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: November 9, 2010
Citation: 2010 CHRT 28

[1] This is a ruling on the motion of the Respondent for an order that the Complaints in this matter be adjourned *sine die*, or alternatively to January 31, 2011 to allow for the passage of Bill C-3 currently before the House of Commons.

[2] The Complainants who are siblings, have each filed Complaints in virtually identical form, alleging that the Respondent has discriminated against them by denying them entitlement to be registered as "Indians" in the Indian Register under s.6 of the *Indian Act*. The Complaints were signed on December 6, 2008 and allege that the denial of eligibility to be registered as an Indian is a discriminatory practice based both "... upon the prohibited grounds of family status and gender under the *Canadian Human Rights Act*" ("*CHRA*").

[3] For the purposes of this Ruling it suffices to describe the Complainant's situation 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) 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 have never been entitled to status. As a result, the children they have had with non-Indians since 1985 also are not entitled to status.

b) The Complainants have 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 have status under s. 6 (1) of the *Indian Act*, and would be able to pass s. 6 (2) status to their children.

c) he Complainants allege that this differential treatment, flowing from discrimination in the *Indian Act*, has two principal adverse effects: first, they are themselves denied status, and the benefits that flow there from; and second, they are denied the opportunity to pass status to their children.

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

[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] The *McIvor* matter concerned the constitutionality of s. 6 of the *Indian Act* which establishes the entitlement of a person to be registered as an Indian. This is the same provision that is at issue in the Complaints before the Tribunal since the Complainants take issue with the refusal of the Office of the Indian Registrar (the "OIR") to register them as Indians notwithstanding the *McIvor* decision.

[7] As the law currently stands, the Complainants are not entitled to be registered, and the OIR cannot register an individual unless they meet the legal requirements for registration. Following the *McIvor* decision, the Crown introduced 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)" which is currently before Parliament.

[8] A previous Notice of Motion was filed by the Respondent on April 7, 2010 requesting an adjournment of these matters. The Commission and the Complainants both filed submissions in response to the Notice of Motion of the Respondent and agreed to the request for an adjournment. By letter to the parties dated March 20, 2010, the Tribunal agreed to adjourn the proceedings to a date in July of 2010 when a case management call to update matters was to be held.

[9] At the conference call on July 6, 2010 the parties discussed the status of Bill C-3 including the fact that the Bill had not by then been passed and the House of Commons, where it was still in Committee, had been adjourned until September 20, 2010. The parties also discussed the fact that the British Columbia Court of Appeal had granted an extension until January 31, 2011 to allow Parliament to amend the *Indian Act* following its decision in *McIvor*.

[10] The following is a summary of how Bill C-3 has progressed since its introduction:

a) Bill C-3 passed first reading in the House of Commons on March 11, 2010, and second reading on March 29, 2010.

b) After second reading Bill C-3 was referred to the Standing Committee on Aboriginal Affairs and Northern Development ("AANO") for further study and consideration. A number of witnesses who appeared before AANO stated their views that the legislation as drafted would not eliminate residual sex discrimination in the registration provisions of the *Indian Act*. Several witnesses

pointed specifically to the same continuing differential treatment that the Complainants have identified in this case.

c) After considering the presentations of witnesses and conducting a clause-by-clause review, AANO agreed to report Bill C-3 back to the House of Commons with various amendments.

d) After Bill C-3 was reported back to the House of Commons, the Parliamentary Secretary to the Leader of the Government raised a point of order, arguing that the AANO amendments improperly expanded the scope of Bill C-3. On May 11, 2010, the Speaker ruled that the AANO amendments to clause 2 of Bill C-3 exceeded the scope of the bill as set by the House at second reading, and were therefore inadmissible and null and void. He further directed that Bill C-3 be reprinted in a manner consistent with his ruling.

e) Although some further discussion on the AANO report took place in the House on May 25, 2010, the debate was not concluded when the House adjourned for the summer on June 17, 2010 until September 20, 2010. The House of Commons has not done anything with the Bill since it resumed on September 20, 2010.

[11] As there was disagreement between the parties at the July 6th case management call on whether a further adjournment of these matters ought to be allowed, as requested by the Respondent, the Tribunal issued directions to the Respondent to perfect its adjournment Motion by filing a Notice of Motion, Affidavit and written submissions and for the Complainants and Commission to file their responding submissions and for the Respondent to file its reply to those submissions.

[12] Following the directions referred to above, the Respondent has filed its Notice of Motion requesting the adjournment referred to above, together with its submissions and Affidavit material and the Complainants and the Commission have filed their submissions objecting to the

request for the adjournment by the Respondent and the Respondent has filed its reply to those submissions.

[13] The Respondent's submissions, in summary, are as follows:

a) The passage of new legislation i.e. Bill C-3 may resolve the Complaints or, in the alternative, materially change the nature of their Complaints such that any decision of the Tribunal would be moot;

b) The Complaints, as currently structured, would require the Respondent to defend legislative provisions that were found unconstitutional and will be replaced with the passage of Bill C-3;

c) The remedies that the Complainants seek may not be possible;

d) Registration under the *Indian Act* may not constitute a "service" under the *Canadian Human Rights Act;*

e) The Respondent currently anticipates that the hearing of this matter, as it relates to those provisions that were found unconstitutional and will be replaced with the passage of Bill C-3, will take several weeks given the volume of materials anticipated to be disclosed and the historical nature that such a defence might take; and

f) In order to ensure that the Complaints are properly addressed, and that time before the Tribunal is used most appropriately, the Complaints should be adjourned *sine die,* or alternatively to January 31, 2011, to allow for the passage of Bill C-3 currently before the House of Commons.

