Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Jeremy Eugene Matson, Mardy Eugene Matson and Melody Katrina Schneider

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Indian and Northern Affairs Canada

Respondent

Ruling

Member: Edward P. Lustig
Date: September 27, 2011
Citation: 2011 CHRT 14

[1] This is a Ruling on a Motion by the Complainants requesting the Tribunal to accept for filing their Amended Statement of Particulars dated June 28, 2011 and by the Commission requesting the Tribunal to accept for filing its Amended Statement of Particulars dated July 4, 2011, or alternatively to amend each of the Complaints in this matter and accept for filing its Amended Statement of Particulars.

[2] The Complainants who are siblings, have each filed Complaints in virtually identical form, signed on November 24, 2008, December 6, 2008 and December 8, 2008 alleging that the denial of status to be registered as an Indian under s. 6 of the *Indian Act* is a discriminatory practice based both "...upon the prohibited grounds of family status and gender under the *Canadian Human Rights Act"* ("*CHRA*"). On the last page of each Complaint, under the heading "Prohibited Grounds", each Complainant states his or her view that the registration provisions of the *Indian Act* are discriminatory, in that status eligibility would extend farther down their lineage if their Indian grandparent had been male instead of female:

> I believe that the Rule resulting from Bill C-31 is discriminatory towards me and my [siblings/brothers] based both [sic] the prohibited grounds of family status and gender under the Canadian Human Rights Act in that Bill C-31 continues to distinguish and discriminate against the descendants of Indian women who married non-Indian men by limiting the extension of status to a certain tier of lineage that would not apply to male Indians of the same heritage.

[3] On November 9, 2009 the Complaints in this matter were referred by the Canadian Human Rights Commission (the "Commission") to this Tribunal pursuant to ss. 40 (4) and 49 of the *CHRA* for a single inquiry.

- The Complainants filed their Statement of Particulars dated February 4, 2010.

- The Commission filed its Statement of Particulars dated February 9, 2010.

- The Respondent filed its Statement of Particulars dated March 1, 2010.

[4] For the purpose of this Ruling it suffices to describe the Complainants' situation as alleged by them in their and the Commission's Statements of Particulars as follows:

a) The Complainants were all born before 1985. They have one Indian grandparent: a woman who lost status when she married a non-Indian before 1985, and who regained her status under s. 6 (1) (c) of the *Indian Act* with the passage of the Bill C-31 amendments in 1985. By virtue of those same amendments, the children of her marriage with a non-Indian man (one of whom was the Complainants' father, Eugene) were deemed eligible for status under s.6 (2) of the *Indian Act*. Since the 1985 amendments only gave their father status under s. 6 (2), and since their mother was a non-Indian, the Complainants were not at the time of the filing by them of their Complaints entitled to any status under the *Indian Act* since s. 6 (2) does not allow a person to pass his or her status to children with non Indians. As a result, the children they have had with non-Indians since 1985 were also not entitled to status.

b) The Complainants prepared and delivered a chart that sets out their family and status history as compared to a hypothetical family history that is identical in all respects, save for the sex of their Indian grandparent. In other words, in the hypothetical family history, their Indian grandparent is male instead of female. All dates of births, marriages and deaths are consistent in both scenarios. As shown in the chart, the Complainants in the hypothetical patrilineal scenario would at the time of the filing by them of their Complaints have had status under s. 6 (1) of the Indian Act, and would be able to pass s. 6 (2) status to their children while in their real matrilineal scenario they had no status either under s. 6 (1) or under s. 6 (2).

c) The Complainants alleged that this differential treatment, flowing from discrimination in the *Indian Act*, had two principal adverse effects: first, they were

themselves denied status, and the benefits that flow therefrom; and second, they were being denied the opportunity to pass status to their children.

[5] On April 6, 2009, the British Columbia Court of Appeal rendered its decision in the matter of *McIvor v. Canada (Registrar of Indian and Northern Affairs)* wherein it declared s. 6 (1) (a) and s. 6 (1) (c) of the *Indian Act* to be of no force or effect as these provisions infringed the plaintiff's right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) and that the infringement is not justified by s. 1 of the *Charter*. The British Columbia Court of Appeal suspended its declaration for a period of one year and subsequently extended the suspension on two occasions - the last of which took place on July 5, 2010 until January 31, 2011, to allow Parliament time to review and consider new amendments to the *Indian Act.*

[6] In April and August 2010, the Respondent sought and obtained adjournments of the Tribunal process while Parliament debated Bill C-3 being *An Act to promote gender equity in Indian registration* by responding to the Court of Appeal for British Columbia decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs).*

[7] Bill C-3 was introduced on March 11, 2010, given Royal Assent on December 15, 2010, and came into effect on January 31, 2011.

