Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Roger William Andrews and
Roger William Andrews on behalf of Michelle Dominique Andrews

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Indian and Northern Affairs Canada

Respondent

Decision

Member: Sophie Marchildon
Date: September 30, 2013
Citation: 2013 CHRT 21

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I. Introduction & Historical Context

[1] Indian status is a legal construct created by the federal government. Through various provisions of the *Indian Act*, R.S.C., 1985, c. I-5 [the *Indian Act*] and its prior enactments, the federal government has defined the persons who are entitled to registration as "Indian". The statutory concept of "Indian" from early colonialism to the present day does not reflect the traditional or current customs of First Nations peoples for defining their social organization and its membership (see *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at paras. 8-12 [*McIvor*]).

[2] Prior to 1985, in defining who was and who was not entitled to registration as "Indian", previous enactments of the *Indian Act* also provided for situations where an "Indian" could be enfranchised from entitlement to registration, whether voluntarily or involuntarily. "Enfranchisement" was one of the key mechanisms by which the federal government sought to achieve the goal of assimilating First Nations people to the rest of Canadian society. The term refers to a number of statutory mechanisms that existed in the *Indian Act*, in varying forms, at all material times up to 1985. Generally speaking, enfranchisement was a process by which the federal government stripped an Indian, all of his or her minor unmarried children and future descendants of Indian status and band membership in exchange for incentives and various entitlements under the *Indian act* and otherwise, depending on the mechanisms in force at the time of enfranchisement. At different times, these incentives included such things as Canadian citizenship, the right to vote in Canadian elections, rights to hold life and/or fee simple estates in reserve lands, or per capita shares of funds held on behalf of the First Nation. In 1985, the provisions of the *Indian Act* that allowed for enfranchisement were repealed.

[3] Canada's Indian enfranchisement policy exemplifies well the dissonance between the statutory definition of "Indian" and First Nations peoples' perspective on defining their identity. The Supreme Court of Canada has noted the disadvantage, stereotyping, prejudice and discrimination associated with the enfranchisement provisions of the *Indian Act*. As L'Heureux-Dube J. wrote in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*] at para. 88 "The enfranchisement provisions of the Indian Act

were designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society". She further noted that the application of the provisions had helped to create a population of former Indians living off reserve, who were subjected to discriminatory assumptions that they were somehow "less Aboriginal" than others who had remained on reserve: *Corbiere* at paras. 83-92. Writing for the majority, McLachlin J. (as she then was) also found that to assume that an Aboriginal person off-reserve is not interested in preserving their cultural identity is to engage in discriminatory stereotyping: *Corbiere*, supra at para. 18. In a recent decision issued in July of 2012, a unanimous Federal Court of Appeal had the following to say about the process of enfranchisement by application under the former s. 108(1) of the *Indian Act*:

> Enfranchisement' is a euphemism for one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples: Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.
>
> Beginning in 1857 and evolving into different forms until 1985, 'enfranchisement' was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging 'the progress of [c]ivilization' among Aboriginal peoples...
>
> Under one form of 'enfranchisement' - the form at issue in this case – Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce - on behalf of themselves and all their descendants, living and future - their legal recognition as an 'Indian', their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.
>
> The Supreme Court has noted the disadvantage, stereotyping, prejudice and discrimination associated with 'enfranchisement': *Corbiere* ... With deep reluctance or at high personal cost, and sometimes under compulsion, many spent decades cut off from communities to which they had a deep cultural and spiritual bond.
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> *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paras. 10-13

The Ontario Court of Appeal previously made similar comments in a case involving an enfranchisement by application, stating that, "The purpose of enfranchisement was to facilitate the federal government's attempts to assimilate Aboriginal peoples into the mainstream population", and endorsing the same passage from the Royal Commission on Aboriginal Peoples, describing enfranchisement as being amongst the most oppressive practices in the history of the *Indian Act*: *Etches v. Canada (Indian and Northern Affairs)*, 2009 ONCA 182 at para. 1.

[4] As part of these proceedings, John F. Leslie Ph.D testified and prepared an expert report entitled *Indian Enfranchisement Policy in Canada: 1867 to 1951*. Excerpts from this report demonstrate the government's objective behind the previous enfranchisement provisions of the *Indian Act*:

- " ... the time has come for facilitating the enfranchisement of a great number of those Indians who, by their education and knowledge of business, their intelligence and their good conduct, are as well qualified as whites to enjoy civil rights, and to be released from a state of tutelage" (Canada, *Annual Report of the Secretary of State for the Year ended 30 June 1868*, at pp. 1-2; cited at p. 3 of Dr. Leslie's report);

- "To grant enfranchisement to the intelligent and well-behaved Indians would probably train them to still further self-reliance, and encourage their brethren who are lagging behind to make greater exertions to overtake the Anglo-Saxon in the race of progress" (Canada, *Annual Report of the Department of the Interior for the Year ended 30 June 1874*, at pp. 5-6; cited at pp. 4-5 of Dr. Leslie's report);

- " ... the true interests of the aborigines and of the State alike require that every effort should be made to aid the red man in lifting himself out of his condition of tutelage and dependence, and that it is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of true citizenship" (Canada, *Annual Report of the Department of the Interior for the Year elided 30 June 1875*, at p. xiii; cited on p. 5 of Dr. Leslie's report);

- "I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to

> stand alone...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, and that is the whole object of this Bill" (Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, 1919, quoted in John L. Taylor, *Canadian Indian Policy During the Inter-War Years, 1981-1939* at p. 147; cited on p. 17 of Dr Leslie's report);

- "In the long path that must be followed in bringing the Indian from a primitive, uncivilized state to one of self-reliance and self-support, the latter is the objective kept in view throughout.

  It is inevitable that at the beginning assistance, advice and direction must be given and restraint applied. Obviously all these should disappear upon the attainment of the desired status by the protégés or wards of the government

  [...]

  The Indian communities, instead of progressing, stand still or even retrogress: not only that, but they have a deteriorating effect upon surrounding white communities and form an obstruction to the country's progress as a whole." (Dr. Harold McGill, Deputy Superintendent General of Indian Affairs, 1933, "Notes on the enfranchisement of Indians"; cited on p. 20 of Dr. Leslie's report).

[5] In my view, in the human rights context in particular, Justice not only seeks to rectify the violation of a person's rights, but should also endeavour to heal any suffering a person has endured as a result of unjust treatment. A fundamental component of healing is the recognition of suffering. The recognition of the hurt an individual or group has endured may address their need for justice, speed up the healing process, enhance feelings of self-value and promote respect for human dignity. While the judicial sphere often speaks in terms of what is legal or illegal, human values of what is right or wrong frequently transcend beyond formal legalities and may not always be encompassed in the current state of the law. In my view, the enfranchisement policies and practices encompassed in the *Indian Act* were completely contrary to human rights principles and values.

[6] I acknowledge the suffering created by the government's previous enfranchisement policies and practices on the First Nations people of Canada, including the Complainant, Roger William Andrews, and his family.

[7] It is within the historical context of enfranchisement that the Complainant brings the present complaints.

II. Complaints

[8] The Canadian Human Rights Commission (the Commission) has requested the Canadian Human Rights Tribunal (the Tribunal) inquire into two complaints filed by the Complainant.

[9] In his first complaint, filed on or around October 20, 2008, the Complainant, on behalf of his daughter Michelle Dominique Andrews, claims Indian and Northern Affairs Canada [INAC], the Respondent, engaged in a discriminatory practice within the meaning of section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], when it denied his daughter's application for Indian status under the *Indian Act* [the first complaint].

[10] In his second complaint, filed on or around February 1, 2010, the Complainant also claims the Respondent engaged in a discriminatory practice within the meaning of section 5 of the *Act* when it granted his own application for Indian status under subsection 6(2) rather than subsection 6(1) of the *Indian Act* [the second complaint].

[11] The essence of the complaints, as described by the parties in their Agreed Statement of Facts, is that the Complainant challenges the registration provisions in section 6 of the *Indian Act* as discriminatory on the grounds of race, national or ethnic origin and family status.

[12] The complaints were consolidated for the purpose of a single hearing (see *Roger William Andrews v. Aboriginal Affairs and Northern Development Canada*, 2011 CHRT 22), which was held from October 15-19, October 22-26, and November 7-9, 2012, in Surrey, British Columbia.

III. Background

[13] The Complainant's father, Andrew Joseph, was recorded from birth as being a member of the Naotkamegwanning First Nation, also known as the Whitefish Bay Indian Band, and, therefore, was an Indian under paragraph 2(d)(i) of the *Indian Act*, R.S.C. 1927, c. 98.

[14] His father married Isabella McCafferty, who had no aboriginal ancestry, but who became an Indian under paragraph 2(d)(iii) of the *Indian Act*, R.S.C. 1927, c. 98, upon her marriage to Andrew Joseph. The two had a daughter, Jessie Joseph, on December 22, 1955. At that time, Jessie Joseph was entitled to registration as an Indian and was a member of the Naotkamegwanning Indian by virtue of her father.

[15] By written application dated January 8, 1957, Andrew Joseph applied for enfranchisement pursuant to subsection 108(1) of the *Indian Act*, R.S.C. 1952, c. 149. Through enfranchisement, Andrew Joseph, his wife and unmarried child, would cease being Indians pursuant to the *Indian Act* in exchange for various incentives.