[14] The Complainants' submissions, in summary, are as follows:

a) The Complainants understand that the OIR cannot register them under the current *Indian Act*. The Complainants are not seeking a review of the OIR's policies or of its registration protocol; they are asking the Canadian Human Rights Tribunal to review s. 6 of the *Indian Act* to make a determination as whether it infringes the Complainants' human rights as determined by the *CHRA;*

b) The Tribunal should not allow any further delay of its process based on what may or may not happen with Bill C-3 in the House of Commons. The Tribunal must operate on complaints before it, based on law and statutes that are currently in place;

c) It is the Complainants position that Bill C-3, as currently before the House of Commons, will not resolve the substance of their complaints in their entirety;

d) A further delay of a determination of the matter will continue to prejudice the Complainants, most notably, by continuing to prevent them from a potential right to recognize an ethnic identity that they have been denied for their lifetime;

e) The Respondent's argument alluding to cost effectiveness should not be given weight against continuing substantive human rights violations experienced by the Complainants. The Complainants are not concerned with the length of the potential hearing and submit that the Respondent has had ample time to prepare; and

f) Although the facts and issues of the Complainants' case are similar to the *McIvor* case, they are nonetheless distinct claims that are being pursued in different forums; each having its own considerations, policies and procedures that ought to be followed and enforced.

[15] The Commission's submissions, in summary, are as follows:

> The Commission opposes the current request to adjourn these proceedings *sine die* or to January 31, 2011. Instead, the Commission asks that the Tribunal put in place a schedule to deal with the Respondent's preliminary argument that the government does not provide a "service" under the *CHRA* when deciding the eligibility for registration under the *Indian Act*. This approach is to be preferred according to the Commission because:
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> a) it avoids prolonging the hearing process through a series of lengthy adjournments;
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> b) nothing in the draft legislation that is currently before Parliament would affect the evidence or arguments that are required to resolve the "services" question; and
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> c) it promotes efficiency by focusing on a discrete preliminary jurisdictional matter that has the potential to finally determine the complaints.

[16] It is clearly very frustrating and disappointing for the Complainants to have their Complaints delayed while the Court of Appeal of British Columbia in *McIvor* waits for the Parliament of Canada to legislate in response to its findings that parts of s. 6 of the *Indian Act* are of no force and effect on constitutional grounds.

[17] The *McIvor* decision by the Court of Appeal of British Columbia to not issue a declaration that would put its findings respecting the validity of parts of s. 6 of the *Indian Act* into effect to allow the Parliament of Canada to provide remedial legislation, means that currently s. 6 is technically still fully in effect but, practically speaking, is of doubtful validity upon which to base any decision by this Tribunal at the present time. This is particularly so in view of the fact that the House of Commons has introduced and given two readings to Bill C-3.

[18] It is certainly a goal and objective of the Tribunal to provide expeditious resolutions to complaints brought before it and to avoid unnecessary and undue delays that have the impact of conceivably denying justice. That goal and objective, however, must be balanced against the equally important objective and goal of the Tribunal to ensure that its decisions are just and meaningful not simply swift.

[19] The parties all acknowledge that currently s. 6 of the *Indian Act* does not provide the OIR with authority to register an individual where the individual does not meet the legal requirements for registration as an Indian under s. 6 as the OIR does not have discretion when determining whether or not an individual has met these requirements. *Etches v. Canada (Registrar of Indian and Northern Affairs), 2009 ONCA 182*

[20] However flawed, in the view of the Complainants and the Commission, that Bill C-3's current language is in effecting for the Complainants the remedies sought by them, the House of Commons has acted in response to *McIvor* by introducing and giving two readings to Bill C-3. The result of what Bill C-3 will eventually accomplish is unknown at this point and it is purely speculative to make predictions about its final language.

[21] The Complainants and the Commission both are of the view that the Tribunal, as a result of the delay of the House of Commons in legislating in response to *McIvor* and the uncertainty of the current language of the proposed remedial legislation now before the House, should make a determination now based on the current state of s. 6 of the *Indian Act*, in spite of the fact that the Court of Appeal of British Columbia has determined in *McIvor* that it is of no force and effect, subject to the temporary suspension of its declaration.

[22] As much as I favour an expeditious process in this matter and am disappointed by the failure of the Parliament to enact remedial legislation, I can see neither any real value or advantage, from a practical point of view of scheduling a hearing, as requested by the Commission, under current circumstances, into whether under s. 5 of the *CHRA* there is a "service" in registration under s. 6 of the *Indian Act* when s. 6 has been found itself to be of no

force and effect by the British Columbia Court of Appeal in *McIvor* and the current law does not allow for registration of the Complainants. While such a hearing may give the impression or appearance that matters are moving forward, in reality, such a hearing based on legislation, already determined to be invalid, is not, in my opinion appropriate or actually helpful to anyone**.**

[23] In the result, for the foregoing reasons, I will grant the request of the Respondent for an adjournment until January 31, 2011 and we will see what the Court of Appeal of British Columbia or Parliament will do next.

Signed by

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
November 9, 2010

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: November 9, 2010

Appearances:

Jeremy Eugene Matson, for the Complainants

Brian Smith, for the Canadian Human Rights Commission

Sean Stynes and Kevin Staska, for the Respondent