *Ka-Nowpasikow v Poundmaker Cree Nation*, 2023 CHRT 38, the housing situation of the Complainant at the time the Tribunal issued its decision was uncertain. In both cases, more evidence was needed to craft an appropriate and effective remedy. 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*), 2021 CHRT 6, the Tribunal retained jurisdiction in order to decide remedial issues.

[265] Similarly, in *Association of Ontario Midwives v. Ontario (Health and Long-Term Care),* 2020 HRTO 165 at paras. 203-204, the Human Rights Tribunal of Ontario denied the request to retain jurisdiction simply to monitor implementation.

[266] The CHRA contemplates situations where respondents neglect or refuse to properly or fully implement orders from this Tribunal. Specifically, the CHRA provides an avenue to enforcement at section 57 by registering an order with the Federal Court:

> **57** An order under section 53 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy.

[267] This request would be the proper and most time-effective avenue for enforcement should the implementation of the orders issued in this decision become an issue. Further, given the enforcement powers of the Federal Court that the Tribunal do not possess, this avenue will likely be the most effective path to enforcing implementation.

VII. Orders

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

a. Peters First Nation discriminated against Gordon Lock, Deborah Senger, Carol Raymond and Neil Peters in the provision of membership-related services on the prohibited grounds of age and family status;

b. Peters First Nation is ordered to cease its discrimination against Gordon Lock, Deborah Senger, Carol Raymond and Neil Peters pursuant to section 53(2)(a) of the CHRA;

c. Peters First Nation is ordered to reprocess Gordon Lock's, Deborah Senger's, Carol Raymond's and Neil Peter's membership applications in a non-discriminatory manner within 30 days in accordance with the findings of this Tribunal pursuant to section 53(2)(b) of the CHRA;

d. Peters First Nation is ordered to cease employing discriminatory policies and practices in relation to age and family status and according to the findings of this Tribunal regarding the processing of all future membership applications, pursuant to section 53(2)(a) of the CHRA;

e. Within 60 days, Peters First Nation is ordered to pay to each of Gordon Lock, Deborah Senger, Carol Raymond and Neil Peters the amount of $242,000, which encompasses $30,000 for their share of distributions from the Trans Mountain Pipeline disbursements and $212,000 for their share of the Seabird Island Band land settlement disbursements, pursuant to section 53(2)(b) of the CHRA;

f. Within 60 days, Peters First Nation is ordered to pay Gordon Lock, Deborah Senger, Carol Raymond and Neil Peters $12,500 each in compensation for the pain and suffering they have experienced as a result of the discrimination pursuant to section 53(2)(e) of the CHRA;

g. Within 60 days, Peters First Nation is ordered to pay Gordon Lock, Deborah Senger, Carol Raymond and Neil Peters $20,000 as compensation for Peters First Nation's willful and reckless discrimination against them pursuant to section 53(3) of the CHRA; and

h. Within one year, Peters First Nation is ordered to review and revise its application form and related application procedures in consultation with the Commission, pursuant to section 53(2)(a) of the CHRA.

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
November 28, 2023

Schedule A:

Peters v. Peters First Nation Band, 2018 FC 544 (CanLII)

[43] INAC's letter to Chief Frank Peters dated October 15, 1987 confirmed that Mr. Peters was registered as a member of the PFN. The fact that Mr. Peters' name appeared only on the "manually maintained" list is irrelevant. Furthermore, he acquired his right to membership before the Membership Code came into effect, and he therefore benefited from the protection afforded by s 10(4) of the *Indian Act*. Pursuant to Bill C-31, the PFN had no power to deprive him of his previously-acquired right to band membership. It follows that former Chief Frank Peters acted without authority when he sought to remove Mr. Peters from the band list in November 1987.

Engstrom v. Peters First Nation, 2020 FC 286 (CanLII)

[10] In rejecting the applications of Mr. Engstrom and Ms. Ragan, it is clear that Council did not consider itself bound by the membership criteria set out in the Code. This is a surprising and indefensible position. It was not open to the Council to make up its own membership rules to supplement the explicit criteria that were adopted in 1990 when the Band took control of its memberships.

[14] All of this is not to say that the Band cannot control its own membership. If the Band wants to apply "character" considerations or any other lawful limitations to membership, it can do so with appropriate amendments to the Code. It is questionable, however, that an age limitation would be justified because it is *prima facie* discriminatory.