[16] By Order in Council dated March 21, 1957, Mr. Joseph was enfranchised, along with his wife, Isabella Joseph (née McCafferty), and their daughter, Jessie Joseph. As a result, all three individuals ceased to be Indians within the meaning of the *Indian Act*, R.S.C. 1952, c. 149, s. 109, and as amended by R.S.C. 1956, c. 40, s. 27; and their names were removed from the Indian Register and from the membership list of the Indian Band.

[17] The Complainant was born in 1958. His mother, Marie Holden, is not and never was entitled to registration as an Indian under the *Indian Act*. As a result of his father's enfranchisement in 1957, when the Complainant was born, he was not entitled to registration as an Indian under the *Indian Act*, R.S.C. 1952, c. 149. If the Complainant's father had not enfranchised, the Complainant would have been entitled at birth to registration under paragraph 11(1)(c) of the *Indian Act*, R.S.C. 1952, c. 149, as a male person who is a direct descendant in the male line of a male band member.

[18] The Complainant married Georgina Maltzan in 1976, who is not and never was entitled to registration as an Indian under the *Indian Act*. They have two daughters: Cheryl Andrews, born May 9, 1983; and, Michelle Andrews, born December 4, 1986.

[19] In 1985, the provisions of the *Indian Act* that allowed for enfranchisement were repealed. The *Indian Act* was also amended to reinstate entitlements to registration for those who had previously been enfranchised. Specifically, paragraph 6(1)(d) of the *Indian Act* created entitlement to registration for persons who were named in an Order in Council issued pursuant to the former enfranchisement provisions. However, section 7 also provided that a person was not entitled to be registered if, generally, they (i) had no claim to Indian status by virtue of their own ancestry, (ii) previously gained status before 1985 by marrying an Indian man, and (iii) lost that status before 1985 by virtue of an application for enfranchisement.

[20] In 1985, the coming into force of Bill C-31, resulted in significant amendments to the registration provisions of the *Indian Act*. Since that time, it has been sections 6(1) and 6(2) of the *Indian Act* that describe the various persons who are entitled to be registered in the Indian Register. The amendments also introduced the current formulation of what is commonly known as the "second generation cut-off rule". This rule operates so as to cut off eligibility for registration upon the second consecutive generation of parenting with a person who is not an Indian. The second generation cut-off rule functions as follows:

- 6(1) has child with 6(1) = 6(1) child
- 6(1) has child with 6(2) = 6(1) child
- 6(2) has child with 6(2) = 6(1) child
- 6(1) has child with non-Indian = 6(2) child
- 6(2) has child with non-Indian = non-Indian child

[21] Prior to the 1985 amendments to the *Indian Act*, Indian status was based almost entirely upon having a patrilineal connection to an Indian man. For example, the children of Indian men who married non-Indian women received Indian status; however, the children of Indian women who had married non-Indian men were denied status. The second generation cut-off rule was introduced in an attempt to establish equality of women and men using and to create a gender-neutral standard for Indian status entitlement. As outlined above, the status of children is now assessed based on an examination of both parents, not just the father.

[22] As a result of the 1985 amendments, the Complainant's father, Andrew Joseph, and half-sister, Jessie Joseph, became eligible for registration under paragraph 6(1)(d) of the *Indian Act*. Isabella Joseph (née McCafferty), whose former status flowed solely from her marriage to Andrew Joseph, did not regain status given the application of section 7 of the *Indian Act*. The Complainant became eligible for registration under subsection 6(2), as he was the child of one person eligible under subsection 6(1) (Andrew Joseph) and one non-Indian (Marie Holden). The Complainant was not himself eligible for registration under paragraph 6(1)(d) as his name did not appear in the enfranchisement order as he was born after his father's enfranchisement.

[23] On July 29, 2004, the Complainant applied for registration as an Indian under the *Indian Act*. His application was supported by various documents outlining the Complainant's background and family history. On August 21, 2006, the Office of the Indian Registrar notified the Complainant that he was registered as an Indian under subsection 6(2) of the *Indian Act* and as a member of the Naotkamegwanning Band in accordance with paragraph 11(2)(b).

[24] On October 19, 2006, the Complainant submitted an application for registration as an Indian under the *Indian Act* on behalf of his daughter, Michelle Andrews. This application provided information about Michelle Andrews' father (the Complainant), but no information about the identity of Michelle Andrews' mother (Georgina Maltzan). On March 20, 2007, the Office of the Indian Registrar notified Michelle Andrews that, since one of her parents (her father Roger Andrews) was entitled to be registered under section 6(2) and since no information

had been provided about her mother, there was no provision in the *Indian Act* which would permit entry of her name in the Indian Register.

[25] On March 30, 2009, the Complainant submitted a protest to the Office of the Indian Registrar, pursuant to section 14.2 of the *Indian Act*, in which he voiced his wish to appeal, among other things, the decision to register him under subsection 6(2) of the *Indian Act*, rather than under some provision of subsection 6(1); and, the decision that Michelle Andrews was not eligible for registration.

[26] On June 4, 2010, the Office of the Indian Registrar wrote a letter to Mr. Andrews explaining the legislative provisions and explaining how they operated so as to enable him to be eligible for registration under subsection 6(2) of the *Indian Act*, but not under any provision of subsection 6(1). The letter also explained that since the Complainant had not provided any new information and since he had not provided any new arguments as to how the information already supplied should be analysed, his letter could not be accepted as a valid protest.

[27] As for his daughter, Michelle Andrews, the June 4, 2010 letter explained that, since she was an adult, she needed to provide her own letter of protest. At the time of this complaint, Michelle Andrews had not submitted a protest in respect of the decision made by the Office of the Indian Registrar regarding her application for registration.

IV. Positions of the Parties

A. The Complainant

[28] According to the Complainant, given his status under subsection 6(2) and his daughter's denial of status, the present day version of the *Indian Act* continues the discriminatory effects of the previous enfranchisement provisions of the *Indian Act*. He submits that, while the 1985 amendments to the *Indian Act* partly reversed the effects of enfranchisement, people like himself and his daughter still endure the discriminatory effects of the enfranchisement of their relatives.

[29] Had his father not enfranchised, the Complainant submits he would have been entitled to registration pursuant to any of the versions of the *Indian Act* pre-1985; and, to subsection 6(1) status under the current version of the *Indian Act*. With subsection 6(1) status, the Complainant would then be able to pass 6(2) status along to his daughter, Michelle Andrews.

[30] The Complainant notes that while the 1985 amendments to the *Indian Act* were done in an attempt to alleviate gender discrimination and the discrimination of enfranchisement, the government was not successful in removing these forms of discrimination. According to the Complainant, this is evident by examining his and his daughter's current circumstances with regard to Indian status, and the finding of the British Columbia Court of Appeal in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [*McIvor*]. In *McIvor*, the Court found that paragraphs 6(1)(a) and 6(1)(c) of the *Indian Act* violated the right to equality under section 15 of the *Canadian Charter of Rights and Freedoms* and were not justified under section 1 of that same legislation. In sum, the Court found that certain aspects of the *Indian Act*'s registration scheme continued to discriminate between the descendants of Indian men and women, despite the 1985 amendments to correct such inequality.

[31] The Complainant also notes that, when considering the amendments to the *Indian Act* prior to those that occurred in 1985, the government had first thought of extending status to those persons with a ¼ Indian heritage. In the Complainant's view, if that standard had been adopted instead of the current regime, it would have allowed for one more generation of status Indians, which would have included himself and his daughter. Pursuant to the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*, 2012 SCC 61 [*Moore*], the Complainant claims the Respondent failed to appropriately consider this alternative to the current registration provisions of the *Indian Act*; or, how the current provisions differentiate between siblings of the same family affected by enfranchisement. Therefore, as the registration provisions of the *Indian Act* currently stand, the Complainant submits that the regime is still discriminatory.

B. The Commission

[32] According to the Commission, the previous enfranchisement provisions of the *Indian Act* were based on colonial assumptions that Aboriginal peoples would, over time, abandon their traditional cultures and ways of life, and be absorbed into "civilized" Euro-Canadian society. These assumptions, and the government's policy of encouraging enfranchisement, were oppressive, assimilationist, and racially discriminatory. The Commission argues that the registration provisions of the *Indian Act* are inconsistent with the requirements of the *Act*, insofar as they continue to allow the current entitlements of Roger and Michelle Andrews to be negatively affected by the past enfranchisement of Andrew Joseph.

[33] The basis for the Commission's argument is that the *Act* allows for complaints challenging the discriminatory impact of other federal laws. According to the Commission, Supreme Court of Canada case law states that, barring express statutory language to the contrary, human rights legislation has primacy over other legislation and renders inconsistent laws inoperable.

[34] In this regard, the Commission claims the record of these proceedings establishes a *prima facie* case of discrimination: registration as an Indian is a "service" within the meaning of section 5 of the *Act*; the Complainant and his daughter have either been (i) denied this service or (ii) been subjected to adverse differentiation with respect to this service; and, the denial or adverse differentiation is linked to the prohibited grounds of race and/or family status.