[8] Among other things, Bill C-3 amended the registration provisions by adding a new s. 6 (1) (c.1) to the *Indian Act*. This subsection creates a new category of s. 6 (1) status for eligible persons whose mothers had lost status by marrying on-Indians before the 1985 amendments. However, the registration provisions of the *Indian Act*, both before and after the passage of Bill C-3, confer s. 6 (1) status on persons who have the same family history as the Complainants, but whose sole Indian grandparent was a grandfather, rather than a grandmother. Persons with s. 6 (1) status can pass Indian status to the children they have with non-Indians. The registration provisions of the *Indian Act*, both before and after the passage of Bill C-3, does not grant to the

Complainants s. 6 (1) status and as such the Complainants are not able to pass Indian status to the children that they have had, or will have, with a non-Indian.

[9] After Bill C-3 was given Royal Assent, all three Complainants filed fresh applications with the Office of the Indian Registry, seeking registration. Jeremy Matson also filed an application seeking registration for this daughter, Iris Matson.

[10] In a letter to Jeremy Matson dated May 9, 2011, the Indian Registrar confirmed that (i) the Complainants' father, Eugene Matson, was now entitled to be registered under the new s. 6 (1) (c.1), rather than s. 6 (2), (ii) Jeremy Matson was therefore now eligible for status under s. 6 (2), as the child of one Indian parent, and (iii) Jeremy Matson was therefore registered under the *Indian Act* as of May 9, 2011. The letter further stated that the Squamish Nation, to which Jeremy Matson traces his ancestry, is one of the bands that has chosen since the 1985 amendments to control its own band membership.

[11] By emails dated June 13 and 14, 2011, Mardy Matson and Melody Schneider advised the Commission that their applications had also been approved, and that they too had been found eligible for s. 6 (2) status, and registered as Indians.

[12] By letter to Jeremy Matson dated May 20, 2011, the Indian Registrar denied the registration application that he had filed on behalf of his daughter, Iris Matson. The letter states that while Bill C-3 had changed the status entitlement of Jeremy Matson's father (i.e. Eugene Matson), it had not changed the status entitlement of his daughter (ie. Iris Matson), who remains ineligible.

[13] As a result of the matters outlined in paragraphs No. 7 to 12 inclusive, the Complainants and the Commission decided to file Amended Statements of Particulars dated June 28, 2011 and July 4, 2011 (the "Amended Particulars") respectively in order to continue with the Complaints with what they deemed to be necessary changes to reflect the fact that Bill C-3 provided them with s. 6 (2) status without the right to pass status to their children with non-Indians but did not

provide them with s. 6 (1) status under the *Indian Act*, as would have been the case in their hypothetical comparative paralineal scenario both before and after the passing of Bill C-3 under which they could have passed status to their children with non-Indians.

[14] At the case conference meeting held before me with the parties on July 11, 2011, the Respondent indicated that it was objecting to the Tribunal accepting the Amended Statements of Particulars of the Complainants and the Commission. I directed the Complainants and the Commission to file Notices of Motion requesting the acceptance of the filing of their Amendments to the Statements of Particulars. The Commission filed its Motion and submissions on August 11, 2011, the Complainants filed their Motion and submissions on August 15, 2011, the Respondent filed its Motion's Brief in response on August 29, 2011, the Commission filed its Reply to the Motion's Brief on September 1, 2011 and the Complainants filed their Reply to the Motion's Brief on September 3, 2011.

[15] Based upon the facts as they see them, the Commission's and the Complainants' submissions, in support of their motions, are as follows:

a) The Tribunal has the legislative authority to order that the Amended Particulars be accepted for filing, and/or to order that the complaints be amended, if necessary.

b) Human rights complaints are not to be too narrowly or technically perused and interpreted and the Tribunal process is not strictly bound by the four corners of the initial complaint form.

c) It is the Statement of Particulars that sets the precise terms of a hearing, not the complaint form.

d) The essence of the Complaints in this case is exactly the same as the substance of the allegations in the Amended Particulars, namely, that the registration provisions of the *Indian Act* discriminate on the basis of sex and/or family status

because they allow Indian status to be transmitted further in a family descended from an Indian grandfather, as compared to a family that is descended from an Indian grandmother, but is otherwise alike in all respects.

