Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 26
Date: April 22, 2024
File Nos.: T1894/12612 and T1894/12412

Between:

Robert Renaud and Abraham Morigeau

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Aboriginal Affairs and Northern Development Canada

Respondent

Ruling

Member: Jennifer Khurana

OVERVIEW

[1] Mr. Renaud is Indigenous and was born in 1942. Abraham Morigeau is Indigenous and was born in 1933. They are the Complainants in this proceeding and applied for registration under the *Indian Act*, R.S.C. 1985, c. I-5. The Office of the Indian Registrar denied their applications because they did not meet the definition of "Indian" as defined in the *Indian Act* at the time of their applications. Mr. Renaud and Mr. Morigeau filed human rights complaints alleging that the criteria for registration under section 6 of the *Indian Act* are discriminatory on the basis of age, sex and/or family status.

[2] The Respondent, formerly known as Aboriginal Affairs and Northern Development Canada, wants the Tribunal to dismiss the complaints on a preliminary basis because it says the complaints have no reasonable chance of success. The Respondent submits that section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act") cannot be used to challenge the criteria for registration found in the *Indian Act* and that the courts are the proper forum for direct challenges to legislation.

[3] The Canadian Human Rights Commission (the "Commission") agrees that the complaints have no reasonable prospect of success. The Complainants did not respond to the motion to dismiss.

[4] For the reasons that follow, I find that the complaints must be dismissed. They are outside the scope of the Act.

BACKGROUND

[5] The *Indian Act* creates a registration system under which individuals qualify for status as an "Indian" on the basis of an exhaustive list of eligibility criteria. These criteria do not necessarily correspond to the customs of Indigenous communities for determining their own membership or reflect an individual's Aboriginal identity or heritage (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, at para 4 [*Matson/Andrews (SCC)*]).

[6] Mr. Renaud was born in 1942 and at the time of his birth, neither his maternal grandparents nor his parents had status under the *Indian Act*, despite his mother and maternal grandmother being Indigenous. As a result, Mr. Renaud was not eligible to be registered. Mr. Morigeau was born in 1933 and at the time of his birth, neither his paternal grandparents nor his parents had status under the *Indian Act*. As a result, Mr. Morigeau was not eligible to be registered.

[7] Before 1985, the *Indian Act* stripped women of their *Indian Act* status when they married a man without status. In contrast, men did not lose anything, regardless of whom they married. If a man with status married a woman without status, the woman gained status.

[8] Legislative changes to the *Indian Act* were passed in 1985 and 2011 which restored the status entitlements of some women and their grandchildren who previously lost status through marriage. As a result of those changes, Mr. Renaud's maternal grandmother and mother and Mr. Morigeau's father and paternal grandmother were entitled to be registered under sections 6(1)(c) and 6(2) of the *Indian Act*. Grandchildren born on or after September 4, 1951, also became eligible for status.

[9] Mr. Morigeau applied for registration four times under the *Indian Act*, in 1987, 2005, 2008 and 2011. Mr. Renaud applied for registration three times, in 1991, 2009 and 2011. The Office of the Indian Registrar advised the complainants each time they applied that they were not entitled to registration because they did not meet the conditions set out in the *Indian Act*. They were also born before the 1951 cut-off date set out in the *Indian Act*.

[10] Mr. Renaud filed a complaint with the Commission in 2011 alleging that the *Indian Act* discriminates on the basis of age and/or sex and Mr. Morigeau filed a complaint the same year alleging discrimination on the grounds of age, sex and/or family status. The Commission referred the complaints to the Tribunal together in December 2012 and asking the Tribunal to treat these as a single proceeding.

[11] The complaints were stayed pending relevant litigation in two other complaints before the Tribunal that also challenged the *Indian Act*. The Tribunal dismissed those complaints and found that section 5 of the Act could not be used to directly challenge discrimination written into federal laws passed by Parliament (*Matson et al v. Indian and Northern Affairs*

Canada, 2013 CHRT 13; *Andrews et al v. Indian and Northern Affairs Canada*, 2013 CHRT 21 [known together as *Matson/Andrews (CHRT)*]). In other words, lawmaking is not a "service" within the meaning of the Act, and challenges to federal laws must be made in the courts. The Commission sought judicial review of the decisions, which were upheld by the Federal Court (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2015 FC 398), the Federal Court of Appeal (*Canada (Human Rights Commission) v. Canada (Attorney General*), 2016 FCA 200), and ultimately upheld by the Supreme Court of Canada (*Matson/Andrews (SCC)*).