[35] The Commission submits that the Respondent, in responding to this *prima facie* case of discrimination, has failed to satisfy it onus of proving a *bona fide* justification for the discrimination. According to the Commission, the Respondent has not proven that (i) due consideration has been given to the circumstances of persons in the situations of the Complainant and his daughter; or, (ii) that it would cause undue hardship to eradicate the impugned denial or adverse differentiation by extending subsection 6(1) status to Mr. Andrews and subsection 6(2) status to his daughter. In this regard, the Commission submits the Supreme Court of Canada's decision in *Moore* confirms that, without proof of giving serious consideration

to accommodating the circumstances of persons in the situation of the Complainant and his daughter, any claim to justify the registration provisions of the *Indian Act* cannot succeed.

C. The Respondent

[36] According to the Respondent, these complaints are directed solely at an Act of Parliament and nothing else. As a result, the Federal Court of Appeal's reasoning in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 [*Murphy*], which found that a complaint directed against an act of Parliament fell outside the jurisdiction of the *Act*, would dictate that the complaint should be dismissed. The Respondent argues the *Murphy* decision is directly on point and binding on the Tribunal, and it is not open to the Tribunal to overturn a decision of the Federal Court of Appeal. In the Respondent's view, as the Complainant seeks to challenge section 6 of the *Indian Act*, he should be filing a *Canadian Charter of Rights and Freedoms* challenge in a court of law.

[37] In the alternative, the Respondent raises many other arguments as to why these complaints cannot form the basis of a *prima facie* case of discrimination, including: (1) the Complainant is trying to re-invigorate the male bias that existed in the *Indian Act* prior to 1985; (2) the complaint is based on an impermissible retrospective application of the *Act* to an event, the enfranchisement of Andrew Joseph, that occurred 20 years prior to the coming into force of the *Act*; (3) the grounds of family status, race or ethnic origin are not implicated by these complaints; (4) the Complainant cannot rely on the alleged discriminatory treatment of someone else (their grandparent) to substantiate his own claim of discrimination; and, (5) the complaints require an element of "arbitrariness" or "stereotyping" and not simply a distinction based on a prohibited ground of discrimination.

[38] In the further alternative, if a *prima facie* case of discrimination is established, the Respondent submits it is justified pursuant to paragraph 15(1)(g) and subsection 15(2) of the *Act*. According to the Respondent, the 1985 amendments to the *Indian Act* were the product of over fifteen years of consultation with aboriginal peoples, study by Parliamentary Committees and development by government. Parliament amended the former gender-biased legislation and

balanced the interests of all those affected by the legislation, thereby achieving the current gender-neutral registration provisions. Deviating from the gender neutral provisions by adopting and reinvigorating the male bias of the former *Indian Act* would constitute undue hardship. Likewise, the Respondent submits that deviating from the genealogical standard employed by section 6 of the *Indian Act*, to encompass a third or fourth generation of persons with mixed parentage as suggested by the Complainant, would also constitute undue hardship.

[39] That said, as subsection 15(2) of the *Act* only allows undue hardship to be established on the basis of health, safety and/or cost, the Respondent argues that to justify a *prima facie* case of discrimination in this matter the term "cost" should include "social" cost, and not simply financial cost. Otherwise, the Respondent claims it would be put in the position of having to advance a justification based solely on financial undue hardship. According to the Respondent, it is loathe to pursue a solely financial justification for the registration provisions of the *Indian Act* given its reductive, dehumanizing nature, and the fact that non-monetary factors were important and powerful considerations in crafting those provisions. In this regard, the Respondent notes that an analysis under the *Canadian Charter of Rights and Freedoms*, instead of under the *Act*, would be a more conducive analysis for taking into account the social considerations that went into the registration provisions of the *Indian Act*.

V. Issues

[40] The present complaints are brought pursuant to section 5 of the *Act*, which provides:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> > (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
> >
> > (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[41] Given section 5 and the positions of the parties outlined above, the issues in this case can be framed as follows:

A. Do the complaints involve the provision of services customarily available to the general public within the meaning of section 5 of the *Act*; or, are the complaints solely a challenge to legislation?

B. If the complaints are solely a challenge to legislation, does the *Act* allow for such complaints?

[42] If the complaints involve the provision of services, or if the *Act* allows for complaints that challenge legislation, then the remaining issues to address would be:

A. Has the Complainant established a *prima facie* case of discrimination?

B. If so, has the Respondent demonstrated that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act*?

VI. Analysis

A. Do the complaints involve the provision of services customarily available to the general public within the meaning of section 5 of the *Act*; or, are the complaints solely a challenge to legislation?

Parties' positions

[43] The Complainant views Indian registration as a "service". According to the Complainant, Service Canada lists Indian Registration and Band Lists as services on its website. Therefore, in the Complainant's view, Indian registration can be seen to provide a benefit or assistance to first nations. The Complainant adds, the benefits that Indian registration provides are inextricably linked to that registration and are services themselves (for example, health care, right to access land and hunting and fishing rights).

[44] The Commission also views Indian registration as a "service" for the purposes of section 5 of the *Act*. First, it claims the wording and legislative history of the former section 67 of the *Act* shows Parliament's intent and understanding that, in the absence of a specific legislative statement to the contrary, the *Act* will apply to the registration provisions of the *Indian Act*. According to the Commission, the only way to give effect to Parliament's intent in this regard is to accept that the granting of Indian status is a "service customarily available to the general public", within the meaning of section 5 of the *Act*. In the Commission's view, there is no other section in the *Act* that could reasonably be interpreted to support the kinds of complaints that Parliament clearly envisioned when enacting the former section 67 in 1977.

[45] The Commission also submits that Indian registration meets all the general criteria that are currently used to determine whether government conduct qualifies as a "service": (i) registration as an Indian under the *Indian Act* confers tangible and intangible benefits (including the ability to pass a status entitlement to one's child or grandchild); (ii) those benefits are "held out" and "offered" to the eligible public in the terms of the *Indian Act* itself, and in publicly-available government publications; (iii) persons seeking to be registered under the *Indian Act* are required to submit applications to the Office of the Indian Registrar; (iv) past case law has recognized that the terms of federal benefits legislation, and the actions of government departments in administering that legislation, are subject to review as "services" under section 5 of the *Act*; and, (v) treating the registration scheme under the *Indian Act* as a "service" would also be consistent with decisions from other jurisdictions that have found government benefit schemes to be "services" within the meaning of the applicable human rights statutes.

[46] The Respondent, on the other hand, does not view entitlement to registration under the *Indian Act* as a "service" under section 5 of the *Act*. According to the Respondent, while the processing of applications for registration may constitute a "service" under section 5 of the *Act*, Parliament's criteria for identifying who is eligible for registration in section 6 of the *Indian Act* is not a service. The Complainant is not saying that his application was processed any differently from other applications resulting in discrimination; rather, these complaints are about the

parameters within which Parliament has delineated the Indian status population. In this regard, Parliamentary law making is not a service.

Analysis

[47] In determining whether or not Indian registration, as alleged by the Complainants and the Commission in this case, is a service under the *Act*, it is useful here to provide greater clarity on what is meant in s. 5 by the words "a service customarily available to the general public". In *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.J. No. 29 [*Gould*], the Supreme Court of Canada interpreted s. 8(a) of the *Yukon Human Rights Act*, which prohibits any person from discriminating "when offering or providing services, goods, or facilities to the public", in light of other analogous provisions of the various Canadian human rights statutes, including s. 5 of the *Act*. The Court comes to establish a two-part analysis to interpret this section at paragraph 68:

> The first step in the analysis involves a determination of what constitutes the "service", based on the facts before the court. Having determined what the "service" is, the next step requires a determination of whether the service creates a public relationship between the service provider and the service user. Inherent in this determination is a decision as to what constitutes "the public" to which the service is being offered, recalling that public is to be defined in relational as opposed to quantitative terms. In ascertaining a "public relationship" arising from a service, criteria including, but not limited to, selectivity in the provision of the service, diversity in the public to whom the service is offered, involvement of non-members in the service, whether the service is of a commercial nature, the intimate nature of the service and the purpose of offering the service will all be relevant. I would emphasize that none of these criteria operate determinatively; for example, the mere fact that an organization is exclusive with respect to the offering or providing of its service does not necessarily immunize that service from the reach of anti-discrimination legislation. A public relationship is to be determined by examining the relevant factors in a contextual manner.

[48] The scope of section 5 has been further defined in recent years with cases like *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268 [*Watkin*], *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 [*Forward*] and *Dreaver v. Pankiw*, 2009 CHRT 8 [*Pankiw*] upheld by the Federal Court in *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 [*Pankiw FC*]. In *Watkin*, the Federal Court of Appeal expressly rejects the

idea that all government actions come within the ambit of section 5 of the *Act*. The Court disavows the finding in *Bailey v. Canada (Minister of National Revenue)*, (1980) 1 C.H.R.D./193 that "all government actions in the performance of a statutory function constitute "services" within the meaning of section 5 because they are undertaken by the "public service" for the public good". (See also *Menghani v. Canada (Employment and Immigration Commission)* (1992), 17 C.H.R.R. D/236 at D/244—D/246 and Re *Singh*, [1989] 1 F.C. 430 (F.C.A.)). Rather, the Court defines section 5 as contemplating "something of benefit being "held out" as services and "offered" to the public" and which are the result of a process taking place "in the context of a public relationship". The Court offers some examples of government actions that would constitute a service at para. 28:

> Public authorities can and do engage in the provision of services in fulfilling their statutory functions. For example, the Canada Revenue Agency provides a service when it issues advance income tax rulings; Environment Canada provides a service when it publicizes weather and road conditions; Health Canada provides a service when it encourages Canadians to take an active role in their health by increasing their level of physical activity and eating well; Immigration Canada provides a service when it advises immigrants about how to become a Canadian resident. That said, not all government actions are services.