[15] Councils' further argument that it was entitled to consider past practice and band customs to supplement its discretion is untenable. The Code leaves no room for such matters; but even if it did, the evidence presented on behalf of the Council does not establish the existence of any such practice or custom. Past practices or band customs may be available where gaps exist in an applicable code that must be filled to give operational effect to a regime or process: see *Beardy v Beardy*, 2016 FC 383, 266 ACWS (3d) 527. This is most commonly seen in band election codes where not every exigency is provided for. Even at that, the establishment of customary practice requires evidence that shows that the practice was "firmly established, generalized and followed consistently and conscientiously by the majority of the community, thus evidencing a broad consensus" (*Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, at para 36, [2003] 4 FC 1133): see *Gadwa v Kehewin First Nation*, 2016 FC 597, [2016] FCJ No 569 (QL). Based on the affidavits provided by both parties, such is not the case here. Further, as Justice McVeigh stated in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, at para 32, 279 ACWS (3d) 2: "For example, a majority of a band's members must recognize the custom, not just Chief and Council. The band members must not only agree as a community to the new custom, the community must know they have agreed."

[18] In my view, this is an appropriate case to direct Council to take all the steps necessary to grant full Band memberships to the Applicants. Council has repeatedly

shown itself to be unfit to decide these matters and there is no reasonable expectation that fairness and reason will now prevail. Furthermore, the Applicants have clear and unqualified rights to be members of the Band based on their father's membership in Peters Indian Band. There is no room for some other determination. To quote from *Vavilov,* a reviewing court should not countenance "an endless merry-go-round of judicial reviews and subsequent reconsiderations." This is particularly the case where the outcome is inevitable such that remitting the case would serve no useful purpose.

Peters First Nation v. Engstrom, 2021 FCA 243 (CanLII)

[31] Given that there is only one reasonable interpretation of the term, the Federal Court did not err in ordering the Band Council to grant the respondents' membership. The Membership Code stated that the membership *shall* consist of the following persons: "everyone who is a natural child of a parent whose name is registered on the Band List." *Shall* is not discretionary and as the criteria is met, the only conclusion is that the respondents satisfy the conditions for band membership. The undisputed fact of paternity combined with the express terms of the Membership Code are sufficient to support an order that the respondents are entitled to membership in Peters First Nation.

Peters v. Peters First Nation, 2023 FC 399

[13] A band that assumes control of its membership may establish its own membership rules (Act, s. 10(2)). However, by virtue of subsections 10(4) and 10(5), if someone had already acquired the right to membership in the band prior to the time that the band established membership rules, the rules established by the band may not deprive that person of their acquired right "by reason only of a situation that existed or an action that was taken before the rules came into force."

[65] Although the 1985 amendments to the *Indian Act* recognized the right of bands to determine their own membership codes, that right is subject to conditions set out in section 10 of the *Indian Act*. Under subsection 10(4), band membership rules may not deprive a person of membership "who had the right" to have their name entered in the band list for that band immediately prior to the time the rules were established. Put another way, membership rules must provide for the continuation of subsection 11(1) of the *Indian Act*.

[66] The Interim Rules provided for a continuation of subsection 11(1) of the *Indian Act*. Therefore, since the Applicant is entitled to membership under subsection 11(1)(a) of the *Indian Act*, the Band Council is obligated to recognize his membership under both the *Indian Act* and its own Membership Code.

[67] By letter dated October 15, 1987, the Registrar provided PFN with a copy of its Band List, which included the Applicant as a subsection 11(1) member. The Band Council had no discretion to remove the Applicant. The Applicant must only request to be added to the membership list (*L'Hirondelle v Canada*, 2004 FCA 16 at para 35).

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2697/7321; T2698/7421; T2699/7521; T2716/9221; T2717/9321

Style of Cause: Lock et al. v Peters First Nation

Decision of the Tribunal Dated: November 28, 2023

Date and Place of Hearing: January 16-18, 2023, September 7 and 8, 2023

By videoconference

Appearances:

David W. Wu, for the Complainants

Sophia Karantonis, for the Canadian Human Rights Commission

Stan H. Ashcroft, for the Respondent