[12] The Tribunal wrote to the parties after the Supreme Court of Canada released its decision upholding the Tribunal's findings in *Matson/Andrews (CHRT)*. The Respondent argued that the complaints are beyond the scope of the Tribunal's jurisdiction. The Complainants wanted their complaints to proceed. The Commission agreed that challenges to legislation must be pursued in the court system. It said that Mr. Renaud and Mr. Morigeau, like the parties in Matson/Andrews, were challenging discriminatory impacts flowing from the application of mandatory and unambiguous eligibility criteria that is written into federal legislation. Those challenges are outside the scope of the Act.

[13] The Respondent filed this motion requesting that the Tribunal dismiss the complaints.

ISSUES

[14] I must decide whether the complaints are within the scope of section 5 of the Act or whether they should be dismissed as having no reasonable prospect of success. I am not determining whether the legislation was discriminatory or whether it was unfair.

[15] To decide whether the Tribunal has the jurisdiction to hear the complaints, I must answer the following questions:

1. **Do Mr. Renaud and Mr. Morigeau challenge legislation? If so, do they also allege discrimination in how a service was provided?**
2. **If the complaints are a challenge to legislation only, do they fall within section 5 of the Act?**

REASONS

[16] The Tribunal is the master of its own procedure and has the authority to determine the process to be followed in deciding the issues raised by a human rights complaint. It does not always have to hold a full evidentiary hearing in relation to each and every issue raised by a complaint to decide substantive issues coming before it (*Canada (Human Rights Commission) v. Canada (Attorney General*), 2012 FC 445 at para 119 [*First Nations Child and Family Caring Society*]). The nature of the procedure to secure the just, fair and expeditious determination of each complaint coming before the Tribunal may vary from case to case, depending on the type of issues involved (*First Nations Child and Family Caring Society* at para 128).

[17] The Tribunal may consider and grant preliminary motions to dismiss cases but must do so in a procedurally fair manner, cautiously and only in the clearest of cases (*First Nations Child and Family Caring Society* at paras 132 and 140).

[18] In my view, this is a situation where it is appropriate for the Tribunal to decide this discrete threshold question on a preliminary basis. The parties were given the opportunity to file motion materials and submissions. It is not a situation where issues of fact and law are complex and intermingled (*First Nations Child and Family Caring Society* at paras 142-143) such that it would be more efficient to proceed to a full hearing on the merits.

1. Do Mr. Renaud and Mr. Morigeau challenge legislation? If so, do they also allege discrimination in how a service was provided?

[19] Yes. Both complaints challenged the criteria for registration as an “Indian” under section 6 of the *Indian Act*. The source of the alleged discrimination is the definition of “Indian” and the registration criteria under section 6 of the *Indian Act*.

[20] In other words, the complaints are directed at the non-discretionary criteria set out in the legislation itself. Neither complainant alleges that the Office of the Indian Registrar processing their applications for registration behaved in a discriminatory way in their administration of the legislation.

2. If the complaints are a challenge to legislation only, do they fall within section 5 of the Act?

[21] No. It is settled law that section 5 of the Act cannot be used to support a direct challenge to legislation. Section 5 of the Act requires that services customarily available to the general public be provided in a non-discriminatory manner (*Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1 at para 102 [*Beattie*]). However, lawmaking is not a service customarily offered to the public, and legislation does not in and of itself constitute a "service" (*Matson/Andrews (SCC),* at paras 57-62). The proper forum to bring challenges to legislation is by way of a constitutional challenge before the courts.

[22] In certain cases where government officials have discretion in implementing legislation, or where legislation is ambiguous and open to multiple interpretations, a case may well fall within the scope of the Act (*Beattie* at paras 99 and 102).

[23] But that is not the situation here. Mr. Renaud and Mr. Morigeau are challenging the unambiguous eligibility criteria written into the legislation. The Respondent's employees had no discretion to register the complainants according to the wording of the *Indian Act* at the time. Nor is it a situation where the Respondent's officials could have interpreted the cut-off date provision in another way.

[24] Considering the jurisprudence and the nature of the complaints, I accept the Respondent's and the Commission's submissions that the complaints have no reasonable prospect of success and must be dismissed. The complaints do not challenge the way a service was provided and only target the legislation itself as discriminatory. They are outside the Tribunal's jurisdiction to decide, and I am barred from proceeding.

[25] Although I have dismissed the complaints, as the Commission submits, since the time the Respondent filed its motion to dismiss, amendments to the *Indian Act* removed the 1951 cut-off date and granted entitlements to all individuals born before April 1985 who are directly descended from women who previously lost status due to marriage. The Respondent advised the Tribunal that Mr. Renaud and Mr. Morigeau have since been registered under the *Indian Act*.

ORDER

[26] The Respondent's motion is allowed. The complaints are dismissed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
April 22, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1894/12612 and T1894/12412

Style of Cause: Robert Renaud and Abraham Morigeau v. Aboriginal Affairs and Northern Development Canada

Ruling of the Tribunal Dated: April 22, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Brian Smith, for the Canadian Human Rights Commission

Josef Rosenthal, for the Respondent