[49] In *Pankiw*, the Tribunal determined that Householders (printed brochures sent to households within a constituency) sent by Dr. Jim Pankiw, Member of Parliament for the Federal riding Saskatoon Humbolt in 2002-2003 to his constituents and alleged to contain discriminatory content, were not a service and were therefore not subject to the provisions of the *Act*. The Tribunal relied on the interpretation of section 5 made in *Watkin* but went further, accounting for cases like *Canada (A.G.) v. McKenna*, [1999] 1 F.C. 401 (CA) [*McKenna* (F.C.)] and *Forward*, and determined that a service must require something of benefit or assistance being held out, but that one may also inquire "whether that benefit or assistance was the essential nature of the activity": *Pankiw FC* at para. 42.

[50] Applied to the facts in *Pankiw*, the Tribunal found that the fundamental purpose and character of the Householders, which were funded by the House of Commons, was to enable Members of Parliament to further their political communications needs. It was the Members of

Parliament, and not the constituents, who were the true prime beneficiaries of the Householders and as a result, their content did not constitute a "service" within the meaning of s. 5 of the *Act*. Moving on to the second part of the analysis set out in *Gould*, the Tribunal found that, moreover, even if the content of the Householders did constitute a service, it did not occur in the context of a public relationship as the public had not been invited to participate in the creation of the Householders. The Tribunal concluded that while the *distribution* of the Householders to the constituents did give rise to a public relationship and could have constituted a "service" under the *Act*, this activity was not alleged to have occurred in any discriminatory way. It therefore concluded that there was no contravention of the *Act*. On judicial review, the Federal Court upheld the Tribunal's decision, finding that the Tribunal had added to or clarified the law with regard to s. 5 as it stood post-*Watkin*.

[51] Applying these principles to the facts of the present case, the Tribunal must therefore first determine, on the basis of the evidence presented, what constitutes the "service" and whether it was provided for in a discriminatory manner.

[52] There is no contention on this point. The Commission and the Complainant have both clearly stated that the complaints are with regard to Indian registration pursuant to the *Indian Act*: *See* Complainant's Arguments, lines 49-51. During the hearing the Complainant was asked whether he was alleging that discrimination had occurred in the *process* of the Indian registration by AANDC officials. The Indian registrar manages section 11 of the *Indian Act* band membership lists, offers information and processes the registration applications, all of which would indicate the existence of services being held out to the public. The Complainant has however affirmed that this does not form the basis for allegations: See Testimony of Roger Andrews, October 15, 2012. The Complainant's only contention lies in the registration provisions in the *Indian Act* insofar as they exclude him from registration under s. 6(1) due to his father's enfranchisement (the second complaint) thereby precluding him from passing Indian status to his children, including his daughter Michelle Andrews (the first complaint).

[53] Can these registration provisions therefore constitute a "service" in that they hold out a benefit as per *Watkin*? The Complainant and the Commission argue as much. They allege that Indian registration confers a number of tangible and intangible benefits such as non-insured health benefits, tax exemptions for goods purchased on reserve and eligibility for financial assistance with post-secondary education to name a few. The Commission also contends that this position is supported by decisions like *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 [*Cunningham*] and *McIvor*. The Respondent, however, disagrees with this characterization, stating that Indian registration is not like other benefit schemes in that it more closely resembles the benefits obtained from Canadian citizenships as was the case in *Forward*. The Respondent contends that, as per *Forward*, since it defines the relationship between the individual and the state, Indian registration does not constitute a "service" under the *Act*.

[54] The conclusion in *Forward* that was upheld by the Federal Court of Appeal in *Murphy*, and is therefore binding on this Tribunal, dealt with the notion that direct attacks to legislation fall outside the scope of the *Act* as they are aimed at the legislation *per se*, and nothing else: *Forward* at para. 6. Member Sinclair's subsequent finding that "citizenship is a distinct status granted by the state" and therefore "to characterize it as a mere service is to ignore its fundamental role in defining the relationship between individuals and the state" only serves to support this first conclusion. Indeed, in *Forward*, the alleged discriminatory actions of citizenship officials were found to be immune from scrutiny under the *Act* because they flowed directly from the provisions of the *Citizenship Act*, not because of the "distinct status" of citizenship. Had the legislation not been directly challenged, discriminatory actions by citizenship officials would not be immune from scrutiny under the *Act* simply because of the "distinct status" acquired through citizenship. Therefore, the fact that an alleged discriminatory action defines "the relationship between the individual and the state" has no bearing on the service analysis pursuant to section 5 of the *Act*.

[55] Turning to the *Watkin* test, in my view, Indian status obtained through registration does confer tangible and intangible benefits to the public. In addition to the benefits detailed by the

Commission and recognized by the Supreme Court in *Cunningham* and *McIvor*, I note that the Complainant also highlighted the correlation between Indian registration and obtaining band membership as well as the cultural importance of passing Indian status on to his children. There is undoubtedly great significance and there are numerous benefits attached to obtaining Indian status. Having said this, beyond finding that the impugned activity constitutes "something of benefit", the test in *Watkin* also states that it should be ""held out" as services and "offered to the public"", relying, in this regard, on *Gould* at paragraph 55:

> […] There is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition. […]

[56] The "transitive connotation" from the language of the various Human Rights Acts examined in *Gould* is present in section 5 of the *Act* in the words "*in the provision of services*". In providing benefits such as non-insured health benefits, financial support and tax exemptions, and in processing Indian registration application, departments like AANDC, Health Canada and Canada Revenue Agency are all service providers, providing a service to the public pursuant to section 5 of the *Act*. However, as stated earlier, this is not the object of the present complaint. The present complaints challenge the provisions of the *Indian Act* itself. As such, the question that I must answer is: In providing for these benefits through the Indian registration provisions of the *Indian Act*, in other words, in the act of creating legislation, is Parliament a service provider, holding out a service to the public? The answer is no.

[57] Law-making is one of Parliament's most fundamental and significant functions and *sui generis* in its nature. This is confirmed by the powers, privileges and immunities that Parliament and the Legislatures possess to ensure their proper functioning, which are rooted in the Constitution, by virtue of the preamble and section 18 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3, [*Constitution Act*] and in statute law, in sections 4 and 5 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1: *Telezone Inc. v. Canada (Attorney General)*, (2004), 235

D.L.R. (4th) 719 at paras. 13-17. Indeed, the dignity, integrity and efficient functioning of the Legislature is preserved through parliamentary privilege which, once established, is afforded constitutional status and is immune from review: *Harvey v. New Brunswick (Attorney General)*, (1996), 137 D.L.R. (4th) 142, [1996] 2 S.C.R. 876; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 33 [*Vaid*]. To consider the act of legislating along the same lines as that of delivering Householders as in *Pankiw* or to processing a citizenship application as in *Forward* is fundamentally problematic and emblematic of an approach which ignores the special role law-making possesses in our society. In legislating, Parliament is not a service provider and there is no "transitive connotation" to this function. Rather, it is fulfilling a constitutionally mandated role, at the very core of our democracy. As such, while law-making is an activity that could be said to take place "in the context of a public relationship" (*Gould* at para. 16) or "creates a public relationship" (*Gould* at para. 68, cited above) as per the second part of the *Gould* test, to characterize it as a service would ignore this *sui generis* quality.

[58] This reasoning is supported when applying rules of statutory interpretation to the term "services" in section 5 of the *Act*. According to the modern principle of statutory interpretation, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*, and the intention of Parliament: Elmer A. Driedger, *The Construction of Statutes*, (Toronto: Butterworths, 1974) at p. 67. In *Forward*, the Tribunal examined the meaning of "services" in light of the associated words rule of *noscitur a sociis*:

> Parliament might reasonably have intended the ambit of the word "services" in section 5 to be informed by its placement alongside the words "goods", "facilities" and accommodation". (*noscitur a sociis*, "the associated words rule"). Viewed in this way, it is very difficult to conclude that the grant of citizenship is a service having a similar character to goods, facilities or accommodation.

[59] I believe that this interpretation is also in harmony with the purpose of the *Act* as stated at section 2:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the

> principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[60] Even if law-making does not constitute a "service" and therefore cannot be considered to be a "discriminatory practice", this in no way takes away from the aim of the *Act* to enable individuals to live without the hindrance of what do constitute "discriminatory practices". While the Commission argues that nothing in this section suggests that conduct prescribed by law is somehow immune from review of compliance with the purposes of the *Act*, in my view nothing in this section supports the idea either. Even with the broad and purposeful interpretation attributed to human rights legislation, the words of a statute must not be given a meaning which their construction cannot reasonably bear: *R. v. Z. (D.A.)*, [1992] S.C.J. No. 80 at 1042. As for Parliamentary intent, I examine the question in greater detail below in response to the Commission's submissions regarding the recently repealed section 67 of the *Act*. Suffice it to say here that I do not understand Parliament's intent to allow for the direct challenge of legislation by the *Act*.