e) The Amended Particulars do not raise any new allegations. To the extent that they acknowledge the conferral of status on the Complainants post-Bill C-3, and emphasize the continuing differential treatment with respect to their ability to pass status to their children, the Amended Particulars simply clarify and make explicit the current legalities of the general situation that was already raised in the original complaints.

f) The Amended Particulars properly put all parties on notice of the issues arising from the original complaints, and they serve their intended function of setting the terms of the hearing.

g) Accepting the Amended Particulars for filing would not cause any prejudice to the parties. The Respondent has known about the issue with respect to the status of children for some time.

h) Requiring the additional formal step of amending the Complaints would run contrary to directions that the Tribunal conduct its proceedings as informally and expeditiously as the requirements of natural justice and rules of procedural fairness allow.

i) Alternatively, if amendments to the Complaints are required prior to accepting the Amended Particulars, the Tribunal has the authority to accept amended Complaints since they respect the substance of the original Complaint, do not result in prejudice to the opposing party and do not seek to raise allegations that plainly and obviously cannot succeed. The amendments have their “pedigree” in the circumstances that were put before the Commission in the Complaint and do

not raise a “new” complaint that is legally or factually unconnected to the original Complaint.

[16] Based upon the facts as it sees them, the Respondent’s submissions in opposition to the Commission and Complainant’s submissions in summary, are as follows:

a) The Statement of Particulars cannot create a new complaint but is outlined by the language and allegations in the Complaint Form.

b) As the Complaint Forms lack particularity, it is not fair game for the Statement of Particulars to create a new basis for a complaint that was not particularized.

c) The proposed amendments have the effect of creating entirely new issues, namely, the legislation under which registration is occurring and the individuals who may be impacted by same.

d) The proposed amendments to the Complaints are not appropriate as they do not have a “pedigree” in the original Complaint and are essentially a new complaint that was not the subject of the investigation by the Commission and referred to the Tribunal.

e) The Complainants Complaints are now mooted by virtue of their registrations under s. 6 (2) of the *Indian Act* and should be dismissed.

f) The proposed amendments to the Statements of Particulars and/or the original Complaint Forms represent such a fundamental change to the initial referral that they are outside the framework of the *CHRA.*

g) New Complaints ought to be started anew with a new process before the Commission.

[17] In my opinion, the Amended Particulars are acceptable for filing in this matter. The Complaint, in its essence, has not changed, however, the legislation has changed. Prior to the enactment of Bill C-3 when the Complainants filed their Complaints, they had no status for registration under s.6 of the *Indian Act*. Their Complaints, without particularizing this in terms of either s. 6 (1) or s. 6 (2) of the *Indian Act*, were directed to the inequity that they felt existed vis-a-vis status as between them and their comparators in the theoretical patrilineal scenario who had s. 6 (1) status with the right to pass status on to their children with non-Indians. It is not surprising that they did not specify s. 6 (1) or s. 6 (2) of the *Indian Act*, given the more general nature of a Complaint Form, the fact that they are not lawyers and the likelihood, in my opinion, that they simply expected their Complaints to cover the entire difference between them and their theoretical comparators. They would not have known then that Bill C-3 would be passed without the amendments that would give them the same s. 6 (1) status as their theoretical comparators.

[18] Following the enactment of Bill C-3 and the Complainants registrations under s. 6 (2) of the *Indian Act* it has become appropriate that the Amended Particulars be submitted and filed given current circumstances. This should neither be surprising to the Respondent nor does it raise anything that is essentially new in my opinion. There is a reasonable and logical nexus between the Complaints and the Amended Particulars. In my opinion it would be a waste of time and resources and not in the public interest to have the Complainants return to the Commission with new Complaints in these circumstances.

[19] The Amended Particulars will bring this case up to date so that it can properly proceed. The Complainants Complaints respecting their own registration under the *Indian Act* are now moot since the Complainants have now been registered, however, the part of their Complaints that, in my opinion, implicitly related to the opportunity to pass this status on to any children with non-Indians, as exists currently for their theoretical comparators, is still live.

[20] In the result, I hereby Order that the Amended Particulars be accepted for filing.

Signed by

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
September 27, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1444/7009

Style of Cause: Jeremy Eugene Matson, Mardy Eugene Matson, and Melody Katrina Schneider (née Matson) v. Indian and Northern Affairs Canada

Ruling of the Tribunal Dated: September 27, 2011

Appearances:

Jeremy Eugene Matson, for the Complainants

Brian Smith, for the Canadian Human Rights Commission

Sid Restall and Kevin Staska, for the Respondent