[61] Having said this, it is true that legislation has, in the past, been accepted to constitute a "service customarily available to the general public" pursuant to s. 5 of the *Act*. In *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.) [*Druken*], the complainants, who were employees of businesses owned by their spouses, were denied unemployment insurance benefits on the basis of their marital and/or family status. The Tribunal found that the refusal of a benefit, pursuant to the *Unemployment Insurance Act, 1971*, constituted a denial of a service on a prohibited ground of discrimination pursuant to s. 5 of the *Act* and was therefore discriminatory. Subsequent cases like *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] F.C.J. No. 790 [*Gonzalez*] at para. 37, *McAllister-Windsor v. Canada (Human Resources Development)*, [2001] C.H.R.D. No. 4 [*McAllister-Windsor*] at para. 30 and *McKenna v. Canada (Department of Secretary of State*), [1993] C.H.R.D. No. 18 [*McKenna*], affirmed the principle

that benefits provided pursuant to legislation such as the *Unemployment Insurance Act* and the *Citizenship Act* constituted a service under s. 5 of the *Act*. The Tribunal's decision in *McKenna* was appealed however, and while neither the Federal Court nor the Federal Court of Appeal dealt this particular finding, Robertson J.A. made the following *obiter*, bringing this principle into question (*Canada (A.G.) v. McKenna*, [1999] 1 F.C. 401 (CA) [*McKenna* (F.C.)] at paras. 78 - 80):

> While focusing on this particular issue, I do not wish to leave the impression that I agree with the Tribunal's conclusion that the granting of citizenship constitutes a service customarily available to the general public within the meaning of the *Canadian Human Rights Act* and, therefore, that the Tribunal has the jurisdiction to negotiate with the responsible Minister the manner in which the provisions of the *Citizenship Act* are to be applied in future. As this particular issue was not pursued before either the Motions Judge or this Court, I do not propose to deal with it other than to lay to rest the mistaken view that this Court's decision in *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.) somehow supports the proposition that the denial of citizenship constitutes the denial of a service.
>
> […]
>
> In my opinion, *Druken* does not stand for the proposition that denial of unemployment insurance benefits constitutes denial of service within the meaning of the *Canadian Human Rights Act*, but only that the Attorney General conceded as much.

[62] The Tribunal came to a similar conclusion in 2009 in *Forward*. It found that the sole source of the alleged discrimination, the denial of citizenship due to parental lineage pursuant to the 1977 *Citizenship Act*, R.S.C. c. C-29 [the 1977 *Act*], was the legislative language of the 1977 *Act*. In reviewing the application for citizenship, the officials had done nothing more than apply categorical statutory criteria to undisputed facts. Any issue taken with the application review process was therefore really an issue taken with the 1977 *Act* (*Forward* at para. 38). Relying on Robertson J.A.'s interpretation of *Druken* in *McKenna* (F.C.), the Tribunal found that the granting of citizenship did not constitute a service under s. 5 of the *Act*.

[63] The Federal Court of Appeal upheld this finding in 2012 in *Murphy*. The Court found that as the complaint was a direct attack on sections 110.2 and 120.31 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) and therefore aimed solely at the legislation *per se,* it fell outside the scope of the *Act*. Relying on Justice O'Reilly's *obiter* in *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280, the Court noted that such attacks could only succeed with a constitutional challenge as the *Act* does not provide for the filing of a complaint directed against an act of Parliament. The Court noted that despite the concession made by the Attorney General in *Druken* that the denial of unemployment insurance constituted a denial of a service under the *Act*, the facts were clear that the complaint was directed solely at paragraphs 3(2)(*c*) and 4(3)(*d*) of the *Unemployment Insurance Act*, S.C. 1974-75-76, c. 80 and 4(3)(*d*) of the *Unemployment Insurance Regulations*, C.R.C., c. 1576). The Court suggests that had the parties argued this point, *Druken* would, for the same reasons cited in the present case, have been decided differently.

[64] In dismissing the complaint, *Murphy* not only concludes that legislation is not a service pursuant to s. 5 of the *Act*, but removes any direct attack to legislation from the purview of the *Act* as a whole. I have already concluded, for above-stated reasons, that law-making is not a service under the *Act*. However, if this Tribunal accepts that it must follow *Murphy* as argued by the Respondent, then this decision disposes of the present complaints in their entirety.

B. If the complaints are solely a challenge to legislation, does the *Act* allow for such complaints?

[65] The Commission acknowledges that on its face, the *Murphy* decision would be a full answer to the present complaints, which are aimed at government conduct that was mandatory under the registration provisions of the *Indian Act*. However, in the Commission's view, *Murphy* is contrary to binding case law from the Supreme Court of Canada, finding that human rights laws have primacy over other inconsistent laws and render inconsistent legislation inoperable. Up until *Murphy*, a long line of case law within the federal human rights system had also recognized these principles. Therefore, the Tribunal should respectfully decline to apply *Murphy* and should instead follow the binding direction from the Supreme Court. The Commission also

argues that cases from across the country have recognized the primacy of human rights laws and the ability to challenge government conduct that is mandatory under the wording of legislation.

[66] The Commission also notes that Parliament's intent that the *Act* apply to the wording of other federal legislation is reflected in several current provisions of the *Act*: 2, 49(5), and 62(1). In a similar vein, the Commission also points to the former section 67 of the *Act*, which it claims was specifically enacted to shield the registration provisions of the *Indian Act* from review under the *Act*.

[67] The Complainant adopted the Commission's arguments on this issue.

[68] According to the Respondent, the Commission's arguments invite the Tribunal to fall into error as they run contrary to the doctrine of *stare decisis* and the principle that the Tribunal is bound by decisions of the Federal Court and Federal Court of Appeal. The Respondent submits that the Supreme Court cases relied upon by the Commission did not interpret the specific provisions of the *Act* in question in this complaint, namely subsection 40(1) and sections 5 to 14.1. Instead, the Respondent views the Supreme Court cases as making general comments about the nature of human rights legislation. In *Murphy*, however, the Respondent submits the Federal Court of Appeal interpreted subsection 40(1) and sections 5 to 14.1 of the *Act*, while taking into account the entire context of the *Act*. Since the Tribunal is now tasked with interpreting those same provisions, the Respondent claims it must follow the decision in *Murphy*.

[69] Each of the Commission's arguments will be addressed in turn.

(i) Supreme Court of Canada and other federal human rights case law regarding the primacy of human rights legislation

Commission's position

[70] Pursuant to the Supreme Court of Canada's decisions in *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 [*Heerspink*], and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 [*Craton*], the Commission submits that where there is a conflict

between human rights law and other legislation, the human rights law will govern as a quasi-constitutional statement of public policy, and will supersede inconsistent legislation, unless the legislature has clearly stated otherwise in express and unequivocal language. This presumed primacy of human rights laws means, according to the Commission, that inconsistent legislation is rendered inoperable, as was explained by the Supreme Court of Canada in cases like *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 [*Tranchemontagne*], and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 [*Larocque*].

[71] The Commission claims that prior to the Federal Court of Appeal's decision in *Murphy*, a long line of case law within the federal human rights system had recognized the *Act* as having primacy over other inconsistent laws, consistent with the principles set out in cases like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*. In this regard, the Commission relies on the following cases: *Druken*; *Gonzalez*; *McAllister-Windsor; Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 [*Uzoaba*]; the dissenting reasons of Dickson C.J. and Lamer J. in *Bhinder v. CN*, [1985] 2 S.C.R. 561 [*Bhinder*]; and, the dissenting reasons of McLachlin J. and L'Heureux-Dubé J. in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*].

[72] In the circumstances of this case, the Commission claims the Tribunal is faced with two contradictory lines of authority from higher decision-makers: (i) the Supreme Court of Canada jurisprudence, declaring that in the absence of a clear legislative statement to the contrary, human rights laws render other laws inoperable; and, (ii) the Federal Court of Appeal decision in *Murphy*, finding the opposite. Under the principles of vertical *stare decisis*, the Commission argues the Tribunal must follow the principles established by the Supreme Court of Canada.

Analysis

[73] The Tribunal has recently examined the Supreme Court of Canada jurisprudence dealing with the primacy of human rights legislation in light of the Federal Court of Appeal's decision in *Murphy*. In a decision dated May 24, 2013, Member Ed Lustig dismissed the complaints of Jeremy and Mardy Matson and Melody Schneider: *Matson et al. v. Indian and Northern Affairs*

Canada, 2013 CHRT 13, [*Matson*]. The Matsons and Ms. Schneider, who are siblings, argued that due to their matrilineal Indian heritage, pursuant to which they were found eligible for registration under subsection 6(2) of the *Indian Act*, they were treated differently than others whose lineage was paternal and therefore registered under subsection 6(1) of the *Indian Act*. They maintained that the registration provisions in the *Indian Act*, as they are applied to them, were discriminatory on the basis of sex, family status, race, national origin and/or ethnic origin contrary to s. 5 of the *Act*.

[74] Much like Mr. Andrews in the present case, the Matsons and Ms. Schneider argued that registration as an Indian under the *Indian Act* was a "service" under s. 5 of the *Act* and therefore within the Tribunal's jurisdiction. While the Commission and the Complainants in *Matson* did not concede that the complaints amounted to a direct challenge to legislation and nothing else, the Tribunal concluded that this was indeed the case: *Matson* at para. 60. While *Matson* does not deal with the issue of enfranchisement and its consequences, the legal issues raised are the same as the ones before me in the present instance.

[75] The Commission also participated in *Matson*. Its submissions on the issue of the primacy of human rights legislation as stated in Supreme Court of Canada jurisprudence and the alleged inconsistency with the *Murphy* decision were virtually identical to the ones made before me in the present case: See *Matson* at paras. 30-33. The Tribunal in *Matson* addressed these submissions. Over the span of thirteen pages of analysis, the Tribunal considered, one by one, each of the Supreme Court of Canada cases regarding the interpretation and primacy of human rights laws relied upon by the Complainants and the Commission, namely, *Heerspink*, *Craton*, *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 114 [*Action Travail des Femmes*], *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 [*Andrews*], *Larocque* and *Tranchemontagne*: *Matson* at paras. 66-91.

[76] The Tribunal concludes this analysis as follows:

> [92] Pursuant to the analysis above, in my view, *Heerspink*, *Craton*, *Larocque* and *Tranchemontage* support the Complainants and Commission's claim that human

> rights legislation can render inoperable, legislation that is in conflict with it. However, that is not to say that the *Act* allows for complaints that challenge the wording of other laws, absent a discriminatory practice within the meaning of the *Act*.
>
> [93] There are no comments from the Supreme Court in any of these cases that indicate that the primacy of human rights legislation equates to the ability to challenge legislation under human rights legislation. The basis of the conflict between legislation in *Heerspink*, *Craton* and *Larocque* was couched in the terms of a "discrimination" complaint under the applicable human rights legislation in those cases. The complaints themselves were not challenges to the wording of other laws.
>
> [94] In this regard, *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* are actually consistent with the Federal Court of Appeal's decision in *Murphy*, in the sense that the Federal Court of Appeal required there to be a "service", within the meaning of section 5 of the *Act*, for there to be a valid complaint in that case.

[77] I do not propose to conduct this analysis again here. I have reviewed these decisions along with the Tribunal's reasons in detail and share the view that the above-stated Supreme Court of Canada jurisprudence and the *Murphy* decision are not in contradiction. I agree that human rights legislation, including the *Act*, has the ability to render inoperable other conflicting legislation pursuant to *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* and supported by *Action Travail des Femmes*. However, this does not preclude the necessity for the existence of a discriminatory practice pursuant to the *Act*, thereby giving the Tribunal the jurisdiction to examine the complaint as expressed in *Murphy*.

[78] Contrary to the Commission's submissions, this view is also supported by the long line of federal cases which preceded *Murphy*. As detailed in my preceding analysis on the meaning of a "service" pursuant to section 5 of the *Act*, the cases in *Druken*, *Gonzalez* and *McAllister-Windsor* stood for the principle that benefits provided pursuant to the *Unemployment Insurance Act* and the *Citizenship Act* constituted a service under s. 5 of the *Act*. Along with *Gould*, *Watkin*, *Pankiw*, *McKenna* and *Forward*, they form part of the evolving jurisprudence that has helped to define the scope of section 5 of the *Act*. While the term "service" may have been conceived differently under *Druken*, *Gonzalez* and *McAllister-Windsor* then it was subsequently in *Murphy*,

I do not read these cases as foregoing the jurisdictional requirement for the Tribunal to find the existence of a "discriminatory practice" within the meaning of the *Act*.

[79] The Commission also relies on *Uzoaba* and the dissenting reasons in *Bhinder* and *Cooper* as evidence of the ability of the *Act* to render inoperative legislation, such as the *Public Service Employment Act* and the *Canada Labour Code*, where certain provisions come into conflict with the *Act*. This argument was also addressed by the Tribunal in *Matson* and like Member Lustig, I am of the view that while these cases affirm the primacy of the *Act* when it comes into conflict with other legislation, consistent with the principles enunciated by the Supreme Court in *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* none address the issue of whether legislation can be challenged under the *Act* as a "service": *Matson* at paras 114 and 116-118.

[80] In light of the above, I must disagree with the Commission's characterization of the issue as one of two contradictory lines of authority from higher decision-makers. For the above-stated reasons, I do not believe that *Murphy* is in contradiction with either the Supreme Court of Canada or the previous federal court jurisprudence dealing with the primacy of human rights laws.

[81] *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* must also be harmonized with other Supreme Court jurisprudence such as *Alberta v. Hutterian Bretheren of Wilson Colony*, 2009 SCC 37 [*Hutterian Bretheren*]. In this decision, the Honourable Justice McLachlin C.J. elaborates on the distinction between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. In so doing, she explains why, where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis and the minimal impairment test (See *R. v. Oakes*, [1986] 1 S.C.R. 103):

> [68] Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties—most commonly an employer and employee — adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to

the point at which accommodation would mean undue hardship for the accommodating party. In *Multani*, Deschamps and Abella JJ. explained:

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

[69]A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

[70]Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

[82] Applied to the facts of the present case, if I am to follow the Complainant's and the Commission's argument, the Respondent must justify any discrimination emanating from

Parliament's delineation of Indian status in the *Indian Act* based on the *bona fide* justification test on the grounds of health, safety and cost as per sections 15(1)g) and 15(2) of the *Act*. Since neither health nor safety form part of the factors considered by Parliament in enacting section 7 and subsections 6(1) and 6(2) of the *Indian Act*, cost remains the sole manner in which the Respondent can demonstrate that extending registration to the grandchildren of those reinstated under s. 6(1)d), as requests the Complainants and the Commission, would amount to "undue hardship".

[83] For the Respondent to do so adequately, it argues that "costs" must be interpreted to include "social costs". Only then would the Tribunal be able to consider the Respondent's justification for the alleged discriminatory legislation, including: the standard of gender neutrality underlying the 1985 changes to the *Indian Act* in Bill C-31; Parliament's role in delineating the contours of a population enjoying a historically-based relationship with the Crown; and the impact on the social, political, economic and cultural structure of bands resulting from an increase to the "registration" population.

[84] In my view, regardless of whether or not "costs" can, in certain circumstances, include "social costs" so as to amount to "undue hardship" under the *Act*, to stretch the "undue hardship" test so as to include the above underlying considerations made by Parliament in legislating would, in the words of McLachlin, "attenuate the concept": *Hutterian Bretheren* at para. 70. Instead, these considerations best inform the question of whether the alleged infringement is justifiable in a free and democratic society as per the test under s. 1 of the *Charter*. As stated by the Court in *Hutterian Bretheren* in its conclusion on this issue:

> […] The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. [para.71]

It is clear that the test for undue hardship provides an inadequate means for Parliament to defend a challenge to its legislation.

[85] This only further confirms the conclusion which I have already made, namely that while the Supreme Court has affirmed the primacy of human rights legislation, this principle applies to a "discriminatory practice" under the *Act* which is not present in the case at hand. Direct challenges to legislation, as currently sought by the Complainants and the Commission must, as reasoned in *Murphy* and demonstrated by *Hutterian Bretheren*, be obtained with a constitutional challenge.

[86] It is worthwhile to take a moment here to exemplify instances where the inconsistency or conflict between the *Act* and other legislation have led to the application of the principle of the primacy of human rights legislation and yet where there existed no direct challenge of legislation, requiring the application of the *Charter*. For if my reasoning renders this principle, recognized in Supreme Court jurisprudence like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*, devoid of any true meaning, the Court will have spoken for nothing and my reasoning is surely flawed.

[87] One of these examples can be found in the Tribunal decision *Franke v. Canada (Canadian Armed Forces)*, [1998] C.H.R.D. No. 3 [*Franke*]. In this case, the Respondent argued that, pursuant to section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 [*CLPA*] and section 111 of the *Pension Act*, R.S.C. 1985 c. P-6 [*PA*], the Tribunal was precluded from awarding damages for economic loss to the Complainant because she was receiving a pension from Veterans Affairs in respect of this loss. The Tribunal found that there was a conflict between those provisions and the remedies provisions of the *Act*. Relying on *Heerspink*, *Craton*, *Action Travail des Femmes*, *Druken* and *Uzoaba*, the Tribunal dismissed the Respondent's argument and affirmed the primacy of the *Act* noting that, as the legislature had not spoken to the contrary, the *Act* superseded the provisions of the *CLPA* and the *PA* and therefore damages for economic loss could be awarded: *Franke* at paras. 644 – 678.

[88] In *Eyerley v. Seaspan International Ltd.*, [2000] C.H.R.D. No. 14 [*Eyerley*], the Respondent filed a motion to dismiss on the ground that the Tribunal did not have jurisdiction to hear the complaint due to the fact that the British Columbia Worker's Compensation Board had

already dealt with Mr. Eyerley's case and the BC *Worker's Compensation Act*, R S.B.C. 1996, Ch. 492 contained a privative clause. The Tribunal dismissed the motion, finding that due to the special nature of human rights legislation, it did not believe that the privative clauses in the *Worker's Compensation Act* had the effect of precluding the exercise of jurisdiction by the Tribunal pursuant to the *Act*: *Eyerley* at paras. 27-37.

[89] In *Morten v. Air Canada*, 2009 CHRT 3 [*Morten*], rev'd on other grounds *Canada (Canadian Transportation Agency v. Morten)*, 2010 FC 1008, rev'd *Canada (Canadian Human Rights Commission) v. Canada (Canadian Transportation Agency)*, 2011 FCA 332, Air Canada argued that the Tribunal should confine itself to ordering a monetary remedy as section 172 of the *Canada Transportation Act*, S.C. 1996, c. 10 [*CTA*] confers on the Canadian Transport Agency the power to determine whether there is an undue obstacle to the mobility of persons with disabilities and if necessary, order corrective action. Relying on *Heerspink*, *Craton* and *Vaid*, the Tribunal dismissed the argument and, having concluded in favour of the Complainant, went on to impose a number of extensive systemic remedies in addition to a monetary award for pain and suffering: *Morten* at paras. 189 - 218.

[90] In *Douglas v. SLH Transport Inc.*, 2010 CHRT 1 [*Douglas*], the Respondent fired the Complainant while he was in the sixth month of a *bonafide* medical leave waiting to have surgery on his right knee. As the Tribunal found the existence of a *prima facie* case of discrimination on the basis of disability, the Respondent argued, as part of its justification for the discrimination, that subsection 239(1) of the *Canada Labour Code*, R.S.C., 1985, c. L-2 [the *Code*] allowed him to terminate the Complainant once twelve weeks had elapsed from the beginning of his medical leave. The Tribunal found that while the *Code* prohibited an employer from firing an employee on medical leave for a non-work related injury prior to twelve weeks if he had three years of continuous service, this did not allow employers to discriminate against employees contrary to section 7 of the *Act*. The Tribunal found that in light of the *Act*'s quasi-constitutional nature as recognized in *Heerspink*, *Craton*, *Uzoaba* and *Vaid*, the *Act* superseded the *Code* in this instance. The Tribunal concluded that the Respondent had not provided a

reasonable explanation or justification for its discrimination in terminating the Complainant's employment and found the complaint substantiated: *Douglas* at paras. 69-71.

[91] *Uzoaba* is another example of a case where the Tribunal applied the principle of primacy of human rights legislation without directly challenging legislation. As part of its remedy, the Tribunal ordered the reinstatement of the Complainant at a level two steps higher than that held by him at the time of the discrimination. On judicial review, the Respondent argued that this remedy was precluded by the *Public Service Employment Act*, R.S.C., 1985, c. P-33 which establishes a scheme whereby promotions are based on merit and that this could not be overruled by the Tribunal. The Federal Court disagreed, applying the principle of primacy of the *Act* in the following manner:

> I think this principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the *Act*. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the *Act*, orders a promotion in order to remedy the results of discriminatory action taken by the employer. [para.20]

[92] In all of these cases the Tribunal found the existence of a discriminatory practice, thereby grounding the Tribunal's jurisdiction. Faced with a conflict between the *Act* and another piece of legislation, the Tribunal relied on cases such as *Heerspink* and *Craton* and affirmed the principle of the primacy of human rights legislation. In none of these examples was the Tribunal attempting to use the *Act* to invalidate the conflicting provision in the same way one would use the Charter, rather the Tribunal simply concluded that the provision should simply not apply to the present case, favouring instead the application of the provision of the *Act*. In my view, it is in this distinction that lays the true essence of the meaning of the primacy of human rights laws.

(ii) Other human rights case law from across the country regarding the primacy of human rights legislation

[93] The Commission submits that, wherever possible, human rights statutes from across Canada should be given consistent interpretation, given their general similarities, quasi-constitutional status, and shared objectives of preventing discrimination. As a result, in considering whether the *Act* allows for complaints that challenge the wording of federal laws, the Commission claims it is also useful to examine case law from other jurisdictions across Canada. The Commission submits that in these cases, decisions-makers followed cases like *Heerspink*, *Craton*, *Larocque*, *Tranchemontagne* and the *Druken* line of federal case law and accepted that (i) steps taken by government actors under mandatory terms of legislation can qualify as "services" for the purposes of human rights review, and/or (ii) quasi-constitutional human rights statutes can be used to render conflicting legislation inoperable, and thereby remedy its discriminatory impact. The Commission refers the Tribunal to the following cases: *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 [*Tranchemontagne (ONCA)*]; *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 [*Hendershott*]; *Ivancicevic v. Ontario (Consumer Services)*, 2011 HRTO 1714 [*Ivancicevic*]; *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 [*XY*]; *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 [*Gwinner*]; *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)*, 1988 CanLII 212 (SK CA) [*Chambers*]; *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission)*, 1999 CanLII 12368 (SK CA) [*Wiebe*]; *Human Rights Commission v. Workplace Health, Safety and Compensation Commission*, 2005 NLCA 61 [*Nfld HRC*]; *Neubauer v. British Columbia (Ministry of Human Resources)*, 2005 BCHRT 239 [*Neubauer*]; and, *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4 (QL) [*AA*].

[94] These are once again the same arguments that were made before the Tribunal in *Matson* and which the Tribunal disposed of at paragraphs 121 to 126 of this decision. I do not believe that these cases refute the conclusion that a "service" must exist regardless of the quasi-constitutional nature of human rights legislation. Indeed, with the exception perhaps of the

Gwinner decision which does not address the issue of the existence of a service in the circumstances of that case (and which, for this very reason, is of little help to the Tribunal in the case at hand), all of these cases make a finding of the existence of a service. While some may have found, implicitly (*Hendershott* at paras. 69-70, 79; *Neubauer* at para. 61; *Tranchemontagne* at para. 50) or explicitly (*AA* at para. 49; *Ivancicevic* at para. 151; *XY* at paras 85 - 87), that legislation is a service and can therefore be directly challenged under human rights law, for reasons stated above, I have come to a different conclusion which I have found to be supported by the Federal and Supreme Court of Canada jurisprudence. I note that while these cases could have had a persuasive effect, they are in no way authoritative or binding on the Tribunal.

(iii) Current provisions of the *Act*

[95] According to the Commission, the principle that complaints may be filed concerning other federal laws is reflected in subsection 49(5) and 62(1) of the *Act*. Subsection 49(5) of the *Act* reads as follows:

> If the complaint involves a question about whether another Act or a regulation made under another Act is inconsistent with this Act or a regulation made under it, the member assigned to inquire into the complaint or, if three members have been assigned, the member chairing the inquiry, must be a member of the bar of a province or the Chambre des notaires du Québec.

[96] By requiring that complaints with respect to the inconsistency of other federal laws be adjudicated by a Tribunal member who is a member of the bar of a province or the Chambre des notaires du Quebec, the Commission views subsection 49(5) as demonstrating Parliament's understanding that such complaints may be filed and determined on their merits. The Commission also submits that the proceedings leading to the passage of subsection 49(5) contain numerous comments demonstrating the government's recognition and acceptance that the *Act* applies to the wording of other federal laws. If the Respondent is correct in arguing that the *Act* does not apply to the wording of other laws, then the Commission argues subsection 49(5) is rendered meaningless, which cannot be what Parliament intended.

[97] This argument was also made before the Tribunal in *Matson*. I note, like the Tribunal in that case, that subsection 49(5) of the *Act* refers to the *inconsistency* between the *Act* and other pieces of legislation and does not imply the *Act*'s ability to directly *challenge* legislation. This section may very well recognize the primacy of the *Act* when it is in conflict with other laws, however I have already provided numerous examples of instances (see paras. 86-91) where primacy applies and yet where there is no direct challenge to legislation. This subsection in no way alters this reasoning.

[98] I also agree with the Tribunal's interpretation in *Matson* as to the purpose of subsection 49(5) of the *Act*. The Tribunal found that the passages from the Parliament proceedings leading to the adoption of the section on which the Commission relies indicate that the underlying intent was to have lawyers adjudicate cases involving questions of inconsistency of legislation. Since cases of this nature could be legalistic and complex, this requirement was meant to facilitate an efficient and expeditious resolution. This is further confirmed when subsection 49(5) is considered alongside the other subsections of section 49 which deal with the procedural steps which take place upon the referral of a complaint by the Commission to the Tribunal. This includes, at subsection 49(2), the Chairperson's ability to assign a three-member panel in complex cases, which again, aims to ensure process efficiency and expeditiousness: *Matson* at para. 131.

[99] Turning to subsection 62(1) of the *Act*, this section states the following:

> This Part and Parts I and II do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before March 1, 1978.

The Commission submits that this provision provides what the Supreme Court decisions have always allowed for: a statutory exception to the general rule that human rights laws are paramount. According to the Commission, without this exemption, the *Act* would have applied to and affected any discriminatory provisions in the federal pension or superannuation legislation. The Commission claims this is confirmed by a review of the legislative history of subsection 62(1). Again, if the Respondent is correct in arguing that the *Act* does not apply to the

wording of other laws, then the Commission argues subsection 62(1) is rendered meaningless, which cannot be what Parliament intended.

[100] As found in *Matson*, the argument, as the Commission intends it, once again confuses the principle of primacy of human rights legislation with direct challenges to legislation. Subsection 62(1) is evidence of the *primacy* of the *Act*, something which, for reasons above, is well recognized here. The subsection does not in any way remove the jurisdictional requirement of the existence of a discriminatory practice as set out in section 5 to 14.1 of the *Act*. Indeed, according to subsection 40(1) of the *Act*, individuals may file a complaint with the Commission provided that they have reasonable grounds for believing that a person has engaged in a "discriminatory practice" and section 39 defines a "discriminatory practice" as any practice within the meaning of section 5 to 14.1 of the *Act*: *Matson* at paras. 128, 132-135.

(iv) The former section 67 of the *Act*

[101] Similar to its argument regarding subsection 62(1), the Commission points to the wording of the former section 67 of the *Act* as demonstrating Parliament's intent that the *Act* apply to discriminatory provisions of federal laws. The former section 67 of the *Act*, which was repealed in 2008 (Bill C-21, *An Act to amend the Canadian Human Rights Act*, 2nd Sess., 39th Parl., 2008), provided:

> Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

Like subsection 62(1), the Commission argues the former section 67 functioned as a statutory exception to the general principle that human rights laws have primacy. Without the exemption, the Commission claims the *Act* would have applied to and affected any discriminatory provisions in the *Indian Act*. Again, if the Respondent is correct in arguing that the *Act* does not apply to the wording of other laws, then the Commission submits section 67 was meaningless and had no effect during its lifespan, which cannot be what Parliament intended. According to the Commission, the historical context of section 67 demonstrates it was specifically enacted to shield the registration provisions of the *Indian Act* from review under the *Act*. In the same vein,

in repealing section 67 in 2008, the Commission is of the view Parliament intended to open the door to human rights complaints challenging discriminatory aspects of those same provisions.

[102] The Commission relies on various government statements, some by the Minister of Justice, and governmental memorandums and briefing notes which demonstrate that when section 63(2) of the *Act* (which subsequently became section 67) was enacted in the late 1970s, government officials understood that Parliament's intent for the enactment was to prevent the Tribunal from finding provisions of the *Indian Act* to be discriminatory. I accept that this evidence is persuasive and that Parliament may have feared scrutiny of the *Indian Act* by the *Act* and decided to ensure its protection by enacting section 67. In so doing, Parliament would have indeed implicitly imputed to the *Act* the ability to challenge legislation. I also accept that, in light of Tribunal case law like *Druken* and *McAllister-Windsor* and the Federal Court's decision in *Gonzalez*, in the absence of section 67, there was indeed a risk that the *Indian Act* would have been considered by the Tribunal.

[103] Having said this, for reasons stated above, these cases were decided on the basis of an interpretation of section 5 of the *Act* which no longer reflects current day understanding. Moreover, while this may reflect Parliament's intent to prevent challenges to the *Indian Act* by the *Act* in a pre-Charter era, this evidence is in and of itself insufficient to demonstrate that when Parliament enacted the *Act* in its entirety, it intended for this legislation to possess the ability to directly challenge other legislation. For, as I do not understand Complainant and the Commission to argue that this ability is limited to the challenge of the *Indian Act*, then it must also be true for all pieces of legislation. To come to this conclusion, we must examine the *Act* as a whole and for reasons already stated, I have concluded that the rules of statutory interpretation do not support the interpretation argued by the Complainant.

[104] In addition, contrary to the Commission's submission, I do not believe that this conclusion renders the existence of section 67 meaningless. Even if Parliament intended to protect the provisions of the *Indian Act* from scrutiny by the *Act*, section 67 also stated that nothing in the *Act* affected "any provision made under or pursuant to that Act". This is precisely

the focus of the statutory interpretation conducted by the Honourable Justice Desjardins J.A. (as she then was) in *Desjarlais (Re) (C.A.)*, [1989] 3 F.C. 605 [*Desjarlais*] at para. 13:

> The word "provision" in the expression "or any provision made under or pursuant to [the *Indian Act*]" cannot have the same meaning as the first word "provision" and cannot refer exclusively to a legislative enactment of general application as counsel for the Commission submits. Such interpretation is made impossible by the French version. The word "dispositions" in that version might have the meaning of "mesures législatives" but it encompasses as well the very wide connotation of "décisions", "mesures". So that the words "or any provision made under or pursuant to that Act" mean more than a mere stipulation of a legal character. **I interpret such words as covering any decision made under or pursuant to the *Indian Act***.
>
> [Emphasis added]

[105] The Court in *Desjarlais* found that the decision in the case of bar, that of a Band Council's vote of non-confidence, or firing of one of the band's administrators on the ground that she was too old, was nowhere provided for by the *Indian Act* and therefore did not fall within the exempting provisions of subsection 63(2) (now known as section 67) of the *Act*. Despite this conclusion, the case has since been cited as authority for its interpretation of section 67. In *Laslo* v. *Gordon Band (Council)*, [1996] C.H.R.D. No. 12 [*Laslo*], the Tribunal relied on this interpretation, finding that section 67 of the *Act* applied to decisions that, by virtue of their subject matter, are within the authority expressly granted by a provision of the Indian Act: *Laslo* at paras. 43 and 44. The Tribunal found that pursuant to section 67, the Gordan Band Reserve band council's denial to allocate housing to Ms. Laslo, a reinstated First Nations woman, pursuant to its authority under section 20 of the *Indian Act*, was immune from scrutiny under the *Act*. This finding was upheld by the Federal Court of Appeal: *Laslo* v. *Gordon Band (Council)*, [2000] F.C.J. No. 1175.

[106] Far from being meaningless, it is with the repeal of section 67 that cases of this kind may now be brought before the Canadian Human Rights Commission and the Tribunal. The *Indian Act* provides for the provision of a number of services and allows Bands the discretion to implement various rules and policies, all of which arguably now fall within the ambit of the *Act*.

In my view, the words of the Honourable Jim Prentice, then Minister of Indian Affairs and Northern Development during a 2007 appearance before the Standing Committee on Aboriginal Affairs and Northern Development with regard to the proposed repeal of s. 67 of the *Act*, on which the Commission itself relies, illustrate well the implications of the repeal:

> The repeal of section 67 will provide First Nation citizens, in particular first nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, the quality of the services that they've accessed, in addition to other issues, such as membership, I assume, as well.

[107] While my reasoning precludes challenges of decisions and/or actions which emanate directly from the *Indian Act*, decisions and/or actions which constitute a "discriminatory practice" pursuant to sections 5 to 25 of the *Act* and which would have previously been made "under the authority" of the *Indian Act* now fall within the Tribunal's jurisdiction. The fact that the Tribunal has already started to see cases of this kind is further evidence of this (See for example *Louie and Beattie v. Indian and Northern Affairs Canada,* 2011 CHRT 2).

[108] The Commission submits that the evidence of Allan Tallman, the Indian Registrar, and Tribunal case law such as *Jacobs v. Mohawk Council of Kahnawake*, [1998] C.H.R.D. No. 2 [*Jacobs*] demonstrates that band membership has been considered to be a "service", capable of review pursuant to s. 5 of the *Act*. The Commission contends that if band membership, which also relates to the relationship between an individual and the state, is recognized as a "service", then so too should Indian registration.

[109] Pursuant to section 10 of the *Indian Act*, bands have the ability to control their own membership in accordance with their own membership rules. Band membership, insofar as bands have indeed chosen to exercise that control, is therefore a regulated not by the *Indian Act* itself but by a set of rules as allowed by the legislation. A challenge to membership is, in this context, therefore not a challenge to legislation and as such, can more readily be considered as a "service", provided by the band, pursuant to section 5 of the *Act*. For reasons already stated, the

same cannot be said of Indian registration, the terms of which are explicitly delineated in the *Indian Act*. As such, the scope of what does or does not constitute a "service" is not defined by the relationship between the individual and the state as argued by the Commission, but rather by the examining whether what is being challenged constitutes a direct attack on Parliament's act of legislating, something best achieved with the Charter, or an alleged discriminatory practice pursuant to section 5 of the *Act* and the above-stated reasons.

VII. Conclusion

[110] Although this reasoning does not lead to a decision in the Complainant's favour, I do not wish to diminish the suffering that Mr. Andrews and his family state to have endured as a result of the government's enfranchisement policies. While the Complainants cannot challenge the impugned sections of the *Indian Act* pursuant to the *Act*, they may still choose to do so pursuant to the Charter as per *Murphy*. This was done successfully in the *McIvor* case, for example, for sections 6(1)(a) and 6(1)(c) of the *Indian Act*. The Tribunal is not, however, the appropriate forum to hear this challenge in this case.

[111] I would therefore answer questions A. and B. in the following manner:

A. Do the complaints involve the provision of services customarily available to the general public within the meaning of section 5 of the *Act*; or, are the complaints solely a challenge to legislation?

Answer: The complaints are solely a challenge to legislation.

B. If the complaints are solely a challenge to legislation, does the *Act* allow for such complaints?

Answer: No.

In light of these answers, I do not need to address questions C. and D., namely

> C. Has the Complainant established a *prima facie* case of discrimination? and
>
> D. If so, has the Respondent demonstrated that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act*?

[112] For these reasons, the Complaints are dismissed.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
September 30, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1686/4111, T1725/8011

Style of Cause: Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada

Decision of the Tribunal Dated: September 30, 2013

Date and Place of Hearing: October 15-19, 22-26 and November 7-9, 2012

Surrey, British Columbia

Appearances:

Roger William Andrews, for the Complainants

Brian Smith , for the Canadian Human Rights Commission

Sean Stynes, for the Respondent

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Stephen A. McLachlin, for the Respondent